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National security information and the PURSUE Initiative

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CONTENTS

Roadmap

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- 01 Overview: national security and separation of powers
 - 02 The government's secrecy architecture
 - 03 Disclosures to AARO
 - 04 Disclosures to the PURSUE Initiative
 - 05 Disclosures to Congress
 - 06 Conclusion and questions
-

Three branches minus one equals confusion

Under the Constitution, the federal government comprises three branches:

- **Legislative** branch (Congress)
- **Executive** branch (President)
- **Judicial** branch (Supreme Court)

The legislative and executive branches are the "**political branches**".

The judicial branch resolves disputes between the political branches.

But the federal courts **intentionally** leave some disputes unresolved.

- This **doctrine of avoidance** is notable in national security.
- It is intended to promote flexibility, cooperation, and productive rivalry between the political branches.
- Often it just confuses everyone.



The constitutional scheme differs from reality after World War II

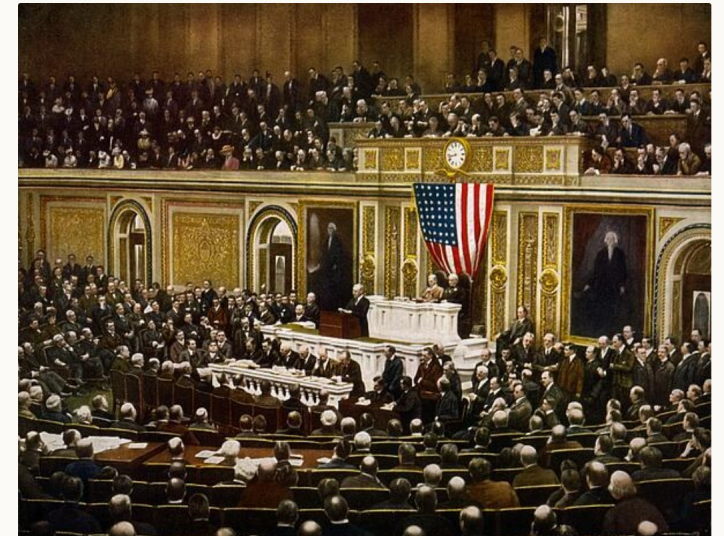
Congress and the President **both** have constitutional national security powers.

CONGRESS

- Power to provide for the common defense. U.S. Const. art. 1 § 8.
- Power of the purse. U.S. Const. art. 1 § 9.
- The only branch the Constitution expressly recognizes as a classification authority: *"Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting . . . as may in their Judgment require Secrecy."* U.S. Const. art. 1 § 5.

PRESIDENT

- Commander in Chief. U.S. Const. art. 2 § 2.
- Shall *"take Care that the Laws be faithfully executed."* U.S. Const. art. 2 § 3.



The modern presidency: Justice Jackson's three-part framework

The two branches **cooperate** when Congress passes a bill the President signs. That is a **statute**, which is binding law.

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

An active branch can **displace** an inactive one.

"When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority." Id.

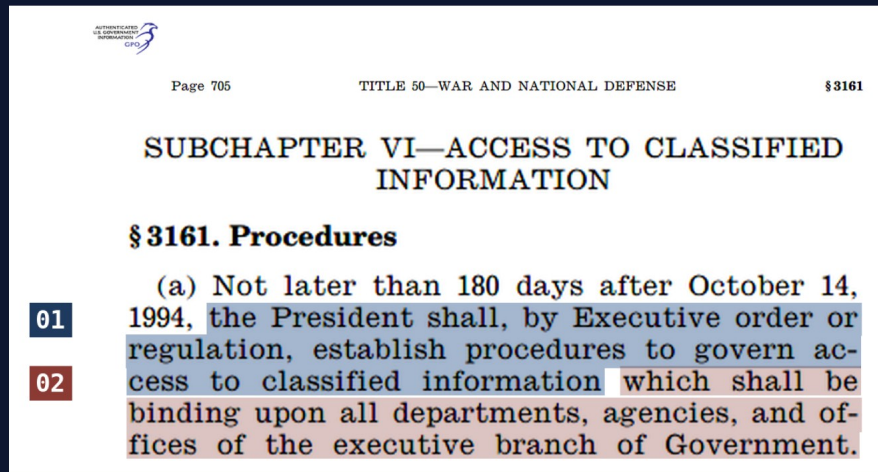
They **compete** when each branch invokes its powers against the other.

"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." Id.



The National Security Act: Congress and the President cooperate on classifying information

Here is a statute, **binding law**: 50 U.S.C. § 3161(a) - Security Act of 1947 (as amended).



01 "the President shall, by Executive order or regulation, establish procedures to govern access to classified information"

02 "which shall be binding upon all departments, agencies, and offices of the executive branch of Government"

That cooperation is confined

01 *"[T]he President shall, by executive order or regulation, establish procedures to govern access to classified information."*

- Congress and the President cooperated by enacting a statute that **delegates** specific authority to the President.
- The President promulgated various orders, including Executive Order 13526 (2009), which prescribes a system for (a) classifying, (b) safeguarding, and (c) declassifying information; authorizes special access programs; and further delegates authority to **other** officials.

02 *"Which shall be binding upon . . . the executive branch."*

- Under Jackson's framework, the President's power to classify information is at its **maximum** due to statute, but generally **confined** to the executive branch.
- **This is the most frequently misunderstood concept.**



Information "classified" by the executive branch and "national defense information" under statute

The President's decisions over classified information are generally **not binding on Congress or the courts.**

- Leaking information the executive branch determines is "classified" is not a crime.*

Congress and the President **cooperated** to enact another statute, the Espionage Act of 1917 (as amended), which **criminalizes** improper handling and transfer of "information respecting the national defense" ("**NDI**").

- NDI often **overlaps** with what the executive branch determines is "classified."
- But a **jury** determines NDI. *Gorin v. United States*, 312 U.S. 19 (1941).

Why?



* But see 18 U.S.C. § 793(c).

Prosecution: three branches minus none

So the President cannot, by classifying information, send someone to prison.

THOUGHT EXPERIMENT

If the President **classified** the White House lasagna recipe, does the chef commit a felony under the Espionage Act by selling it to North Korea?

A jury in court proceedings **independently** determines whether that information is NDI.

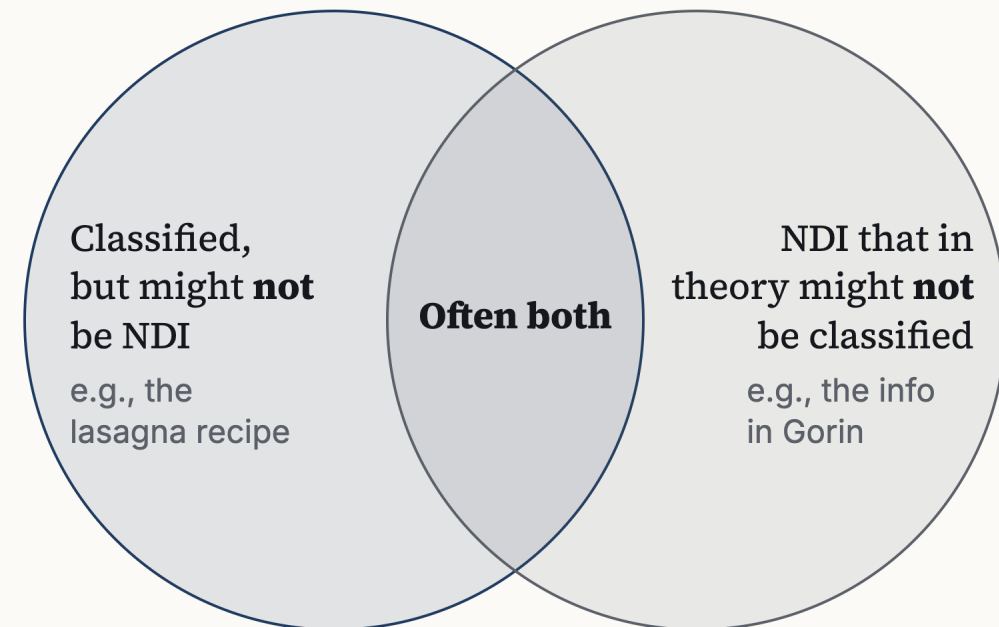
The Atomic Energy Act of 1954, a statute not considered here, presents different, although generally analogous, issues.

CLASSIFIED

The executive branch decides

NDI

A jury decides



Disciplinary action: executive orders from the boss at work

Nevertheless, the President's classification decisions are "*binding . . . upon the executive branch.*"

- They are "**orders from the boss at work.**"
- When those orders are disobeyed, the boss's remedy is **disciplinary**: firing, demotion, clearance-stripping.
- Revocations of clearance have limited appeals in administrative proceedings.
- The Justice Department **separately** can prosecute under the Espionage Act to the extent NDI is implicated.



NDAs with agencies and government contractors

CLASSIFICATION (When Filled In)	
SPECIAL ACCESS PROGRAM INDOCTRINATION AGREEMENT	
An Agreement between	_____ and the United States
(Name - typed or printed) (Last, First, Middle Initial)	

Employees and contractors of the executive branch might **also** sign confidentiality, or non-disclosure, agreements ("NDAs").

- NDAs are **voluntary** contracts.
- NDAs only bind persons **party** to them. T can't waive a contract between A and B.
- You can't go to prison for violating a contract.
- An NDA entitles the non-violating party to court enforcement for (a) **money** and/or (b) an "**injunction**," a court order to make someone do or stop doing something.

You can't "**contract to a crime**":

- **No one** can lawfully contract to murder, steal, embezzle, or misappropriate funds directed by Congress.
- An NDA that says otherwise is **unenforceable**.



Recap: the parade of four horribles

01 • ADMINISTRATIVE LAW

Classification

The President is granted broad discretion by the National Security Act and other statutes to determine who can **access** or **control** classified information.

Administrative appeals processes implement determinations and resolve interagency disputes.

02 • CRIMINAL LAW

Prosecution

The Espionage Act and related **statutes**.

People go to prison all the time for transmitting NDI to reporters and foreign powers.

No one has ever gone to prison or faced prosecution for sharing NDI with Congress.

Members of Congress and their staffs have **constitutional immunity** for "legislative acts," e.g., Floor and committee statements. U.S. Const. art. 1 § 6.

03 • EMPLOYMENT LAW

Discipline

Orders and regulations in the executive branch.

This happens.

Rare for disclosures to Congress, even where the executive branch learns of them.

04 • CIVIL LAW

Contract

Money damages and injunction.

Contracts for crimes like murder or misappropriation of congressional funds are **unenforceable**.

The government's own NDAs expressly preserve the right of **Congress** to information.

Congress and the President cooperate on limited UAP disclosure

Here is another statute, **binding law**, which governs the All-domain Anomaly Resolution Office ("**AARO**"):

01

The Secretary of Defense, acting through the head of the Office and in consultation with the Director of National Intelligence, shall establish a secure mechanism for authorized reporting of—

02

03

(A) any event relating to unidentified anomalous phenomena; and
(B) any activity or program by a department or agency of the Federal Government or a contractor of such a department or agency relating to unidentified anomalous phenomena, including with respect to material retrieval, material analysis, reverse engineering, research and development, detection and tracking, developmental or operational testing, and security protections and enforcement.

04

(b) Protection for individuals making authorized disclosures

05

An authorized disclosure—

06

(A) shall not be subject to a nondisclosure agreement entered into by the individual who makes the disclosure;

07

(B) shall be deemed to comply with any regulation or order issued under the authority of Executive Order 13526 (50 U.S.C. 3161 note; relating to classified national security information) or chapter 18 of the Atomic Energy Act of 1954 (42 U.S.C. 2271 et seq.); and
(C) is not a violation of section 798 of title 18 or other provision of law relating to the disclosure of information.

01

(a)(1) Congress and the President agree to the mechanism.

02

(a)(1) Establishes receiving mechanism.

03

(a)(1)(A)–(B) Broad definition of UAP events and activities.

04

(b) Any individual may disclose.

05

(b)(1)(A) Contract. Overrides any NDA.

06

(b)(1)(B) Classification. Overrides all information restrictions.*

07

(b)(1)(C) Prosecution. Overrides the Espionage Act and any other secrecy law.

SOURCE: 50 U.S.C. § 3373B • * EXCEPTION NOTED IN THE SUMMARY THAT FOLLOWS

KEY

Authority

Discloser

Disclosed Info

Recipient

Relief

Congress and the President cooperate on limited UAP disclosure, and oversight

This statute also prohibits any **disciplinary retaliation** by the U.S. government or a contractor for making disclosures to AARO:

01

(2) Prohibition on reprisals

(A) Protection

01 An employee of a department or agency of the Federal Government, or of a contractor, subcontractor, grantee, subgrantee, or personal services contractor of such a department or agency, who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, a personnel action, including the revocation or suspension of security clearances, or termination of employment, with respect to any individual as a reprisal for any authorized disclosure.

01

RELIEF

Prohibits any retaliation by government or contractor.

SOURCE: 50 U.S.C. § 3373B · PROHIBITION ON REPRISALS

KEY Authority Discloser Disclosed Info Recipient Relief

The statute covers the four horribles, at least on paper

In summary, Congress and the President made **binding law** to:

- Define UAP **events** and **activities** broadly.
- Cover the **entire** federal government and federal contractors.

- **Limit** federal government and contractor authority to:

LIMITS ON AUTHORITY

Classify information beyond AARO, with a potentially major exception.*

Prosecute individuals for disclosures to AARO.

Enforce NDAs to which the executive branch is party.

Take **disciplinary actions** or retaliate for authorized disclosures.

* Other than any special or compartmented access program fully briefed to applicable congressional authorities. 50 U.S.C. § 3373b(4)(A).

PURSUE & the Pentagon directive for limited disclosure

On September 14, 2026, the Pentagon issued the following legal waiver:



U.S. Department of War

In direct alignment with President Trump's mandate for comprehensive transparency on Unidentified Anomalous Phenomena (UAP), the Department of War (DOW) today announced the issuance of a targeted legal waiver. This waiver establishes an authorized, legally protected disclosure mechanism for current and former personnel to provide UAP-related National Defense Information (NDI) to designated representatives of the PURSUE effort.

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Under this directive, all current and former DOW service members, civilian personnel, and contractors holding or previously granted access to UAP-related National Defense Information (NDI) are authorized to disclose protected information directly to official PURSUE representatives. The waiver supersedes civil and administrative enforcement provisions contained within Non-Disclosure Agreements (NDAs) and Special Access Program Indoctrination Agreements (SAPIAs) previously executed within the United States, strictly for communications directed to the PURSUE team.

01

02

03

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Agency directive by the Pentagon.

Applies to three categories of persons.

Purports to apply to NDI.

Designates a channel.

Applies to those NDAs the Department can waive.

SOURCE: U.S. DEPARTMENT OF WAR • SEPTEMBER 14, 2026

KEY  Authority  Discloser  Disclosed Info  Recipient  Relief

Comparison of disclosures to AARO and PURSUE

ELEMENT	AARO • 50 U.S.C. § 3373B	PURSUE INITIATIVE
Authority	Statute	War Department directive
Discloser	Any individual	Current or former War Department service members, civilian personnel, and contractors
Disclosed information	All UAP-related information of any event, activity, or program by the U.S. government or any contractor	Purportedly, UAP-related NDI capable of waiver by the War Department • Does not purport to affect other agencies • Purports to cover NDAs solely between Pentagon contractors and their employers
Recipient	AARO	To-be-designated PURSUE representatives
Relief	Prosecution by U.S. government • Disciplinary action by government or contractor • Civil suit by anyone	According to the War Department, civil suit or administrative action under an NDA executed in the U.S. • Silent as to prosecution (determined by Justice Department) • Silent as to disciplinary action

Political effects versus legal consequences of PURSUE

POLITICALLY

Signals transparency and a step forward.

LEGALLY

Creates confusion and potential mistrust.

LEGALLY: DISCLOSURES TO PURSUE ARE NARROWER THAN TO AARO

What if a **non-Pentagon employee** discloses to PURSUE instead of AARO?

How can the Pentagon, by directive, waive an NDA **it is not party to**? Possible if NDAs incorporate agency guidance.

- What if a person with an NDA with a Pentagon contractor discloses to PURSUE?
- What if an employee of a contractor **other** than to the Pentagon discloses to PURSUE?

Can AARO share with PURSUE disclosures made to AARO?

The directive purports to govern NDI. But a **jury** determines NDI. Gorin, 312 U.S. at 31-2.

A simple fix

"In consultation with the Director of National Intelligence, the Secretary of War hereby establishes the PURSUE Initiative as a secure mechanism for reporting under 50 U.S.C. § 3373b. Representatives of the PURSUE Initiative are as follows"

Why is UAP disclosure so unlike any other classified disclosure to Congress?

Whistleblowers and other potential sources of alleged UAP information have stated that they will **not** provide **classified information** to Congress behind **closed doors**, citing fears that include:

01 Prosecution (criminal law)

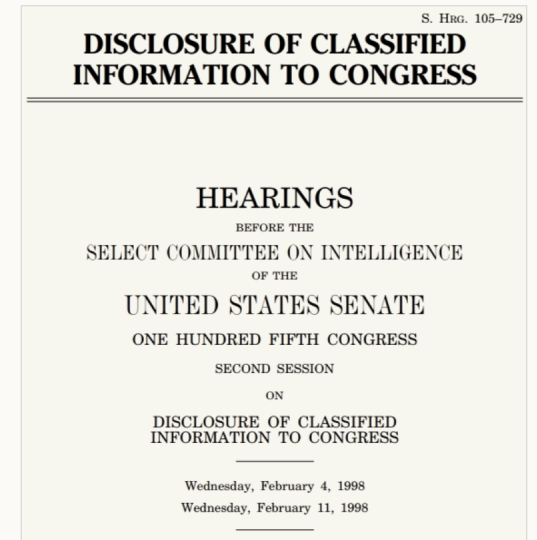
02 Contract (civil law)

03 Discipline (employment law)

04 Physical harm (illegal)

This **dissuades other sources from coming forward**, perversely chilling the very disclosure these sources state should occur.

These statements misunderstand laws affecting national security information.



01 • Prosecution

Executive branch classified information determinations are generally not binding on Congress or the courts.

The courts have **never convicted** someone under the Espionage Act or other U.S. law for providing classified information behind closed doors to Members of Congress.

The Justice Department has **never charged** someone for providing classified information to Congress.

- The Department occasionally claims that statutes regulating the flow of classified information to Congress are unconstitutional. See, e.g., Access to Classified Info., Memorandum from Acting Assistant Att'y Gen. to Gen. Counsel, Cntr'l Intel. Agency (1996).

The Intelligence Community Whistleblower Protection Act ("**ICWPA**") and reporting requirements like 10 U.S.C. § 119 set a **floor**, not a **ceiling**, on disclosures to Congress.



02 • Contract



No court has ever held an NDA prevents sharing classified information or NDI with Congress.

Government NDAs expressly incorporate Congress's information rights, **whatever they are:**

"These provisions . . . do not supersede . . . obligations, [or] rights . . . relating to . . . communications with Congress," nor "supersede . . . Section 7211 of Title 5, United States Code (permitting disclosures to Congress)." Form of Classified Information Nondisclosure Agreement, Standard Form 312 (2023).

"These restrictions . . . do not supersede . . . Section 7211 of Title 5, United States Code (permitting disclosures to Congress)." Form of Special Access Program Indoctrination Agreement (2020).

03 • Employment retaliation

Retaliation remains possible for disclosures to Congress outside the procedures of the ICWPA.

- UAP whistleblowers have alleged retaliation even after following the ICWPA.
- Retaliation has happened before in non-UAP contexts.

Congress has **limited ability** to prevent or undo the executive branch's "orders from the boss at work."

Committees and members are **generally** good at keeping confidences, but exceptions overwhelm reality given the stakes.

At the same time, it is difficult for Members to **act** on information without outing the source. Burning one source means **no more sources**.



Jackson's "zone of twilight" equals a zone of silence by the courts, and hence opportunity

Does Congress itself have a right to **access** classified information held by the executive branch? Or does the executive branch have a right to keep it?

- Federal courts have avoided deciding the question.
- It involves esoteric legal theories.

Possession is 9/10 of the law: whichever branch "gets," or gets to keep, the information **wins**, because a **court is unlikely to act**.

When courts intervene, they urge the branches to pursue "**accommodation**." United States v. AT&T, 567 F.2d 121, 127, 130 (1977). **How accommodation in the AT&T cases played out:**

i	ii	iii	iv
House commerce subcommittee subpoenaed a telecom company for warrantless wiretaps.	Subpoena sought "request letters" by the FBI to the company to conduct taps.	DOJ intervened to quash.	Subpoena withered pending "accommodation."

It can be counterproductive for an "outside" committee to subpoena the executive branch without a clear strategy.

Congressional path for (mostly) protected public disclosure

If any Member of Congress gets the information, lawful public disclosure is possible.

THE SOURCE

No person has ever been **prosecuted** or **sued** for providing classified information to **any** Member or committee of Congress in private, in contrast to telling a newspaper.

- **Disciplinary action remains possible** if the source is unmasked.

MEMBERS AND STAFF

Members of Congress and their staffs have **constitutional immunity** for "legislative acts," e.g., Floor and committee statements and presentations. U.S. Const. art. 1 § 6; *Gravel v. United States*, 408 U.S. 606 (1972).

- Members **also** face possible disciplinary action from their caucus, e.g., loss of committee assignments or expulsion.
- Neither has **ever** happened for accidental or intentional disclosures.

CLEARANCES

Members don't have executive branch security clearances. Why not?

Congress asserts a right to **all** information. A clearance is viewed as a **limitation**.

One difficulty is lack of understanding:

- The executive branch repeats its view on national security powers so often that **everyone believes it**.
- The media benefits by focusing attention on prosecutions for leaks **to the press**.

Conclusion

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- When it comes to national security, **branches** of government behave more like **different governments**.
-
- **Statutes** demonstrate **agreement** between Congress and the President to either expand or limit legislative and executive power.
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- AARO's statute is **both higher authority and broader** than the Pentagon-only PURSUE directive.
-
- UAP whistleblowers and other insiders are skeptical of both AARO and PURSUE.
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- At the same time, they won't share classified information with Congress.
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- Concerns around disciplinary action, clearance, and livelihood are warranted, but **the stakes around prosecution and NDAs or lawsuits are different from the public narrative**.
-
- **A path for lawful public disclosure through Congress exists, and it doesn't require a majority to pass a bill.**
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Questions?

Thank you.