

**DISCLOSURE OF CLASSIFIED
INFORMATION TO CONGRESS**

HEARINGS

BEFORE THE
SELECT COMMITTEE ON INTELLIGENCE
OF THE
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

DISCLOSURE OF CLASSIFIED
INFORMATION TO CONGRESS

Wednesday, February 4, 1998

Wednesday, February 11, 1998

Printed for the use of the Select Committee on Intelligence



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DISCLOSURE OF CLASSIFIED INFORMATION TO CONGRESS

WEDNESDAY, FEBRUARY 4, 1998

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Select Committee met, pursuant to notice, at 10:05 a.m., in Room SH-216, Hart Senate Office Building, the Honorable Richard Shelby, Chairman of the Committee, presiding.

Present: Senators Shelby, Roberts, and Kerrey of Nebraska.

Also Present: Taylor Lawrence, Staff Director; Chris Straub, Minority Staff Director; Dan Gallington, General Counsel; and Kathleen McGhee, Chief Clerk.

Chairman SHELBY. The Committee will come to order.

The Committee meets today to examine an issue that goes to the very core of our mission, namely vigilant oversight of the intelligence activities and programs of the United States Government.

We are the people's representatives in ensuring that such activities are in conformity with the Constitution and the laws of the United States.

The issue before us is whether the Congress and the President share constitutional authority over the regulation of classified information.

As one might expect, the Administration has asserted that the President has ultimate and unimpeded authority over the collection, retention and dissemination of national security information. We disagree.

While the Constitution grants the President, as Commander-in-Chief, the authority to regulate classified information, this grant of authority is by no means exclusive.

In fact, the Congress has legislated extensively in this area.

For example, many specific provisions of the National Security Act of 1947, amended most recently in 1994, require that our Committee receive and review classified information as part of our oversight duties. Certainly, classified information pertaining to fraud, mismanagement, or misconduct within the Intelligence Community is in this category.

Last year we wrote a new chapter in this legislative history by reporting an Authorization Bill that included a key provision. Section 306 directed the President to inform Executive branch employees that they may disclose information, including classified information, to Congress that is relevant to fraud, mismanagement, or misconduct, within the Executive branch.

The Senate passed the bill with an almost unanimous vote of 98 to one.

Shortly after passage, the Administration expressed their opposition to Section 306 stating that it was “unconstitutional” and that “senior advisers would recommend that the President veto the bill.”

The House version of the bill did not include such a provision and many Members of the House Permanent Select Committee on Intelligence expressed concern over the constitutional implications of Section 306.

The Chairman of the House Intelligence Committee requested, on behalf of his Members, to have an opportunity to more closely examine this issue.

And in deference to our colleagues in the House, we agreed in Conference to amend Section 306 to reflect the sense of Congress that both branches of government have “equal standing” in the handling of national security information and we did not impose a statutory requirement on the President.

The Conference Committee agreed, however, that each Committee would hold hearings on this issue and pursue a more definitive legislative remedy in this session of the 105th Congress.

An assertion of exclusive authority by the President to control classified information that may evidence misconduct within his Administration is not only counter intuitive, it contradicts nearly two hundred years of legislative and judicial precedent.

Our primary purpose in pursuing this legislation is to ensure that this Committee retains its ability to rigorously oversee the intelligence activities of the United States Government on behalf of the people.

Under the current policy, Administration officials reserve the right to withhold classified information from Congress, thereby insulating themselves from the scrutiny of the people’s elected representatives.

We don’t believe that the Founding Fathers intended this result and we know that the American people will not accept it.

Our secondary purpose in putting forth legislation is to give Executive branch personnel an authorized outlet for extremely sensitive information.

It has become almost routine to see unauthorized disclosures of allegedly classified information in the print and broadcast media.

I believe it is imperative that individuals with information about misconduct within the Executive branch have a safe harbor where they know the information will be properly safeguarded and thoroughly investigated.

Every Member of this Committee and every member of its staff are properly cleared and acutely aware of their responsibility to protect sensitive national security information under the rules of the Committee.

I am very disturbed that employees of the Executive Branch would risk grave harm to our national security by disclosing classified information to a reporter.

The First Amendment protection, provided in most cases to reporters who refuse to reveal their sources, provides a dangerous sanctuary to those who are taking unnecessary risks with our national security.

Such employees should feel secure in coming forward to the Oversight Committees of Congress because the information can be acted on without placing it in the public domain where it can be used by our adversaries and foreign intelligence services.

I believe we must make it clear to all those who give classified information to reporters that they will be prosecuted.

At the same time, we must make it clear that if they bring this information to the appropriate Oversight Committees, they will be protected from any retribution, and any allegations of wrongdoing will be thoroughly investigated without jeopardizing national security through public disclosures of sensitive information.

And this last point is the key to effective oversight.

In the investigation process, it is incumbent on us to vigorously adhere to the rules of our Committee governing the safeguard of national security information.

I look forward to hearing from our witnesses today on this very important topic.

I understand that Senator Kerrey, the Vice Chairman, will join us later. He's in the Finance Committee.

At this point, Senator Roberts, do you have an opening statement?

Senator ROBERTS. I just have an observation, Mr. Chairman.

Chairman SHELBY. Uh-huh.

Senator ROBERTS. I don't mean to summarize Dr. Fisher's testimony before he testifies, but I note there was a very pertinent conclusion in his conclusion, when he says, to the extent that the concern of the Executive branch is directed towards the control of information that might be damaging to national security, the Intelligence Committees have procedures in place designed to protect against such damage.

And I know of no one on this Committee, or for that matter, the House Committee, that would willingly or willfully do anything of that nature.

Now, I'm, in my real life, in my former life, I'm a former newspaper man—as a matter of fact, the bio says journalist. That's an unemployed newspaper man. And I note the concern about what appears in the Fourth Estate in regards to national security matters, and Director Tenet just the other day when he testified before the Committee indicated that the Executive does have a problem in regards to what is referred to as leaks. It's been my experience it is not a leak until somebody gets wet. And with the Executive, I think we're under water in some cases.

And the thought occurs to me that in a vetting process, if somebody thinks there is something wrong or they have a concern or there has been fraud or abuse or somebody is out of bounds or there's lawbreaking, that if they could come to the Committee, it seems to me that we might prevent some of the unauthorized press coverage in regards to classified information. It would be a vetting process. It would be somewhere where employees could feel, at least to some degree, that they were being responsible to their code of conduct, without going to the press.

Now, I am a realist and I understand it. The press has a right to know, when they shine the light of truth into darkness, and all of that, and I know they will continue to do that, as they should.

But I think this could be helpful in that regard, Mr. Chairman, and I want to thank you for your efforts in that regard.

Chairman SHELBY. We will hear from two panels today.

The first panel will present the argument that the Executive Branch and Legislative Branch share constitutional authority over the regulation of classified information.

The second panel will present the opposing argument.

On our first panel is Dr. Louis Fisher. Dr. Fisher may look familiar because he has testified on over thirty occasions before various Congressional Committees.

Dr. Fisher is a Senior Specialist in the separation of powers with the Congressional Research Service of the Library of Congress. He began work with the CRS in 1970 and served as research director of the House Iran-Contra Committee in 1987.

Dr. Fisher's areas of expertise are Constitutional Law, the Presidency, Executive-Legislative Relations, War Powers, and Congressional-Judicial Relations.

He has authored over a dozen books on various constitutional topics, many of which focus on the constitutional tension between the legislature and the executive. He is the author of more than 200 articles in law reviews, journals, magazines, books, and newspapers.

Dr. Fisher, we are pleased that you could be with us today.

Also, on our first panel is Professor Peter Raven-Hansen. Professor Raven-Hansen is currently the Glen Earl Weston Research Professor of Law at the George Washington University Law School. He has been a Professor of Law at George Washington University Law School since 1980.

Before I call on you gentlemen, Senator Levin has joined us.

Senator.

Senator LEVIN. Mr. Chairman, I'll be very, very brief. I would ask that my entire statement be placed in the record.

Chairman SHELBY. Without objection, it is so ordered.

Senator LEVIN. Mr. Chairman, I want to commend you and our Vice Chairman, first of all, for the energy with which you have pursued this very important issue. It is an issue which was left unresolved at the end of last year's legislative period. It is my own view that a Member of Congress or staff with the appropriate security clearance, should be able to request or receive classified information, as long as there is a legitimate purpose to be served.

And one legitimate for either requesting or receiving classified information would be if that information provides evidence of waste, fraud or abuse in programs for which Congress has oversight responsibility. And the key issue to me is whether or not the person receiving the information, number one, has clearance, and number two, has a legitimate—and there is a legitimate legislative purpose, including oversight.

And so I think that the—hope that we'll be able to resolve this issue, but I mainly want to, in the moment I have, just to thank you, Mr. Chairman, and Senator Kerrey as well, our Vice Chairman, for pursuing this issue. It's very important in terms of the fight against waste, fraud and abuse.

[The statement of Senator Levin follows:]

STATEMENT OF SENATOR CARL LEVIN, INTELLIGENCE COMMITTEE HEARING ON
DISCLOSURE OF INFORMATION TO CONGRESS

Mr. Chairman, Mr. Vice Chairman, today's hearing addresses an important issue that was left unresolved in last year's Intelligence Authorization and Defense Authorization bills, the nature and degree of protection to be afforded to federal employees who use classified information to report fraud, waste and abuse to Members of Congress with the appropriate security clearance to receive the information.

As the author of the Whistleblower Protection Act of 1989, I salute you for the energy with which you have pursued this important issue.

We are here today, in large part, because the Justice Department has taken the position that it is unconstitutional for Congress to provide protection to whistleblowers who use classified information to disclose waste, fraud and abuse even if the information is provided to Members and staff with the appropriate security clearance to receive the information. The basis for this position is a legal memorandum stating—without any citation to either the text of the Constitution or the case law—that the President has “ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information” and that “The Constitution does not permit Congress to circumvent” this authority.

I think we all recognize that the dissemination of classified information must be carefully controlled and we do not want to “legalize leaking [classified] information to Congress”. At the same time, however, Congress cannot and should not accept the conclusion that Executive branch officials are free to lie to Congress—or to hide evidence of waste, fraud and abuse—and then threaten reprisal against any employee who might expose the truth.

A Member of Congress, with the appropriate security clearance, should be able to request or receive classified information, as long as the Member has a legitimate need for that information. One legitimate basis for requesting or receiving classified information would be if that information provided evidence of waste, fraud and abuse in programs for which the Member has oversight responsibility.

I look forward to the testimony of our witnesses.

Chairman SHELBY. Well, Senator Levin, I know that you have spent a lot of time in this area, and I think this is—this one you've served and chaired another Committee that deals with a lot of the issues here, but the Intelligence Committee, I believe, is the proper forum to try to deal with this, and I appreciate your remarks.

Dr. Fisher, you may proceed.

Any and all of your written statement will be made part of the record in its entirety.

[The written statement of Dr. Fisher follows:]

PREPARED STATEMENT BY LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE,
EXECUTIVE EMPLOYEE ACCESS TO CONGRESS

Mr. Chairman, I appreciate the opportunity to testify on legislation that would allow executive employees to contact the Intelligence Committees without first receiving approval from their supervisors in the executive branch.

This issue was debated last year when the Intelligence Committees considered Section 306 of S. 858 to expand executive employee access to Congress (see appendix for legislative language). The Senate report accompanying S. 858 explained that current executive branch policies on classified information “could interfere with [the Senate Intelligence Committee's] ability to learn of wrongdoing within the elements over which it has oversight responsibility.” [S. Rept. No. 105–24, 105th Cong., 1st Sess. 26 (1997).]

I approach Section 306 from the work I do on separation of powers. For thirty years my interest has been in political institutions: how to keep them healthy so that government as a whole functions well. At times I testify in defense of legislative prerogatives. On other occasions I have testified that pending bills interfere with presidential responsibilities or threaten judicial independence.

I regard Section 306 as an appropriate and constitutional means of protecting legislative interests. That is especially so because Congress in the 1970s—in creating the Intelligence Committees—relied heavily on those panels to guard Congress as an institution. To a great degree, Congress delegated to these committees the responsibility for monitoring and controlling the intelligence community. There are sufficient safeguards in Section 306 to protect executive interests. My statement cov-

ers a number of points, including arguments put forth by the Justice Department's Office of Legal Counsel in a 1996 memorandum.

As presently drafted, Section 306 contemplates two steps: enactment of a law followed by "appropriate actions" by the President to inform executive employees of the congressional policy. If for some reason the President failed to act, or informed executive employees in such a way as to dilute the congressional policy, the statutory purpose would be undermined without a clear remedy. An alternative would be to use a single step: enact Section 306 with no requirement for presidential action. Of course the President would always be free to issue any guidelines he considered appropriate to the agencies, but Section 306 would stand alone as a statement of national policy for executive employees and contractors.

OLC MEMORANDUM

In a memorandum dated November 26, 1996, Christopher H. Schroeder of the Office of Legal Counsel, U.S. Department of Justice, wrote to Michael J. O'Neil, General Counsel of the Central Intelligence Agency, regarding access to classified information. The memo analyzes two congressional enactments concerning the rights of federal employees to provide information to Congress: 5 U.S.C. 7211 (Lloyd-LaFollette Act) and Section 625 of the Treasury, Postal Service Appropriation Act for fiscal 1997 (P.L. No. 104-208). Both statutory provisions give executive employees a right to furnish information to either House of Congress or to a committee or Member thereof. The OLC memo repeats the position announced in previous Justice Department documents that a congressional enactment "would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a 'right' to furnish such information to a Member of Congress without receiving official authorization to do so." [OLC Memo at 3.] The Justice Department bases this position on the following separation of powers rationale:

"The President's roles as Commander in Chief, head of the executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its Members. In that context, as in all others, the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, to the President. The Constitution does not permit Congress to circumvent these orderly procedures and chain of command—and to erect an obstacle to the President's exercise of all executive powers relating to the Nation's security—by vesting lower-level employees in the Executive Branch with a supposed 'right' to disclose national security information to Members of Congress (or anyone else) without the authorization of Executive Branch personnel who derive their authority from the President." [Id. at 4.]

According to this analysis, the two congressional statutes and the pending language in S. 858 are unconstitutional. The Department's position relies in part on generalizations and misconceptions about the President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations.

COMMANDER IN CHIEF

The Constitution empowers the President to be Commander in Chief, but that title must be understood in the context of military responsibilities that the Constitution grants to Congress. Article II reads: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." For the militia, Congress—not the President—does the calling. Article I gives to Congress the power to provide "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions." Article I also empowers Congress to declare war, raise and support armies, and make rules for the land and naval forces.

The debates at the Philadelphia Convention make clear that the Commander in Chief Clause did not grant the President unilateral, independent power other than the power to "repel sudden attacks." [2 Farrand 318-19.] The Commander in Chief Clause was also intended to preserve civilian supremacy. [10 Op. Att'y Gen. 74, 79 (1861).] The historical record is replete with examples of Congress relying on the

regular legislative process to control the President's actions in military affairs.¹ There is no evidence from these sources that the framers intended the Commander in Chief Clause to deny to Members of Congress information needed to supervise the executive branch and learn of agency wrongdoing.

HEAD OF THE EXECUTIVE BRANCH

The framers placed the President at the head of the executive branch to provide for unity, responsibility, and accountability. No doubt that was an important principle for assuring that the President, under Article II, Section 3, was positioned to "take Care that the Laws be faithfully executed." The delegates at the constitutional convention rejected the idea of a plural executive, preferring to anchor that responsibility in a single individual. Said John Rutledge: "A single man would feel the greatest responsibility and administer the public affairs best." [1 Farrand 65.]

But placing the President at the head of the executive branch did not remove from Congress the power to direct certain executive activities and to gain access to information needed for the performance of legislative duties. At the Convention, Roger Sherman considered the executive "nothing more than an institution for carrying the will of the Legislature into effect." [1 Farrand 65.] It was never the purpose to make the President personally responsible for executing all the laws. Rather he was to take care that the laws be faithfully executed, including laws that excluded him from operations in the executive branch.

For example, from an early date Congress vested in certain subordinate executive officials the duty to carry out specified "ministerial" functions without interference from the President. On many occasions an Attorney General has advised Presidents that they have no legal right to interfere with administrative decisions made by the auditors and comptrollers in the Treasury Department, pension officers, and other officials.² The President is responsible for seeing that administrative officers faithfully perform their duties, "but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties." [19 Op. Att'y Gen. 685, 686–87 (1890).] In several decisions the Supreme Court has recognized that Congress can impose certain duties on executive officials that are beyond the control and direction of the President.³

Agencies have a direct responsibility to Congress, the body that creates them. In 1854, Attorney General Caleb Cushing advised departmental heads that they had a threefold relation: to the President, to execute his will in cases in which the President possessed a constitutional or legal discretion; to the law, which directs them to perform certain acts; and to Congress, "in the conditions contemplated by the Constitution." Agencies are created by law and "most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty; and it may, if it sees fit, interpose by legislation concerning them, when required by the interests of the Government." [6 Op. Att'y Gen. 326, 344 (1854).]

SOLE ORGAN IN FOREIGN AFFAIRS

During debate in the House of Representatives in 1800, John Marshall said that the President "is the sole organ of the nation in its external relations and its sole representative with foreign nations." [Annals of Cong., 6th Cong. 613 (1800).] This remark was later incorporated in Justice Sutherland's opinion in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936), to suggest that the President is the exclusive policymaker in foreign affairs. However, Justice Sutherland wrenched Marshall's statement from context to imply a position that Marshall never held. At no time, either in 1800 or later, did Marshall suggest that the President could act unilaterally to make foreign policy in the face of statutory limitations.

¹Louis Fisher, *Presidential War Power* (1995); Louis Fisher, "Congressional Checks on Military Initiatives," 109 Pol. Sci. Q. 739 (Winter 1994–95); William C. Banks and Peter Raven-Hansen, *National Security Law and the Power of the Purse* (1994); Louis Fisher, "How tightly Can Congress Draw the Purse Strings?," 83 Am. J. Int'l L. 758 (1989).

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

³E.g., *Kendall v. United States*, 37 U.S. 522, 610 (1838); *United States v. Schurz*, 102 U.S. 378 (1880); *Butterworth v. Hoe*, 112 U.S. 50 (1884); *United States v. Price*, 116 U.S. 43 (1885); *United States v. Louisville*, 169 U.S. 249 (1898).

The debate in 1800 focused on the decision by President John Adams to turn over to England someone who had been charged with murder. Because the case was already pending in an American court, some Members of Congress recommended that Adams be impeached for encroaching upon the judiciary and violating the doctrine of separated powers. It was at that point that Marshall intervened to say that there was no basis for impeachment. Adams, by carrying out an extradition treaty entered into between England and the United States, was not attempting to make national policy single-handedly. Instead, he was carrying out a policy made jointly by the President and the Senate (for treaties). Only after the policy had been formulated through the collective effort of the executive and legislative branches (by treaty or by statute) did the President emerge as the “sole organ” in *implementing* national policy. The President merely *announced* policy; he did not alone *make* it. Consistent with that principal, Marshall later decided a case as Chief Justice of the Supreme Court and ruled that in a conflict between a presidential proclamation and a congressional statute governing the seizure of foreign vessels during wartime, the statute prevails. *Little v. Barreme*, 6 U.S. (2 Cr.) 169, 179 (1804).

Sutherland’s use of the “sole organ” remark in *Curtiss-Wright* prompted Justice Robert Jackson in 1952 to say that the most that can be drawn from Sutherland’s decision is the intimidation that the President “might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress.” *Youngstown Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952). Jackson also noted that “much of the [Sutherland] opinion is dictum.” [Id.] In 1981, the D.C. Circuit cautioned against placing undue reliance on “certain dicta” in Sutherland’s opinion: “To the extent that denominating the President as the ‘sole organ’ of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization.” *American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981).

DEPARTMENT OF THE NAVY V. EGAN (1988)

The OLC memo (pp. 6–7) relies in part on the Supreme Court’s decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1998). However, *Egan* is fundamentally a case of statutory construction. It involved the Navy’s denial of a security clearance to Thomas Egan, who worked on the Trident submarine. He was subsequently removed. Egan sought review by the Merit Systems Protection Board (MSPB), but the Supreme Court upheld the Navy’s action by ruling that the denial of a security clearance is a sensitive discretionary judgment call *committed by law* to the executive agency with the necessary expertise for protecting classified information. [Id. at 529–30.] The conflict in this case was within the executive branch. It was between the Navy and the MSPB, not between Congress and the executive branch.

The focus on statutory questions was evident throughout the case. As the Justice Department noted in its brief submitted to the Supreme Court: “The issue in this case is one of statutory construction and ‘at bottom * * * turns on congressional intent’”⁴ The parties were directed to address this question:

“Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merits Systems Protection Board is *authorized by statute* to review the substance of the underlying decision to deny or revoke the security clearance.” (Italic added.)

The statutory questions centered on 5 U.S.C. 7512, 7513, 7532, and 7701. The brief submitted by the Justice Department analyzed the relevant statutes and their legislative history and could find no basis for determining that Congress intended the MSPB to review the merits of security clearance determinations.⁵ The entire oral argument before the Court on December 2, 1987, was devoted to the meaning of statutes and what Congress intended by them. At no time did the Justice Department suggest that classified information could be withheld from Congress.

The Court’s deference to the Navy did not cast a shadow over the right of Congress to sensitive information. The Court decided merely the “narrow question” of whether the MSPB had *statutory* authority to review the substance of a decision to deny a security clearance. [484 U.S. at 520.] Although the Court referred to independent constitutional powers of the President, including those as Commander in

⁴U.S. Department of Justice, Brief for the Petitioner, *Department of the Navy v. Egan*, October Term, 1987, at 22 (citation to *Clarke v. Securities Industry Ass’n.*, No. 85–971 (Jan. 14, 1987) omitted).

⁵U.S. Department of Justice, Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit, *Department of the Navy v. Thomas E. Egan*, October Term, 1986, at 4–5, 13, 15–16, 18.

Chief and head of the executive branch, *id.* at 527, and noted the President's responsibility over foreign policy, *id.* at 529, the case was disposed of on statutory grounds. In stating that courts "traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs," the Court added this key qualification: "*unless Congress specifically has provided otherwise.*" [*Id.* at 530 (italic added).]⁶ Nothing in the legislative history of the Civil Service Reform Act of 1978 convinced the Court that the MSPB could review, on the merits, an agency's security-clearance determination. [*Id.* at 531 n.6.]

In citing the President's role as Commander in Chief, the Court stated that the President's authority to protect classified information "flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant." [*Id.* at 527.] If Congress had never enacted legislation regarding classified information, certainly the President could act in the absence of congressional authority. But if Congress acts by statute, it can narrow the President's range of action.

It is helpful to place *Egan* in the context of Justice Jackson's three categories laid out in the Steel Seizure Case of 1952: (1) when the President acts pursuant to congressional authority his authority is at its maximum, because it includes everything that he possesses under the Constitution plus what Congress has delegated; (2) when he acts in the absence of congressional authority he operates in a "zone of twilight" in which he and Congress share concurrent authority; (3) when he acts against the expressed or implied will of Congress, his power is at "its lowest ebb." *Youngstown Co. v. Sawyer*, 343 U.S. 579, 637 (1952). *Egan* belongs in the middle category. The President's range is broad until Congress enters the zone of twilight and exerts its own authority.

THE GARFINKEL CASE (1989)

The OLC memo also relies on the litigation that led to the Supreme Court's decision in *American Foreign Service Assn. v. Garfinkel*, 490 U.S. 153 (1989). The progression of this case from district court to the Supreme Court and back to the district court illustrates how a lower court may exaggerate the national security powers of the President at the expense of congressional prerogatives. The district court's interpretation of executive power was quickly vacated by the Supreme Court.

In 1983, President Reagan directed that all federal employees with access to classified information sign "nondisclosure agreements" or risk the loss of their security clearance. Congress, concerned about the vagueness of some terms and the loss of access to information, passed legislation to prohibit the use of appropriated funds to implement the nondisclosure policy.

In 1988, District Court Judge Oliver Gasch held that Congress lacked constitutional authority to interfere, by statute, with nondisclosure agreements drafted by the executive branch to protect the secrecy of classified information. *National Federation of Federal Employees v. United States*, 688 F.Supp. 671 (D.D.C. 1988). Among other authorities, Judge Gasch relied on *Egan* and *Curtiss-Wright*. [*Id.* at 676, 684-85.] From *Egan* he extracts a sentence ("The authority to protect such [national security] information falls on the President as head of the Executive Branch and as Commander in Chief") without acknowledging that *Egan* was decided on statutory, not constitutional, grounds. [*Id.* at 685.] From *Curtiss-Wright* he concludes that the "sensitive and complicated role cast for the President as this nation's emissary in foreign relations requires that congressional intrusion upon the President's oversight of national security information be more severely limited than might be required in matters of purely domestic concern." [*Id.* at 685.] In fact, the issue in *Curtiss-Wright* was whether Congress could delegate *its* powers to the President in the field of foreign relations. The previous year the Court had struck down the National Industry Recovery Act because it had delegated an excessive amount of legislative power to the President in the field of domestic policy. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). The question before the Court in *Curtiss-Wright*: Could Congress use more general standards when delegating its authority in foreign affairs? The Court held that more general standards were permissible because of the changing circumstances that prevail in international affairs. The issue before the

⁶The Court appears to have borrowed this thought, and language, from the Justice Department's brief: "Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs." U.S. Department of Justice, Brief for the Petitioner, *Department of the Navy v. Egan*, October Term, 1987, at 21.

Court was the extent to which Congress could delegate its power (embargo authority), not the existence of independent and autonomous powers for the President.

Having mischaracterized both Supreme Court decisions, Judge Gasch concluded that Congress had passed legislation that “impermissibly restricts the President’s power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations.” [Id. at 685.]

On October 31, 1988, the Supreme Court noted probable jurisdiction in the *Garfinkel* case, [488 U.S. 923.] Both the House and the Senate submitted briefs objecting strongly to Judge Gasch’s analysis of the President’s power over foreign affairs. During oral argument, after Edwin Kneedler of the Justice Department spoke repeatedly about the President’s constitutional role to control classified information, one of the Justices remarked: “But, Mr. Kneedler, I just can’t—I can’t avoid interrupting you with this thought. The Constitution also gives Congress the power to provide for a navy and for the armed forces, and so forth, and often classified information is highly relevant to their task. Transcript of Oral Argument, March 20, 1989, at 57–58.”

On April 18, 1989, the Court issued a per curiam order that vacated Judge Gasch’s order and remanded the case for further consideration. In doing so, the Court cautioned Judge Gasch to tread with greater caution in expounding on constitutional matters: “Having thus skirted the statutory question whether the Executive Branch’s implementation of [nondisclosure] Forms 189 and 4193 violated §630, the court proceeded to address appellees’ argument that the lawsuit should be dismissed because §630 was an unconstitutional interference with the President’s authority to protect the national security.” *American Foreign Service Assn. v. Garfinkel*, 490 U.S. 153, 158 (1989). The Court emphasized that the district court “should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings.” [Id. at 161.]

On remand, Judge Gasch held that the plaintiffs (*American Foreign Service Association and Members of Congress*) failed to state a cause of action for courts to decide. *American Foreign Service Ass’n v. Garfinkel*, 732 F.Supp. 13 (D.D.C. 1990). By dismissing the plaintiffs’ complaint on this ground, Judge Gasch did not address any of the constitutional issues. [Id. at 16.]

THE LLOYD-LAFOLLETTE ACT

The OLC memo sweeps broadly to challenge the constitutionality of the Lloyd-Lafollette Act, originally enacted in 1912. The statute responded to presidential efforts to block the flow of information from executive employees to Congress. For example, President Theodore Roosevelt in 1902 issued a “gag order” prohibiting employees of the executive department from seeking to influence legislation “individually or through associations” except through the heads of the departments. Failure to abide by this presidential order could result in dismissal from government service. [48 Cong. Rec. 4513 (1912).] In 1909, President William Howard Taft issued another gag order, forbidding any bureau chief or any subordinate in government to apply to either House of Congress, to any committee of Congress, or to any member of Congress, for legislation, appropriations, or congressional action of any kind,

“ . . . except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of Congress, or any committee of either House of Congress, or any Member of Congress, except through, or as authorized by, the head of his department.” [48 Cong. Rec. 4513 (1912).]

Through language added to an appropriations bill in 1912, Congress nullified the gag orders issued by Roosevelt and Taft. The debate on this provision underscores the concern of Congress that the gag orders would put congressional committees in the position of hearing “only one side of a case”; the views of Cabinet officials rather than the rank-and-file members of a department. [48 Cong. Rec. 4657 (1912).] Members wanted agency employees to express complaints about the conduct of their supervisors. [Id.] The stated purpose of the legislation was to ensure that government employees could exercise their constitutional rights to free speech, to peaceable assembly, and to petition the government for redress of grievances. [Id. at 5201.]

In the course of debate Members of Congress viewed the gag orders as an effort to prevent Congress from learning “the actual conditions that surrounded the employees of the service.” [Id. at 5235.] If agency employees could speak only through the heads of the departments, “there is no possible way of obtaining information excepting through the Cabinet officers, and if these officers desire to withhold informa-

tion and suppress the truth or to conceal their official acts it is within their power to do so.” [Id. at 5634 (statement of Rep Lloyd).] Another legislator remarked: “The vast army of Government employees have signed no agreement upon entering the service of the Government to give up the boasted liberty of the American citizens.” [Id. at 5637 (statement of Rep. Wilson).] Even more explicit was this statement during debate in the Senate: “Mr. President, it will not do for Congress to permit the executive branch of this Government to deny to it the sources of information which ought to be free and open to it, and such an order as this, it seems to me, belongs in some other country than the United States.” Id. at 10674 (statement of Senator Reed).

The language used to nullify the gag orders was added as Section 6 to the Postal Services Appropriations Act of 1912. [37 Stat. 539, 555 (1912).] Section 6, known as the Lloyd-LaFollette Act, provides a number of procedural safeguards to protect agency officials from arbitrary dismissals. The final sentence of Section 6 reads: “The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.”

Section 6 was later carried forward in the Civil Service Reform Act of 1978 and codified as permanent law. [5 U.S.C. 7211 (1994).] The conference report on this statute elaborates on the need for executive employees to disclose information to Congress:

“The provision is intended to make clear that by placing limitations on the kinds of information an employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to Congress. Section 2302(b)(8) of this act would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly unprotected if such disclosure is made to the appropriate unit of the Congress. Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.” S. Rept. No. 1272, 95th Cong., 2d Sess. 132 (1978).

WHISTLEBLOWER PROTECTION ACT OF 1989

Congress enacted legislation in 1989, finding that federal employees who make disclosures described in 5 U.S.C. 2302(b)(8) “serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures” and that “protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service.” [103 Stat. 16, §2(a) (1989).] Employees may disclose information which they reasonably believe evidences a violation of any law, rule, or regulation, or constitutes gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Such disclosures are permitted unless “specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.” [103 Stat. 21.] In signing the bill, President Bush said that “a true whistleblower is a public servant of the highest order . . . these dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment.” [Public Papers of the Presidents, 1989, I, at 391.]

CONGRESSIONAL ACCESS TO AGENCY INFORMATION

To perform its legislative and constitutional functions, Congress depends on information available from the executive branch. The Supreme Court remarked in 1927 that a legislative body “cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to those who do possess it.” *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). Investigation is a prerequisite for intelligent lawmaking, and much of the information that Congress requires is located within the executive branch. Congress needs information to enact legislation, to oversee the administration of programs, to inform the public, and to protect its integrity, dignity, reputation, and privileges. To enforce these constitutional duties, Congress possesses the inherent power to issue subpoenas and to punish for contempt. *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 505 (1975);

Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). The Supreme Court has said that the power of Congress to conduct investigations “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.” *Watkins v. United States*, 354 U.S. 178, 187 (1957).

The power of Congress to investigate reaches to all sectors of executive branch activity, not merely domestic policy but also foreign, military, and national security policy. The first major congressional investigation, in 1792, involved the ill-fated expedition of Major General St. Clair, whose forces met heavy losses to the Indians. A House committee was empowered “to call for such persons, papers, and records, as may be necessary to assist their inquiries.” After President Washington, met with his Cabinet to consider the House request, it was agreed that there was not a paper “which might not be properly produced.” Louis Fisher, *Constitutional Conflicts between Congress and the President* 161 (4th ed. 1997).

To buttress its power to investigate, Congress frequently has enacted statutory language to require the executive branch to produce information. When Congress passed the Budget and Accounting Act of 1921, it directed the newly established Bureau of the Budget (now the Office of Management and Budget) to provide Congress with information. The Bureau “shall, at the request of any committee on either House of Congress having jurisdiction over revenue or appropriations, furnish the committee such aid and information as it may request.” [42 Stat. 20, 23, § 212.] The current version regarding congressional requests for information in the budget area appears at 31 U.S.C. 1113 (1994).

As part of the National Security Act, Congress in 1991 required the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the U.S. government involved in intelligence activities to keep the Intelligence Committees “fully and currently informed of all intelligence activities,” other than a covert action. The procedures for covert actions are spelled out elsewhere. The Intelligence Committees are to receive “any information or material concerning intelligence activities * * * which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.”⁷

Congress also relies on the assistance of employees within the executive branch. Upon the request of a congressional committee or a committee member, any officer or employee of the State Department, the U.S. Information Agency, the Agency for International Development, the U.S. Arms Control and Disarmament Agency, “or any other department, agency, or independent establishment of the United States Government primarily concerned with matters relating to foreign countries or multilateral organizations may express his views and opinions, and make recommendations he considers appropriate, if the request of the committee or member of the committee relates to a subject which is within the jurisdiction of that committee.” [2 U.S.C. 194a (1994).]

CONCLUSIONS

The text and intent of the Constitution, combined with legislative and judicial precedents over the past two centuries, provide strong support for congressional access to information within the executive branch. Without that information, Congress would be unable to adequately discharge its legislative and constitutional duties. It could not properly oversee executive branch agencies, which are creatures of Congress. Part of legislative access depends on executive employees—the rank-and-file—who are willing to share with Congress information about operations within their agencies. On the basis of two centuries of experience, Congress knows the value of gaining access to information regarding agency corruption and mismanagement that an administration may want to conceal.

No doubt the executive branch has an interest in seeing that agency information is disclosed only through authorized channels. Part of that concern has been directed toward controlling information that might be embarrassing to the agency, and the administration, if released. There is no legal or constitutional justification for concealing that kind of information. To the extent that the concern of the executive branch is directed toward the control of information that might be damaging to national security, the Intelligence Committees have procedures in place designed to protect against such damage. To question these procedures would put the executive branch in the position of asserting that only its procedures can safely protect

⁷ Compilation of Intelligence Laws and Related Laws and Executive Orders of Interest to the National Intelligence Community, prepared for the use of the House Permanent Select Committee on Intelligence, 104th Cong., 1st Sess. 20 (Committee Print July 1995); 50 U.S.C. 413a, as added by the intelligence authorization act for fiscal 1991, P.L. 102–88, 105 Stat. 442.

national security, even at the cost of denying Congress the information it needs to discharge its constitutional duties.

**STATEMENT OF DR. LOUIS FISHER, PH.D., SENIOR SPECIALIST
(SEPARATION OF POWERS), CONGRESSIONAL RESEARCH
SERVICE, LIBRARY OF CONGRESS**

Dr. FISHER. Thank you very much. I'll summarize the main points.

As you mentioned, I've testified before Congress before and although I am a staff member of Congress, I try in my testimony to look at the issues in terms of the structure of government and to see how certain reforms would affect the institutions. In previous testimony on certain bills, I've concluded that a bill will entrench upon the President's power or will endanger judicial powers. I try and look at all three branches to see how they can operate most effectively and most consistently with their constitutional duties.

Section 306 seems to me an appropriate and constitutional way for Congress to protect its own responsibilities and own duties to the citizens. I think that is particularly so because of the reforms in the 1970's that set up the two Intelligence Committees. Unlike other Committees where many Committees may have jurisdiction and a responsibility, the duty here to monitor the Intelligence Community is solely on you and the House Committee. So I think the need for you to have the access to carry out your responsibilities is very great and should not be restricted.

I do think the way Section 306 is written, there are sufficient safeguards there to protect information and to protect Executive—

Chairman SHELBY. Would you say that this is a logical extension of our oversight on both Intelligence Committees of what we do?

Dr. FISHER. Logical.

Chairman SHELBY. Very logical.

Dr. FISHER. And very consistent.

Chairman SHELBY. Okay.

Dr. FISHER. The only suggestion I make in my testimony regarding 306 is that currently it is a two step process. You make a statement and then the policy to be implemented requires Presidential action. One alternative is just to let the policy be national policy, legislative policy, and not require a second step, and the President can always issue whatever guidelines he considers appropriate. But let it be a one step process.

My statement begins by looking at the analysis by the Office of Legal Counsel, which challenged this kind of legislation in its 1996 memo, and then I turn to some other issues.

OLC starts by saying that the President has this unusual authority over classified information because he is Commander-in-Chief, he's head of the Executive branch, and he is the sole organ in the field of foreign affairs.

I think those three categories are so general they don't do justice to the complexity of the issue that you're dealing with. First of all, the Commander-in-Chief clause doesn't give the President unrestricted power. The scope of the Commander-in-Chief clause depends, in large part, on what you do in Congress through statutory process in restricting and channeling the Commander-in-Chief

clause. There is nothing in the history of the Commander-in-Chief clause to suggest that Congress could be denied classified information it needs to perform its constitutional duties.

The same with the argument of the President being head of the Executive branch. He is that, but that depends on statutes, on what duties you place in Executive employees, what rights you place there.

The President is to take care that the laws are faithfully executed. It doesn't mean that the Executive branch is hierarchical in that every employee is subordinate to the President. It depends on the statutory framework. There are many statutes that have placed certain duties and rights into other agencies, and the President may not interfere. It's well established in law, it is well established in Supreme Court decisions.

The third category, the President being sole organ in foreign affairs, this is a misconception that comes out of the famous 1936 Curtis-Wright case. It's purely dicta, and it's a misconception in the sense that the term "sole organ" comes from a speech that John Marshall gave when he was a member of the House in 1800.

If you look at the context of the speech, John Marshall never argued that the President has some sort of exclusive control over foreign affairs. The issue was simply after Congress and the President decide what national policy is, either by a treaty or by a statute, at that point, the President is the sole organ in communicating to other countries what our policy is. The President doesn't have sole power to make the policy. That's done with Congress. After the policy is decided, then he is the sole organ.

It is an unfortunate misconception by Justice Sutherland in the Curtiss-Wright case, and it is repeated ever since. There is no doubt that John Marshall, even when he was on the Court, never thought that the President had any exclusive control, and that if a statute restricted the President, what governed was the statute, not the Presidential action. And that's borne out in the *Little* (v.) *Barreme* case in 1804.

The Justice Department also relies on two cases, *Egan* and *Garfinkel*. *Egan*, 1988, shouldn't be used to restrict the right of Congress to information. *Egan* was a statutory matter, it wasn't a constitutional matter. It was not a conflict between the Executive branch and Congress. It was a conflict inside the Executive Branch between the Navy and the Merit Systems Protection Board.

The case was briefed that way, was argued that way. The oral argument makes it clear that is a statutory matter of whether MSPB has this kind of authority. People asked what do the statutes say, what did Congress mean when it wrote the other statutes. A purely statutory matter.

There is some language in the *Egan* case by the Supreme Court that talks about some constitutional issues, and if you read it, you may think the President has unusual authority. For instance, the Supreme Court said that courts, "traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs," but then there is a qualifier, "unless Congress specifically has provided otherwise."

It's also important that the courts are reluctant. It doesn't mean that Congress has to be reluctant. Congress has very broad authority in the field of national security, unlike the courts.

The Garfinkel case, the next year in 1989, concerned non-disclosure agreements. This was a case where the lower courts, Judge Gasch, wrote in such a way to suggest that the President had the dominant voice in foreign affairs and national security, but as that went up the line, both the House and the Senate filed briefs vigorously objecting to Judge Gasch's position. The Supreme Court, when it handled the issue, sent it back down to the District Court advising the District Court to stay away from generalizations that are not necessary, particularly constitutional generalizations. And the District Court complied.

The rest of my statement has to do with other issues, like the Lloyd-LaFollette Act. It's been in place since 1912, where President Taft and President Teddy Roosevelt issued gag orders so that Executive employees could not come to Committees or to Members to provide information. Congress responded with a statute to give them that right. It's been in place since 1912. To my knowledge, not until 1996 was there a challenge constitutionally—

Chairman SHELBY. I assume the statute was never vetoed, the legislation.

Dr. FISHER. It was signed into law.

Chairman SHELBY. Signed into law: Go ahead.

Dr. FISHER. And when you look at the history of this, what Taft and Teddy Roosevelt were saying is that don't get information from agency employees. You come to the Cabinet heads and we'll spoon feed legislators. Congress felt that it couldn't discharge its constitutional duties being given such a limited amount of information.

So this is part of the history of Congress to obtain information, not just from Cabinet officials, but from lower level employees. Next is the Whistleblower Protection Act of 1989. When that was signed into law by President Bush, he said that "a true whistleblower is a public servant of the highest order * * * these dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment."

My statement concludes with a number of statutes and constitutional decisions by the Court that give Congress the opportunity and the right to obtain whatever information it needs to carry out probes of the Executive branch into corruption, waste, inefficiency. Our Constitution has been read that way from the start, even in national security matters.

The first investigation by Congress was 1792 into the St. Clair Expedition. There was never any doubt on the Executive branch side that whatever information Congress needed to conduct its investigation, it would obtain, and received the cooperation of the Executive branch.

So those are some of my initial comments, Mr. Chairman. I'd be happy, after Mr. Raven-Hansen speaks, to respond to any questions after his testimony.

Thank you very much.

Chairman SHELBY. Professor Raven-Hansen.

Mr. RAVEN-HANSEN. Thank you.

Chairman SHELBY. Your entire written statement will be made part of the record. You proceed as you wish.

Mr. RAVEN-HANSEN. I had previously submitted a more comprehensive analysis of the issues that I prepared with Professor Banks of Syracuse Law School, and I would ask that that be made part of the record.

Chairman SHELBY. It will be made part of the record in its entirety.

Mr. RAVEN-HANSEN. Thank you very much.
[The statements referred to follow:]

STATEMENT OF PROFESSOR PETER RAVEN-HANSEN, GLEN EARL WESTON RESEARCH
PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Thank you for the invitation to testify today about the constitutional issues raised by disclosure bills like S. 858. I have previously (Oct. 22, 1997) submitted a more comprehensive analysis of the issues that I prepared with my colleague and co-author, Professor William C. Banks of Syracuse University College of Law, and I ask that it be made part of the record together with this statement.

Let me begin by anticipating the argument that may be made on behalf of the executive branch that bills like S. 858 are unconstitutional. That argument will center on the Supreme Court's statement in *Department of the Navy v. Egan*¹ that the President's "authority to classify and control access to information bearing on national security . . . flows primarily from [the Commander in Chief Clause] and exists quite apart from any explicit congressional grant." Consequently, the argument will conclude, as the Office of Legal Counsel did in 1989 regarding another disclosure statute, that the President has "ultimate and unimpeded authority over the collection, retention, and dissemination of intelligence and other national security information"² and that any statutory limitation on this authority is therefore unconstitutional.

The premises of this logic are incomplete and the conclusion is wrong.

I. The President and Congress share constitutional authority to regulate classified information

Both the constitutional text and historical practice establish that the President and Congress share constitutional authority to regulate classified information.

In the first place, there is no express constitutional text regarding the collection, retention, and dissemination of intelligence and national security information. The President's authority on this subject is implied, flowing from his constitutional designation as Commander in Chief. But if regulation of national security information is implicit in the command authority vested in the President by the Commander in Chief Clause, it is equally implicit in the nine express textual grants of national security and foreign affairs authority to Congress. These range from the authority provide for the Common Defense to the authority to make rules for the government and regulation of the land and naval forces.³ It is also implicit in Congress' residual authority to make all laws which shall be necessary and proper for carrying into execution not just this broad collection of national security authorities, but also all the national security authority vested in the President and the executive branch.⁴

In fact, the only express constitutional authority for keeping governmental information secret is given not to the President, but to Congress. The Constitution vests each house with the authority to except from publication "such Parts [of its journal] as may in their Judgment require Secrecy."⁵

Because the President has implied constitutional authority to regulate classified information, he does not need congressional authority, as *Egan* stated. But the *Egan* dictum acknowledged only that he has such constitutional authority, not that he alone has it. Indeed, the Court's ultimate holding in *Egan*—that an executive decision to deny a security clearance to an executive branch employee was not reviewable by the Merit Systems Protection Board—expressly depended on the fact that

¹ 484 U.S. 518, 527 (1988).

² Memorandum from Christopher H. Schroeder (Acting Assistant Attorney General, Office of Legal Counsel) to Michael J. O'Neil at 4 ("OLC memo") (quoting Brief for Appellees at 42, *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989) (No. 87-2127)).

³ U.S. Const. art. I, § 8, cl. 10-16.

⁴ *Id.* cl. 18.

⁵ *Id.* § 4, cl. 3.

Congress has not “specifically * * * provided otherwise.”⁶ *Egan* is therefore consistent with the conclusion that the President and Congress share authority in the regulation of national security information. To paraphrase Justice Jackson, *Egan*, “intimated that the President might act [to regulate classified information] without congressional authority, but not that he might act contrary to an Act of Congress * * *”⁷

In fact, the President and Congress have acted together to regulate classified information since the beginnings of our organized system for protecting national security information. In our previously submitted analysis, Professor Banks and I cite over a dozen statutes ranging over an eighty-year period to demonstrate this point, ranging from the Espionage Act of 1917, which first criminalized certain uses of national security information to harm the United States, to the Protection and Reduction of Government Secrecy Act of 1994⁸ which established the framework and minimum procedures for deciding access to classified information on which the current executive order is based. What these statutes have in common is that they pervasively regulate the dissemination and protection of classified information and consistently reserve the right of Congress, at large or by its intelligence committees, to receive such information. The Supreme Court’s recognition that there is “abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch”⁹ therefore applies as fully to classified as to unclassified materials.

In short, it is far too late in the day for anyone credibly to assert that the President’s constitutional authority to regulate national security information is somehow plenary and exclusive. Instead, the constitutional text and history establish that the President and Congress share implied constitutional authority in this area.

II. Any intrusion on the President’s constitutionally assigned national security functions resulting from the disclosure provision is justified by an overriding need to promote constitutional objectives of Congress

The pertinence of the foregoing conclusion, according to Justice Kennedy, is this: when a constitutional power is “not explicitly assigned by the text of the Constitution to be within the sole province of the President,” but instead is only an implied power, the constitutionality of a statute affecting it is decided by “a balancing approach.” Using this approach, we must ask whether the statute at issue prevents the President “from accomplishing [his] constitutionally assigned functions,” and whether the extent of the intrusion on the President’s powers ‘is justified by an overriding need to promote objectives within the constitutional authority of Congress.’”¹⁰ In this balancing, the Court has also said, undifferentiated claims by one branch must yield to the specific needs of another.¹¹ But it has also found that “regulation of material generated in the Executive Branch has *never* been considered invalid as an invasion of its autonomy.”¹²

a. The disclosure provisions intrusion on the President’s national security functions

The Office of Legal Counsel has asserted that a disclosure under S. 858 would “circumvent[]” the orderly executive branch procedure for disclosure of classified information, which involves access determinations by executive delegates of the President, and the corresponding chain of command. Such a disclosure may therefore deny the President and his delegates the opportunity to invoke constitutionally-based claims of executive privilege and claims of state secrets, as well as to take steps to protect their “sources and methods.”

This assessment of the disclosure provision’s intrusion on the President’s functions is substantially exaggerated for several reasons.

⁶ 484 U.S. at 530.

⁷ *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579, 637 n.2 (1952) Justice Jackson was explaining similar dicta in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which, like *Egan*, is also frequently mis-cited as authority for plenary and exclusive presidential power.

⁸ Pub. L. No., 103–236, 108 Stat. 525 (1994), codified at 50 U.S.C. § 435 (1994).

⁹ *Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977).

¹⁰ *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 485 (1989) (quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988)) (in turn, quoting *Nixon v. Administrator*, 433 U.S. at 443).

¹¹ *United States v. Nixon*, 418 U.S. 683 (705–06) (1974).

¹² *Nixon v. Administrator*, 433 U.S. at 445 (emphasis added). The only decision to the contrary, *National Federation of Federal Employees v. United States*, 688 F. Supp. 671 (D.D.C. 1988), was promptly vacated by the Supreme Court, 490 U.S. 153 (1989), which disparaged the district court’s analysis as “abbreviated” and admonished the court on remand not to “pronounce upon the relative constitutional authority of Congress and the executive Branch unless it finds it imperative to do so.” *Id.* at 161.

First, the disclosure provision encourages disclosure of only a small subset of classified information: that which provides “direct and specific evidence” of: “a violation of law, rule, or regulation; a false statements to Congress on an issue of material fact; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” Under the President’s own executive order, “[i]n no case shall information be classified in order to . . . conceal violations of law, inefficiency, or administrative error [or to] prevent embarrassment to a person, organization, or agency.”¹³ False statement to Congress are themselves violations of law.¹⁴ Unless, therefore, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety is not either “inefficiency” or “administrative error,” *none* of the information targeted by the disclosure provision is properly classified according to the President’s own standards.

Second, the disclosure provision is aimed at encouraging—and ultimately protecting—only the employee who “reasonably” believes that the classified information falls into this subset. The employee who discloses information he knows falls outside this subset, or which he unreasonably believes falls within it, is not covered by the bill. As a result, deliberate or reckless disclosure of classified information which falls outside the disclosure provision is neither encouraged nor protected by it.

Third, the bill encourages disclosure only to members of congressional committees with oversight over the governmental unit to which the information relates. and not to the world or even to the Congress at large. Because section 306(c) covers only “employees” of agencies within the national intelligence community, most of the classified information they are encouraged to disclose would relate to that community, and the contemplated disclosures would be made chiefly to the intelligence committees. As you, of course, intimately know, these committees operate under specially-enacted rules “to protect from unauthorized disclosure all classified information, and all information relating to intelligence sources and methods, that is furnished to them]. . . .”¹⁵

In light of these limitations in the disclosure provision, we can now describe more precisely the provision’s intrusion on the President’s constitutionally assigned functions. The intrusion that the provision risks is that (1) executive branch employees with access to classified information will reasonably, but erroneously, conclude that such information provides direct and specific evidence of the actions listed in the disclosure provisions, and (2) disclose it to a member or staff member of a congressional committee that either is not subject to the protective safeguards governing the intelligence committees, or who is, but disregards them, with the result that (3) lawfully classified information—including information that may be subject to executive or state secrets privileges—is compromised, harming the national security.

b. The congressional interests

The chief legislative interest advanced by the disclosure provision is the oversight of the national security and intelligence communities. The Supreme Court has declared that the right to information is inherent in the power to legislate¹⁶ and is as broad as the power to enact and appropriate.¹⁷ The Court has also acknowledged a related congressional interest in regulating information in the executive branch.¹⁸

Whether the congressional need for information is “overriding” for purposes of the mandated constitutional balancing analysis, however, turns in part on how specific it is. Generalized congressional interests do not weigh as heavily in the balancing as more specifically defined interests and do not override specific executive interests.

The disclosure provision, however, *does* narrow Congress’s generalized interest in national security information to three specific interests. The first—the congressional interest in direct and specific evidence of “a false statement to Congress on an issue of material fact”—is among the weightiest interests Congress can assert, because it

¹³ Exec. Order No. 12,958 § 1.8(a), 60 Fed. Reg. 19,825 (1995).

¹⁴ Although the Supreme court has recently suggested that the false statements criminal statute, 18 U.S.C. § 1001 (1994), does not apply to statements made to Congress, *Hubbard v. United States*, 514 U.S. 695 (1995), such statements may still constitute obstruction of justice, 18 U.S.C. § 1505 (1994), or perjury. 18 U.S.C. § 1621 (1994).

¹⁵ *Id.*

¹⁶ *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

¹⁷ *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). In *Barenblatt*, the Court added that Congress “cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.” *Id.* at 111–12. As I have noted, *supra*, the constitutional text and historical practice refute any claim that national security or foreign affairs are within the “exclusive” province of the executive.

¹⁸ *Nixon v. Administrator*, 433 U.S. 425.

protects the integrity of Congress's fact-finding process. As Judge Gerhard Gesell emphasized in the *North* litigation, "[i]t is essential that Congress legislate based on fact, not falsifications, in the realm of foreign affairs as well as in domestic legislation."¹⁹ Without access to evidence showing that it been given false information, Congress is wholly dependent on the executive branch to police the accuracy of its own submissions. Ironically, therefore, this provision permits Congress—and this Committee in particular—to trust the information which it is officially given by the executive branch, by giving it an independent check on such information.

It is no rebuttal to assert that national security sometimes requires the executive to lie to Congress. There is no executive or state secret privilege to lie, as Judge Gesell also emphatically stated. Addressing precisely the kind of lies that the disclosure provision targets, he said that "where, as here, power is shared among the branches, willful and deliberate deceit . . . cannot be excused on constitutional grounds."²⁰

Nor, it follows, can a denial of access by Congress to direct and specific evidence of such deceit be excused on constitutional grounds. I believe that there is no question that Congress's overriding need for such information justifies any intrusion on the President's authority resulting from the "false statement" subprovision of the disclosure provision.

The disclosure provision also seeks to insure that Congress obtains evidence of "a violation of any law, rule, or regulation." This, too, is a concrete and specific need that is "overriding" in this setting. In addition to the obvious utility of such information for carrying out the congressional oversight function, as well as for revising existing law and enacting new law, the need for this category of information is underscored by the fact that this information indicates that executive oversight and execution has, by definition, failed. Furthermore, the President has himself recognized Congress's and the public's need for such information by prohibiting classification "to conceal violations of law."

Finally, the disclosure provision also encourages disclosure of direct and specific evidence of "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Although this subprovision corresponds roughly to the executive prohibition on the classification of information to conceal "inefficiency" or "administrative error," its terms are intrinsically ambiguous, leaving the employee to make a difficult judgment with little direct guidance from Congress. This subprovision therefore potentially targets the largest category of classified information, and, in so doing, poses the greatest risk of error by the disclosing employee. Moreover, as a sort of catch-all, this provision reflects a congressional interest that is hardly more specific than a generalized need for oversight information, which may not be sufficiently overriding to justify an intrusion on specific executive national security functions.

An important countervailing consideration, however, is that the general secrecy and attenuated oversight to which the national intelligence community is subject heightens the congressional need for this kind of evidence from executive branch employees. As the members of this Committee know better than anyone, under the existing statutory regime, not only do national security officials enjoy enormous discretion with few specific statutory restraints, but they are largely spared the fiscal accountability to which other, more "transparent" public bureaucracies are routinely subjected.²¹ Secret budgets, secret spending, and classified information conspire to limit media oversight of the national intelligence community as well. One does not have to suspect the national security and intelligence communities of bad faith or worse, and I emphatically do not, to recognize that the system under which they currently operate fosters bureaucracy and hampers accountability. For this reason, Congress may, after all, have a special need for employee disclosures in the bill's third category to compensate for the severe restraints on other methods of assuring the accountability of the national security and intelligence communities to Congress and the public.

III. The disclosure provision could be revised to strengthen its constitutionality

Professor Banks and I have made several suggestions to strengthen the constitutionality of the disclosure provision in our prior submission to the Committee. I will close by noting the most important of these.

As written, the provision encourages executive branch employees to bring their information to any committee with jurisdiction over the subject. But most of these

¹⁹ *United States v. North*, 708 F. Supp. 380, 383 (D.D.C. 1988).

²⁰ *Id.*

²¹ See, e.g., William C. Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* 51–53, 100–105 (1994).

committees are not presently subject to security rules and do not have safeguards in place to protect classified information. We therefore recommend that the “covered individuals” defined in section 306(a)(3) be narrowed to members or security-cleared staff of the intelligence committees. Because a statute²² requires these committees to operate under house rules to protect classified information from unauthorized disclosure, employee disclosures of classified information to them are less likely to compromise such information than disclosures to less secure committees, their members, or staff. Although we understand that our committees, including notably the appropriations committees, may also have a legitimate legislative need for such information, each intelligence committee is already directed by statute, in accordance with secure procedures, “to promptly call to the attention of this respective House, or to any appropriate committee or committees of the respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.”²³

Alternatively, if jurisdictional considerations, as a practical matter, prevent the suggested limitation of “covered persons” to just the members and staff of the intelligence committees, the disclosure provision might be enhanced by inclusion of a subprovision requiring the application of the existing rules and procedures for protecting classified information to any committees to whom disclosures may be made under the provision.²⁴ In any case, specific identification of the covered committees by name would reduce the risk that an employee will mistakenly disclose to persons who are not covered by the disclosure provision. The provision as currently drafted leaves an ambiguity that invites such error.

That completes my testimony. Thank you.

THE GEORGE WASHINGTON UNIVERSITY
LAW SCHOOL,
Washington, DC, October 22, 1997.

Senator RICHARD C. SHELBY, Chairman,
Senator J. ROBERT KERREY, Vice Chairman,
U.S. Senate, Select Committee on Intelligence, Washington, DC.

DEAR SENATORS SHELBY AND KERREY: We are pleased to respond to the invitation in your letter of October 7 to provide comments and opinions concerning section 306, entitled “Encouragement of Disclosure of Certain Information to Congress” (hereinafter “The Disclosure Provision”). In addition to the disclosure provision, we have reviewed the November 26, 1996, memorandum from Christopher H. Schroeder (Acting Assistant Attorney General, Office of Legal Counsel) to Michael J. O’Neil regarding congressional access to classified information (“OLC memo”), the June 18, 1997, Statement of Administration Policy on S. 858, and various other authorities pertinent to this debate.

We conclude that the disclosure provision is clearly constitutional insofar as it relates to classified information that provides direct and specific evidence of a false statement to Congress on an issue of material fact. Although the question is closer, we also conclude that the balance of the disclosure provision is constitutional. The case for its constitutionality, however, could be strengthened by several changes to narrow and/or clarify its coverage.

In the following four sections, we briefly describe the two analytic approaches taken by the Supreme Court to resolve separation-of-powers disputes, explain why the OLC memo errs by taking the wrong approach to answer the separation-of-powers question posed by the disclosure provision,¹ apply the proper balancing approach to this question to reach our conclusions concerning the constitutionality of the pro-

²² See, e.g., 50 U.S.C. § 413(d)(1994).

²³ *Id.*

²⁴ Such a subprovision would largely track 50 U.S.C. § 413(d)(1994).

¹ In *National Federal Employees v. United States*, 688 F Supp. 671 (D.D.C. 1998), vacated sub nom. *American Foreign Serv. Assn’s v. Garfinkel*, 490 U.S. 153 (1989), the district court made the same error in striking down and appropriations rider designed to limit enforcement of non-disclosure agreements. Its decision—apparently the first and only decision in our history in which a federal court found an appropriations law unconstitutional for intruding impermissibly on executive power—was subsequently vacated for mootness by the Supreme Court. The Supreme Court disparaged the district court’s analysis as “abbreviated” and admonished the court on remand not to “pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so.” *Id.* at 161. *Garfinkel* is therefore not sound authority for the separation-of-powers question posed by the instant disclosure provision. We have elsewhere analyzed and criticized its reasoning. See Peter Raven-Hansen and William C. Banks, Pulling the Purse Strings of the Commander in Chief, 80 Va. L. Rev. 933, 923–42 (1994) (enclosed).

vision, and suggest a few changes that would strengthen the case for the provision's constitutionality.

I. There are two analytic approaches to the resolution of separation-of-powers disputes

Over the last decade, Supreme Court decisions and separate opinions of some of the Justices, along with the analyses of many scholars, have clarified the constitutional law of separation of powers. In one line of Supreme Court separation-of-powers decisions the Court has determined that “the Constitution by explicit text commits the power at issue to the exclusive control of [another branch].”² In such cases, explains Justice Anthony Kennedy, courts do not balance the interests of the branches: “[w]here a power has been committed to a particular Branch of Government in the text of the Constitution, the balance already has been struck by the Constitution itself.”³

*United States v. Lovett*⁴ was such a case. There, after secret hearings, the House Committee on Un-American Activities had found three federal employees guilty of “subversive activity.” As a result, the House voted a rider to a wartime appropriation forbidding the executive branch from disbursing salaries to the employees unless they were reappointed with the advice and consent of the Senate. Because the House would not approve any appropriation without the rider, the Senate agreed to it and the President reluctantly signed it into law. The Supreme Court held that the rider was an unconstitutional bill of attainder. Once the Court characterized the rider as a bill of attainder, the constitutional text supplied a clear and unequivocal standard against which to measure the rider. By retroactively punishing specific federal employees without benefit of judicial trial, Congress attempted to exercise a “power which the Constitution unequivocally declares Congress can never exercise.”⁵ Congress had violated an express textual command of the Constitution, as well as the textual assignment of “[t]he judicial power of the United States” to the judicial branch; no further balancing of Congress’s interests in the legislation was needed or appropriate.

When the explicit constitutional text does not strike its own balance by assigning the power solely to one branch or denying a power to it, however, the Court has employed a different analysis. It has then taken “a balancing approach,” as Justice Kennedy explains it, “asking whether the statute at issue prevents the President ‘from accomplishing [his] constitutionally assigned functions,’” and “whether the extent of the intrusion on the President’s powers ‘is justified by an overriding need to promote objectives within the constitutional authority of Congress.’”⁶ This balancing approach is appropriate for deciding separation-of-powers disputes involving shared constitutional powers. The Court has also suggested that in the balancing, undifferentiated claims by one branch must yield to the specific needs of another.⁷

For example, in *Morrison v. Olson*, the Court determined that the President’s power to remove Executive officers, a necessary but implicit component of the “executive Power” in Article II, section 1, could be subordinated in a balancing analysis to the overriding need of Congress, expressed in the Ethics in Government Act, to provide an Independent Counsel mechanism free from the taint of political influences. Similarly, in *Nixon v. Administrator of General Services*,⁸ the Executive Branch’s power to dispose of presidential materials, implicitly integral to the President’s ability to performed his assigned functions, was balanced against the Congress’s need to promote objectives within its constitutional powers.

For present purposes, the important point is that, before the constitutional separation of powers analysis is performed, the dispute between the branches must be carefully characterized according to the precise constitutional powers at issue.

II. The executive and legislative branches share constitutional authority, and the President does not have exclusive, “ultimate or unimpeded” authority, over the regulation of classified information

The OLC memo asserts that the Constitution vests the President with “ultimate and unimpeded authority over the collection retention and dissemination of intelligence and other national security information,” and that any statutory intrusion

²*Public Citizen v. Department of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring).

³*Id.* at 486.

⁴328 U.S. 303 (1946).

⁵328 U.S. at 307.

⁶*Public Citizen*, 491 U.S. at 485 (quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988)) (in turn, quoting *Nixon v. Administrator of General Service*, 433 U.S. 425, 443 (1977)).

⁷*United States v. Nixon*, 418 U.S. 683, 705–06 (1974).

⁸433 U.S. 427 (1977).

on this authority must therefore be unconstitutional.⁹ It thus assumes that “the Constitutional by explicit text commits the powers at issue to the exclusive control” of the President,¹⁰ and that there is no constitutional room for weighing the congressional interest.

This assumption is both textually and historically wrong.

On the first place, there is no explicit constitutional text regarding the collection, retention, and dissemination of intelligence and national security information. The President’s authority on this subject is the paradigm of implied authority, in this case flowing from his constitutional designation as Commander in Chief and his sparse, but explicit foreign affairs authority to appoint and receive ambassadors and to make treaties. But the latter grants of authority are explicitly shared with the Senate. And if regulation of national security information is implicit in the broad array of national security and foreign affairs authorities explicitly vested in Congress, including the authority to provide for the Common Defense;¹¹ to regulate foreign commerce;¹² to define and punish offences against the law of nations;¹³ to declare war and grant letters of marque and reprisal;¹⁴ to raise and support armies;¹⁵ to provide and maintain a navy;¹⁶ to make rules for the government and regulation of the land and naval forces;¹⁷ to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions;¹⁸ to provide for organizing, arming, and disciplining the militia;¹⁹ and to make all laws which shall be necessary and proper for carrying into execution not just this broad collection of national security authorities, but also all the national security authority vested in the President and the executive branch.²⁰

In fact, the only explicit constitutional provision for keeping governmental information secret authorizes Congress, not the President. Article I, section 5, clause 3, vests each house with the authority to except from publication “such Parts [of its journal] as may in their Judgment require Secrecy.”²¹

Unable to identify explicit constitutional text for the presumed assignment of exclusive control over national security information to the President, the OLC memo instead predictably cites *United States v. Curtiss-Wright Export Corp.*²² In *Curtiss-Wright*, Justice Sutherland alluded in dicta to “the very delicate, plenary and exclusive power of the President as the sole organ in the field of international relations.”²³ But as we have explained elsewhere,²⁴ Sutherland’s “sole organ” reference (which OLC quotes in its analysis²⁵) was wrested from the context in which then-Representative (and later Chief Justice) John Marshall spoke: a House debate on President John Adams’ extradition of a British subject to England pursuant to the Jay Treaty of 1795. Defending Adams, Marshall noted the following:

“The treaty, which is law, enjoins the performance of a particular object. . . . Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, *till this be done*, it seems the duty of the executive department to execute the contract by any means it possesses.”

President Adams was executing not his own foreign policy, but a treaty of the United States made with the consent of the Senate. Had Congress prescribed the mode of execution, the President would have been obliged to follow it. The President, Marshall was saying, is not the sole organ for making foreign policy, but rather the sole organ for communicating it.

Curtiss-Wright, properly understood, does not stand for the proposition that the President is the “sole” regulator of national security information. Furthermore, Justice Jackson subsequently reminded us that *Curtiss-Wright* “intimated that the

⁹OLC memo at 4 (quoting Brief for Appellees at 42, *American Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153 (1989) (No. 87–2127)).

¹⁰*Public Citizen*, 491, U.S. at 485 (Kennedy, J., concurring).

¹¹U.S. Const. art. I, § 8, cl. 1.

¹²*Id.* cl. 3.

¹³*Id.* cl. 10.

¹⁴*Id.* cl. 11.

¹⁵*Id.* cl. 12.

¹⁶*Id.* cl. 13.

¹⁷*Id.* cl. 14.

¹⁸*Id.* cl. 15.

¹⁹*Id.* cl. 16.

²⁰*Id.* cl. 18.

²¹*Id.* § 4, cl. 3.

²²299 U.S. 304 (1936).

²³*Id.* at 320.

²⁴80 Va. L. Rev. at 900–901 (quoting from 6 Annals of Cong. 613–14 (1800) (statement of Rep. Marshall) (emphasis added)).

²⁵OLC memo at 4.

President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress . . .”²⁶

Nor is *Department of Navy v. Egan*²⁷ to the contrary. There the Court observed that the President’s authority to classify and control access to information bearing on national security “flows primarily from [the Commander-in-Chief clause] . . . and exists quite apart from any explicit congressional grant.”²⁸ But this observation confirms only that the President has such constitutional authority, not that it is exclusive. Indeed, the Court’s ultimate holding in *Egan*—that an executive decision to deny a security clearance to an executive branch employee was not reviewable by the Merit Systems Protection Board—expressly depended on the fact that Congress had not “specifically . . . provided otherwise.”²⁹ *Egan* is therefore perfectly consistent with the conclusion that the President and Congress share authority in the regulation of national security information.

Historical practice confirms this conclusion. Senator Daniel Patrick Moynihan, writing as Chairman of the Commission on Protecting and Reducing Government Secrecy, has traced the origins of our system for protecting national security information to a statute: the Espionage Act of 1917,³⁰ which criminalized certain uses of national security information to harm the United States. We have sketched the later history elsewhere.³¹

Until 1940, information classification “existed as a military hobby in a legal limbo.”³² In that year, President Roosevelt for the first time issued an executive order adopting the military classification system.³³ But he did not advance inherent constitutional authority for his order. Instead, he cited an act³⁴ that empowered him to “define[] certain vital military and naval installations or equipment as requiring protection.”³⁵

World War II and its immediate aftermath saw a slew of additional statutes giving momentum to the classification of national security information.³⁶ One of the first statutes actually to acknowledge “classified information” was enacted in 1951,³⁷ but it also provided that nothing therein “shall prohibit the furnishing, upon lawful demand, of information” to congressional committees.³⁸

Executive orders in 1951 and 1953 laid the foundation for the present system of classification.³⁹ These cited no specific statutory authority, but a 1957 Report of the Commission on Government Security defended the legality of the latest by asserting that “*in the absence of any law to the contrary*, there is an adequate constitutional and statutory basis upon which to predicate the Presidential authority to issue Executive Order 10501.”⁴⁰ The same report emphasized that “various statutes do afford a basis upon which to justify the issuance of the order.”⁴¹

Subsequently, Congress continued to pass legislation acknowledging authority in the executive to classify national security information, including the Freedom of In-

²⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 n. 2 (1952).

²⁷ 484 U.S. 518 (1988).

²⁸ *Id.* at 527.

²⁹ *Id.* at 530.

³⁰ Report of the Commission on Protecting and Reducing Government Secrecy A-7 (1997) (citing 40 Stat. 451 (1917)) (“Secrecy Commission Report”).

³¹ 80 Va. L. Rev. at 931-33 (selected footnotes retained, but renumbered).

³² Arthur M. Schlesinger, Jr., *The Imperial Presidency* 338 (1973).

³³ Exec. Order No. 8381, 3 C.F.R. 634 (1938-1943).

³⁴ Act of Jan. 12, 1938, ch. 2 § 1, 52 Stat. 3 (codified as amended at 18 U.S.C. § 795(a) (1994)).

³⁵ *Id.*

³⁶ E.g., Atomic Energy Act of 1954, ch. 1073, sec. 1, § 142, 68 Stat. 919, 941 (codified as amended at 42 U.S.C. § 2162 (1994)); National Security Act of 1947, ch. 343, § 102(d)(3), 61 Stat. 495, 498 (codified as amended at 50 U.S.C. § 403(d)(3) (1994)) (authorizing the Central Intelligence Agency to protect “intelligence sources and methods from unauthorized disclosure”); Internal Security Act of 1950, ch. 1024 § 4(b), 64 Stat. 987, 991 (codified as amended at 50 U.S.C. § 783(b) (1994)). See generally Foreign Affairs Div., Congressional Research Serv., for Senate Comm. on Foreign Relations, 92d Cong., 1st Sess., Security Classification as a Problem in the Congressional Role in Foreign Policy 9-12 (Comm. Print 1971) (“Security Classification Report”) (discussing the impact of the National Security, the Internal Security, and the Atomic Energy Acts in the context of classified information).

³⁷ Act of Oct. 31, 1951, ch. 655, sec. 24(a), § 798, 65 Stat. 710, 719-20 (codified as amended at 18 U.S.C. § 798(c) (1994)).

³⁸ *Id.* sec. 24(a), § 798(c), 65 Stat. at 720.

³⁹ Exec. Order No. 10,290, 3 C.F.R. 789 (1949-1953); Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953).

⁴⁰ Commission on Gov’t Sec. Report 160 (1957) (emphasis added). Pressed for the legal authority for Executive Order 10,501 in 1970 by the Senate Foreign Relations Committee, the Legal Advisor to the State Department cited this report. *Security Classification Report*, supra note 36, at 5.

⁴¹ *Commission on Gov’t Sec. Report*, supra note 40, at 158.

formation Act,⁴² the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961,⁴³ the Civil Service Reform Act of 1978,⁴⁴ the Intelligence Identities Protection Act of 1982,⁴⁵ and the Intelligence Authorization Act, Fiscal Year 1991.⁴⁶ But Congress was also careful to reserve its own right to classified information by consistently providing that nothing in such legislation should be construed as authority to withhold information from it.⁴⁷ . . .

[This] history of national security information control is consistent with implied constitutional authority of the President to protect security information. Yet the practice of formal security classification by executive order is of relatively recent vintage and hardly calculated to give notice of any claim of *plenary* or *exclusive* presidential power to oversee national security information. In fact, Congress has expressly and consistently declined to recognize or yield plenary authority to the President. every important statute by which Congress can be said to have acquiesced in executive authority to protect classified information has also expressly preserved Congress' own rights to such information (at least through designated secure channels of disclosure). Moreover, Congress has legislated so comprehensively that "[t]he classification system is impotent without that network of legislation, for Congressional statutes—not an administrative system—establish the criminal offenses for security violations, their conduct and intent standards, the judicial procedures, the weight to be given to the fact of classification, and the punishment for such offenses."⁴⁸

That the President and Congress share constitutional authority in the regulation of national security information has been demonstrated anew even more recently. In 1994, for example, Congress by statute required the President to promulgate procedures "to govern access to classified information" in the executive branch, including, "at a minimum," several specific procedures or standards set out in the statute.⁴⁹ In response, President Clinton promulgated Executive Order No. 12,968,⁵⁰ the most far-reaching overhaul of the clearance system since it was first established. We are unaware of any constitutional protest made by him or on his behalf to this assertion of shared congressional authority over access to national security information.

In 1994 also, Congress for the first time criminalized the unauthorized removal of classified materials without requiring proof of any intent to harm the United States.⁵¹ This statute plugged a statutory gap in the protection of classified information, effectively criminalizing leaks by executive officials. It is today arguably the lynchpin, with the espionage laws, of the executive branch's control over classified information. Yet this very statute, again, expressly exempt disclosures to Congress from that control by providing that "the provision of documents and materials to Congress shall not constitute an offense" under the statute.⁵²

In short, it is far too late in the day for anyone credibly to assert that the President's constitutional authority to regulate national security information is plenary and exclusive. Instead, the constitutional text and pertinent history establishes that the President and Congress share authority in this area. Exercising its authority, Congress has understandably vested enormous discretion in him to regulate such information, but it has also consistently, and usually with his acquiescence, taken pains to preserve its own unhampered access to such information. The instant disclosure provision falls squarely within this historical tradition.

⁴² Act of June 5, 1967, Pub. L. No. 90-23, sec. 1, § 552(b)(1), 81 Stat. 54, 55 (codified as amended at 5 U.S.C. § 552(b)(1) (1994)).

⁴³ Foreign Assistance Act of 1974, Pub. L. No. 93-559, sec. 32, § 662(a), 88 Stat. 1795, 1804, repealed by Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, § 601, 105 Stat. 429, 441.

⁴⁴ Civil Service Reform Act of 1974, Pub. L. No. 95-454, § 101(a), 92 Stat. 1111, 1116 (codified as amended at 5 U.S.C. § 2302(b)(8)(A) (1994)).

⁴⁵ Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, sec. 2(a), § 606(1), 96 Stat. 122, 123-24 (codified as amended at 50 U.S.C. § 426(1) (1994)).

⁴⁶ Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602, § 502(c)(2), 105 Stat. 429, 443 (codified as amended at 50 U.S.C. § 413b(c)(2) (1994)).

⁴⁷ E.g., 5 U.S.C. §§ 552(b)(1), 2302(b) (1994); 50 U.S.C. §§ 413(e), 425 (1994).

⁴⁸ Memorandum of the Speaker and Leadership Group in Opposition to Defendants' Motion to Dismiss at 35-36, *American Foreign Serv. Ass'n v. Garfinkel*, 732 F. Supp. 13 (D.D.C. 1990) (No. 88-0400-OG) (footnotes omitted).

⁴⁹ 50 U.S.C. § 435 (1994).

⁵⁰ 60 Fed. Reg. 40,245 (1995).

⁵¹ 18 U.S.C. § 1924 (1994).

⁵² 18 U.S.C. § 1924(b) (1994).

III. Any intrusion on the president's constitutionally assigned national security functions resulting from the disclosure provision is justified by an overriding need to promote constitutional objectives of congress

Because the constitutional text and historical practice establish beyond peradventure that the President and Congress share constitutional authority to regulate national security information, the proper analytic approach to determining the constitutionality of the disclosure provision is “a balancing approach, asking whether the statute at issue prevents the President from accomplishing [his] constitutionally assigned functions,” and whether the extent of the intrusion on the President’s powers “is justified by an overriding need to promote objectives within the constitutional authority of Congress.”⁵³

a. The disclosure provision's intrusion on the President's national security functions

As Commander in Chief and head of the executive branch, the President unquestionably enjoys implied constitutional authority to regulate national security information. Indeed, the assignment of such authority to him reflects his functional advantages in collecting, protecting, and disseminating such information:

“[H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathering by them may be highly necessary, and the premature disclosure of it productive of harmful results.”⁵⁴

Thus, it is ultimately the constitutionally assigned (albeit implied) function of collecting, protecting, and disseminating classified national security information which is impacted by the disclosure provision; an executive branch employee’s unilateral disclosure of classified information to Congress may be “premature” and therefore cause “harmful results.” More specifically, the OLC memo suggests that such a disclosure would “circumvent[]” the orderly executive branch procedure for disclosure of classified information, which involves access determinations by executive delegates of the President, and the corresponding chain of command. Such a disclosure may therefore deny the President and his delegates the opportunity to invoke constitutionally-based claims of executive privilege⁵⁵ and claims of state secrets,⁵⁶ as well as to take steps to protect their “sources and methods.”⁵⁷

This assessment of the disclosure provision’s intrusion on the President’s functions, however, is substantially exaggerated for several reasons.

First, the disclosure provision encourages disclosure of only a small subset of classified information: that which provides “direct and specific evidence” of violations of law, rule, or regulation; a false statement to Congress on an issue of material fact; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Under the President’s own executive order, “[i]n no case shall information be classified in order to . . . conceal violations of law, inefficiency, or administrative error [or to] prevent embarrassment to a person, organization, or agency.”⁵⁸ False statements to Congress are themselves violations of law.⁵⁹ Unless, therefore, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety is not either “inefficiency” or administrative error,” none of the information targeted by the disclosure provision is properly classified according to the President’s own standards. The employee who reasonably and correctly determines that the putatively “classified” information provides direct and specific evidence of the listed actions cannot compromise the information by disclosing it to congress for the simple reason that it is not lawfully classified.

Second, the disclosure provision is aimed at encouraging—and ultimately protecting—only the employee who “reasonably” believes that the classified information falls into this subset. The employee who discloses information he knows falls outside this subset, or which he unreasonably believes falls within it, is not covered by the

⁵³ *Public Citizen*, 491 U.S. at 485 (Kennedy, J., concurring).

⁵⁴ *Curtiss-Wright*, 299 U.S. at 320.

⁵⁵ See, e.g., *United States v. Nixon*, 418 U.S. 683, 705–06 (1974); *In re Sealed Case*, 116 F.3d 550 (D.C. Cir. 1997).

⁵⁶ *United States v. Reynolds*, 345 U.S. 1, 10(1953); *Nixon*, 418 U.S. at 706.

⁵⁷ See 50 U.S.C. § 403–3(c)(6) (1994).

⁵⁸ Exec. Order No. 12,958 § 1.8(a), 60 Fed. Reg. 19,825 (1995).

⁵⁹ Although the Supreme Court has recently suggested that the false statements criminal statute, 18 U.S.C. § 1001 (1994), does not apply to statements made to Congress, *Hubbard v. United States*, 514 U.S. 695 (1995), such statements may still constitute obstruction of justice, 18 U.S.C. § 1505 (1994), or perjury. 18 U.S.C. § 1621 (1994).

act. As a result, deliberate or reckless disclosure of classified information which falls outside the disclosure provision is not encouraged or protected by it.

Third, the disclosure which the disclosure provision encourages is only to members of congressional committees with oversight over the governmental unit to which the information relates, and not to the world or even to the Congress at large. Because section 306(c) targets only “employees” of agencies within the national intelligence community, most of the classified information they are encouraged to disclose would relate to that community, and the contemplated disclosures would be made chiefly to the intelligence committees.⁶⁰ These committees operate under specially-enacted rules “to protect from unauthorized disclosure all classified information, and all information relating to intelligence sources and methods, that is furnished to the[m]. . . .”⁶¹

In light of these limitations in the disclosure provision, we can now describe more precisely the provision’s intrusion on the President’s constitutionally assigned functions. The intrusion that the provision risks is that (1) executive branch employees with access to classified information will reasonably, but erroneously, conclude that such information provides direct and specific evidence of the actions listed in the disclosure provision, and (2) disclose it to a member of staff member of a congressional committee that either is not subject to the protective rules governing the intelligence committees, or who is, but disregards them, with the result that (3) lawfully classified information—including information that may be subject to executive or state secrets privileges—is compromised, harming the national security.

b. The Congressional interests

Assuming this intrusion by the disclosure provision on executive functions, it remains to consider whether the extent of the intrusion is justified by an overriding need to promote objectives within the constitutional authority of Congress.

The chief legislative interest advanced by the disclosure provision is the oversight of the national security and intelligence communities.⁶² As we have explained elsewhere:⁶³

“[T]he national security and foreign affairs authority assigned to Congress by the Constitution logically carries with it attendant rights of oversight and information access. As early as 1927, the Supreme Court acknowledged the constitutionality of the general investigative function of Congress and the need for information access in lawmaking.⁶⁴ Indeed, more recently it has said that Congress’ investigatory powers are as “penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”⁶⁵ . . . The post-World War II growth of the defense and intelligence community has only increased Congress’ need for classified information to aid oversight in peacetime.”

The Court has also acknowledged a related congressional interest in regulating information in the executive branch. In rejecting a constitutional challenge to one regulatory statute, the Supreme Court in *Nixon v. Administrator of General Serv-*

⁶⁰ As we discuss below, the constitutionality of the disclosure provision would be strengthened by narrowing the “covered individuals” to members and staff of the intelligence committees subject to rules of protecting classified information. *See, e.g.*, 50 U.S.C. § 413(D) (1994).

⁶¹ *Id.*

⁶² Congress also has an interest in protecting the First Amendment rights of executive employees. Indeed, members of Congress are not only constitutionally authorized, but “bound by Oath or Affirmation, to support [the] Constitution.” U.S. Const. art. VI. In exercise of this authority and furtherance of this duty, Congress as early as 1912 enacted the Lloyd-LaFollete Act, providing that “[t]he right of [employees], individually or collectively, to petition Congress or any Member thereof, or to furnish information to [Congress] . . . shall not be denied or interfered with.” Act of Aug. 24, ch. 389, § 6, 37 Stat. 539, 555 (codified as amended at 5 U.S.C. § 7211 (1994)). This Act was intended to nullify a gag order by President Taft forbidding a federal employee from requesting Congress to act on any matter without prior authorization from the head of her department. Congress has since enacted similar legislation protecting the right of military personnel to communicate with Congress, 10 U.S.C. § 1034 (1994), and of executive employees in agencies and departments concerned with foreign relations to speak, on request, to committees of appropriate oversight jurisdiction. Foreign Relations Authorization Act of 1972, Pub. L. No. 92-352 § 502, 86 Stat. 489, 496 (codified as amended at 2 U.S.C. § 194a (1994)).

We do not stress Congress’s undoubted constitutional authority to protect the constitutional rights of federal employees because, as far as we know, the sponsors of the disclosure provision have not.

⁶³ *Raven-Hansen & Banks*, 80 Va. L. Rev. at 938–39 (selected footnotes omitted or modified).

⁶⁴ *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

⁶⁵ *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). In *Barenblatt*, the Court added that Congress “cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.” *Id.* at 111–12. As we have shown in Part II *supra*, however, the constitutional text and historical practice refute any claim that national security or foreign affairs are within the “exclusive” province of the executive.

*ices*⁶⁶ took notice of “abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch” and stated flatly that “[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its [executive] autonomy.”⁶⁷

The executive branch has acknowledged the congressional fact-gathering and investigatory authority, as it must, but has tried to minimize it by arguing that it “is nowhere expressed in the Constitution [and just] implied from Congress’s power to make laws,” in alleged contrast to the President’s “plenary control over the disclosure of national security information” which is “integral” to his roles as Commander in Chief and sole organ for foreign affairs.⁶⁸ But, as we have shown in Part I, the President’s power is also nowhere expressed in the Constitution and only implied in his roles. In any event, the Supreme Court answered this argument when, in upholding a congressional inquiry, it observed that at the time the Constitution was framed legislative fact-gathering “was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as *inhering* in it.”⁶⁹ In short, access to national security information is an inherent power, integral to *both* the President’s and Congress’s constitutionally assigned functions in the area of national security.

Whether the congressional need for information is “overriding,” however, turns in part on how specific it is. Generalized congressional interests do not weigh as heavily in the balancing as more specifically defined interests, and do not override specific executive interests. For example, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,⁷⁰ the Court of Appeals held that the generalized investigatory need cited by a Senate Committee for electronic tapes of presidential communications was “too attenuated and too tangential to its functions” to overcome the President’s interests in the confidentiality of those communications in light of the more specific impeachment inquiry then underway in the House Judiciary Committee.

The disclosure provision, however, *does* narrow Congress’s generalized interest in national security information to three specific categories. We believe that the specific congressional interest in direct and specific evidence of “a false statement to Congress on an issue of material fact” is among the weightiest interests Congress can assert, because it protects the integrity of Congress’s fact-finding process. As one federal court has emphasized, in rejecting the claim that the executive may lie to Congress to protect national security, “[i]t is essential that Congress legislate based on fact, not falsifications, in the realm of foreign affairs as well as in domestic legislation.”⁷¹ Indeed, access to such information is necessary to make the formal provision of authorized national security information from the executive branch to Congress work. Without such access, Congress is wholly dependent on the executive branch to police the accuracy of its own submissions.

It is no rebuttal to assert that national security sometimes requires the executive to lie to Congress. There is no executive or state secret privilege to lie.

“The thought that any one of the hundreds or thousands of persons working for the President can affirmatively and intentionally mislead Congress when it seeks information to perform one of its assigned functions for any reason—including self-interest or the belief that the President would approve—is unacceptable on its face. Such a disdainful view of our democratic form of government has no constitutional substance. Where, as here, power is shared among the branches, willful and deliberate deceit . . . cannot be excused on constitutional grounds.”⁷²

Nor, it follows, can a denial of access by Congress to direct and specific evidence of such deceit be excused on constitutional grounds. We believe that there is no question that Congress’s overriding need for such information justifies any intrusion on the President’s authority resulting from the “false statement” subprovision of the disclosure provision.

The disclosure provision also seeks to insure that Congress obtains evidence of “a violation of any law, rule, or regulation.” This, too, is concrete and specific need that we believe is “overriding” in this setting, although we add one caveat to this conclusion. In addition to the obvious utility of such information for carrying out of the congressional oversight function, as well as for revising existing law and enacting new law, the need for this category of information is underscored by the fact that

⁶⁶ 433 U.S. 425 (1977).

⁶⁷ *Id.* at 445.

⁶⁸ Brief of Appellees *supra* note 9, at 49 n. 42.

⁶⁹ *McGrain*, 273 U.S. at 175 (emphasis added).

⁷⁰ 498 F. 2d 725 (D.C. Cir. 1974).

⁷¹ *United States v. North*, 708 F. Supp. 380, 383 (D.D.C. 1988).

⁷² *Id.*

this information indicates that executive oversight—and, therefore, execution—has, by definition, failed. Furthermore, the executive has itself recognized Congress's and the public's need for such information by prohibiting classification "to conceal violations of law."

Our caveat concerns the phrase "rule, or regulation." Without further refinement, rules may be construed by administrative lawyers to include internal interpretive or housekeeping rules that usually lack the force and effect of law and are therefore generally understood to be unenforceable outside the agency that makes them.⁷³ The congressional need for this subprovision is strongest if the "rule, or regulation" subprovision is understood, or ideally, redrafted, to mean only those legislative or substantive rules or regulations having the force and effect of law.

Finally, the disclosure provision also encourages disclosure of direct and specific evidence of "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Although this subprovision corresponds roughly to the executive prohibition on the classification of information to conceal "inefficiency" or "administrative error," and is drawn from the Whistleblower Protection Act,⁷⁴ its terms are intrinsically ambiguous, leaving the employee to make a difficult judgment with little direct guidance from Congress. This subprovision therefore potentially targets the largest category of classified information, and, in so doing, poses the greatest risk of error by the disclosing employee. Moreover, viewed as a sort of catch-all, the congressional interest expressed in this subprovision is hardly more specific than a generalized need for oversight information, which may not be sufficiently overriding to justify an intrusion on specific executive national security functions.

An important countervailing consideration, however, is that the general secrecy and attenuated oversight to which the national intelligence community is subject may themselves add to the weight of the congressional need for this kind of evidence from executive branch employees. Not only does existing national security legislation give enormous discretion to national security bureaucrats with few specific statutory restraints, but they are largely spared the fiscal accountability to which other, more "transparent" public bureaucracies are routinely subjected.⁷⁵ Their budget lines are kept secret not only from the public, but also from most of Congress, and they do not publicly account for how they spend their budgets either. Secret budgets, secret spending, and classified information conspire to limit media oversight of the national intelligence community as well. Max Weber's analysis of bureaucracy therefore applies with special force to the national security and intelligence community.

"Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions" in so far as it can, it hides its knowledge and action from criticism. . . . In facing a parliament, the bureaucracy, out of a sure power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts or from interest groups. The so-called right of parliamentary investigations is one of the means by which parliament seeks such knowledge. Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament—at least in so far as ignorance somehow agrees with the bureaucracy's interest."⁷⁶

One does not have to share Weber's views about government bureaucracies in general, or to suspect the national security and intelligence communities of bad faith or worse, to recognize that the system under which they currently operate fosters bureaucracy and hampers accountability. For this reason, Congress may, after all, have a special need for employee disclosures of classified information evidencing "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety" by agencies or departments in the national security and intelligence communities. Such disclosures can be justified to compensate for the severe restraints on other methods of assuring their accountability to Congress and the public. We conclude, therefore, that this subprovision of the disclosure provision is also constitutional.

⁷³ See 5 U.S.C. § 553(b)(A)(1994); see generally Alfred C. Aman, Jr., & William T. Mayton, *Administrative Law §§ 4.2–4.3* (1993).

⁷⁴ 5 U.S.C. § 2302(1994).

⁷⁵ See, e.g., William C. Banks & Peter Raven-Hanse, *National Security Law and the Power of the Purse* 51–53, 100–105 (1994).

⁷⁶ Max Weber, *Essays in Sociology* 233–34 (H.H. Gerth & C. Wright Mills ed. 1946), quoted in *Secrecy Commission Report* supra note 30, at A-15 to A-16.

IV. The disclosure provision could be revised to enhance its constitutionality

Although we have concluded that the disclosure provision is constitutional, we also believe that the case for its constitutionality could be enhanced by several changes.

First, the “covered individuals” defined in section 306(a)(3) could be narrowed to members or security-cleared staff of the intelligence committees. Because a statute⁷⁷ requires these committees to operate under house rules to protect classified information from unauthorized disclosure, employee disclosures of classified information to them are less likely to compromise such information than disclosures to less secure committees, their members, or staff. Although we understand that other communities, including notably the appropriations committees, may also have a legitimate legislative need for such information, each intelligence committee is already directed by statute, in accordance with secure procedures, “to promptly call to the attention of its respective House, or to any appropriate committee or committees of the respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.”⁷⁸ Alternatively, if jurisdictional considerations, as a practical matter, prevent the suggested limitation of “covered persons” to just the members and staff of the intelligence committees, the disclosure provision might be enhanced by inclusion of a subprovision requiring the application of the existing rules and procedures for protecting classified information to any committees to whom disclosures may be made under the provision.⁷⁹ In any case, specific identification of the covered committees by name would reduce the risk that an employee will mistakenly disclose to persons who are not covered by the disclosure provision; the provision as currently drafted leaves an ambiguity that invites such error.

Second, section 306(a)(2)(A) could be narrowed to cover only violations of law or substantive rules or regulations with the force and effect of law, thus excluding violations of mere procedural, housekeeping, and interpretive rules, as discussed above. This revision would again reduce the risk of erroneous disclosure by narrowing the range of disclosable classified information.

Third, section 306(a)(2)(C) could be revised to track more directly the President’s own classification prohibition in Executive Order No. 12,958, section 1.8(a)(1).⁸⁰ This revision would not narrow the reach of the disclosure provision, but it would make it more difficult for the President and his lawyers to argue that this subprovision goes too far, for it would target precisely the information that the President has admitted should not be classified.

Finally, the intrusion on presidential functions could be reduced if the covered employees was required to exhaust certain administrative remedies before disclosing classified information to covered persons. For example, an employee might be required first to disclose the information to the agency or department Inspector General, if there is one, or to the Office of Special Counsel of the Merits Systems Protection Act. Such a revision would require amendment of the Whistleblower Protection Act,⁸¹ as well, ideally, as the addition of a requirement that such offices adopt special rules for the protection against unauthorized disclosures of classified information disclosed to them. This revision would also presumably require deadlines for responses by these offices, and/or exceptions to the exhaustion requirement for time-urgent information. Such a revision would enhance the constitutionality of the act by offering executive branch officials an opportunity to review the proposed disclosure and to use an orderly process for deciding whether the disclosure should be made pre-emptively, but officially, thus reducing if not in many cases eliminating, the intrusion on the executive function.

In conclusion, we assume that it was in part to give the President the opportunity to impose such exhaustion requirements (as well as other procedures that could minimize the intrusion on his functions without denying Congress the information it needs) that the disclosure provision is not framed in terms of employee rights, but instead as a request to the President to take appropriate actions to encourage employee disclosures. While such voluntary action by him would be in keeping with a long and successful history of negotiated solutions to inter-branch disputes,⁸² and while we applaud the sponsors’ evident desire for this outcome, we doubt that this provision will achieve it. It is, after all, not merely precatory. Indeed, it ultimately

⁷⁷ See e.g., 50 U.S.C. § 413(d) (1994).

⁷⁸ *Id.*

⁷⁹ Such a subprovision would largely track 50 U.S.C. § 413(d) (1994).

⁸⁰ 60 Fed. Reg. 19,825 (1995).

⁸¹ 5 U.S.C. § 2302(b)(8)(A) (1994).

⁸² See, e.g., Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of executive Privilege Claims Against Congress*, 71 Minn. L. Rev. 462 (1987).

commands the President to take the required action within thirty days of enactment. Such a command may actually be more offensive to the executive than a straightforward declaration of employee (and, derivatively, congressional) rights, in that it may precipitate a direct conflict sooner than the latter.

We hope this analysis will assist you, and we would be happy to summarize it in testimony.

Sincerely yours,

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**STATEMENT OF PETER RAVEN-HANSEN, GLEN EARL WESTON
RESEARCH PROFESSOR OF LAW, THE GEORGE WASHINGTON
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Mr. RAVEN-HANSEN. Well, let me begin at the same place that Dr. Fisher began and I'll cover a little bit of the same ground, but I think it's important to note that we have independently come at the same conclusion.

Last year, the Office of Legal Counsel opined that Section 306 was unconstitutional and presumably would reach the same conclusion about similar bills. And it based that conclusion principally on this statement from the Supreme Court in *Department of Navy versus Egan*. That the President's authority to classify and control access to information bearing on national security flows primarily from the Commander-in-Chief clause and "exists quite apart from any explicit Congressional grant."

And it was that statement that they relied on to conclude that the President has ultimate and unimpeded authority over classified information. And that therefore, limitations like Section 306 are unconstitutional.

I think the premises of their logic are flawed and their conclusion is dead wrong. The President and Congress have both historically and as a matter of constitutional text shared authority over classified information from the beginning.

Now, let's start with the text. There is no express text regarding the regulation of classified information. The President's authority on this subject is entirely implied from his command authority as Commander-in-Chief. But if it is implicit in the Commander-in-Chief clause, it is equally implicit in the nine separate express provisions of the Constitution that confer national security and foreign affairs powers on the Congress, ranging from the authority to provide for the common defense to the authority to make rules for the government and regulation of the armed forces.

It's also implicit in Congress' residual authority to make all laws necessary and proper to carry out not only their own vast national security powers, but also the President's. In fact, the only express constitutional text that deals with governmental information that is secret gives the Congress, and not the President, the power to keep it secret. Each House is permitted to keep parts of its journal secret when, in its judgment, that's necessary.

Egan, therefore, properly read, stands simply for the proposition that the President has inherent authority to regulate classified information and doesn't need a statute to do so. It does not mean

that he could violate a statute if Congress passed one regulating such matters.

And in fact, as Dr. Fisher noted, the Court was careful to say in its actual holding in *Egan*, that it reached its statutory decision in the absence of statutes to the contrary, leaving open the possibility, and I would say the likelihood, that if Congress had legislated on the subject, they would have come out differently.

In short, I would paraphrase Justice Jackson on this as he said of *Curtiss-Wright*, another popular decision cited by the Office of Legal Counsel, *Egan* at most intimates that the President can act without Congressional authority. It does not say that he can act contrary to an act of Congress, like Section 306.

In addition, the President and Congress have historically acted together to regulate classified information for over 80 years. In my longer statement, Professor Banks and I sampled just 12 statutes to illustrate that point, but I could give you 50 if you wished, and we had all day.

They range back to the Espionage Act of 1917, which was the first act that criminalized the uses of national security information to harm the country, and they go up, to most recently, the Protection and Reduction of Government Secrecy Act of 1994, which established minimum procedures for access to classified information on which the President's own Executive Order is now based.

And what these statutes have in common is not just that they pervasively regulate classified information, but that they also consistently reserve the right of Congress to receive that information, either at large or through its Intelligence Committees. One example I can give on which I testified two years ago before your counterpart in the House is 18 U.S.C. 1924. This is the statute that for the first time criminalized leaks of classified information by Executive branch officials. I testified to the House Committee that Congress always reserved its own rights when it enacts legislation in this matter, and they then added a provision that the production of documents to Congress was not an offense under the statute. That is a routine reservation of rights by Congress. No one has challenged them, to my knowledge, in 80 days.

So I think it is far too late in the day for the Office of Legal Counsel of the Executive branch to assert that the President has some sort of plenary and exclusive authority to regulate classified information. Instead, the text and the history establish beyond question that this is an area of shared power.

The issue then is what do you do when we have a statute that would limit the President's power in the area? And on that subject, Justice Kennedy has said that when the constitutional text does not assign authority exclusively to the President and only gives him an implied authority, the constitutionality of that statute has to be decided by balancing. What you balance is the degree of intrusion on the President's powers against the need to achieve objectives that are within Congress's constitutional authority.

I should add that the Court has also said, "The regulation of material generated in the Executive branch has never been considered invalid as an invasion of its autonomy."

So with that background, let's do the balancing. What is the actual intrusion on the Executive branch that Section 306 threatens?

The Office of Legal Counsel asserted last year that the act would circumvent the Executive branch's procedure for the orderly disclosure of classified information by preventing the chain of command for considering whether there were constitutionally based privileges to be asserted or from taking other action to protect sources and methods. Disclosure would be made by lower ranking employees on their own authority.

I think that is partly correct, but it exaggerates substantially the effect of Section 306. In the first place, the disclosure that it encourages is not of all classified information, but of a small, well defined subset: namely, the information that would provide direct and specific evidence of violations of law or that false statements have been made to Congress or of gross mismanagement, etc.

The President's own Executive Order on classified information that is now in place states, "in no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error, or to prevent embarrassment." False statements to Congress, of course, are violations of law. And unless gross mismanagement is neither administrative error nor inefficiency, I would have to say that none of the information targeted by Section 306 is currently properly classified under the President's own order.

Secondly, the disclosure provision is aimed at encouraging only employees who reasonably believe that the classified information falls into the subset I have just described. So an employee who knows that it is outside of that subset or who unreasonably believes that the information is in this category, isn't covered by the bill. It therefore does not encourage or protect deliberate or reckless disclosures.

And third, it only encourages disclosures to Committees that have oversight responsibility for the subject of the disclosure. Since the covered employees are usually employees of national Intelligence Community agencies, the information they are going to disclose would come to this Committee and the House Committee in most instances. Of course, both Committees operate under elaborate safeguards to protect against unauthorized disclosures.

So I think in the end, the intrusion, the actual scope of the intrusion on the Executive is the following: The risk is that Executive branch employees with access to classified information will reasonably but erroneously conclude that that information falls within the statute and disclose it to a Member of a Congressional Committee or a staff member that is either not subject to the safeguards we've described or who is but ignores them as a result of which the information is disclosed to the public and compromised, harming the national security.

Now, that's a real concern, but it is not nearly as large as the Office of Legal Counsel has described it, and what remains is to consider whether the Congressional need is overriding. And in that regard, I won't belabor the extensive Supreme Court authority concerning Congress's constitutional right to information from the Executive branch. The question is really whether the informational need of Congress is specific enough to overcome the Executive interest that I have just described. General interests of Congress in

the balancing process that Justice Kennedy has described do not overcome specific interests of the Executive branch.

The disclosure section, however, does not state a general informational interest of Congress. It narrows Congress's interest in three ways.

The first, I think, asserts the strongest interest I could imagine for this Committee and the Congress as a whole. That is, to obtain evidence that Congress has been lied to regarding matters within the purview of this Committee. I can't think of a weightier interest in the oversight of the national Intelligence Community or of national security in general. This interest protects the integrity of Congress's fact-finding process. It, in fact, could be viewed ironically as an interest that the Executive branch should share, because it would help Congress have faith in official channels if you have an independent check on the rare—hopefully rare—false statement made through official channels.

It is no answer to this, incidentally, to say that the President has some sort of Executive privilege or state secrets privilege to lie. Judge Gesell squarely rejected that in the North litigation. He said where power is shared among the branches, willful and deliberate deceit cannot be excused on constitutional grounds. And of course, he was talking about national security information.

And I think it follows that nor can denial of access by Congress to this kind of information be excused on constitutional grounds. So I have no hesitation in saying that as to this category of information, the bill is clearly constitutional and very sound.

The second category is information about violations of law. And I think that is also concrete and specific enough to override the Executive interest that I have described. When law has been violated, it means not only that Congress has a need to know in order to legislate anew, but by definition, the President has failed to take care that the law be faithfully executed. In those circumstances, it seems to me that Congress has a very specific and heightened need for the information.

Finally, the third provision is the most constitutionally problematical. That's the provision that deals with information about gross mismanagement, waste of funds, abuse of authority, etc. This corresponds roughly to the President's own categories of inefficiency or administrative error, which he says cannot be properly classified. But I think it is also ambiguous, and it leaves the employee with a difficult judgment to make, and not too much guidance from Section 306. In other words, this section potentially targets the largest category of classified information, and therefore poses the greatest risk of an error if an employee comes to Congress.

On the other hand, there is an important countervailing consideration here, and that lies in the nature of oversight of the national Intelligence Community in general. And with all due respect to this Committee, I think one would recognize that because of secrecy, because of the secret budgeting process, that community is not as accountable, to the public at least, and to the Congress at large, as other more transparent agencies. It operates under a system that fosters bureaucracy and hampers accountability. And I say that without impugning in any way the people who work in that community. It is just a nature of the workplace when you operate se-

cretely and without full fiscal accountability and outside the glare of media scrutiny.

As a result, Congress may have a special need for disclosures in this third category, to compensate for the very limited accountability that the national security community otherwise has to the Congress and to the public at large.

Let me conclude by saying I think there are some things that you could do to enhance the constitutional argument for this section 306. I have listed them in my more comprehensive statement, but let me just focus on two.

The bill currently encourages employees to bring information to any Committee with jurisdiction over the subject. But other Committees do not operate under the same safeguards for protecting against unauthorized disclosures that you operate under. And I think it would be desirable to limit disclosures to the Intelligence Committees because of those safeguards. That would not only reduce the risk of unauthorized disclosure and therefore reduce the intrusion on the Executive branch, but it also brings the information where the oversight is. I mean, to the extent that this is basically classified information from the Intelligence Communities that you oversee, it seems appropriate that it would come to these Committees and not to Committees that don't operate under the same safeguards.

Finally, I would add one other point that is not in my statement but is a concern I have had. Dr. Fisher referred to the Lloyd-LaFollette Act. This, since 1912, has given government employees the right to furnish information to Congress. That is what it says. It is unconditional. I would be disturbed if Section 306 or a bill like it was construed to narrow the Lloyd-LaFollette Act unless that was what the Committee intended. And so I would urge you to consider language in a bill like this that says "nothing in the bill is intended to limit any existing right under law or the Constitution of employees to communicate to Congress."

Thank you.

Chairman SHELBY. In the statement of Administration policy drafted in response to Section 306, the Administration states that section 306, "vests lower ranking personnel in the Executive branch with a right to furnish national security or other privileged information to a Member of Congress without receiving official authorization to do so."

It is not the intent of the Committee to create any rights for individual Intelligence Community employees. Rather, our intent is to inform employees within the Intelligence Community, that disclosing evidence of misconduct, fraud, and mismanagement to this Committee is not an unauthorized disclosure.

Assuming our proposed language become law, would individual Intelligence Community employees obtain enforceable rights under its provision? And if so, how would they be enforced?

Dr. Fisher, do you have any comment?

Dr. FISHER. I think that Peter is going to be better on this than me. I think anytime you have a statute, whether it is whistleblower for non-national security information, anytime you give employees a statutory basis for providing information with you, I think they

know that they operate at some risk, whatever the statutory safeguard is.

I think under the language—Peter will go more into this—that in court, they certainly would have a statutory basis, but they know they are taking chances in giving you information that the Agency did not want disclosed.

Chairman SHELBY. Professor Raven-Hansen, we also did not intend to create, and do not intend to create a private cause of action, that is, a lawsuit for money damages here, for an individual employee within the Intelligence Community. Can our proposed language as currently drafted be construed to create such a cause of action?

Mr. RAVEN-HANSEN. I think as you currently drafted it, which is to ask the President to remind Federal employees of the existing rights they have, that it would not be construed in that fashion, and if the legislative history were clear that Congress has not such intent, I think it unlikely that courts would imply a cause of action here.

I might add that they have implied a cause of action under the Lloyd-LaFollette Act, and I presume that law would remain in place.

Chairman SHELBY. But if either one of you has some suggestions to tighten the language without destroying what our intentions are, we will consider that.

Dr. FISHER. Thank you.

Chairman SHELBY. The proposed Senate language requires the President to, “take appropriate actions to inform employees that they may disclose information to this Committee” if they reasonably believe that it is a direct and specific evidence of an act that falls within certain parameters.

We do not expressly say that employees within the Intelligence Community have a “right” to provide information to this Committee. Could we, however, expressly grant an employee a right to bring such information to Congress, and remain within the constitutional limits of our authority? And if we can, what argument could we expect from the Administration if we did so?

Dr. Fisher first?

Dr. FISHER. At this point I would like to submit a response better reasoned on this than I can give you right now. I’d be happy to do that.

I think the legislative language would grant an employee a right to bring information to the Intelligence Committees, and I further believe that the legislative language would be within the constitutional authority available to Congress. Apparently the Administration would continue to challenge such language on constitutional grounds, but I do not think the DOJ argument is persuasive as it now stands. Regarding your earlier question on a cause of action, courts will rely on the intent of Congress. *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). In the legislative history, Congress can clarify its intent not to create a cause of action.

Chairman SHELBY. I would like that.

Professor Raven-Hansen.

Mr. RAVEN-HANSEN. I think you could clearly phrase this as a declaration of Congressional—of employee rights, although I think

it is best defended as an exercise of Congressional right. What it does now is remind employees of rights they already have and give them a channel for exercising them. I would see no objection to phrasing it as a right. I understand that the way it's been framed now is basically as an accommodation to the President, urging him to remind employees of their rights. Sort of an invitation for him to follow through. But if he doesn't take that invitation, I would rephrase this as a statement of both employee and Congressional rights.

Chairman SHELBY. The Administration emphasizes the, "need to know factor" a great deal in its policy statements, Executive Orders and legal briefs. In fact, Executive Order number 12,958 states that a person has, "a need to know if access to classified information is required in order to perform or assist in a lawful and authorized governmental function."

The language offered at the Conference with the House Intelligence Committee narrowly defines the type of information that may be provided by an employee on the Committee. It includes only information, classified or otherwise, that the employee reasonably believes to provide direct and specific evidence of a violation of any law, rule, or regulation, a false statement to Congress on an issue of material fact, or gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety.

Do you two professors, do you agree that these categories of information are appropriately limited and specifically pertain to the oversight responsibilities of the Senate Intelligence Committee so as to be required to perform our lawful and our authorized governmental function as expressed in Executive Order number 12958.

Dr. Fisher.

Dr. FISHER. I think these categories that you mentioned, 306, are appropriate, and I want to talk to some of my colleagues to see if any other categories occurred to them.

Chairman SHELBY. Would you submit some information to—

Dr. FISHER. I'll submit it.

Chairman SHELBY. Both of you, on that?

Dr. FISHER. I will. And I also want to say, Executive Orders, of course, are issued by the President to guide the Executive branch. The Executive Order can't restrict the powers and duties of Congress as a separate institution.

Chairman SHELBY. Okay.

Do you agree that these categories of information are appropriately limited? You know, you're going to send that to me.

Dr. FISHER. Uh-huh; I will.

Chairman SHELBY. Looks to be, but you want to do more.

Dr. FISHER. Oh, I think the ones you have are appropriate, and maybe my friends in CRS have some other categories.

Chairman SHELBY. Could they be expanded and remain within our lawful and authorized functions?

Dr. FISHER. I think they can. These categories come out of the whistleblower statute, and since you have a specific duty here in national security, there may be other language that would be also appropriate. But I want to submit that to you.

Chairman SHELBY. You know, both of you know that the President argues that it is his exclusive authority to determine who has, "a need to know" a particular piece of classified information, even if that individual is a Member of Congress.

In the *American Foreign Service Association versus Garfinkel*, however, the government brief refers repeatedly to the concept of need to know and specifically argues that, "this important limitation is preserved when national security information is furnished through official agency channels to a relatively few Members of Congress who serve on a Committee that has been designated by that House to be responsible for a particular jurisdiction and area of defense, foreign affairs or intelligence."

It seems to me that the government in its brief in the *Garfinkel* case basically acknowledges that the Intelligence Oversight Committees have a need to know particular information within their specific jurisdiction.

Do either one of you agree with that?

Mr. RAVEN-HANSEN. Absolutely. It is hard to imagine what information from the national security community is not within the appropriate jurisdiction of this Committee.

Dr. FISHER. I think the Justice Department concedes the legitimacy of access—

Chairman SHELBY. In their brief, do they not?

Dr. FISHER. In their brief and in other statements. And they—I think that the dispute comes down to the Administration trying to think up certain situations where there might be some embarrassment. But those situations, hypotheticals, shouldn't stand in the way of access that you need to fulfill your mission.

Chairman SHELBY. Is there any basis for the President to argue that evidence of misconduct within the Intelligence Community is not within the jurisdiction of the Senate Intelligence Committee?

Dr. RAVEN-HANSEN. Not at all.

Dr. FISHER. I don't think so.

Chairman SHELBY. You gentleman realize, you can tell from the absence of Members here, we have a vote in progress, we have, I understand four or five consecutive roll call votes, so that is going to eat the rest of the morning up. It's just part of the hearing process.

I appreciate the first panel being here. I apologize to the second panel, and I don't know when we can continue this, but we will certainly do this and we'll schedule, because we want to hear from the other side, too. And we appreciate any information written to this Committee by you, Professor Raven-Hansen, or Dr. Fisher, will help us make this legislation work.

Dr. FISHER. Thank you.

Chairman SHELBY. The Committee is going to adjourn.

Thank you.

[Thereupon, at 10:51 a.m., the Committee was adjourned.]

DISCLOSURE OF CLASSIFIED INFORMATION TO CONGRESS

WEDNESDAY, FEBRUARY 11, 1998

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Select Committee met, pursuant to notice, at 9:00 a.m., in Room SH-216, Hart Senate Office Building, the Honorable Richard Shelby, Chairman of the Committee, presiding.

Present: Senators Shelby, Kerrey of Nebraska, and Graham of Florida.

Also Present: Taylor Lawrence, Staff Director; Chris Straub, Minority Staff Director; Dan Gallington, General Counsel; and Kathleen McGhee, Chief Clerk.

Chairman SHELBY. The Committee will come to order. We apologize for the delay last week, and now, but we do have intervening votes, as most of you realize, in the Senate.

The Committee will meet today to continue hearings on the proposed legislation that would allow employees of the Intelligence Community to disclose certain types of information to an appropriate oversight Committee of Congress. Last week, the Committee heard from Dr. Louis Fisher, a senior specialist on separation of powers, with the Congressional Research Service, and Professor Peter Raven-Hansen, a professor of law at George Washington School of Law. Dr. Fisher and Professor Raven-Hansen presented arguments supporting the proposition that Congress and the Executive branch share constitutional authority over the regulation of national security information.

Dr. Fisher is again with us today to continue discussions because a number of Members did not have an opportunity to question him prior to the series of Floor votes last week. Dr. Fisher, we thank you for being here.

Seated with Dr. Fisher is Mr. Randolph D. Moss. Mr. Moss is the Deputy Assistant Attorney General for the Office of Legal Counsel within the Department of Justice. It was the Office of Legal Counsel that wrote the legal memoranda, which is at Tab D in the Members briefing books. On which the Administration based their constitutional objection to section 306 last year. Mr. Moss, we look forward to hearing from you today.

Senator Kerrey.

Vice Chairman KERREY. Thank you very much, Mr. Chairman.

Last November, the two of us made a commitment during the conference Committee that we would pass legislation to establish procedures for government employees to bring information of

wrongdoing to Congress, even if the information was classified. And today's hearing is Part II of the process of you and I keeping our commitment.

For me this is not about a particular Administration or a particular incident. This is about the freedom of Americans, some of whom are government employees, and it's about making this government work the way the founders intended.

Today's hearing will help us further improve the legislation passed by the Senate last year and will also help inform the public on the need for this legislation.

On some topics, such as reforming the Internal Revenue Service, the need for legislation is blindingly obvious because of problems that are apparent to all of us. However, on this topic, the need is present, but in a much more subtle fashion. We cannot quantify the number of government employees who would bring classified information of wrongdoing to Congress if the law established a procedure for doing it.

Today these employees can take their concerns to their superiors, to the inspector general of their agencies, to the general counsels of their agencies, or even to the Attorney General. But if the employee feared for his or her career, these might not be appealing options.

If the employee believes his boss to be guilty of or aware of the wrongdoing, or if agency management, or even the highest level of government were implicated in the wrongdoing, these would not be appealing options. If the employee believes himself to be in such circumstances, unable to safely report the wrongdoing in Administration channels, he or she is faced with two choices—neither of them good: come to Congress and take the consequences from his employer, or go to the press and risk even greater legal penalties for leaking.

We can never know how many government employees are faced with this dilemma. I hope and presume the number is small. The quality and motivation of the Clinton Administration's foreign policy, national security and intelligence teams suggest to me that the number of employees with something to report is very low.

This Administration has done more than any other to keep Congress informed on intelligence matters, including instances of wrongdoing. And it is aggressively declassifying old secrets and opening intelligence to the public to an unprecedented degree.

So my support for this legislation is not connected to my concerns about a particular Administration. My concerns are for the access of government employees to Congress and the right of Congress to have the information it needs to carry out its constitutional responsibilities.

There are already two laws—the Lloyd-Lafollette Act of 1912 and the Whistleblower Protection Act of 1989—which give government employees the right to bring information of wrongdoing directly to Congress.

The Administration apparently believes classified information is different because such information is created by the Executive branch and so much be controlled exclusively by the Executive branch on the grounds of what the Administration claims is the President's sole authority in national security matters.

But the Constitution clearly gives Congress its own authorities in national security. Congress, not the President, raises armies and maintains navies. Congress, not the President, calls out the militia. And Congress, not the President, declares war. Congress, therefore, has the right to national security information. And in fact, Congressional Committees in the national security and foreign policy fields have been successfully working with and storing this information securely for many years.

Further, Congress's annual responsibility to authorize and appropriate funds for national security and foreign policy purposes, and its continuing responsibility to oversee how those funds are spent gives Congress a need to know which justifies its access to the information.

I stress with much certainty that this information is held closely and securely in Congress. As CIA Director Tenet told this Committee last week, Congress has a better record at keeping secrets than does the executive branch, which he said, quote, leaks like a sieve, end of quote.

I don't claim perfection. Congress can always do better. But the argument that Congress doesn't have a need to know or can't be trusted with this information is a false one. In fact, our legislation has the potential to reduce damaging leaks by giving government employees less rationale for taking their classified concerns to the news media.

Particularly in the murky and potentially dangerous world of intelligence, it seems self-evident that an employee who knew of serious wrongdoing in some classified program might not want to clear with her boss or her agency's inspector general or even with the Justice Department the fact that she was going to an oversight Committee of Congress with the information.

It is equally obvious that Congressional oversight of these sensitive activities cannot take place without information.

Mr. Chairman, it is our charge and our duty to protect and keep America and Americans safe. This legislation flows from that charge and that duty. We need to act this year to make these truths clear in our law.

I thank you, Mr. Chairman, again for following up on our commitment that we made last November in the conference Committee.

Chairman SHELBY. Senator Graham, do you have an opening statement?

Senator GRAHAM of Florida. No opening statement, Mr. Chairman.

Chairman SHELBY. Mr. Moss, your entire written statement will be made part of the record in its entirety. You may proceed as you wish.

Mr. MOSS. Thank you, Mr. Chairman.

Chairman SHELBY. We're glad to have you.

STATEMENT OF RANDOLPH D. MOSS, DEPUTY ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. MOSS. Mr. Chairman, Mr. Vice Chairman, members of the Committee, I'm pleased to be here to address Section 306 of last

year's Intelligence Authorization Bill as originally passed by the Senate. Last year, the Department of Justice concluded that the provision was unconstitutional. I'm here today at the Committee's request to explain our reasons for reaching that conclusion. I will present a summary of our position and would be happy to answer any questions that the Committee may have.

I do want to note that, because Section 306 is the only proposal we have thoroughly reviewed, I'm not able today to provide the department's position on other proposals that might be developed. The department would, however, be pleased to review future proposals and to provide comments to the Committee at a later time. Section 306 would have required the President to inform employees of covered Federal agencies that their disclosure to Congress of classified information that the employer reasonably believes provides direct and specific evidence of misconduct is not prohibited by law, Executive Order or regulation or otherwise contrary to public policy.

Congress, of course, has important oversight responsibilities and a corollary interest in receiving the information that enables it to carry out those responsibilities. Those interests obviously include Congress's ability to bring to light evidence of misconduct by Executive branch employees, including evidence that Executive branch employees have misled or misinformed Congress.

We are committed to seeking to accommodate Congress's oversight needs in ways that are consistent with the Executive branch's constitutional responsibilities.

Moreover, I would emphasize that our concern with Section 306 focuses on the process by which you would secure disclosure of evidence of misconduct. It is clear that misconduct be ferreted out. In that respect, I would note, as the Vice Chairman noted, that existing rules require an Executive branch employee who discovers waste, fraud, abuse or corruption to bring such misconduct to the attention of appropriate authorities who in turn can and should take appropriate corrective measures. In some cases, this may mean going to someone within the employee's own agency. In other cases, it may mean going to someone outside the agency, for example the Department of Justice.

The critical flaw in Section 306 is that it would vest any Federal employee—I should say any covered Federal employee—having access to classified information with a unilateral right to circumvent the process by which the Executive and Legislative branches accommodate their respective interests in that information. Under Section 306, any Federal employee with access to classified information that, in the employee's opinion, indicates misconduct can determine how, when and under what circumstances that information is shared with Congress. The provision would do so, moreover, no matter what the effect on the President's ability to accomplish his constitutionally assigned functions in the areas of national security and foreign relations. Such a rule would violate separation of powers.

A host of precedents beginning at the founding of the republic support the view that the President has unique constitutional responsibilities with respect to national defense and foreign relations. John Jay, later the first Chief Justice of the United States, argued

in the Federalist Papers that secrecy is at times essential to the Executive branch's discharge of its responsibilities in these core areas. As long ago as 1792, President Washington, with the concurrence of his distinguished cabinet, took the position that Congress could not require the Executive branch to produce documents whose disclosure would be contrary to the public interest.

Since the Washington Administration, Presidents and their senior advisers have repeatedly concluded that our constitutional system grants the Executive branch authority to control the disposition of secret information. Then-Assistant Attorney General William Rehnquist, for example, concluded over 30 years ago, and I quote, The President has the authority to withhold from Congress information in the field of foreign relations or national security if, in his judgment, disclosure would be incompatible with the public interest, end quote.

The Supreme Court has similarly recognized the importance of the President's ability to control the disclosure of classified information. In the Egan case, the court noted that the President possesses, "the authority to classify and control access to information bearing on national security," and continued, "quite apart from any explicit Congressional grant."

Similarly, Justice Stewart, in his concurring opinion in the Pentagon Papers case, said, "It is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. In the area of basic national defense, the frequent need for absolute secrecy is of course self-evident." He continued, "I think there can be but one answer to this dilemma if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and in the maintenance of national defense, then under the Constitution, the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is clear to me," that is, Justice Stewart, "that it is the constitutional duty of the Executive to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense."

The principal flaw in Section 306 is that it would permit individual Federal employees unilaterally to determine how, when and under what circumstances classified information will be shared with Congress. It would authorize any Federal employee to circumvent a Presidential determination—and again I should say any covered employee—to circumvent a Presidential determination that restricted Congressional access to certain classified information in extraordinary circumstances.

In the National Security Act, for example, Congress itself recognized the need for heightened scrutiny in certain, "extraordinary circumstances affecting vital interest of the United States." and the Congress authorized the President to sharply limit Congressional access to information relating to covert actions in such cases.

In contrast, Section 306 would deprive the President of the authority to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed. This is an impermissible encroachment on the Presi-

dent's ability to carry out core executive functions. The decision when, whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President, and who is ultimately responsible to the president.

The Constitution does not permit Congress to authorize subordinate Executive officials to bypass the orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information, even to Members of Congress. Such a law would squarely conflict with the framers' considered judgment, embodied in Article II of the Constitution that, within the Executive branch, all authority over matters of national defense and foreign affairs is vested in the President as chief executive and Commander in Chief.

Professor Raven-Hansen last week suggested that Section 306, at least with modest revision, would strike an acceptable balance between the competing Executive and Legislative interest relating to the control of classified information. That balance under Section 306, however, would be based on an abstract notion of what information Congress might need to know relating to some future inquiry and what information the President might need to protect in light of some future set of world events. Such an abstract resolution of the competing interests at stake is simply not consistent with the President's constitutional responsibilities respecting national security and foreign affairs. He must be free to determine, based on particular and perhaps currently unforeseeable circumstances, that the security or foreign affairs interests of the nation dictate a particular treatment of classified information.

In sum, Section 306 would vest any Federal employee, any covered Federal employee, who has access to classified information, with a unilateral right to disregard the President's procedures for the dissemination of such information, as well as to bypass the accommodation process between the two branches and disclose that information to Congress, no matter how grave the risk to national security or the President's foreign affairs initiatives. Such an enactment would constitute an impermissible intrusion on the President's constitutional authority.

Thank you, Mr. Chairman.

Chairman SHEBLY. I'm going to start with a question to Dr. Fisher, and then I'll go to you, Mr. Moss.

There's been a great deal of debate among my colleagues in the House, Dr. Fisher, on whether there are any—any nonstatutory alternatives to this legislation. We've discussed here numerous variations on our conference language. We've entertained various alternatives to statutory enactments. In the end, our goal is to preserve our constitutional prerogative to receive classified information that may be evidence of misconduct within the Intelligence Community. However, as long as the President asserts a plenary authority to withhold information from Congress as he sees fit, I believe we will be unable to do the job the American people elected us to here.

Dr. Fisher, do you believe that there are any nonstatutory means by which we can reach our goal or will the "prior authorization" problem still exist?

STATEMENT OF LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE

Dr. FISHER. I think there was a nonstatutory remedy. That's what we've done up to now. But as you say, once the President and the Justice Department begin to draw the line to say that the President has some plenary and exclusive duty here, then I think, you see that the nonstatutory process is not going to be that reliable and you need some statutory language.

Chairman SHELBY. Mr. Moss, I believe your presentation, at least as I understand it, is based on the version of 306—of the 306 passed by the Senate, and not on the version considered at conference as Senator Kerrey alluded to. The conference language provided to the department prior to last week's hearing is much narrower in scope. The legislation we're considering today does not give, "any Federal employee having access to classified information a unilateral right to come to Congress." The language we're considering today pertains only to the Intelligence Community personnel. It also restricts disclosure to those Committees having primary responsibility for oversight of the agency involved.

Our goal is to allow a limited universe of Executive branch employees to come forward to an appropriate Committee without fear of reprisal.

Having said that, could you explain to the Committee today how your analysis would change with the narrowing of the language, if it would at all? And can you keep the new version of the language—legislation in mind as you address, you know, the following questions I'll get into?

Mr. MOSS. I would be happy to do that, Mr. Chairman, and I apologize to the extent there is any confusion regarding the provision we were addressing.

Chairman SHELBY. Sure.

Mr. MOSS. The answer to your question, I believe though, is that as a matter of constitutional law, I do not believe that the limitation on the scope of who may make a disclosure and to whom the disclosure may be made significantly changes the constitutional analysis. I think the same concern exists that employees now in covered—within covered agencies could determine for themselves to come forward with classified information without first determining whether the President or his senior advisers may believe that the information needs to be revealed in a particular manner at a particular time for national security or foreign affairs reasons.

Chairman SHELBY. But you understood what we're trying to do here? Our goal here, is to limit in scope our legislation to people in the Intelligence Community that would have knowledge of fraud, corruption and so forth, that they could come to members of Intelligence Committees in both houses that are privileged to have all this classified information to begin with.

Mr. MOSS. I do understand that, Mr. Chairman, and—

Chairman SHELBY. Do you see where we're going, or trying to go?

Mr. MOSS. I do see where you're going with that. And what I would note is that I think that, as has previously been noted by the Vice Chairman, there is a tremendous amount of classified information that this administration has shared with this Committee and its House counterpart. And I don't mean to suggest in any way

that the Administration should not be fully sharing that information and fully cognizant of the very legitimate oversight needs of this Committee.

The concern, though, just goes to the question of whether the President or his delegees will maintain an ultimate decision in the very, very rare extraordinary circumstance of whether it's necessary to disclose information in a particular manner.

And as I mentioned in my testimony, and example of that comes to mind is the National Security Act where, I think, Congress wisely noted that there could be circumstances in which disclosure should be very limited and gave the President authority to limit disclosure in that manner. I should note though even with respect to that provision in the National Security Act, President Bush expressly reserved his constitutional authority even to take a narrower approach with respect to the sharing of information. And Congress, I think disagreed with that approach, but simply said the President's view is his view. We have our view on this and whatever the constitutional rule is in this areas will actually control.

Chairman SHELBY. Mr. Moss, shouldn't employees in the Intelligence Community of the United States government have a safe harbor, an outlet where they know there's corruption going on, they know there's wrongdoing? They ought to know, people here in the Congress ought to know, especially people that serve on the Committees of both Houses, shouldn't there be an outlet for that?

Mr. MOSS. Well, you know, I'm not a policy specialist by any means, but what you suggest is, I think, a sensible point. I think that there does need to be an outlet of some sort. I think that current law does provide for a number of outlets. I can understand circumstances in which an employee, for example, might not want to go to someone in their agency.

Chairman SHELBY. Sure.

Mr. MOSS. And they might then be able to go, for example, to the Attorney General.

Chairman SHELBY. If they knew somebody they were working for in their agency was lying to Congress, lying about a lot of things, covering up things, and was really deeply troubled with this, and then had no outlet. We're trying to provide them an outlet. That's our goal.

Mr. MOSS. I understand that and I think that is a laudable goal, and I think that there is just a very real tension between some very significant interests at stake here—the interest in the President in controlling the access to national security information; Congress' legitimate interest in oversight and maintaining, by that same virtue, the secrecy of information.

Chairman SHELBY. Sure.

Senator Kerrey?

Vice Chairman KERREY. Mr. Moss, like the Chairman, I was a bit confused. You cited the Egan case. You seemed to imply that we're asking that covered individuals bring information to unauthorized persons. And we've narrowed this legislation in Section 306 to deal with this Oversight Committee. So it does lead us to be a bit confused when you cite something that actually references

the Executive branch's legitimate concern about the need to control the dissemination of classified information to unauthorized people.

I mean, you make a very good case there, but we're not asking for information to be disseminated to unauthorized people. Everybody on this Committee is authorized. It's not a question of dissemination of information to unauthorized. We're talking about relevant situations that, Mr. Moss, that I think have three components of concern for me. One is the trust to the people. I mean this is a—anytime you classify, it's an act that by its very nature is an anathema to government of, by and for the people. We do it for a very good reason. I'm not against the maintenance of secrets for the purpose of keeping the American people safe. But it's important for us to recognize that it's an anathema to an open system of government. And unlike other Committees on which I sit, I don't have the press, and I don't have open sources that are out there evaluating how these agencies are doing their business. Because we've classified them, it's only our eyes and ears that determine whether or not we're getting the information. So I think trust is number one.

Money is very much an issue because you're making decisions about taxpayers' money. And overriding all of these things is the question of the American people's security. I mean every classification decision and every dollar that we spend has to add value to keeping the American people safe. That's our mission. And if all I'm doing is keeping myself safe from people seeing what I'm doing because I've just made a terrible mistake and I don't want anybody to know about it, then that, it seems to me, needs to be brought to the Committee in an environment where the man or woman doing it can bring it without fear that they're going to lose their job.

You used St. Clair's Expedition, 1791. Let me bring one a bit more relevant, closer to this time frame, since, as you no doubt know, there's been a tremendous widening of authority to classify things since 1791—since we begin to talk about an enemy within, as well as an enemy without, since we begin to presume that some people in the United States can be an enemy of our own interests. It gets a bit confusing sometimes and we treat the American people as if they could potentially be an enemy as well.

So let me take a more current example. In 1992, this Committee, through an audit of the National Reconnaissance Office, discovered a building that the NRO was going to occupy out in suburban Virginia. And the existence of that building and the use of that building was classified at the highest level. So our auditing discovered that at every turn, every turn in the decision making process—the American people need to understand it's not easy to make decisions in a secret environment. It is not easy. It's done for the purpose of keeping the American people safe, and it's easier in a secret environment to make mistakes because you don't have people watching you. You don't have the kind of oversight that you need. You need that check. So at every turn, when the decision was made about how to build this building, they took the expensive turn. And at the end of the day we ended up with a building that cost at least twice as much as it should have, maybe three times as much as it should have. It went way beyond what was necessary.

And then in 1993, we find ourselves with a situation—well, what do we do about it? You know, the bad guys knew about this building. Everybody knew what this building was. It was sitting out in suburban Virginia like a rather sore and embarrassing thumb. And we pressed DCI Woolsey to declassify, and he did declassify. And there was an awful lot of wailing and gnashing of teeth, and I think it was quite healthy. That kind of public disclosure, that kind of declassification, I give the President and Director Woolsey full credit for declassifying. They didn't get a lot of credit for the act and the decision to declassify. But that's the kind of thing we're talking about: a decision that's made that's wrong.

And I'm sitting out there as a GS-12 and I'm worrying about whether or not I'm going to get advanced if I bring that kind of mistake to the Oversight Committee. So—I mean our concern is trust with the people. We do not want to classify something if we're not adding value in terms of security. Our concern is making certain that taxpayers money is being well spent. And our concern, at the end of the day as well, is making sure that the American people are safe, that this intelligence effort adds value to the safety of their lives.

And it seems to me that what we're asking for in Section 306—although I, you know, I hear the—I'm not a constitutional lawyer and you make very compelling cases, but they're narrow cases. And I think that we have to consider this legislation in the context of maintaining the trust of the people that we're not overclassifying, maintaining the trust of the people that we're spending their money well, and maintaining the trust of the people that we're making the best effort that we possibly can to make sure that this intelligence keeps them safe.

Now none of this was for the purpose of provoking an answer from you necessarily, but I want you to know that I listened to your testimony and found myself making notes here, thinking I could go item by item and dissect and disagree at any point in the testimony. But it would not serve the purpose of explaining to you why I think Section 306, though you make a constitutional argument—let's, you know, let's examine and let's hear the counter argument. I think there is an urgency to change the law. There is urgency in all three of the categories that I have described.

Mr. MOSS. Mr. Vice Chairman, I want to make clear that I concur in your view fully that wrongdoing must be ferreted out and cannot be tolerated. I concur in your view that this Committee has an extremely important oversight function.

Vice Chairman KERREY. If I could interrupt you, Mr. Moss, ferreting out implies that there is some sort of dark and evil conspiracy out there where people are intentionally, you know, that one day, that one morning they wake up and they drink a cup of coffee and they become a bad person. And I think it is very important for me to say a second time, I'm deeply appreciative of the difficulty of making decisions when you close the doors and you don't let the American people see what you are doing because you are concerned about their security.

It is not because we—the initial classification decision is done for good and legitimate reasons.

Mr. MOSS. Right.

Vice Chairman KERREY. But it creates difficulty, because you don't have the same kind of oversight that we have got in other areas and all of us are going to make mistakes. So when I hear you use the verb ferret out, I mean, I want to make sure that I once more insert this notion that the American people should not suffer the illusion that I have got a bunch of nasty people out there intentionally trying to do bad things. It's just—it's not easy to make decisions in a secret or higher environment.

Mr. MOSS. And I appreciate that clarification and I did not mean to suggest anything to the contrary.

Vice Chairman KERREY. I understand. I just wanted to—

Mr. MOSS. But your point that you make I think kind of highlights for me what is significant about this is that to the extent that we are talking about judgments regarding abuse, excessive spending, should someone have authorized spending the extra \$1,000, \$10,000, \$100,000 on a particular piece of equipment or something within a building, those sorts of decisions are, of course, judgment calls that people need to make. And to authorize any covered employee to make that judgment for themselves and say, you know I think this is really grossly wasteful and shouldn't be tolerated, to allow an individual who has then made that decision for themselves to bypass the procedure for sharing classified information and to take the President and his senior advisers out of the process of deciding whether sharing information is in the national interest, I think, raises a constitutional concern.

Vice Chairman KERREY. Mr. Moss, may I just beg the chairman to indulge us to do one follow up on that.

Give me some comments on our concern as we hear from not just employees that are in covered positions but any employee. I mean, you are sitting out there as an employee, you've got a good job, you've got a family, you've got a family that depends on your income. You say I've got a process to take this up the food chain. I can run it up to an inspector general, I can take it to—but I could also lose my job. I mean, my superior may not like the fact that I have reached a conclusion that they are wasting government money or that they are doing something wrong. They may take a dim view of the conclusion; they may disagree with. You know, the old joke about the major telling the general exactly what happened. The general throws him out of the office and the major says, I mean, sir, you didn't get to be general did you by just kissing everybody's rear end. He said, no, but that's how I got to be lieutenant colonel.

And you know, it seems to me that you have got to talk to us a little about it, at least acknowledge that employees are concerned that there could be adverse consequences of disclosure through the normal process.

Mr. MOSS. Well, I think that's a fair point. But to the extent that that is the concern, I think that there are ways of getting at that sort of problem, providing protection for employees that if they go to an inspector general or go to the Attorney General with information that they cannot be punished for having done that—whistle-blower protection in that respect without undermining the Executive branch's authority.

Vice Chairman KERREY. Bingo, you agree with us then. That's all we are trying to do. We have common ground here.

Mr. MOSS. I think we have a great deal of common ground and I think what we are talking about here really is the rare circumstance, but I think that it is essential the Executive branch at some level maintain control over how the information is shared with respect to that rare circumstance.

Vice Chairman KERREY. Dr. Fisher, are you chomping at the bit or do you want to—

Chairman SHELBY. He's wanting to.

Dr. FISHER. I had two comments on listening to the statement by OLC. One comment was I think most of the statements in there have to do with a situation where Congress is going to the President for information, and the President says I am sorry I can't release that to you. There is a long history and I think Members of Congress would agree that lots of times Members of Congress and Committees don't have a right to certain information, but that's not Section 306. That's a different issue.

And I also find in the statement from OLC, a lot of references to what courts have said, lower courts and the Supreme Court, about the President's powerful position in foreign affairs and national security. Most of that's dicta, but still it is interesting to read dicta from the courts. But what the courts are doing here is saying that when it comes to a conflict between the courts asking for information and the President, as with the Watergate tapes case on page 11 of the OLC's statement, any time it has to do with military, diplomatic or sensitive national security secrets, courts have traditionally shown the most—utmost deference to Presidential responsibilities.

That is fine for the courts to make that judgment because they don't have much of a role in foreign affairs and national security. But Congress doesn't have to defer.

So I think that much of the statement doesn't relate to the objective of Section 306 and much of the strength in terms of Presidential responsibility goes to judicial deference and that is not an issue with Section 306. It is Congressional deference and Congress has such a powerful, explicit role in national security to carry out its mission.

Vice Chairman KERREY. Thank you.

Chairman SHELBY. Mr. Moss, you want to respond to that?

Mr. MOSS. I would be happy to.

With respect to Dr. Fisher's point that these issues usually arise in the context of Congress going to the President requesting information, the President making a determination about whether he thinks, in the interest of national security, the information could be shared, how, when and under what circumstances, that is to argue the way the system should work. And in fact, I have some recollection that very early on in this nation's history, there was a question of whether the request should be directed to the President or to his subordinates and determination was made that the request should be made to the President. And the reason for that is that it is the President or delegee that has to make the ultimate decision regarding national security and his foreign affairs powers.

That authority, at least within the Executive branch, is vested in one place.

With respect to the Supreme Court decisions, I agree that there is no Supreme Court decision directly on point here. There is language in cases which I think is supportive of the view that we are stating. And the reason that there are not Supreme Court decisions directly on point is that by and large the accommodation process between the Executive branch and the Legislative branch works and they work it out between themselves to serve both interests. But that is in a process which needs to take place at a level in which the President or his delegates can make determinations about how the system should work and not simply any covered employee believes they have discovered abuse of some sort.

And finally—let me leave it at that.

Chairman SHELBY. Senator Robb.

Senator ROBB. Thank you, Mr. President. I regret that after the vote, I had to participate in a hearing in the Foreign Relations Committee and did not have the benefit of the opening statements of our participants or the questions that you and the Vice Chairman have asked.

I understand there is one area that has not been explored that I would like to explore very briefly and then I will wait for the next round, if that should take place before I have to go to yet another meeting that involves the Armed Services Committee, all three being conveniently scheduled at the same time which is frequently the case for which I apologize.

I would like to ask the question about the need-to-know aspects. It sounded to me like you were getting close to it just a minute ago. But is it the position of the Executive branch of government that the president has the authority, under the Constitution, to withhold classified information that may be direct and specific evidence of a violation of law, a material false statement to Congress, or gross mismanagement within the intelligence community? Is that the position that the Executive branch takes in this case? And if so, from whence does that particular authority derive?

Mr. MOSS. Senator Robb, it's the position of the Executive branch that the President needs to maintain ultimate responsibility regarding how, when and under what circumstances information that could affect the national security or foreign affairs is shared with Congress. This is—that is not to suggest that the information shouldn't be shared with Congress, but rather that the President or his senior advisers need to make the decision to at least have the opportunity to make the decision about how, under what circumstances and what manner that information should be shared so that they can protect national security and foreign affairs interests.

Senator ROBB. Okay. I don't think there would be any disagreement as to the old questions of sources and methods and nondisclosure in those areas. But in terms of the absoluteness of the question, when push comes to shove, assuming that there is some appropriate venue for resolving that particular matter, is it your view or Dr. Fisher's view that the President act or those acting in his stead have the absolute authority to make the final decision, in effect to withhold, perhaps based on the disclosure of sources and methods being inevitable if information is disclosed, notwithstand-

ing the security classification of any of the material and the clearances of the Members of Congress or the Committee to deal with that kind of sensitive information?

Mr. MOSS. Well, I'll let Mr. Fisher address the question, as well. But the Executive branch's view with respect to the question you raised is that the President does need to maintain ultimate responsibility to decide whether in a particular circumstance—and I think what we're talking about is extraordinary, very, very rare circumstances—that information should not be shared, or that it can only be shared under very limited circumstances.

Senator ROBB. Again, I'm suggesting that direct evidence of some kind of wrongful conduct, something that would fall into the purview of the general discussion that has been carried on here. If there—it's your view that if the Executive branch feels strongly enough about it—is that the criteria, that it's too important, under any circumstances to be shared even though it's in essence evidence of wrongdoing by some element of the Executive branch?

Mr. MOSS. Well, I think that if one goes back to the time President Washington first looked at this question following the St. Clair expedition, that what we were talking about there was not dissimilar from what we're talking about here today. There were charges of mismanagement regarding the expedition. The Army was devastated in the expedition and there was an investigation of what happened. Where did this go wrong? Was there misconduct involved here? President Washington convened his Cabinet, including the likes of Thomas Jefferson, and they all agreed that the President needed to maintain ultimate authority to decide whether it was in the public interest to share the information.

There they did decide to share the information and I think that that is what we would likely see in most circumstances. But I think the ultimate answer to the question that you're seeking is that the President does need to maintain ultimate authority to decide not to share information or I think, more likely, to limit the time or manner in which information is shared, even if that information arguably relates to wrongdoing.

Senator ROBB. I think the qualification of time or manner is certainly understandable. But again, when you push the question to the limit—and I appreciate the fact that in support of the argument, you have quoted two Virginians, which is always persuasive with this particular Member.

But again, sometimes the only way we can test the validity of a particular proposal is to subject it to the toughest case scenario. And again, I would ask that—do you believe—and I will leave it at this—do you believe that there are circumstances that the—let's isolate it a little bit more—that the sole matter of concern is a violation or a misdeed or something by the Executive branch, that there are no collateral matters involved but because the disclosure of that misdeed itself would be so significant that the Executive branch or those operating under the authority of the Executive branch could invoke that defense or privilege and withhold the information from a body duly constituted? Again, we did not have the oversight Committees back in the days of Mr. Washington and Mr. Jefferson.

Mr. MOSS. I do think that it is a decision that the President ultimately needs to make, and I think that it's a decision that will depend very much on the context. I mean, one can imagine a circumstance—and I hate to get into hypotheticals here because it's not my field, and I think it's—I don't want to get into—I think it's a question of principle rather than hypothetical. But let me just give you an example. One can imagine a circumstance in which the President meets with a leader of another nation, just the President and the leader of the other nation and their two interpreters in the room, and the leader of the nation says I need to share some information with you so we can negotiate this very important issue. But if I'm going to share this information with you, I need your absolute commitment that the information will never leave this room. The information is then shared after the President makes the commitment.

The question is, can that interpreter on his or her own decide, you know, I think there may have been something that Congress should know about here, perhaps, relating to some abuse. But that interpreter or lower level government employee is deciding for his or herself and could therefore require the President in essence to break his word in that context and undermine the ability of the Executive branch to negotiate in the future.

Senator ROBB. Mr. Chairman, my time is expired, but could I just ask Dr. Fisher if he has a response to that same general question?

Chairman SHELBY. Go right ahead; you certainly can.

Dr. FISHER. I did. When you raised that point I think the concern I have is that, unlike the St. Clair expedition where every bit of information was given to Congress for its investigation, there are recent cases where the Executive branch takes this point of view that foreign affairs is exclusive for the President and Congress is denied information. I'm thinking of the case in the Reagan years where Congress looked into a dispute with Canada. Secretary of the Interior Watt said, sorry, you can't have that information. That relates to foreign affairs.

And this was foreign commerce, something explicitly given to Congress in Article I. Well, eventually the information was revealed. But you can see the frame of mind where, once something falls under foreign affairs and national security, the door supposedly closes to Congress.

Senator ROBB. Mr. Chairman.

Chairman SHELBY. Yes, sir?

Senator ROBB. I just—

Chairman SHELBY. You go ahead.

Senator ROBB [continuing]. Conjured up one hypothetical and I'll—

Chairman SHELBY. You're doing well. You keep on.

Senator ROBB [continuing]. Quit at this, if I may.

But let's assume, for the purposes of the question, that a President issues a Finding that is clearly contrary to U.S. law, and the consequences of the disclosure of that Finding would bring about repercussions that are clearly contrary to the national interests in a significant way. That puts it, I think, as close as you could put it to the question we're trying, at least I'm trying, to grapple with.

Does that change your view in any way if it is put in that manner? In other words, there—I'll use an even more specific hypothetical, because it's been discussed a great deal lately with respect to the question of what opinions are available to the United States against Saddam Hussein, and if a specific directive that was contrary in terms of assassination of foreign leaders or whatever was to be given. Again, I'm—this is nothing classified that I'm talking about. I'm talking about a hypothetical that could not, under our current law, be given.

But let's say that for whatever reason, such as hypothetical finding was issued and this by itself would trigger the kind of an international reaction that would be adverse in ways that I think all of us could understand. What would be the result of an attempt by the President not to share that Finding with the Congress or some other designated group?

Dr. FISHER. Well, the response is mostly for Mr. Moss. But I would say if the President has signed a Finding that's in violation of law, that would be against the law as it now stands, as it was changed after Iran-Contra, or if the President, in violation of the Executive Order was to authorize assassination, then your question would be, would someone in the Executive branch, a lower level employee, be able to share that—

Seator ROBB. In the Whistleblower, yes.

Dr. FISHER [continuing]. To share that with the Committee without going through superiors. I would think that would be a healthy thing to do. But let's see what Mr. Moss says.

Mr. MOSS. Well, I would note that, in fact, the National Security Act does require reporting to Congress by the President and prompt reporting of violations of the intelligence laws. I think that one could imagine some extraordinary circumstance in which a President might determine not to, at least at a particular time or in a particular manner, report a violation of law where there were grave national security implications to doing so. I mean it's obviously an extremely difficult question that you raised that I think goes to, in a very significant manner, the competing tensions at stake here. There are very legitimate interests this Committee, this Congress and the American public has in this area. And there are also potentially very grave national security and foreign affairs ramifications.

The point that I hope to make today is just that those very difficult pressing decisions need to be made not by any covered employee who might form a judgment, which could well be misinformed, but needs to be made through the accommodation process and with the input of the President and his senior advisers.

Seator ROBB. Thank you.

I ought to reiterate that I'm not suggesting that the scenario that I have just discussed in any way relates to reality. I don't anyone to be—to misinterpret that particular fact. And indeed it, Mr. Chairman, is one of the reasons that I prefer that the majority of these sessions be held in closed session rather than open session.

But with that, I thank both the Chairman and the Vice Chairman very much for allowing me to extend a little beyond my time.

Chairman SHELBY. Senator Robb, I agree with you. We don't hold many sessions that are open. I though this, in this particular part

of what we're doing, should be open to the public because I think the public has a great interest in what we're doing and what our goal is here.

Mr. Moss, as I understand it, the Administration argues that the President has exclusive and unimpeded authority to control the collection, the retention and dissemination of intelligence and national security information. I understand, however, that case law, as you—supports the proposition that a grant of exclusive power is recognized only if that grant is explicit in the text of the Constitution. In fact, the only statutes that have been struck down by the Supreme Court on separations of powers grounds have been determined to have violated specific, textual constitutional problems. That's my understanding now. I haven't practiced law in a long time, and you're doing it today.

Could you, Mr. Moss, please direct me to the explicit constitutional text that grants the President of the United States the exclusive authority to regulate national security information? I have a copy of the Constitution here. You've probably got one.

Mr. MOSS. Sure.

Chairman SHELBY. But, I don't find it in the Constitution and you admitted earlier, at least my understanding, that the Supreme Court has never ruled on this directly. Is that correct?

Mr. MOSS. That is correct, Mr. Chairman. The one opportunity they had to do so was in the Garfinkel case—

Chairman SHELBY. Absolutely.

Senator ROBB [continuing]. Where they ended up remanding and vacating the decision as moot.

Chairman SHELBY. Okay.

Mr. MOSS. But the answer to your question is, of course, that there is no provision in the Constitution which says the President maintains exclusive authority with respect to national security information.

Chairman SHELBY. That's what I thought. Okay.

Mr. MOSS. The authority that we're asserting flows from what are express grants to the President in his—in the areas dealing with national security and foreign affairs. And I should note, just more by a point of interest, that the standard that you articulated regarding the balancing is in one of the great Supreme Court decisions on the subject: Justice Jackson's concurring opinion in the Youngstown Steel case, the steel seizure case. And the point of interest that I note is, is that when Justice Jackson—

Chairman SHELBY. But that case is not controlling of what we're trying to do.

Mr. MOSS. No, not at all, rather it simply states the standard that you're referring to here where there is not an express grant of authority to the President, that one engages in an analysis of the competing interests of the branches, and you look to what Congress has said respecting the President's authority in the area as well.

The point I wanted to make was that Justice Jackson, who authored that famous opinion, when he was Attorney General declined to provide to Congress information relating to the FBI—that the FBI had in its possession regarding labor unrest on national security grounds and asserted exactly the point of authority that we're asserting here today.

Chairman SHELBY. Isn't there an extensive precedent for Congressional regulation of government information?

Let me give you some examples. The Freedom of Information Act, you're familiar with that? The Privacy Act of 1974; the Government in the Sunshine Act; the Federal Records Act; the Central Intelligence Agency Information Act; the Foreign Intelligence Surveillance Act; the Classified Information Procedures Act; Presidential approval in reporting of covert actions and the espionage laws. You're familiar with that. Isn't that getting into this area?

Mr. MOSS. Well, I don't dispute at all, Mr. Chairman, that Congress does have authority to legislate in the area of classified information and, in fact, Congress has made criminal certain disclosures of classified information.

Chairman SHELBY. Absolutely.

Mr. MOSS. The point I mean to make is that, in this area where there are foreign affairs and serious national security interests at stake, the President at least needs the opportunity, though, to assert on behalf of the Executive branch that his power, his authority to fulfill his constitutional responsibilities not be undermined.

Chairman SHELBY. But not pre-imminent authority, is it? You're not saying that he's asserting a pre-imminent authority in this area, are you?

Mr. MOSS. I think there are certain areas in which the President does have unique authority, but I don't dispute that Congress also has authority respecting foreign affairs and national security. As Dr. Fisher mentioned, Congress has authority dealing with the regulation of foreign commerce.

Chairman SHELBY. You mentioned the Mink case, the Environmental Protection Agency versus Mink—I know you're familiar with it—but didn't the Supreme Court of the United States, in that case, confirm, quote, "that classified or national security information is not insulated from Congressional control." In other words, it's not denied to us.

Mr. MOSS. I'm not familiar with that, Mr. Chairman, but I'd be happy to—

Chairman SHELBY. Review it.

Mr. MOSS [continuing]. Look into it and report back.

Chairman SHELBY. Would you get back with us on that?

Mr. MOSS. I would be happy to.

Chairman SHELBY. If the Constitution, Mr. Moss, does not explicitly grant the President exclusive authority to control classified information—I think you conceded that, at least I thought you did—and the Supreme Court recognizes our authorities in this area, why does the President argue that we may not act upon this particular subject?

Mr. MOSS. Well, I think the point is not that Congress lacks authority in this area. As I indicated earlier, Congress has adopted laws dealing with the treatment of classified information, namely in criminalizing certain disclosures of classified information. The point that I want to stress though, is that the President also has substantial authorities in this area in that if individual Executive branch employees are allowed to take it upon themselves to determine how, when, and under what circumstances information will

be disclosed, it takes the President and his senior advisers out of the process.

Chairman SHELBY. I don't mean to be rude—that they would take it upon themselves what information would be disclosed. We're not talking about disclosed to the leading media people in town. We're not talking about disclosing to anybody on the street. We're talking about, as Senator Kerrey mentioned earlier, to disclose to Members of the Intelligence Committee in the Senate and the House who are dealing with classified information every day that we're here. Is that right, Senator Kerrey?

Vice Chairman KERREY. That's what the law says.

Mr. MOSS. Absolutely, Mr. Chairman, and again, it's my understanding that an enormous quantity of intelligence information is shared with these Committees. And what I am talking about is the rare, extraordinary circumstance in which the President might determine, for national security or foreign affairs reasons, that there is some need to limit the disclosure to determine how, when and under what circumstances that the information will be disclosed. And I note in that regard that Congress itself has recognized that need itself in certain circumstances. This National Security Act does permit limited disclosures of particularly sensitive, confidential information that may be—where there may be a vital national interest at stake.

Chairman SHELBY. So, Mr. Moss, are you saying that it is within our constitutional authority to pass legislation governing the handling of national security information between the branches of government?

Mr. MOSS. No, Mr. Chairman.

Chairman SHELBY. Well, okay. We have done some of that, have we not?

Mr. MOSS. Well, there certainly are laws that relate to the subject. I mean, for example—

Chairman SHELBY. Some of them that I've recited earlier.

Mr. MOSS. Yes, Mr. Chairman. For example, in addition to the laws dealing with the imposition of criminal sanctions, there are laws that require the Executive branch to share with Congress information, which presumably would be classified information. And again, I am thinking principally of the National Security Act.

But in that context, and what distinguishes that context from this context, is that the information is shared through the normal process where the President or his senior advisers—those individuals to whom he has delegated authority—can make determinations regarding the national interest in how, when and under what circumstances the information is shared.

Chairman SHELBY. Senator Kerrey.

Vice Chairman KERREY. I am still—Mr. Moss, I must say, I am a little confused by your conclusions. I mean, you make it very clear. You say there is a critical constitutional flaw in Section 306 and that is because at best any—and you have added the word appropriately covered Federal employee having access to classified information with a unilateral right to circumvent the process which the Executive and Legislative branches accommodate each others interests in sensitive information.

I hear the narrowly drawn argument, but again I don't—given what this legislation is attempting to do and given especially the broad powers that the Legislative branch is given under Section 8, Article I of the Constitution, let me just ask both of you in simple terms. Let's say Congress passes this law this year, which I hope they do. And let's say, God forbid, the President vetoes it and we override the veto. Now, let's fast forward a couple of years, and some employee decides to bring information to Congress and the President decides to sue to prevent that employee from doing it and now it goes to the court.

You know, given the Section 8, Article I powers that are granted to this Congress, I just ask both of you, do you think that the United States Supreme Court would rule that the law is a constitutional or unconstitutional?

Dr. FISHER. Well, I would say that Congress is operating under the authority it has and the court would uphold the statute, and I think that relates to what Mr. Moss said about Justice Jackson and the concurrence in *Youngstown*. The Presidential power is particularly broad when Congress is silent or passive. I think we all agree that is a zone of twilight and if Congress doesn't do anything, the President has a lot of room to roam. But here Congress is stepping in and placing restrictions under the authority it has under the Constitution. I think the court would uphold it.

Mr. MOSS. I think that—and I would leave it to the litigators in the Department of Justice perhaps to more definitively resolve kind of a prediction of how the court would handle it. But my own sense is that the court would do one of two things. Either it would uphold the position of the Executive branch and conclude that the President does need to maintain at least the ability to determine how, when and under what circumstances the information is shared. Or the court would do what courts have done in this area as well, which is avoid the question. In the *Garfinkel* case, the court sent the decision back to the District Court vacating the decision as moot and said to the District Court, if you can avoid the constitutional question here, you should do so.

The Court of Appeals for the District of Columbia Circuit tried valiantly to do the same thing in the AT&T case some years ago. And I think that, in part, the message that the court is sending in that context is that this is the sort of issue that the Executive and Legislative branches ought to work out between themselves. They ought to find some way to accommodate the fair interests and that there ought to be a continuation of the accommodation process whereby the President, whenever possible, shares information with Congress. And if the President and Congress have different views on whether particular information can be shared, they work it out.

Vice Chairman KERREY. And I would say in response to that, Mr. Moss—and I'll let Dr. Fisher respond as well—I have great respect for the argument. But, I mean, we are a nation of laws. And what we're talking about, establishing a legal protection for employees who bring information to authorized individuals on this Committee for the purpose of maintaining trust of the American people, and protecting their money and keeping them safe. My own view is that—and self-interest is no doubt driving me in this direction—that Dr. Fisher's opinion of what the Supreme Court would do if

the President were to sue to prevent an employee from bringing information that couldn't be demonstrably proven, put the nation at absolute risk. I agree with you, there would be extraordinary circumstances. You're at war, for example. There'd be situations where the court is likely to hold in a President's favor in that narrow situation. But you can't put that—you can't describe the National Reconnaissance Office buildings or many other things that need to be delivered to this Committee that aren't going to get delivered if the law doesn't protect the employee and give that employee the right to do it.

Dr. Fisher.

Dr. FISHER. I wanted to comment on what Mr. Moss said about those cases, the AT&T cases. I don't think that—I think those are very interesting, but I don't think they apply to the question you raised because those AT&T cases involved a dispute between a House Committee wanting information and the Justice Department wanting to deny that information. Judge Leventhal, through a series of cases, tried to work out an accommodation. And Mr. Moss is correct, they found an accommodation.

But that's a situation where there was no law, where the two branches were contesting ground, and Judge Leventhal was trying to guide them to a solution. But you asked the question whether this law if it happened to be vetoed and overridden, would the court uphold it? Now we're talking about a law, and I think the court would uphold it.

Chairman SHELBY. Existing statutes. Section 413(b) of Title 50 of the U.S. Code directs the President to, quote, "ensure that any illegal intelligence activity is reported promptly to the Intelligence Committees." Section 13E states the following: "Nothing in this Act shall be construed as authority to withhold information from the Intelligence Committees on the grounds that providing the information to the Intelligence Committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources or methods."

How is our proposed legislation, Mr. Moss, conceptually different from Section 413 of Title 50? Are you familiar with that?

Mr. MOSS. I am, Mr. Chairman.

The conceptual difference between the two is that Section 413(b) permits the information to flow to Congress through the President, or whatever senior adviser the President may choose to handle matters of that sort. It allows the Executive branch to determine how, when and under what circumstances the information would be shared. And it permits the Executive branch in an appropriate circumstance which, again, I would stress, I would imagine to be extraordinarily rare, but to assert a constitutionally based form of privilege, and not to provide the information based on some constitutionally based privilege.

In that respect, I don't know that President Bush was referring specifically to Section 413(b), but he did make clear his view that nothing in the National Security Act would trump the President's authority to determine the circumstances in which classified information was shared with Congress.

Chairman SHELBY. Last year there was some discussion among my colleagues in the House on whether employees within the Intel-

ligence Community could already bring information to the Committee, that is, to the Intelligence Committee under Section 413(e) of Title 50, and avoid, Mr. Moss, being accused of an unauthorized disclosure.

None of us are interested in unauthorized disclosures. You know what we're after. We're after a safe harbor, a way to have people that know about corruption, know about wrongdoing, to come to the Intelligence Committees if it's in a classified area, to disclose that to us on the Committee—anybody. You understand that?

Mr. MOSS. I do understand.

Chairman SHELBY. You want to answer the question on that? I said that they could already bring information to the Committee. You know, there was some discussion. I don't know if they could do that or not, but some of the people in the House thought they could. Section 413 seemed to be very clear on this issue. In fact, Executive Order 12333 directs Executive agency heads engaged in intelligence activities to cooperate with Congress in accordance with Section 413, Title 50, that I just cited of the U.S. Code.

I understand, however, that the Administration interprets the term withhold—a very important term—withhold to mean that they may not withhold information specifically requested by a Committee with proper jurisdiction—dealing with intelligence, for example. In other words, if we don't ask for it, it's not being withheld. Is that right?

Mr. MOSS. I don't know. I'm not familiar with the history that you've discussed.

Chairman SHELBY. Okay. So you're not familiar with the Administration's interpretation of Section 413(e) then, is that correct?

Mr. MOSS. Well, as I sit here now, I don't recall whether the Section 413(e) was expressly addressed in the opinion that the Office of Legal Counsel prepared on a related issue a little over a year ago. But the theory of that opinion was that in light of the constitutional concerns in this area, that existing statutes had to be construed in a fashion which was consistent with the President's constitutional authority to control how, when, under what circumstances classified information is shared.

Chairman SHELBY. You seem to imply that the President's authority, Executives's authority, to withhold information is not absolute, but may be, perhaps, a matter of timing.

Mr. MOSS. Well, I think that the authority is absolute to the extent that it is consistent with legitimate foreign affairs or national security interests. I think that—

Chairman SHELBY. Excuse me a minute. How can it be absolute in view of some of these other statutes that have been upheld that we've been talking about?

Mr. MOSS. Well. I don't think a statute has ever been upheld holding—which provided that the President—that the President may not control the access, providing of information to Congress.

Chairman SHELBY. Senator Kerrey.

Vice Chairman KERREY. Done. Thank you.

Chairman SHELBY. We have a number of questions we'd like to submit to both of you for the record, and other Members that are in other Committees. But we appreciate your attendance today. We appreciate your suggestions and your concerns, but we're going to

push this legislation because we believe it's in the best interests of the American people

Thank you, both.

Mr. MOSS. Thank you, Mr. Chairman.

Dr. FISHER. Thank you, Mr. Chairman.

[Thereupon, at 11:40 a.m., the hearing was concluded.]

