In the
United States
Foreign Intelligence Surveillance Court

IN RE OPINIONS & ORDERS OF THIS COURT
ADDRESSING BULK COLLECTION OF DATA
UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

AMICUS APPENDIX

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TABLE OF CONTENTS FOR AMICUS APPENDIX

APPENDIX A: CONSTITUTIONAL V. NON-CONSTITUTIONAL COURTS & TRIBUNALS

Amicus note: The second question refers to the Court's status as "a court of limited or specialized jurisdiction." The type of court (constitutional versus non-constitutional) significantly impacts the legal analysis, as "the judicial power of the United States" necessarily flows through Article III. However, there are no good summaries in the secondary literature of the distinction between Article III courts, Article III specialized courts, Article I courts, and administrative tribunals, and which courts fall into which categories. Appendix A thus provides the Court with the legal underpinning of the different courts, as well as a discussion of their categorization and jurisdiction as supported by the Court's doctrine, statutory law, and scholarly literature bearing on the subject. Importantly, ***in none of the statutes establishing either regular or specialized Article III courts does Congress explicitly grant the courts jurisdiction over their own opinions.***

I. OVERVIEW

The Constitution provides for "the judicial power of the United States" to "be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, §1. Congress, in turn, may "constitute Tribunals inferior to the Supreme Court." *Id.* art. I, §8. Article III courts "are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise." *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929).

There are eight federal Article III courts currently operating in the United States. Five have specialized subject matter jurisdiction (the Foreign Intelligence Surveillance Court; the Foreign Intelligence Surveillance Court of Review; the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of International Trade, and

the Judicial Panel on Multidistrict Litigation).[1] *See* Tables A-1, A-2. At least nine specialized Article III courts no longer exist (four Customs Courts, two Emergency Courts of Appeals, the Commerce Court, the Special Railroad Court, and the Court of Claims).

Structure plays an important role in determining whether a tribunal falls within Article III. Specifically, it must satisfy the constitutional requirements of unity, supremacy, and inferiority. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv. L. Rev. 643, 649 (2004). During the Constitutional Convention, the Framers deliberately rejected a proposal that would have allowed for multiple supreme courts, as existed in England and a number of states.[2] They decided to adopt a unitary model, with all federal judicial

[1] A sixth Article III specialized court, the Alien Terrorist Removal Court, was created by Congress in 1996, but it has never met or heard a case. *See* Table A-2 and discussion, *infra*.

[2] The Virginia Plan included a resolution that a "National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behavior; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony." 1 *The Records of the Federal Convention of 1787*, at 21-22 (Max Farrand ed., rev. ed. 1966).

power vested in one Supreme Court and in such inferior tribunals as Congress might create.[3] The Committee of Detail deliberately replaced the term "tribunals" in Article III with "courts."[4] It also required life tenure for Article III but did not carry over

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The New Jersey Plan, in contrast, "resolved that a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive, and to hold their offices during good behavior, to receive punctually at stated times a fixed compensation for their services in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution; that the Judiciary so established shall have authority to hear and determine in the first instance on all impeachments of federal officers, and by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies and felonies on the high Seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue: that none of the Judiciary shall during the time they remain in office be capable of receiving or holding any other office or appointment during their time of service, or for — thereafter." *Id.* at 244.

[3] Following weeks of deliberation, the Convention forwarded the following resolutions to the Committee of Detail: "That a national Judiciary be established to consist of one Supreme Tribunal – the Judges of which shall be appointed by the second Branch of the national Legislature – to hold their Offices during good Behaviour – to receive punctually at stated Times a fixed Compensation for their Services, in which no Diminution shall be made so as to affect the Persons actually in Office at the Time of such Diminution…That the Jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony…That the national Legislature be empowered to appoint inferior Tribunals." 2 *id.* at 132-33.

[4] The Wilson drafts, which appears to be the last one before the final committee report, stated: "The Judicial Power of the United States shall be vested in one Supreme ~~National~~ Court and in such ~~other~~ [inferior] Courts as shall, from Time to Time, be constituted by the Legislature of the United States. The Judges of the Supreme ~~National~~ Court shall ~~be chosen by the Senate by Ballott. They shall~~ hold their Offices during good Behaviour. They shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance

any similar requirement to Article I. *Id.* The result meant that neither Congress nor the Executive could create independent courts invested with the judicial power and free from the Supreme Court's control and oversight.[5] *See* Pfander, 648-649, 681-684 (arguing that the shift in language provided greater latitude for Congress "to constitute tribunals with judges who would not necessarily meet the more restrictive tenure-in-office and salary requirements of Article III, while preserving state courts' power).

In determining whether an entity falls within Article III, Courts give some weight to Congressional intent. However, the key considerations, in addition to situation within the Article III appellate structure, are whether the statute creating it complies with the constitutional requirements of good behavior, compensation, and case-or-controversy. *United States v. Ferreira*, 54 U.S. 40, 47 (1851); *Glidden Co. v. Zdanok*, 370 U.S. 530, 552 (1962) (Harlan, J., plurality opinion). "The fact that an

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in Office." (strikethroughs in original, bracketed text added by Rutledge). *Id.* at 172; *see also* U.S. Const. art. III, §1.

[5] In England, for instance, "the Crown enjoyed a prerogative to create a new set of tribunals or commissions to handle specific claims. The colonists who declared their independence form England viewed this prerogative power of court creation with great suspicion. Prerogative courts, which were thought to include both Star Chamber and the courts of high commission that handled state trials, were seen, in the colorful but representative phrase of St. George Tucker, as 'engines of oppression and tyranny.'…Tucker, accordingly, was lavish in his praise of Article I and Article III, which operated to 'deny to the executive magistrate' the power to create prerogative courts, and instead placed the court-making power in the federal legislature." James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv. L. Rev. 643, 649 n.16 (2004).

agency uses court-like procedures does not necessarily mean it is exercising the judicial power." *Oil States Energy Servs., LLC v. Green's Energy Grp., LLC*, 138 S.Ct. 1365, 1378 (2018). Similarly, just because a "tribunal [is] called a court and its decisions called judgments [does] not alter its character or enlarge its power." *Williams v. United States*, 289 U.S. 553, 563 (1933). "Nor does the fact that an administrative adjudication is final and binding on an individual who acquiesces in the result necessarily make it an exercise of the judicial power." *Oil States Energy Servs.*, 138 S.Ct. at 1378. *See also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 280 (1856) (recognizing that the "auditing of accounts of a receiver of public moneys" as well as "duties the performance of which involve[] an inquiry into the existence of facts and the application to them of rules of law" may, "in an enlarged sense" be judicial acts, but "that they involve the exercise of judgment upon law and fact" "is not sufficient to bring such matters under the juridical power;" and that the court must further enquire whether the nature of the acts fall within Article III, §2.); *United States v. Ferreira*, 54 U.S. 40, 48 (1851) (holding that while the acts conferred by Congress upon the judge were "judicial in their nature," as "judgment and discretion must be exercised," it was "nothing more than the power ordinarily given by law to a commissioner. While such a power "may constitutionally be conferred on a secretary as well as on a

commissioner." It "is not judicial in either case in the sense in which judicial power is granted by the Constitution to the courts of the United States.")

Certain tribunals that do not meet Article III requirements are considered alternately "non-constitutional," "legislative," or "Article I" courts.[6] These courts are

> created by Congress in the exertion of other powers….Their functions always are directed to the execution of one or more of such powers, and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

Ex parte Bakelite Corp., 279 U.S. 438, 449 (1929). There are seventeen Article I courts: three territorial courts (the District Courts of Guam, Virgin Islands, and Northern Mariana Islands); eight military courts (the U.S. Court of Appeals for the Armed Forces; the Army, Navy-Marine, Air Force, and Coast Guard Courts of Criminal Appeals; the U.S. Courts-Martial; the U.S. Court of Appeals for Veterans Claims; and the U.S. Court of Military Commission Review); and six region and subject-specific courts (the D.C. Court of Appeals, the Superior Court of the District

[6] The allocation of powers in Article I is to "tribunals," and not to "courts," which has led one leading scholar to suggest that Congress can create inferior bodies to the Supreme Court, which lack Article III protections, "While these tribunals must remain inferior to the Supreme Court and the judicial department, Article I does not require that they employ life-tenured judges and Article III does not formally invest these tribunals with the judicial power of the United States." Pfander, *supra*, at 651.

of Columbia, the U.S. Court of Federal Claims, the U.S. Tax Court, the U.S. Bankruptcy Courts, and the Bankruptcy Appellate Panels).[7] *See* Table A-3.

Additionally, there are at least a dozen administrative tribunals (e.g., the U.S. Immigration Courts, the Board of Immigration Appeals, the Military Commissions, the Board of Veterans' Appeals, the U.S. International Trade Commission, the U.S. Merit Systems Protection Board, the Patent Trial and Appeal Board, the Trademark Trial and Appeal Board, the Armed Services Board of Contract Appeals, the Civilian Board of Contract Appeals, the Tennessee Valley Authority Board of Contract Appeals, and the Postal Service Board of Contract Appeals). *See* Table A-4.

II. ARTICLE III COURTS

As a constitutional matter, the legislature has broad power to create lower Article III courts and to set their subject matter jurisdiction. All federal Article III Courts are courts of limited jurisdiction. *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8 (1799). "[T]he power which congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812).

[7] As in the case of Article III courts, there are a number of Article I courts that are no longer in operation. The Court of Private Land Claims, for instance, was created in the late 19th century to oversee claims of title to lands obtained by a treaty from Mexico. Wilber Griffith Katz, *Federal Legislative Courts,* 43 Harv. L. Rev. 894, 907-908 (1930).

Once created, Article III courts "share in the exercise of judicial power defined in [Article III and] can be invested with no other jurisdiction." *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929). As Chief Justice Marshall explained, "The judicial power of the United States is extended to all cases arising under the constitution." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). Justice Scalia echoed these sentiments in his dissent in *Chambers v. NASCO, Inc.*:

> I agree with the Court that Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to '[t]he judicial Power,' U.S. Const., Art. III, § 1, that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings.

Chambers v. NASCO, Inc., 501 U.S. 32, 58 (1991) (Scalia, J., dissenting). Judicial power flows from Article III status. As the Supreme Court has explained, "Congress must not only ordain and establish inferior courts within a state and prescribe their jurisdiction, but the judges appointed to administer them must possess the tenure of office before they can become invested with any portion of the judicial power of the union. There is no exception to this rule in the Constitution." *Benner v. Porter*, 50 U.S. 235, 242 (1850).

Article III courts are limited to nine categories of cases and controversies. U.S. Const. art. III, §2. The Supreme Court understands the constitutional restriction to mean that Article III courts may not issue advisory opinions; the matter must meet

the requirements of standing and ripeness and not be moot; and the matter must not fall subject to political question doctrine. Letter from the Justices of the Supreme Court to President George Washington, (Aug. 8, 1793) (establishing no advisory opinions); *Marbury,* 5 U.S. at 137 (establishing political question doctrine); *Flast v. Cohen*, 392 U.S. 83, 96-97 (1942) (acknowledging the Article III "prohibition against advisory opinions.")

Article III powers do not extend to Article I courts. In 2011, for instance, the Supreme Court considered whether the Bankruptcy Court (an Article I court), exercised the judicial power of the United States by entering final judgment on a common law tort claim and concluded that it did not. *Stern v. Marshall*, 564 U.S. 462, 494-495 (2011). The Court determined that if Article I courts could be given the power to enter a final, binding judgment on a common law cause of action "then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking." *Id.* The Court explained, "Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article." *Id.*

The courts are therefore careful to distinguish between which entities are Article III courts and which are Article I courts. *See, e.g.*, *Giorgio Foods, Inc. v. United States*, 515 F. Supp. 2d 1313, 1321 (2007) ("The Customs Court was an Article I

court, while this court, as a result of the Customs Act of 1980, is an Article III court, with the same power as a district court."); *Int'l Fidelity Ins. Co. v. Sweet Little Mexico Corp.*, 665 F.3d 671, 678 (5th Cir. 2011) (quoting the language from *Giorgio*).

A. Regularly-Constituted Article III Courts Currently Operating

In addition to the Supreme Court, established under Art. III, 1, there are two other regularly-constituted Article III courts: the U.S. Courts of Appeal and the U.S. District Courts. 28 U.S.C. §§ 41, 43 (2012); 28 U.S.C. §§ 81-132 (2012).

B. Previous Regularly-Constituted Article III Courts

The (now defunct) Circuit Courts (1789-1912) were Article III courts that ran in tandem with district courts. The Circuit Courts, which served as both trial courts and had appellate jurisdiction, were created by the Judiciary Act of 1789. In 1891, the Court of Appeals was established as an appellate court for district courts and circuit courts. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. The circuit courts were abolished by The Judicial Code of 1911. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1167.

III. ARTICLE III SPECIALIZED COURTS

As with all Article III courts, those with specialized subject matter jurisdiction carry the judicial power of the United States. The requirements of unity, supremacy, and inferiority having been met, the judicial protections of good behavior and set compensation respected, and the case or controversy requirement satisfied, such

entities carry the full power of the third branch of government. Scholars and the Courts agree that it is "uncontroversial that the lower court courts described in Article III, and created by Congress pursuant to Article I, §8, exercise the judicial power of the United States described in Article III, §2." David A. Case, *Article 1 Courts, Substantive Rights, and Remedies for Government Misconduct*, 26 N. Ill. U. L. Rev. 101, 04-105; *cf Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8 (1799); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812). Accordingly, interference by the other branches in the core functioning of Article III courts, of any type, violates separation of powers.

Specialized Article III courts themselves recognize their status. The U.S. Court of International Trade, for instance, which has exclusive jurisdiction over any civil actions arising under certain sections of the 1930 Tariff Act, 1974 Trade Act, and the 1979 Trade Agreements Act, as well as certain other matters, possesses "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585. *See also* 28 U.S.C. § 251(a).

There are currently five operable federal Article III specialized courts. At least nine other specialized courts have at one point been brought into existence by Congress. *In none of the statutes creating Article III specialized courts does Congress specifically provide them with jurisdiction over their own opinions or records*.

A. Specialized Courts Currently in Existence

In addition to the five specialized Article III courts, the Alien Terrorist Removal Court exists but has neither met nor heard a single case since its creation in 1996.

1. FISC/FISCR

In 1978 Congress created FISC and FISCR to address the collection of domestic electronic surveillance conducted for foreign intelligence purposes. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1811 (2012)). The law responded to public outcry at the extent to which the intelligence community had placed U.S. citizens under surveillance, as well as the Court's determination that the executive could not engage in electronic surveillance for domestic security purposes without some level of judicial process. *See Intelligence Activities: Hearings on S. Res. 21 Before the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities of the United States*, 94th Cong. I (1975), vols. 1-5; United States v. U.S. Dist. Court, 407 U.S. 297 (1972). The statute provided special protections for U.S. persons (USPs). *See* 50 U.S.C. §§ 1801(h)(2), (4), 1802, 1822(a)(1)(B), (a)(1)(A)(ii) (2012).

In 1994 Congress extended the Court's remit to include ex parte orders for physical search. Intelligence Authorization Act for Fiscal Year 1995, Pub L. No. 103-359, § 302(c), 108 Stat. 3423, 3445 (1994) (codified at 50 U.S.C. §§ 1821–

1829). In 1998, it incorporated mechanisms for pen register/trap and trace (PR/TT), as well as acquiring business records. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, §§ 601-02, 112 Stat. 2396, 2404 (1998) (codified at 50 U.S.C. §§ 1841–46, 1861-63) (hereinafter "IAA").

The USA PATRIOT Act made numerous changes to FISA. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. *See, e.g.*, *id.*, at §§ 206, 208, 214, 218, 504, 1003. Congress also expanded the business records provision to include "the production of any tangible things (including books, records, papers, documents, and other items)." *Id.* § 215. Whereas before records could only be sought from common carriers, public accommodation facilities, storage facilities, and vehicle rental facilities, records now can be obtained from any business or entity. *Compare id.* with IAA § 602. In 2005, when section 215 was set to expire, Congress added language requiring that the government establish "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment)" prior to FISC granting an order. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106, 120 Stat. 192, 196 (codified as amended at 50 U.S.C. §1861 (2012)). In 2008, Congress added measures that gave FISC/FISCR oversight over the domestic collection of the communications of non-U.S. persons, as well as U.S.

persons, believed to be overseas. FISA Amendments Act of 2008, Pub. L. No. 110-261, 121 Stat. 2436, 552, 555, 556.

Congress deliberately created FISC as an Article III constitutional court. Foreign Intelligence Electronic Surveillance: Hearings Before the H. Subcomm. on Legis. of the Permanent Select Comm. on Intell., 95th Cong. 26-31 (1978) (Letter from John M. Harmon, Assist. Attn'y Gen., stating FISC/FISCR "will be Article III courts"); *id.* at 116 (FISC, comprised of "article III judge[s]" is to be independent "and in no way dependent on the executive branch of Government"); *id.* at 184 (Letter from Senator Edward (Ted) Kennedy to the Representative Robert McClory (Feb. 10, 1978), stating that FISC is considered within "the constitutional jurisdiction of Article III courts.") *See also id.* at 213, 214, 216, 224; 124 Cong. Rec. 10,896 (1978); 124 Cong. Rec. 28,143 (1978).

Congress still regards FISC as an Article III court. *See* 154 Cong. Rec. 804 (2008) (alluding to FISC as an Article III court with "inherent power" over its own records and balking at the idea that the administration could "withhold FISA Court opinions and documents that include significant interpretations of law"). *See also id.* at 809; Andrew Nolan & Richard M. Thompson, Cong. Res. Serv., R43746, *Congressional Power to Create Federal Courts: A Legal Overview* (2014).

Every court, including this one, to confront the question of whether FISC is an Article III court has answered in the affirmative. *In re: Certification of Questions of*

Law to the Foreign Intelligence Court of Review, No. FISCR 18-01, at 8 (FISA Ct. Rev. Mar. 16, 2018); *In re Opinions and Orders of this Court Addressing Bulk Collection of Data Under FISA*, No. Misc. 13-08, 2017 WL 427591, at *3 (FISA Ct. Jan. 25, 2017) (hereinafter Collyer Op.); *In Re Mot. for Release of Court Records*, 526 F. Supp. 2d 484, 486 (FISA Ct. 2007) (Bates, J.); *In re Sealed Case*, 310 F.3d 717, 731-32 (FISA Ct. Rev. 2002) (per curiam); *United States v. Cavanaugh*, 807 F.2d 787, 792 (9th Cir. 1987); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985), *aff'd*, 788 F.2d 566 (9th Cir. 1986).

2. U.S. Court of Appeals for the Federal Circuit

In 1982 Congress created the U.S. Court of Appeals for the Federal Circuit by merging the U.S. Court of Customs and Patent Appeals and the appellate division of the U.S. Court of Claims. It consists of sixteen judges appointed by the President. 28 U.S.C. §§ 41, 43 (2012); Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 25. The Court has exclusive jurisdiction over (a) civil actions related to patents or plant variety protection; (b) cases arising in the Canal Zone, Guam, the Virgin Islands, or the Northern Mariana Islands; (c) appeals from the U.S. Court of Federal Claims; (d) appeals from decisions of the U.S. Patent and Trademark Office or the U.S. Court of International Trade; and (e) review of certain agency decisions and appeals linked to particular statutory authorities (e.g., §211 of the 1970 Economic Stabilization Act, §5 of the 1973 Emergency Petroleum Allocation Act,

and §506(c) of the Natural Gas Policy Act). 28 U.S.C. § 1295 (2012). The court also has jurisdiction over interlocutory decisions. *Id.* § 1292.

3. U.S. Court of International Trade

The United States Court of International Trade, created by Congress in 1980, consists of nine judges (not more than 5 of whom can be from the same political party), appointed by the President by and with the advice and consent of the Senate. 28 U.S.C. § 251(a) (2012); Customs Courts Act of 1980, Pub. L. No. 96-417, § 101, 94 Stat. 1727. Located in New York, the Court has exclusive jurisdiction over any civil actions arising under certain sections of the 1930 Tariff Act, 1974 Trade Act, and the 1979 Trade Agreements Act; rulings issued by the Secretary of the Treasury related to certain discretionary decisions impacting trade; any law that provides for revenue from imports or tonnage, tariffs, duties, fees, or other taxes on imports, and embargoes or other restrictions on imports. *Id.* §1581 (2012). It also has exclusive jurisdiction over civil actions related to import commenced by the United States, related counter-, cross-, and third-party claims, civil actions under the North American Free Trade Agreement or the U.S.-Canada Free Trade Agreement, *Id.* §§ 1582-1584. The court possesses "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." *Id.* § 1585.

4. Judicial Panel on Multidistrict Litigation

The Judicial Panel on Multidistrict Litigation, established in 1968, consolidates pretrial proceedings in civil actions involving one or more common questions of fact by transferring the related actions to a designated circuit or district judge. *Id.* § 1407(b)-(c). The Chief Justice designates the seven circuit and district judges who serve on the panel no two of whom can be from the same circuit. *Id.* § 1407(d). Decisions carry by majority vote. *Id.* Antitrust actions are excluded from the panel's remit. *Id.* § 1407(g).

5. Alien Terrorist Removal Court

The Alien Terrorist Removal Court (ATRC) of the United States, created in 1996, consists of 5 district court judges appointed by the Chief Justice from 5 of the U.S. judicial circuits. 8 U.S.C. § 1532 (2012). The judges serve five year terms, are eligible for re-designation, and may be jointly appointed to FISC/FISCR. *Id.* § 1532(a)-(b). The court's decisions are reviewable by the U.S. Court of Appeals for the District of Columbia. *Id.* § 1535. The ATRC has never had an application from the Attorney General for the removal of an alien terrorist and therefore it has never conducted a proceeding. *Alien Terrorist Removal Court, 1996-present,* Fed. Judicial Ctr., https://www.fjc.gov/history/courts/alien-terrorist-removal-court-1996-present (last visited June 8, 2018).

B. Specialized Courts No Longer in Existence

At least nine specialized courts created by Congress no longer exist.

1. Customs Courts

The Customs Court appears to have been an Article III court based on the statute designating it as such in 1956, as well as its replacement by the U.S. Court of International Trade. Act of July 14, 1956, Pub. L. No. 84-703, 70 Stat. 532. Other customs courts previously in existence include the Court of Customs Appeals (the predecessor to the Customs & Patent Appeals Court), the Court of Customs and Patent Appeals, and the Court of Customs. See Act of Aug. 5, 1909, ch. 6, 36 Stat. 11, 105; Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475, 1476; Tariff Act of 1930, ch. 497, 46 Stat. 590, 738.

2. Emergency Courts of Appeals

The Emergency Court of Appeals (1941-1961) and Temporary Emergency Court of Appeals (1971-1993) served as Article III courts, with Article III judges assigned to them. *Halleck v. Berliner*, 427 F.Supp. 1225, 1251 (D.D.C. 1977); Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 749 (creating a "Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals."); Act of Jan. 30, 1942, ch. 26, 56 Stat. 23, 32 (creating "a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States

district courts and circuit courts of appeals). Congress provided the court with district court powers in regard to the jurisdiction conferred on it, with some particular exceptions. *Id.*

3. Commerce Court

The Commerce Court (1910-1913) presumably acted as an Article III court as well, as it also had Article III judges assigned. Act of June 18, 1910, ch. 309, 36 Stat. 539, 540 (creating the commerce court as "a court of record," "composed of five judges to be…designated and assigned thereto by the Chief Justice of the United States, from among the circuit judges of the United States, for the period of five years."). The Court was given full powers of a circuit court in regard to cases within its jurisdiction, with the ability to "issue all writs and process appropriate." *Id.* at 541.

4. Special Railroad Court

The Special Railroad Court (1974-1997) appears to have been an Article III court as Article III judges were assigned by the Judicial Panel on Multidistrict Litigation. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985, 999 The "proceedings shall be conducted by the special court which shall be composed of three Federal judges who shall be selected by the panel, except that none of the judges selected may be a judge assigned to a proceeding involving any railroad in reorganization in the region under section 77 of the Bankruptcy Act.").

5. Court of Claims

The court of claims, established in 1855, initially consisted of three judges who held their office during good behavior. An Act to Establish a Court for the Investigation of Claims against the United States, Act of Feb. 24, 1855, c. 122, 10 Stat. 612. The statute directed the court to hear and determine claims against the U.S. government, as well as claims referred to the court by either the Senate or the House of Representatives. *Id.* In 1863, Congress authorized the court to render final judgments, from which an appeal could follow under certain circumstances. Act of March 3, 1863, c. 92, 12 Stat. 765.

For the first several years of its existence, the Court of Claims was considered a legislative court, as, after the court adjudicated a claim, no payment was "to be made until the claim allowed [had] been estimated for by the Secretary of the Treasury, and Congress, upon such estimate, [had made] an appropriation for its payment." *Gordon v. United States,* 69 U.S. (2 Wall.) 561, 562 (1864).).[8] *See also* Act of March 3, 1863, c. 92, 12 Stat. 765, §14 ("That no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.") The court explained,

> Neither the Court of Claims nor the Supreme Court can do anything more than certify opinion to the Secretary of the Treasury, and it depends upon him, in

[8] The undelivered opinion was written by Chief Justice Taney and later, with approval, published in 117 U.S. Appx. 698-99. *Williams v. United States*, 289 U.S. 553, 563 (1933).

> the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment..

Id. As a result, "Neither court can by any process enforce its judgment; and whether it is paid or not, does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury, and of Congress." *Id.* In announcing the judgment, Chief Justice Chase stated, "We think that the authority given to the head of an executive department…to revise all the decisions of that court requiring payment of money, denies to it the judicial power." *Id.*

Congress responded by repealing section 14 of the statute. Act of Mar. 17, 1866, ch. 19, 14 Stat. 9. Thereafter, the Supreme Court agreed to hear appeals from the Court of Claims. *See De Groot v. U.S.*, 72 U.S. 419 (1866); *United States v. Alire*, 73 U.S. 577 (1867); *United States v. O'Grady*, 89 U.S. 641 (1874); *Langford v. United States* 101 U.S. 341 (1879). In 1886, the Court squarely held that "as the law now stands, appeals do lie to this court from the judgments of the court of claims, in the exercise of its general jurisdiction." *United States v. Jones*, 119 U.S. 477, 480 (1886). In 1962 the Court further held that the Court of Claims (and the Court of Customs and Patent Appeals) are Article III courts, with judges constitutionally protected in tenure and compensation, making them eligible to sit as a Court of Appeals judge and a U.S. District Court judge. *Glidden Co. v. Zdanok*, 370 U.S. 530, 569-571 (1962) (plurality opinion).

In 1982, however, Congress turned the tribunal back into an Article I Court. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105, 96 Stat. 25, 27 (codified as amended at 28 U.S.C. §§171-177). *See also Williams v. United States*, 289 U.S. 553, 581 (1933) ("[T]he Court of Claims receives no authority, and its judges no rights, from the judicial article of the Constitution…[T]he court derives its being and its powers and the judges their rights from the acts of Congress passed in pursuance of other and distinct constitutional provisions.") Currently, it thus operates as an Article I court, subject to review in the U.S. Court of Appeals for the Federal Circuit (which is an Article III court). 28 U.S.C. §§ 171(a), 1295 (2012); *see also* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 902(a), 106 Stat. 4506, 4516 (assigning the name "Court of Federal Claims).

IV. ARTICLE I COURTS

One of the earliest distinctions between Article III constitutional courts and non-constitutional courts, alternately called Article I, or legislative courts, came in 1928 with an opinion authored by Chief Justice Marshall:

> The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United Sates. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d Article of the Constitution, but is conferred by

> Congress in the execution of those general powers which that body possesses over the territories of the United States.

Am. Ins. Co. v. 356 Bales of Cotton (Canter), 26 U.S. (1 Pet.) 511, 546 (1828). Since that time, the Supreme Court has consistently viewed territorial courts as Article I entities.[9]

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[9] *See, e.g.*, *Benner v. Porter*, 50 U.S. 235, 242 (1850) ("The distinction between the federal and state jurisdictions, under the Constitution of the United States, has no foundation in these territorial governments…They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the federal and state authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law, but are the creations, exclusively, of the legislative department, and subject to its supervision and control."); *Clinton v. Englebrecht*, 80 U.S. 434, 447 (1871) ("The judges of the supreme court of the territory are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold courts of the United States. This was decided long since in American Insurance Company v. Canter and in the later case of *Benner v. Porter*….There is no Supreme Court of the United States, nor is there any district court of the United States, in the sense of the Constitution, in the territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the general government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territories belonging to the United States.") (footnotes omitted); *Hornbuckle v. Toombs*, 85 U.S. 655, 656 (1873) ("[T]he jurisdiction of the territorial courts is collectively coextensive with and correspondent to that of the state courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States."); Good v. Martin, 95 U.S. 90, 98 (1877) ("Territorial courts are not courts of the United States within the meaning of the Constitution, as appears by all the authorities."); Reynolds v. United States, 98 U.S. 145, 154 (1878) ("By sect. 1910 of the Revised Statutes, the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States

Congress, over time, has created various other Article I tribunals. It enacted courts-martial to adjudicate violations of the Articles of War. *See* 1 William Winthrop, Military Law and Precedents 47-64 (2d ed.) (1896). Although ultimately appeal is to the Supreme court, judges are subject to the military chain of command and do not have the protections of good behavior or compensation provided to Article III courts. *See* 10 U.S.C. § 816 (2012); Uniform Code of Military Justice, art.

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as is vested in the circuit and district courts of the United States; but this does not make them circuit and district courts of the United States. We have often so decided."); *The City of Panama*, 101 U.S. 453, 460 (1879) (Our Constitution, in its operation, is co-extensive with our political jurisdiction, and wherever navigable waters exist within the limits of the United states, it is competent for congress to make provision for the exercise of admiralty jurisdiction…and in organizing territories, Congress may establish tribunals for the exercise of such jurisdiction, or they may leave it to the legislature of the territory to create such tribunals. Courts of the kind, whether created by an act of Congress or a territorial statute, are not, in strictness, courts of the United States; or, in other words, the jurisdiction with which they are invested is not a part of the judicial power defined by the third article of the Constitution, but is conferred by Congress in the execution of the general power which the legislative department possesses to make all needful rules and regulations respecting the public territory and other public property."); *McAllister v. United Sates*, 141 U.S. 174, 184 (1891) (The Court's previous "cases close all discussion…as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that courts in the territories, created under the plenary municipal authority that Congress possesses over the territories of the United States, are not courts of the United States created under the authority conferred by that article."); *Romeu v. Todd*, 206 U.S. 358, 368 (1907) ("The District Court of the United States for Porto Rico is in no sense a constitutional court of the United States, and its authority emanates wholly from Congress under the sanction of the power possessed by that body to govern territory occupying the relation to the United States which Porto Rico does.")

16, Pub. L. 81-506, 64 Stat. 107, 113 (1950).[10] Similarly, the U.S. Court of Military Commission Review is a court of record consisting of one of more panels, each of which is composed of appellate military judges assigned by the Secretary of Defense or appointed by the President, by and with the consent of the Senate. 10 U.S.C. § 950f (2012).

Other legislative courts stem from so-called public rights, such as those related to taxes, customs, and administration of public lands. The public rights distinction was first identified by the Supreme Court in 1855. The Court explained,

> [T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the course of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases.

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).[11] The U.S. Tax Court has nineteen members, appointed to 15-year terms by the President with the advice and consent of the senate. 26 U.S.C. § 7443 (2012).

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[10] Although the U.S. Courts-Martial, like the Military Courts of Appeals, are neither courts of record nor explicitly established under Article I, the Supreme Court has stated that they are Article I courts. *See Weiss v. United States*, 510 U.S. 163, 166 (1993) (stating that the Military Courts of Criminal Appeals are Article I courts); *Id.* at 166-167 (stating that the U.S. Courts-Martial are Article I courts).

[11] The case also notes, "it is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive. Luther v. Borden, 7 How. 1; Doe v. Braden, 16 How. 635." *Id.* at 284-285.

A key difference between Article I territorial courts and Article III courts relates to the "practice, pleadings, and forms and modes of proceeding," as well as their jurisdiction. For Article I courts, such matters are:

> left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves. Of course, in case of any difficulties arising out of this state of things, Congress has in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper.

Hornbuckle v. Toombs, 85 U.S. 648, 656-657 (1873). The territorial courts:

> were not courts in which the judicial power conferred by the Constitution of the federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a state.

Benner v. Porter, 50 U.S. 235, 242 (1850) (citing *Am. Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 546 (1828)). The legislation providing for courts tended to set a fixed tenure of office for judges at four years.[12] Others set it at four years "unless sooner removed."[13]

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[12] *See, e.g.*, Act of Mar. 26, 1804, ch. 38, § 5, 2 Stat. 283, 284 (Orleans); Act of June 12, 1838, ch. 96, § 9, 5 Stat. 235, 238 (Iowa); Act of Mar. 3, 1849, ch. 121, § 9, 9 Stat. 403, 406 (Minnesota); Act of Sept. 9, 1850, ch. 49, § 10, 9 Stat. 446, 449 (New Mexico); Act of Sept. 9, 1850, ch. 51, § 9, 9 Stat. 453, 455 (Utah); Act of Feb. 28, 1861, ch. 59, § 9, 12 Stat. 174-75 (Colorado); Act of Mar. 7, 1861, ch. 83, § 9, 12 Stat. 212 (Nevada); Act of Mar. 2, 1861, ch. 86, § 9, 12 Stat. 241 (Dakota); Act of 1863, Act of Feb. 24, 1863, ch. 56, § 2, 12 Stat. 665 (Arizona) (acts cited in *McAllister v. United Sates*, 141 U.S. 174, 185 n.1 (1891)).

[13] *See, e.g.,* Act of June 4, 1812, ch. 95, 2 Stat. 746 (Missouri); Act of Mar. 2, 1819 ch. 49, § 7, 3 Stat. 495 (Arkansas); Act of Mar. 30, 1822, ch. 13, § 8, 3 Stat. 657

This does not mean that non-Article III courts cannot exercise judicial power, but only that they do not "exercise judicial power…conferred in virtue of the third article of the Constitution." *Williams v. United States*, 289 U.S. 553, 565-566 (1933) (holding that the Court of Claims could exercise the judicial power of the United States). *See also Am. Ins. Co.*, 26 U.S. at 546 (holding that the judicial power of the United States is not limited to the powers defined under Article III and may be exercised by territorial courts*); Freytag v. Comm'r,* 501 U.S. 868, 889 (1991) (stating that some non-Article III tribunals can exercise judicial power).

For purposes of this brief I distinguish between three types of Article I courts: (a) territorial courts; (b) military courts; and (c) courts that specialize by region and/or subject matter. I separate these from administrative agency tribunals. *But see* Andrew Nolan & Richard M. Thompson II, Cong. Res. Serv., R43746, Congressional Power to Create Federal Courts: A Legal Overview 1, 11-12 (2014), (dividing non-Article III categories into "legislative courts" and "adjuncts," with the latter category incorporating both administrative agency tribunals and magistrate judges.

(Florida); Act of Aug. 14, 1848, ch. 177, § 9, 9 Stat. 326 (Oregon); Act of Mar. 2, 1853, ch. 90, § 9, 10 Stat. 175 (Washington); Act of May 30, 1854, ch. 59, § 9, 10 Stat. 280 (Nebraska); Act of May 30, 1854, ch. 59, § 27, 10 Stat. 286 (Kansas); act of Mar. 3, 1863, ch. 117, § 9, 12 Stat. 811 (Idaho); Act of May 26, 1864, ch. 95, § 9, 13 Stat. 88 (Montana); Act of July 25, 1868, ch. 235, § 9, 15 Stat. 180 (Wyoming); Act of May 2, 1890, ch. 182, § 9, 26 Stat. 85 (Oklahoma) (acts cited in *McAllister v. United Sates*, 141 U.S. 174, 185 n.2 (1891)).

V. COURTS OF THE DISTRICT OF COLUMBIA

The status of the Courts of the District of Columbia has changed over time. Currently, they are considered Article I courts. A series of decisions in the late 19th and early 20th century underscored the status of the courts of the District of Columbia as legislative courts, established under Congress's plenary power to govern the District of Columbia. U.S. Const. art. I, §8, cl. 17. Congress could therefore assign them non-judicial functions. For instance, the Supreme Court of the District held revisory powers over patent issues, with decisions binding on the Commissioner of Patents. *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50 (1884). The court similarly had revisory powers over public utilities commissions fixed rates, as well as orders of the Federal Radio Commission. *Keller v. Potomac Elec. Co.*, 261 U.S. 428 (1923); *Fed. Radio Comm'n v. Gen. Elec. Co*., 281 U.S. 464 (1930).

Although the U.S. Supreme Court stated in *dicta* that the courts of the District of Columbia were legislative courts, it then held that they were constitutional courts, exercising the full judicial power of the United States. *O'Donoghue v. United States*, 289 U.S. 516 (1933). The Court determined that insofar as the courts carried non-judicial functions, they comported with Congress's U.S. Const. art. I, §8, cl. 17 powers. It considered Article III, §1 as limiting these authorities only in regard to tenure and compensation, but not in regard to vesting legislative and administrative

powers in the courts. The Court explained, "Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a State legislature has in conferring jurisdiction on its courts." *Id.* at 535-546.

In 1970, Congress acknowledged that two sets of courts operated in Washington D.C.: (a) Article III courts (federal courts, district courts, and a Court of Appeals for the District of Columbia), and (b) Article I courts (the equivalent of state and territorial courts). District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 475. The Supreme Court upheld this distinction in *Palmore v. United States*, 411 U.S. 389 (1973). In that case, the defendant argued that he had the right to be tried before an Article III judge. The Court wrote: "[T]he requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.* at 407-408.

VI. ADMINISTRATIVE TRIBUNALS

The primary difference between an Article I court and an administrative tribunal is the degree of independents it holds from the executive branch. By statute, the U.S. Tax court, for instance, "is not an agency of, and shall be independent of, the executive branch." 26 U.S.C. § 7441 (2012). The line between the quasi-judicial

functions often undertaken by administrative agencies and the judicial matters that come before Article I or Article III courts is not always clear. In 1932, the Court allowed a private right (workers' compensation) to be heard by an agency, while still trying to preserve Article III courts' role in determining questions of law, as well as certain matters of fact. *Crowell v. Benson*, 285 U.S. 22, 27, 49-50, 63-65 (1932). *See also* Pfander, *supra*, at 659. This case played a central role in the growth of the administrative agencies. *Id.*, citing Richard H. Fallon, Jr., Daniel J. Meltser, & David L. Shapiro, Hard and Wechsler's The Federal Courts and the Federal System 367-377 (5th ed. 2003); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988). For purposes of this brief, entities listed under Article I are either (a) statutorily named a court of record; (b) explicitly established under Article I by statute; or (c) stated by the Supreme Court or by the reviewing appellate court as being an Article I court. In contrast, those entities listed as administrative tribunals do not fit any of these categories. [14]

[14] The U.S. Immigration Courts, for instance, are firmly entrenched inside the Department of Justice and not independent. There are no cases from the Supreme Court or Courts of Appeals stating that they are Article I courts; nor does the legislation creating them indicate such. In addition, there are several law review articles indicating they are not Article I courts. *See, e.g.,* Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why is There no Will to Make It an Article I Court?*, 19 Barry L. Rev. 17 (2013).

VII. AUTHORITY, JURISDICTION & SUPPORT FOR EACH COURT'S CATEGORICAL ASSIGNATION

Table A-1: Article III Courts (Non-specialized)

Court	Authority Establishing	Jurisdiction	Appellate Court	Procedural Rules	Appointment and Matters Addressed	Support for Categorical Assignation
U.S. Supreme Court	**U.S. CONST. Art. III, § 1**.	**U.S. CONST. Art. III, § 2, cl. 1**; **U.S. CONST. Art. III., § 2, cl. 2**; **28 U.S.C. §§ 1251-60**.	Court of last resort.	**Rules of the Supreme Court of the United States** [**Westlaw**]	9 Justices appointed by the President with the advice/consent of the Senate; life tenure, salary protection. Art. III, §1; Judiciary Act of 1869, 16 Stat. 44. Jurisdiction: matters involving common law, U.S. Constitution, treaties, federal laws; subject to cases and controversies requirement. Art. III, §2.	Art. III, §1*; O'Donoghue v. United States*, 289 U.S. 516 (1933); District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 475; Act of Sept. 24, 1789, c. 20, 1 Stat. 73.
U.S. Courts of Appeal	**28 U.S.C. § 41; 28 U.S.C. § 43**.	**28 U.S.C. § 1291**; **28 U.S.C. § 1292**.	Decisions reviewable by the U.S. Supreme Court: **28 U.S.C. § 1254**.	**Federal Rules of Appellate Procedure**, promulgated and amended by the U.S. Supreme Court [**Westlaw**]	179 judges appointed by the President with the advice/consent of the senate; life tenure, salary protection; 12 regional courts. Art. III, §1; 28 U.S.C. § 44. Addresses matters involving common law, U.S. Constitution, treaties, federal laws; subject to cases and controversies requirement. Art. III, §2.	Art. III, §1; *See also* District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 475 ("The judicial power in the District of Columbia is vested in…the following Federal Courts established pursuant to article III of the Constitution: (A) The Supreme Court of the United States. (B) The United States Court of Appeals for the District of Columbia Circuit. (C) The United States District Court for the District of Columbia."); Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

U.S. District Courts	**28 U.S.C. § 132**; **28 U.S.C. §§ 81-131** (different districts in each state).	Generally: **28 U.S.C. § 1331**, **28 U.S.C. § 1332**; comprehensively: **28 U.S.C. §§ 1330-69**.	Decisions reviewable by U.S. Court of Appeals: **28 U.S.C. § 1291**, **28 U.S.C. § 1292**.	**Federal Rules of Civil Procedure**, adopted by the U.S. Supreme Court [**Westlaw**]	667 judges appointed to 94 judicial districts by the President with the advice/consent of the senate; life tenure, salary protection. Art. III, §1; 28 U.S.C. § 133. Addresses matters involving common law, U.S. Constitution, treaties, federal laws; subject to cases and controversies requirement.	Art. III, §1; *See also* District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 475 ("The judicial power in the District of Columbia is vested in…the following Federal Courts established pursuant to article III of the Constitution: (A) The Supreme Court of the United States. (B) The United States Court of Appeals for the District of Columbia Circuit. (C) The United States District Court for the District of Columbia."); Act of Sept. 24, 1789, c. 20, 1 Stat. 73

Article III Courts (Specialized)

Court	Authority Establishing	Jurisdiction	Appellate Court	Procedural Rules	Appointment and Matters Addressed	Support for Assignation
U.S. Court of Appeals for the Federal Circuit	**28 U.S.C. § 41**; **28 U.S.C. § 43**; Federal Courts Improvement Act of 1982, **Pub. L. 97-164**, 96 Stat. 25.	**28 U.S.C. § 1295**; **28 U.S.C. § 1292**.	Decisions reviewable by the U.S. Supreme Court: **28 U.S.C. § 1254**.	United States Court of Appeals for the Federal Circuit, **Rules of Practice**. This is a modified version of the Federal Rules of Appellate Procedure [**Westlaw**]	12 judges appointed by the President with the advice/consent of the senate; life tenure, salary protection. 28 U.S.C. § 44 Created in 1982 with merger of U.S. Court of Customs and Patent Appeals and the appellate division of the U.S. Court of Claims, the U.S. court of appeals for the federal circuit consists of sixteen judges appointed by the President. The court has exclusive jurisdiction over (a) civil actions	Act of July 28, 1953, §1, 67 Stat. 226; *Glidden Co. v. Zdanok*, 370 U.S. 530 (1961) (holding the Court of Claims and the Court of Customs and Patent Appeals to be Art. III Courts); Elgin v. Dep't of Treasury, 567 U.S. 1, 17 (2012) (stating the Federal Circuit is an article III court).

					related to patents or plant variety protection; (b) cases arising in the Canal Zone, Guam, the Virgin Islands, or the Northern Mariana Islands; (c) appeals from the U.S. Court of Federal Claims; (d) appeals from decisions of the U.S. Patent and Trademark Office or the U.S. Court of International Trade; and (e) review of certain agency decisions and appeals linked to particular statutory authorities (e.g., §211 of the 1970 Economic Stabilization Act, §5 of the 1973 Emergency Petroleum Allocation Act, and §506(c) of the Natural Gas Policy Act. 28 U.S.C. § 1295. It also has jurisdiction over interlocutory decisions. 28 U.S.C. § 1292. For further discussion of the areas addressed by the court see Richard J. Pierce, Jr., *The Relationship Between the District of Columbia Circuit and Its Critics,* 67 Geo. Wash. L. Rev. 797 (1999).	

U.S. Foreign Intelligence Surveillance Court	**50 U.S.C. § 1803(a)**.	**50 U.S.C. § 1803(a)**.	Decisions reviewable by the U.S. Foreign Intelligence Surveillance Court of Review: **50 U.S.C. § 1803(b)**.	**Rules of Procedure for the Foreign Intelligence Surveillance Court**, pursuant to **50 U.S.C. § 1803(g)**.	Created in 1978 in response to Church Committee hearings to ensure judicial oversight over electronic foreign intelligence collection. Chief Justice designates 11 district court judges from at least 7 circuits, no fewer than 3 of whom reside within 20 miles of D.C. 50 U.S.C. § 1803(a) Court may hold hearing/rehearings en banc.	Op. at *3 (Collyer, J.); *In Re Mot. for Release of Court Records*, 526 F. Supp. 2d 484, 486 (FISA Ct. 2007) (Bates, J.); *In re Sealed Case*, 310 F.3d 717, 731-32 (FISA Ct. Rev. 2002) (per curiam*); U.S. v. Cavanaugh*, 807 F.2d 787, 792 (9th Cir. 1987); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985), aff'd, 788 F.2d 566 (9th Cir. 1986).
U.S. Foreign Intelligence Surveillance Court of Review.	**50 U.S.C. § 1803(b)**.	**50 U.S.C. § 1803(b)**.	Decisions reviewable by the U.S. Supreme Court: **50 U.S.C. § 1803(b)**.	**Rules of Procedure for the Foreign Intelligence Surveillance Court of Review**, pursuant to **50 USC § 1803(g)**.	Chief Justice designates 3 district court or courts of appeal judges to serve for seven years. 50 U.S.C. § 1803(b). The Court acts as the appellate court for FISC.	Op. at *3 (Collyer, J.); *In Re Mot. for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007) (Bates, J.), *3; *In re Sealed Case*, 310 F.3d 717, 731-32 (FISA Ct. Rev. 2002) (per curiam); *United States v. Cavanaugh*, 807 F.2d 787, 792 (9th Cir. 1987); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985), *aff'd*, 788 F.2d 566 (9th Cir. 1986).
U.S. Court of International Trade	**28 U.S.C. § 251(a)**.	**28 U.S.C. §§ 1581-85**.	Decisions reviewable by the Court of Appeals for the Federal Circuit: **28 U.S.C. § 1295(a)(5)**.	**Rules of the U.S. Court of International Trade** [**Westlaw**]	Founded in 1980. Consists of 9 judges (not more than 5 of whom can be from the same political party), appointed by the President by and with the advice and consent of the Senate. 28 U.S.C. § 251 Exclusive jurisdiction over any civil actions arising under certain sections of the 1930 Tariff Act,	28 U.S.C. § 251(a) ("The court is a court established under article III of the Constitution of the United States.")

					1974 Trade Act, and the 1979 Trade Agreements Act; rulings issued by the Secretary of the Treasury related to certain discretionary decisions impacting trade; any law that provides for revenue from imports or tonnage, tariffs, duties, fees, or other taxes on imports, and embargoes or other restrictions on imports. 28 U.S.C. § 1581. It also has exclusive jurisdiction over civil actions related to import commenced by the United States, related counter-, cross-, and third-party claims, civil actions under the North American Free Trade Agreement or the U.S.-Canada Free Trade Agreement, 28 U.S.C. §§ 1582-1584. The court possesses "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585.	
Alien Terrorist Removal Court of the United States	**8 U.S.C. § 1532**.	**8 U.S.C. § 1533**.	Decisions reviewable by the U.S. Court of Appeals for the District of Columbia: **8 U.S.C. § 1535**.	Rules for the Alien Terrorist Removal Court of the United States [**Westlaw**]	5 district court judges appointed by Chief Justice from 5 of the U.S. judicial circuits for five year terms. 8 U.S.C. §1532 Upon application of Attorney General, have jurisdiction of removal of alien terrorists. As of 2018, 0 applications, 0 proceedings.	8 U.S.C. § 1532 (The Chief Justice designates five Article III district court judges to constitute the ATRC).

Judicial Panel on Multidistrict Litigation	**28 U.S.C. § 1407(d)**.	**28 U.S.C. § 1407(a)**.	Decisions may only be permitted by extraordinary writ, which shall be filed in the appropriate court of appeals: **28 U.S.C. § 1407(e)**.	**Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation**, pursuant to **28 U.S.C. § 1407(f).** [**Westlaw**]	Established in 1968, the panel consolidates pretrial proceedings in civil actions involving one or more common questions of fact by transferring the related actions to a designated circuit or district judge. The Chief Justice designates the 7 circuit and district judges who serve on the panel no two of whom can be from the same circuit. Decisions carry by majority vote. Antitrust actions are excluded from the panel's remit. 28 U.S.C. §1407(d).	28 U.S.C. § 1407(d) (The court is made up of seven Article III judges).

Specialized Article I (Legislative) Courts

Court or Tribunal	Establishing Authority	Jurisdiction	Appellate Court	Governing Rules	Appointment and Matters Addressed	Support for Assignation
Territorial						
District Court of Guam	**48 U.S.C. § 1424(a)**.	**48 U.S.C. §1424(b)-(c)**; **48 U.S.C. § 1424-3**.	Reviewable by U.S. Court of Appeals for the Ninth Circuit: **48 U.S.C. § 1424-3**.	**Civil Local Rules of Practice before the District Court of Guam**	Jurisdiction that of U.S. district court, including diversity and bankruptcy. 48 U.S.C. § 1424 (b). Original jurisdiction in all other causes not specifically vested in other courts. 48 U.S.C. § 1424(c). President appoints judge for 10 years, removable for cause, salary that of district court judge. 48 U.S.C. § 1424b(a).	Art. IV, §3.
District Court of the Virgin Islands	**48 U.S.C. § 1611(a)**, **1614**.	**48 U.S.C. § 1611(b)**; **48 U.S.C. § 1612**; **48**	Reviewable by U.S. Court of Appeals for	**Local Rules of Civil Procedure of the District**	Court of record; legislature may vest jurisdiction over all causes in Virgin Islands outside of areas other courts have exclusive jurisdiction. 48 U.S.C.	Art. IV, §3.

		U.S.C. § 1613a.	the Third Circuit: **48 U.S.C. § 1613a**.	**Court of the Virgin Islands**	§§ 1611(a), (b). Includes diversity and bankruptcy, and all criminal/civil proceedings in regard to income tax laws. 48 U.S.C. § 1612. President appoints 2 judges for 10-year terms, removable for cause; no compensation req. 48 U.S.C. § 1614.	
District Court for the Northern Mariana Islands	**48 U.S.C. § 1821(a)**.	**48 U.S.C. §§ 1822-23**.	Reviewable by U.S. Court of Appeals for the Ninth Circuit: **48 U.S.C. § 1823**.	**United States District Court for the Northern Mariana Islands Civil Local Rules**	Court of record; part of same judicial circuit of the U.S. as Guam. 48 U.S.C. § 1821(a). President appoints judge for 10 year terms, unless removed earlier for cause; salary that of U.S. district court judges. 48 U.S.C. §1821(b)(1). Jurisdiction that of a U.S. district court, including diversity and bankruptcy. 48 U.S.C. § 1822.	Art. IV, §3.
Military						
United States Court of Appeals for the Armed Forces	**10 U.S.C. § 941**; **10 U.S.C. § 867**; Uniform Code of Military Justice, Art. 67, Pub. L. 81-506, **64 Stat. 107, 129** (1950).	**10 U.S.C. § 867**.	Decisions reviewable by the Supreme Court: **10 U.S.C. § 867a**.	**U.S. Court of Appeals for the Armed Forces Rules of Practice and Procedure** [**Westlaw**] Note that any subject to a court-martial is also governed by the Uniform Code of Military Justice, **10 U.S.C. part 47**.	Court of record; 5 judges serving 15-year terms, appointed from civilian life by the President, by and with the advice and consent of the Senate. Judges removable for neglect of duty, misconduct, or mental or physical disability. 10 U.S.C. § 941-42. The Court has jurisdiction over cases in which the sentence as affirmed by any military Court of Criminal Appeals extends to death, any cases reviewed by the Court of Criminal Appeals which the Judge Advocate General orders sent to this Court, and by granting of petitions after review by the Court of Criminal Appeals. 10 U.S.C. § 867.	*United States v. Denedo*, 556 U.S. 904 (2009). The NMCCA and CAAF are Article I tribunals. *Id.* at 912; 10 U.S.C. § 941 ("The Court is established under article I of the Constitution.").

Army Court of Criminal Appeals	**10 U.S.C. § 866(a)**; **32 C.F.R. § 150.1**.	**10 U.S.C. § 866(b)**; **10 U.S.C. § 869**; **10 U.S.C. § 862**; **32 C.F.R. § 150.2**.	Decisions reviewable by the Court of Appeals for the Armed Forces: **10 U.S.C. § 867**.	**Courts of Criminal Appeals Rules of Practice and Procedure**, **32 C.F.R. part 150**; **Army Corps of Criminal Appeals Rules of Practice and Procedure**	Each Court of Criminal Appeals is composed of one or more panels, each composed of not less than three appellate military judges. Appellate militia judges may be commissioned officers or civilians, each of whom must be a member of the bar of a Federal court or the highest court of a State. 10 U.S.C. § 866(a). The Court has jurisdiction over all cases of trial by court-martial that have a sentence that extend to death, dismissal, dishonorable or bad-conduct discharge, or confinement for 1 year or longer, and any case referred to the Court by the Judge Advocate General. 10 U.S.C. §§ 866(b), 869(d).	*Weiss v. United States*, 510 U.S. 163, 166-168 (1994) (stating that the Courts of Military Review were Article 1 courts). Note that in 1994, the Military Courts of Review were renamed to Courts of Criminal Appeals to more clearly reflect the appellate judicial role of the tribunals. See S. Rep. No. 103-282, at 230 (1994); H.R. Rep. No. 103-701, at 737-38 (1994 (Conf. Rep.).
Navy-Marine Corps Court of Criminal Appeals	**10 U.S.C. § 866(a)**; **32 C.F.R. § 150.1**.	**10 U.S.C. § 866(b)**; **10 U.S.C. § 869**; **10 U.S.C. § 862**; **32 C.F.R. § 150.2**.	Decisions reviewable by the Court of Appeals for the Armed Forces: **10 U.S.C. § 867**.	**Courts of Criminal Appeals Rules of Practice and Procedure**, **32 C.F.R. part 150**; **Navy-Marine Corps of Criminal Appeals Rules of Practice and Procedure**	*See* ACCA Appointment and Matters Addressed, *supra*.	*United States v. Denedo*, 556 U.S. 904 (2009). The NMCCA and CAAF are Article I tribunals. *Id.* at 912. *See also* ACCA Support for Assignation, *supra*.
Air Force Court of	**10 U.S.C. § 866(a)**; **32**	**10 U.S.C. § 866(b)**; **10 U.S.C. § 869**;	Decisions reviewable by the	**Courts of Criminal Appeals Rules**	*See* ACCA Appointment and Matters Addressed, *supra*.	*See* ACCA Support for Assignation, *supra*.

Criminal Appeals	**C.F.R. § 150.1**.	**10 U.S.C. § 862**; **32 C.F.R. § 150.2**.	Court of Appeals for the Armed Forces: **10 U.S.C. § 867**.	**of Practice and Procedure**, **32 C.F.R. part 150**; **Air Force Court of Criminal Appeals Rules of Practice and Procedure**		
Coast Guard Court of Criminal Appeals	**10 U.S.C. § 866(a)**; **32 C.F.R. § 150.1**.	**10 U.S.C. § 866(b)**; **10 U.S.C. § 869**; **10 U.S.C. § 862**; **32 C.F.R. § 150.2**.	Decisions reviewable by the Court of Appeals for the Armed Forces: **10 U.S.C. § 867**.	**Courts of Criminal Appeals Rules of Practice and Procedure**, **32 C.F.R. part 150**; **Coast Guard Court of Criminal Appeals Rules of Practice and Procedure**	*See* ACCA Appointment and Matters Addressed, *supra*.	See ACCA Support for Assignation, *supra*.
United States Courts-Martial	**10 U.S.C. § 816**; Uniform Code of Military Justice, art. 16, Pub. L. 81-506, **64 Stat. 107, 113** (1950).	Jurisdiction in general: **10 U.S.C. § 817**. General courts-martial: **10 U.S.C. § 818**. Special courts-martial: **10**	Decisions reviewable by the relevant Court of Criminal Appeals or a judge advocate: **10 U.S.C. § 866**; **10 U.S.C. § 869**; **10**	**Manual for Courts-Martial (MCM), United States (2016 ed.)**, which includes the Rules of Court Martial. The MCM is reviewed annually, per **32 C.F.R. § 152.1**.	Court-martial may be convened by the President, the Secretary of Defense, the commanding officer of a unified or specified combatant command, or several other members of the military as defined in 10 U.S.C. §§ 822-24. A military judge shall preside over a court-martial and shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a	"Pursuant to Article I of the Constitution, Congress has established three tiers of military courts. At the trial level are the courts-martial of which there are three types: summary, special, and general." *Weiss v. United States*, 510 U.S. 163, 166-

		U.S.C. § 819. Summary courts-martial: **10 U.S.C. § 820**.	**U.S.C. § 862**; **10 U.S.C. § 864**.	[**Westlaw 2012 ed.**]	military judge by the Judge Advocate General of the armed forces of which such military judge is a member. 10 U.S.C. § 826(b). Each armed force has court-martial jurisdiction over all persons subject to the UCMJ, having the ability to try such persons for any offense punishable by the UCMJ, and the ability to try any person who by the law of war is subject to trial by military tribunal. 10 U.S.C. §§ 816-21.	167 (1994) (citation omitted).
United States Court of Appeals for Veterans Claims	**38 U.S.C. § 7251**.	**38 U.S.C. § 7252**.	Decisions reviewable by the U.S. Court of Appeals for the Federal Circuit: **28 U.S.C. § 7292**.	U.S. Court of Appeals for Veterans Claims, **Rules of Practice and Procedure**, [**Westlaw**]	Court of record; composed of at least three and not more than seven judges, appointed by and with the advice and consent of the Senate, for terms of 15 years. 38 U.S.C. § 7253. The court has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. 38 U.S.C. § 7252.	38 U.S.C. §7251 ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims")
United States Court of Military Commission Review	**10 U.S.C. § 950f(a)**.	**10 U.S.C. § 950d**; **10 U.S.C. § 950f(c)**.	Decisions reviewable by U.S. Court of Appeals for the District of Columbia**:** **10 U.S.C. § 950g(a)**.	**U.S. Court of Military Commission Review Rules of Practice**	Court of record consisting of one or more panels, each composed of not less than three judges of the Court. Judges are either appellate military judges assigned by Secretary of Defense or appointed by the President, by and with the consent of the Senate. 10 U.S.C. § 950f. The Court has jurisdiction to hear appeals from any military commission. 10 U.S.C. § 950c.	*In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016) (stated that the Military Commissions Act of 2009 established an Article I court of record).
Region- and Subject-specific						

D.C. Court of Appeals	**D.C. Code § 11-701**; **D.C. Code § 11-101**; District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, **84 Stat. 473, 475**.	**D.C. Code §§ 11-721 to -723**.	Decisions reviewable by the U.S. Supreme Court: **D.C. Code § 11-102**.	**Rules of the D.C. Court of Appeals,** pursuant to Pub. L. 91-358, **D.C. Code § 11-743**. [**Westlaw**]	Initially, D.C. Superior and D.C. Court of Appeals seen as Art. I courts [Art. I, §8, cl. 17; Federal Radio Comm'n v. General Electric Co., 281 U.S. 464, 468 (1930) ("the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts."; Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 899-903 (1930)] In 1933, SCOTUS ruled Art. III Court. [*O'Donoghue v. United States*, 289 U.S. 516 (1933)] In 1970, Congress re-designated as Art. I courts [District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 475 ("The following District of Columbia courts established pursuant to article 1 of the Constitution: (A) The District of Columbia Court of Appeals. (B) The Superior Court of the District of Columbia."]	District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 475 ("The following District of Columbia courts established pursuant to article 1 of the Constitution: (A) The District of Columbia Court of Appeals. (B) The Superior Court of the District of Columbia."]
Superior Court of the District of Columbia	**D.C. Code § 11-901**; **D.C. Code § 11-101**; District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-	**D.C. Code § 11-921 to -925**.	Decisions are reviewable by the District of Columbia Court of Appeals: **D.C. Code § 721**.	**Superior Court Rules of Civil Procedure** [**Westlaw**]	District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 475 ("The following District of Columbia courts established pursuant to article 1 of the Constitution: (A) The District of Columbia Court of Appeals. (B) The Superior Court of the District of Columbia."]	District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 475 ("The following District of Columbia courts established pursuant to article 1 of the Constitution: (A) The District of Columbia

	358, **84 Stat. 473, 475**.					Court of Appeals. (B) The Superior Court of the District of Columbia."]
United States Court of Federal Claims	**28 U.S.C. § 171(a)**.	**28 U.S.C. § 1491**.	Decisions reviewable by the Court of Appeals for the Federal Circuit: **28 U.S.C. § 1295(a)(3).**	**Rules of the United States Courts of Federal Claims**, prescribed by authority granted in **28 U.S.C. § 2503(b)** [**Westlaw**]	16 members appointed for 15 year terms by the President with the advice and consent of the Senate. 28 U.S.C. § 171-2. Salary set to same rate as district court judges. 28 U.S.C. § 172(b) Removal by the Court of Appeals for the Federal Circuit "only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability." 28 U.S.C. § 176.	28 U.S.C. § 171(a) ("The court is declared to be a court established under article I of the Constitution of the United States)
United States Tax Court	**26 U.S.C. § 7441**.	**26 U.S.C. § 7442**.	Decisions reviewable by the Court of Appeals in which the taxpayer resides: **26 U.S.C. § 7482.**	**Rules of Practice and Procedure of the United States Tax Court**, prescribed by authority granted in **26 U.S.C. § 7453** [**Westlaw**]	19 members appointed for 15 year terms by the President with the advice and consent of the Senate; salary set to same rate as district court judges. 26 U.S.C. § 7443. It is not an agency of, and shall be independent of, the executive branch. 26 U.S.C. § 7441. Removal after notice and opportunity for public hearing for inefficiency, neglect of duty, or malfeasance in office. 26 U.S.C. § 7443. Jurisdiction conferred by Internal Revenue Code of 1939 and Revenue Act of 1926, other laws.	26 U.S.C. § 7441. ("There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.")

United States Bankruptcy Courts	**28 U.S.C. § 151**.	**28 U.S.C. § 157**.	Decisions reviewable by the U.S. district courts or Bankruptcy Appellate Panel (BAP): **28 U.S.C. § 158**.	**Federal Rules of Bankruptcy Procedure**, promulgated and amended by the U.S. Supreme Court [**Westlaw**]	Unit of the district court to be known as bankruptcy court of that district. 28 U.S.C. §151. Number of judges depends upon district; appointed by majority of district court (or chief judge if no majority) to 14 year terms. Judges serve as judicial officers of the Art. III district court within which they operate. 28 U.S.C. §152. Removal "only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located. Majority of judges must concur. 28 U.S.C. §152(e). Compensation 92% that of a judge of the district court. 28 U.S.C. §153. Each district court may provide that any or all cases under title 11 be assigned to bankruptcy court. 28 U.S.C. §157.	*N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Wellness Int'l Network, Ltd. v. Sharif*, 135 Sup. Ct. 1932, 1938 (2015) ("Congress has also authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work").
Bankruptcy Appellate Panels	**28 U.S.C. § 158(b)(1)**.	**28 U.S.C. § 158(b)(1)**.	Decisions reviewable by the relevant circuit court of appeals: **28 U.S.C. § 158(d)**.	Vary by Circuit. Ex: **First Circuit**. **Sixth Circuit**, **Eighth Circuit**, **Ninth Circuit**, **Tenth Circuit** [Note: Not all Circuits have a BAP].	Panel composed of bankruptcy judges to hear appeals. 28 U.S.C. 158(b)(1).	Appointment, tenure, compensation

Administrative Agency[15] Tribunals

Court	Authority Establishing	Jurisdiction	Appellate Court	Procedural Rules	Appointment and Matters Addressed	Support for Assignation
United States Immigration Courts	**8 U.S.C. § 1101(b)(4)**; **8 U.S.C. § 1229a**; **8 C.F.R. § 1003.9(a), (d)**; **8 C.F.R. § 1003.10(a)**.	**8 C.F.R. § 1003.10(b); 8 C.F.R. § 1003.9(b), (c)**.	Decisions reviewable by Board of Immigration Appeals: **8 C.F.R. § 1003.10**; **8 C.F.R. § 1003.38(a)**.	**Immigration Court Practice Manual** and Immigration Court Rules of Procedure, **8 C.F.R. §§ 1003.12-47**.	AG appoints as administrative judges within the Office of the Chief Immigration Judge to conduct specified classes of proceedings; judges act as Attorney General's delegates in cases that arise. 8 C.F.R. 1003.10(a)	8 U.S.C. § 1101(b)(4) (Immigration judges are appointed by the Attorney General (AG) as administrative judges within the Executive Office for Immigration Review (EOIR) and are subject to supervision by the AG); 8 C.F.R. § 1003.9(a), (d) (The Office of Chief Immigration Judge (OCIJ) was created within the EOIR, and Immigration Courts refer to the local sites of the OCIJ where proceedings are held before immigration judges); *see* Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It*

[15] Administrative agencies generally do not automatically acquiesce to federal court decisions and cannot be compelled to acquiesce in federal court interpretations of statutes. Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.9 (4th ed. 2002). For more on this, see Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989). Although agencies are bound by the law of the case, agencies may exhibit, among other types, intracircuit nonacquiescence, in which the agency refuses to follow as precedent the case law of the court of appeals which reviews its decision. *See id.* at 683; *see* 2 Charles H. Koch, Jr. & Richard Murphy, *Administrative Law & Practice* § 5.66 (3d ed., **Westlaw** current through Feb. 2018).

						an Article I Court?, 19 Barry L. Rev. 17 (2013).
Board of Immigration Appeals	**8 C.F.R. § 1003.1(a)(1)**.	**8 C.F.R. § 1003.1(b), 8 C.F.R. § 1003.1(c).**	Decisions reviewable by the proper Court of Appeals or Attorney General: **8 U.S.C. § 1252(a)(5)**; **8 C.F.R. § 1003.1(d)(1)(i)**; **8 C.F.R. § 1003.1(h)**; **U.S. DEP'T OF JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL**, ch. 1.4(h) (2017).	**Board of Immigration Appeals Practice Manual**, prescribed by BIA from authority given in **8 C.F.R. § 1003.1(d)**.	AG appoints attorneys to act as AG delegates in cases that arise; Board subject to the general supervision of the Director, Executive office for Immigration Review. 8 C.F.R. §1003.1 The BIA has jurisdiction to hear appeals from decisions of immigration judges. 8 C.F.R. § 1003.1(b).	8 C.F.R. § 1003.1 (The Board of Immigration Appeals is a body within the Department of Justice and is subject to general supervision of the Director of EOIR).
Military Commissions (generally)	**10 U.S.C. § 948b**.	**10 U.S.C. § 948d**.	Decisions reviewable by U.S. Court of Military Commission Review: **10 U.S.C. § 950c**.	**Manual for Military Commissions**, **Military Commissions Trial Judiciary Rules of Court**, and **Regulation for Trial by**	The President is authorized to establish military commissions, which may be convened by the Secretary of Defense or any officer or official designated by the Secretary for that purpose. 10 U.S.C. §§ 948b, 948h. A military commission shall have at least five primary members (voting member), each being a commissioned officer of the	10 U.S.C. § 948b ("The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.")

				Military Commission	armed forces on active duty. 10 U.S.C. §§ 948i, 948m. A military judge shall also be detailed to each military commission according to regulations prescribed by the Secretary of Defense. 10 U.S.C. § 948j. A military commission has jurisdiction to try any alien unprivileged enemy belligerent that has aided the enemy or found to be acting as a spy. 10 U.S.C. §§ 948c, 948d.	
Board of Veterans' Appeals	**38 U.S.C. § 7101**.	**38 U.S.C. § 7104**.	Some decisions final. 38 U.S.C. §7103. Other decisions reviewable by the Court of Appeals for Veterans Claims: **38 U.S.C. § 7261(a)(3)**.	**Board of Veterans' Appeals Rules of Practice**, 20 C.F.R. § 20.1-.1510. [**Westlaw**]	Members of the Board appointed by the Secretary, with the approval of the President, based upon recommendations of the Chairman; each member in good standing of the bar of a state; compensation at rates payable under section 5372 of title 5. 38 U.S.C. §§7101A(a), (b). Board required to provide a written statement of their findings and conclusions, and reasons/bases for findings and conclusions, on all material issues of fact and law presented on the records, as well as an order granting/denying relief. 38 U.S.C. §7104(d).	*Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (Vet. App. 1990) (stating that the Court of Veterans Appeals is a judicial tribunal while the BVA is an administrative tribunal).

United States International Trade Commission	**19 U.S.C. § 1330.**	**19 U.S.C. § 1332; 19 U.S.C. § 1337.**	Decisions relating to unfair practices in import trade (19 U.S.C. § 1337) are reviewable by the U.S. Court of Appeals for the Federal Circuit: **28 U.S.C. § 1295(a)(6)**.	**United States International Trade Commission Rules of Practice & Procedure**, 19 C.F.R. parts 201 & 210 [Westlaw **201** (general application) & **210** (investigations of unfair practices in import trade)]	Six commissioners appointed by the President by and with the advice and consent of the Senate for five year terms, with no reappointment possible. 19 U.S.C. §1330(a). Note more than three commissioners drawn from same political party. *Id.* Commission is responsible for investigating the administration and fiscal and industrial effects of the customs laws, relations between rates of duty on raw materials and finished/partly finished products, effects of ad valorem and specific duties, classification of articles in customs laws, etc. 19 U.S.C. § 1332(a). Also responsible for investigating tariff relations between the U.S. and other countries, commercial treaties, preferential provisions, economic alliances, export bounties, imports, and foreign competition in the U.S. 19 U.S.C. §1332(b).	*Enercon GmbH v. Int'l Trade Comm'n*, 151 F.3d 1376, 1381 (Fed. Cir. 1998) ("As the agency charged with the administration of section 337, the ITC is entitled to appropriate deference to its interpretation of the statute"); 19 U.S.C. § 1330(f) ("The Commission shall be considered to be an independent regulatory agency for purposes of chapter 35 of Title 44").
United States Merit Systems Protection Board	**5 U.S.C. § 1204.**	**5 U.S.C. § 1204(a)**; **5 C.F.R. § 1201.2**; **5 C.F.R. § 1201.3**.	Decisions reviewable by the Court of Appeals for the Federal Circuit:	**United States Merit Systems Protection Board Practices and Procedures**, 5	The Board is composed of three members appointed to 7-year terms by the President, by and with the consent of the Senate. Members may be removed for inefficiency,	*McAdams v. Reno*, 64 F.3d 1137, 1141 (8th Cir. 1995) (states that the MSB is an independent, quasi-judicial federal administrative agency); 5

			28 U.S.C. § 1295(a)(9).	C.F.R. §§ 1201.11-.113 [**Westlaw**]	neglect of duty, or malfeasance. 5 U.S.C. §§ 1201-02. The MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual federal employee appeals of adverse personnel actions and by conducting merit system studies.	C.F.R. § 1200.1 ("The Merit Systems Protection Board (the Board) is an independent Government agency that operates like a court").
Patent Trial and Appeal Board	**35 U.S.C. § 6(a)**.	**35 U.S.C. § 6(b)**.	Decisions reviewable by the Court of Appeals for the Federal Circuit: **28 U.S.C. § 1295(a)(4)(A)**; **35 U.S.C. § 141**.	**Manual of Patent Examining Procedure**; **Board Trial Rules and Practice Guide** (and Judicial Review of PTAB Decisions), 37 C.F.R. parts 41, 42, and 90 [Westlaw **1**, **41**, **42**, **90**]	Director, Deputy Director, Commissioner for Patents, Commissioner for Trademarks, and administrative patent judges constitute the Patent Trial and Appeal Board. 35 U.S.C. § 6 (a). Administrative patent judges to be "persons of competent legal knowledge and scientific ability who are appointed by the Secretary of Commerce in consultation with the Director." *Id.* Duty: to review adverse decisions of examiners upon applications for patents, review appeals. 35 U.S.C. §6(b)	35 U.S.C. § 6(a) (The PTAB is located within the United States Patent and Trademark Office (USPTO) and consists of administrative patent judges); *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 434 n.3 (D.N.J. 2015) (stating PTAB is administrative body of the USPTO).
Trademark Trial and Appeal Board	**15 U.S.C. § 1067**.	**15 U.S.C. § 1067(a)**; **15 U.S.C. § 1070**.	Decisions reviewable by the U.S. Court of Appeals for the Federal Circuit: **28 U.S.C. § 1295(a)(4)(B)**;	**Trademark Trial and Appeal Board Manual of Procedure**; **Trademark Rules of Practice**,	Director and Deputy Director of the USPTO, Commissioner for Patents, Commissioner for Trademarks, and administrative patent judges constitute the Patent Trial and Appeal Board. 15 U.S.C. § 1067(b).	*Matal v. Tam*, 137 S. Ct. 1744, 1754 (2017) (stating that the TTAB is under the umbrella of the Patent and Trademark Office (USPTO)); Surefoot LC v. Sure Foot Corp., 531 F.3d 1236,

			15 U.S.C. § 1071.	primarily 37 C.F.R. parts 2 & 7. [Westlaw **2** & **7**]	Duty: For every case of interference, opposition to registration, application to register as a lawful concurrent user, or application to cancel the registration of a mark, the TTAB will determine and decide the respective rights of registration. 15 U.S.C. § 1067(a).	1239 (10th Cir. 2008) (stating that TTAB is an administrative body of the USPTO).
Armed Services Board of Contract Appeals	**41 U.S.C. § 7105(a).**	**41 U.S.C. § 7105(e)(1)(A)**.	Decisions reviewable by the Court of Appeals for the Federal Circuit: **41 U.S.C. § 7107(a)(1)**; **28 U.S.C. § 1295(a)(10)**.	**Rules of the Armed Services Board of Contract Appeals**, 48 C.F.R. part 2, Appendix A [**Westlaw**]	Three-member Board selected and appointed in the same manner as administrative law judges, with additional requirement that members have at least five years of experience in public contract law. 41 U.S.C. § 7105(a). The Board has jurisdiction to decide any appeal from a decision of a contracting officer of the DOD, Dept. of the Army, Dept. of the Navy, Dept. of the Airforce, or NASA relative to a contract made by that department or agency. 41 U.S.C. § 7105(e)(1)(A).	41 U.S.C. § 7105 (listing the Board as one of four agency boards).
Civilian Board of Contract Appeals.	**41 U.S.C. § 7105(b).**	**41 U.S.C. § 7105(e)(1)(B)**.	Decisions reviewable by the Court of Appeals for the Federal Circuit: **41 U.S.C. §**	**Rules of Procedure of the U.S. Civilian Board of Contracts**	The Board consists of members appointed by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) from a	41 U.S.C. § 7105 (listing the Board as one of four agency boards).

			7107(a)(1); **28 U.S.C. § 1295(a)(10)**.	**Appeals**, 48 C.F.R. part 61 [**Westlaw**]	register of applicants maintained by the Administrator of General Services. Members shall be selected and appointed to serve in the same manner as administrative judges, with the additional requirement that they have at least 5 years of experience in public contract law. Members are subject to removal in the same manner as administrative law judges. 41 U.S.C. § 7105(b). The Board has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the DOD, Dept. of the Army, Dept. of the Navy, Dept. of the Airforce, NASA, Postal Service, Postal Regulatory Commission, or Tennessee Valley Authority) relative to a contract made by that agency. 41 U.S.C. § 7105(e)(1)(B).	
Tennessee Valley Authority Board of Contract Appeals	**41 U.S.C. § 7105(c). 18 C.F.R. § 1308.21**	**41 U.S.C. § 7105(e)(1)(D)**.	Decisions reviewable by the relevant U.S. district court: **41 U.S.C. § 7107(a)(2)**.	Tennessee Valley Authority Board of Contract Appeals, 18 C.F.R. §§ 1308.21-27	The Board of Directors of the TVA may establish a board of contract appeals of the TVA of an indeterminate number of members, as well as establish criteria for appointment of said members. 41 U.S.C. § 7105(c).	41 U.S.C. § 7105 (listing the Board as one of four agency boards).

				[**Westlaw**] (note: did not locate specific rules and procedures beyond those given by statute)	The Board has jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by the TVA. 41 U.S.C. § 7105(e)(1)(D).	
Postal Service Board of Contract Appeals	**41 U.S.C. § 7105(d).**	**41 U.S.C. § 7105(e)(1)(C)**.	Decisions reviewable by the Court of Appeals for the Federal Circuit: **41 U.S.C. § 7107(a)(1)**; **28 U.S.C. § 1295(a)(10)**.	**Rules of Practice Before the Board of Contract Appeals**, 39 C.F.R. part 955 [**Westlaw**]	The Board consists of judges appointed by the Postmaster General that meet the qualifications and serve in the same manner as the Civilian Board of Contract Appeals. 41 U.S.C. § 7105(d). The Board has jurisdiction to decide any appeal from a decision of a contracting officer of the U.S. Postal Service or the Postal Regulatory Commission relative to a contract made by either agency. 41 U.S.C. § 7105(e)(1)(C).	41 U.S.C. § 7105 (listing the Board as one of four agency boards).

APPENDIX B: INHERENT POWERS

Amicus note: Hundreds of federal cases establish the inherent powers of the courts. As with Appendix A, in the course of research for the brief, I did not find any secondary sources sufficient to give an overview of the range of authorities. Appendix B therefore provides a framework for the inherent powers of the courts, as recognized by the judicial branch.

I. OVERVIEW

The judiciary's inherent powers stem from its duty to ensure the effective administration of justice.[16] Inherent powers recognized by the Courts fall into three broad categories: powers that (I) promote the judiciary's substantive commitment to fairness and justice; (II) facilitate efficiency and fairness in the process of litigation; and (III) protect the integrity, independence, and reputation of the courts. Whether

[16] *See In re Peterson*, 253 U.S. 300, 312 (1920) ("The question presented is…whether the court has the inherent power to supply itself with this instrument for the administration of justice."); *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924) (holding contempt is an inherent power as "[i]t is essential to the administration of justice."); *In re Stone*, 986 F.2d at 902 (recognizing the court's inherent power to ensure "the efficient and orderly administration of justice"). *See also In re Richards,* 63 S.W.2d 672, 675 (Mo. 1933) ("a primary object essentially within the orbit of the judicial department is that courts properly function in the administration of justice, for which purpose they were created."); *Clark v. Austin*, 101 S. W.2d 977, 997 (Mo. 1937). (Ellison, C.J.) ("The ultimate objective of both departments [judicial and legislative] may be the same-the good of the people in the administration of justice; but the powers are fundamentally different. The courts' power essentially is protective and self-serving.").

these powers are "essential" or merely "beneficial" impacts the extent to which Congress may intervene (see Am. Br. at 17-18).[17]

II. PROMOTE THE SUBSTANTIVE COMMITMENT TO FAIRNESS AND JUSTICE

Federal courts use their inherent power to fulfill their substantive commitment to fairness and justice. This includes ensuring full and accurate factual information and access to matters of law; maintaining consistency within and among courts; sealing, unsealing, revoking, or rescinding orders; and undertaking additional steps. *In none of these instances does Congress provide explicit authority for the courts to act*. Instead, courts do so on the basis of their own inherent power as Article III courts.

A. Ensure Full Factual Information and Access to Matters of Law

The judiciary has the inherent power to ensure that it has the benefit of full and accurate factual information. They can, for example, appoint auditors, special masters, and commissioners to make investigations into the facts. *See Ex parte Peterson*, 253 U.S. 300, 304-07, 312-14 (1920) (appointing an auditor "to make a

[17] For scholarly discussion of essential inherent powers see Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 844-45 (2008), Pushaw, Jr., *supra*, 86 Iowa L. Rev. at 741, and Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1468-69 (1984). To the extent that scholars disagree, it is in how broadly such powers should be understood. Some say *any* action bearing a natural relation to the administration of justice falls exclusively within the purview of the courts. *See, e.g.*, Anclien, *supra*, 64 N.Y.U. Ann. Surv. Am. L. at 53; Linda Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Power*s, 77 Minn. L. Rev. 1283, 1320-22 (1993).

preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties, and make and file a report in the Office of the Clerk of this Court with a view to simplifying the issues for the jury," explaining that "[c]ourts have…inherent power to provide themselves with appropriate instruments required for the performance of their duties," including the "authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."); *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983)("[R]ule 53 does not terminate or modify the district court's inherent equitable power to appoint a person, whatever be his title, to assist in administering a remedy."); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956), *cert. denied,* 352 U.S. 833 (1956) ("Beyond the provisions of Rule 53…for appointing and making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" (internal citation omitted)); *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 127-29 (1864) (upholding inherent authority of a court to appoint a referee to hear/determine all issues, with the consent of the parties). *Aff'd by* Fed. R. Civ. P. 53.

Access to accurate information includes the power to ensure a fair and robust evidentiary record. As recognized by the Supreme Court, the judiciary can, on its own authority, use discovery procedures in habeas cases. *Harris v. Nelson*, 394 U.S.

286, 290 (1969). It can allow post-trial depositions. *United States ex rel. Consol. Elec. Distribs., Inc. v. Altech, Inc*., 929 F.2d 1089, 1091-92 (5th Cir. 1991). It can require that witness statements be produced. *Jencks v. United States*, 353 U.S. 657, 668-69 (1957). It can make *in limine* rulings. *Luce v. United States*, 469 U.S. at 38, 41 n. 4 (1984). Lower courts further recognize the inherent powers of the courts to exclude, admit, or strike evidence or exhibits on grounds of fairness. *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir. 1986); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 897-98 (8th Cir. 1978). Courts also can require parties to attend hearings regarding missing evidence. *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11-12 (1st Cir. 1985).

Courts also have the inherent power to issue and answer letters rogatory to obtain evidence from an individual within the jurisdiction of a foreign court. In re Letter Rogatory, 523 F.2d 562, 564 (6th Cir. 1975) ("[I]t has been held that federal courts have inherent power to issue and respond to letters rogatory…"); United States v. Reagan, 453 F.2d 165, 173 (6th Cir. 1971); United States v. Staples, 256 F.2d 290, 292 (9th Cir. 1958). Indeed, the Sixth Circuit's very definition letters rogatory recognizes such power, as well as the direct relationship between it and the administration of justice: "[T]he medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and

by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made, and being usually granted, by reason of the comity existing between nations in ordinary peaceful times." *In re Letter Rogatory*, 523 F.2d at 563 n.1.

Pari passu, lower courts have recognized broad judicial authority to ensure that matters of law are fully addressed. For instance, courts can require parties to enter a memorandum of law. *Alameda v. Sec'y of Health, Educ. & Welfare*, 622 F.2d 1044, 1047 (1st Cir. 1980). They can require counsel to serve standby. *In re Atl. Pipe Corp.*, 304 F.3d 135, 143 (1st Cir. 2002); *Arthur Pierson & Co. v. Provimi Veal Corp.*, 887 F.2d 837, 839 (7th Cir. 1989); *United States v. Bertoli*, 994 F.2d 1002, 1018 (3d Cir. 1993). They can require parties to retain a lawyer. *J.D. Pharm. Distribs., Inc. v. Save-On Drugs & Cosmetics Corp.*, 893 F.2d 1201, 1011-12 (5th Cir. 1977). They can assign attorneys for pretrial actions. *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1011-12 (5th Cir. 1977). And they can appoint amici curiae. *In re Utils. Power & Light Corp.*, 90 F.2d 798, 800 (7th Cir. 1937).

B. Ensure Consistency Within and Among Courts

To ensure consistency, courts have the inherent power, derived from common law, to ensure stare decisis as a matter of both horizontal and vertical parity. This power essentially reflects a policy decision of the court that the effective administration of

justice requires consistency. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) ("[S]tare decisis is not an inexorable command, but instead reflects a policy judgment that in most maters it is more important that the applicable rule of law be settled than that it be settled right.").

C. Seal, Unseal, Revoke, or Rescind Orders

The Supreme Court has recognized the inherent power of courts to seal, unseal, revoke, or rescind orders. They can revoke or rescind orders at any point prior to final judgment in a civil case. *Marconi Wireless Tel. Co. of Am. v. United States*, 320 U.S. 1, 47-48 (1943). This includes the inherent the authority to revoke orders granting bail. *Fernandez v. United States*, 81 S.Ct. 642 (1961). The lower courts have similarly recognized the inherent powers of the courts to modify or lift protective orders. *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 953 (1987); *Poliquin v. Garden Way*, Inc. 989 F.2d 527, 535 (1st Cir. 1993) ("[A] protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment.") This power persists even when jurisdiction over the relevant controversy has ended. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), cert. denied, 498 U.S. 1073 (1991) ("As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed.") The court "can modify

a protective order when a third party requests judicial documents after the parties have filed a stipulation of dismissal pursuant to settlement." *Agent Orange*, 821 F.2d at 143-45.

The lower courts also recognize broad inherent judicial authority to seal and unseal records. *In re Robert Landau Assocs*., 50 B.R. 670, 678 (S.D.N.Y. 1985) ("this court holds that it possesses the inherent authority to seal testimony and enter an order of confidentiality."); *United States v. Seugasala*, 670 Fed. App'x 641 (9th Cir. 2016) (Mem.); *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003); *United States v. Mann*, 829 F.2d 849, 853 (9th Cir. 1987). This power persists despite efforts by Congress to introduce rules governing the process. *Id.* (noting that despite Fed. R. Civ. P. 5.2(d), "The court may order that a filing be made under seal…[and] may later unseal the filing.") The district court's subject matter jurisdiction over the sealed record is not lost when the case is appealed. *United States v. Seugasala*, 670 Fed. App'x 641 (9th Cir. 2016) (Mem.). Even where there is no third party request, the Court is obliged to consider records filed entirely under seal to determine whether they should be made publicly available. *Stern v. Trs. of Columbia Univ.*, 131 F.3d 305, 307 (2d Cir. 1997).

D. Additional Powers

The courts have other inherent powers that go directly to the substantive issues of fairness. As recognized by the Supreme Court, they can stay disbursement of funds

until the revised payments are finally adjudicated. *United States v. Morgan*, 307 U.S. 183, 197-98 (1939). Courts can also excise jury determinations and order a reduction in an excessive verdict in lieu of a grant of a defendant's motion for a new trial or of a reversal (where the court is appellate). This power stems back to the early days of the Republic. The first recorded use of remittitur was by Justice Story. *Blunt v. Little*, 3 F. Cas. 760, 762 (C.C.D. Mass. 1822) (No. 1578). It remains a judicial power, even though the rules provide for the grant of a new trial. Fed. R. Civ. P. 59. Nowhere can remittitur be found in statutory form. Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 830 (2008).

In the interests of fairness, the court can mediate the impact of common law. It can alter common law rules of procedure. *See Funk v. United States*, 290 U.S. 371, 382 (1933) ("That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt." It can also consolidate questions involving common law and fact. *See Bowen v. Chase*, 94 U.S. 812, 824 (1876) (acknowledging inherent power to consolidate two cases arising from same controversy). This remains an inherent power despite the presence of Fed. R. Civ. P. 42(a).

Courts can discharge a jury from delivering a verdict. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). They can rescind a jury discharge order and recall

the jury for further deliberation. *Dietz v. Bouldin*, 136 S. Ct. 1885 (2016). They can withdraw a juror mid-trial where it would be "a total failure of justice if the trial proceed." *United States v. Coolidge*, 25 F.Cas. 622, 623 (C.C.D. Mass. 1815) (No. 14,858). They even can fine jurors who jump out the window to escape jury service. Offutt v. Parrott, 18 F.Cas. 606, 607 (C.C.D.C. 1803) (No. 10,453).

III. FACILITATE FAIR AND EFFICIENT PROCESSES

The judiciary has the inherent authority to facilitate fair and efficient processes—powers stem from its duty to administer justice. Article III courts can "control and direct the conduct of…litigation without any express authorization in a constitution, statute, or written rule of court." Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805, 1805 (1995)). Specifically, the court can control its own calendar and manage its docket; ensure the efficient use of resources.

A. Control the Judicial Calendar and Docket

In 1936 the Supreme Court recognized the inherent authority of the judiciary to manage its docket and courtroom with a view toward the efficient and expedient resolution of cases. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The Court recently reiterated this point, noting that the judiciary has the inherent authority, conferred neither rules nor statutes, "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Goodyear Tire & Rubber Co. v.*

Haegar, 137 S.Ct. 1178, 1186 (2017) (quoting *Link v. Wabash R. Co*., 370 U.S. 626, 630-631 (1962)). *See also In re Atl. Pipe Corp.*, 304 F.3d 135, 143 (1st Cir. 2002); *Arthur Pierson & Co., v. Provimi Veal Corp*., 887 F.2d 837, 839 (7th Cir. 1989).

These authorities are fairly broad. According to the lower courts, the judiciary can demand that defense counsel commit to a date for trial. *United States v. Hughey*, 147 F.3d 423, 430-31 (5th Cir. 1998). The court can control the order in which issues will be considered. *See Marinechance Shipping, Ltd. V. Sebastian*, 143 F.3d 216, 218 (5th Cir. 1998). And it can declare parties ready for trial. *See Williams v. New Orleans Pub. Serv., Inc.*, 728 F.2d 730, 732, n.4 (5th Cir. 1984).

B. Ensure the Efficient Use of Resources

The judiciary has numerous inherent powers at its disposal to ensure the efficient use of resources. As recognized by the Supreme Court, it can consolidate questions involving common law and fact. *See Bowen v. Chase*, 94 U.S. 812, 824 (1876) (acknowledging inherent power to consolidate two cases arising from same controversy). Acknowledged by Fed. R. Civ. Pro. 42(a). the judiciary can stay an action pending the completion of a related action in another court. *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.") *See Colo. River v. United States*, 424 U.S. 800, 817 (1976); *Younger v. Harris*, 401 U.S. 37,

43-44 (1971); *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25, 27-29 (1959); *Burford v. Sun Oil Co.,* 319 U.S. 315, 332-33 (1943); *R.R. Comm'n v. Pullman Co*., 312 U.S. 496, 500-01 (1941). According to the lower courts, it can also consolidate cases. *See MacAlister v. Guterma*, 263 F.2d 65, 68 (2d Cir. 1998). And it can set restrictions on the number of expert witnesses. *See Aetna Cas. & Sur. Co. v. Guynes*, 713 F.2d 1187, 1193 (5th Cir. 1983). *But see United States v. Colomb,* 419 F.3d 292, 301-02 (5th Cir. 2005).

On similar grounds, courts on their own authority can dismiss action on grounds of *forum non conveniens.* Courts consider matters of both public and private interest: for instance, which forum has a more direct interest in addressing the matter? How available will compulsory processes be? How burdensome will it be for witnesses? The Supreme Court first sanctioned this doctrine in 1947. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-08 (1947). (The Court later referenced the power as an example of inherent judicial power. *See Chambers v. NASCO*, 501 U.S. 32, 44 (1991)).

Lower courts recognize a slew of inherent judicial powers similarly directed at efficiency. Courts can restrict pretrial hearing length. *See J.S. Pharm. Distribs., Inc. v. Save-On Drugs & Cosmetics Corp.*, 893 F.2d 1201, 1209 (11th Cir. 1990). They can require parties to have representatives with settlement authority. *See In re Stone*, 986 F.2d 898, 903 (5th Cir. 1993) ("[D]istrict courts have the general inherent power to require a party to have a representative with full settlement authority present—or

at least reasonably and promptly accessible—at pretrial conferences). *See also In re Novak*, 932 F.2d 1397, 1405 (11th Cir. 1991); *Luis C. Forteza e Hijos, Inc. v. Mills*, 534 F.2d 415, 418 (1st Cir. 1976). They can limit the amount of time counsel can speak. *See United States v. Maloof*, 205 F.3d 819, 828 (5th Cir. 2000); *United States v. Gray*, 105 F.3d 956, 964-65 (5th Cir. 1997); *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996).

Although the Supreme Court has not addressed whether preclusion doctrine is an inherent power, it could similarly be seen within the scope of this section. Collateral estoppel, res judicata, and preclusion controls relitigation of issues and claims. The doctrine itself has been recognized by the Court. *Semtek Int'l v. Lockheed Martin*, 531 U.S. 497, 508 (2001) ("[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.") *See also* Barrett, *supra* (arguing that it is an inherent power of the court).

IV. PROTECT THE INTEGRITY, INDEPENDENCE, AND REPUTATION OF THE JUDICIARY

As part of the administration of justice, courts have the inherent power to take steps to protect the integrity, independence, and reputation of the judiciary. This means that they can prevent fraud upon the court; sanction contumacious behavior; punish for contempt and maintain order in the courtroom.

A. Prevent Fraud

As recognized by the Supreme Court, the judiciary has the inherent authority to conduct their own, independent investigation to determine whether fraud has occurred. *See Universal Oil Products Co. v. Root Refining Co*., 328 U.S. 575, 580 (1946). The "historic power of equity to set aside fraudulently begotten judgments" is central to judicial integrity because "tampering with the administration of justice in [this] manner…involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safe-guard the public." *Hazel-Atlas Glass Co. v. Harford-Empire Co.*, 322 U.S. 238, 246 (1946) (first case in which fraud was declared within inherent powers). *See also Universal Oil Prods. Co*, 328 at 580; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

B. Sanction Contumacious Behavior

The Supreme Court and numerous lower courts have recognized the inherent power of the judiciary to sanction contumacious behavior, such as failure to prosecute, fraud, or acting in bad faith. Following repeated prosecutorial delays, in 1962 the court explained that its authority "to dismiss *sua sponte* for lack of prosecution [is] an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962). *See also Chambers*, 501 U.S. at 44 (citing *Link*). Such powers are "governed

not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 at 630-631.

The judiciary similarly can sanction parties for litigating in bad faith. This is one of the ancient powers of the courts, which dates back (at least) to 3 James I (1605). *Tidd's Practice* 60 (1794). The Supreme Court first recognized this power in *Ex parte Burr*, 22 U.S. (9 Wheat.) 529 (1824). It has frequently reaffirmed it. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980); *Goodyear Tire & Rubber Co. v. Haegar*, 137 S.Ct. 1178 (2017) (holding that federal courts have inherent authority to sanction bad-faith conduct).

As part of this power, the Court can fine an attorney when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Lyeska*, at 258-59 (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co*., 417 U.S. 116, 129 (1974)). It can assess attorney fees against counsel. *See Roadway Express*, 447 U.S. at 765 (although, for the most part, the "American Rule" prohibits fee shifting. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975). "The imposition of sanctions transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991). While there may already be procedural rules

in place (indeed, as one scholar argues, "A comprehensive legislative sanctioning scheme has been developed." Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735 765 (2001)), courts nevertheless can still sanction under their inherent powers. *Chambers*, 501 U.S. at 49-50. The court can sanction a party for delaying or disrupting the litigation, or hampering "enforcement of a court order." *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1979).

And courts can go further. In some circumstances, they can dismiss an appeal or complaint entirely. *See In re Prevot*, 59 F.3d 556, 565 (6th Cir. 1995); *D.P. Apparel Corp. v. Roadway Express, Inc.*, 736 F.2d 1, 3-4 (1st Cir. 1984).

C. Punish for Contempt and Maintain Order in the Courtroom

Traditionally, contempt has been understood to mean misconduct in the presence of the court, disobeying court orders, or misbehavior by officers of the court. Since the founding, there has been considerable legislation governing this area. *See, e.g.,* Judiciary Act of 1789, ch. 20, §17, 1 Stat. 73, 83 (giving federal judges "discretion" to punish "by fine or imprisonment…all contempts of authority in any cause or hearing before the court.") Nevertheless, there are early, and repeated, explicit discussion of court's inherent authority over contempt. *See, e.g., Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); United States v. Duane, 25 F. Cas. 920, 922 (C.C.D. Pa. 1801) (No. 14,997) (citing common law roots of judicial authority).

In 1821, even as it upheld the legislature's contempt authority, the Supreme Court compared it to the powers exercised by the courts, which are "universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821). Certain "auxiliary and subordinate" powers can be exercised by the courts where they are "indispensable to the attainment of the ends" specified. *Id.* at 225-26.

The first time the Court squarely addressed contempt as an inherent power of the courts came in 1874. The Supreme Court explained,

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1874). Fifty years later, the Court reiterated its position: "[T]he power to punish for contempts is inherent in all court, has been many times decided and may be regarded as settled law. It is essential to the administration of justice." *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924). The following year, the Court recognized that it had a duty to punish for contempt: "a judge must have and exercise [powers of contempt] in protecting the

due and orderly administration of justice and in maintaining the authority and dignity of the court." *Cooke v. United States*, 267 U.S. 517 (1925).

As the court later explained, "The underlying concern that gave rise to the contempt power was not…merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987) (citations omitted). *See also Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt.")

The inherent power to punish for contempt is not narrow. To the contrary, Courts can take a number of steps to address it. Courts have the power to appoint an attorney to prosecute defendants for criminal contempt. *Young v. United States ex rel. Vuitonn et Fils S.A.*, 481 U.S. 787, 795 (1987) (quoting *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry. Co.*, 266 U.S. 42, 65-66 (1924). *See also Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (court may sanction attorneys for "willful disobedience of a court order.") *See also Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428 (1923) (permitting the court to levy the entire cost of litigation as a punishment). "[T]he inherent power extends

to a full range of litigation abuses." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991).[18]

Not only can courts punish for contempt, but they can bar individuals disrupting a trial from the courtroom. *See Illinois v. Allen*, 397 U.S. 337 (1970). *See also Chambers*, 501 U.S. at 44 (citing *Illinois*). In similar fashion, they can impose silence, respect, and decorum in their presence. *Anderson v. Dunn*, 19 U.S. 227. *See also Chambers*, 501 U.S. at 43 (quoting *Anderson v. Dunn* with approval).

D. Regulate the Practice of Law

One of the oldest, recognized inherent authorities of the courts is the power they wield over matters related to bar admission and discipline. *See Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824). While such power "ought to be exercised with great caution," it is nevertheless "incidental to all Courts." *Id. Cf. Roadway Express*, 447 U.S. at 764; *Chambers*, 501 U.S. at 42-43 (quoting *Ex parte Burr*, 22 U.S. at 531). The judiciary can sanction for unauthorized legal practice. *See United States v. Johnson*, 327 F.3d 554, 560 (7th Cir. 2003).[19]

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[18] Similar embrace of contempt power as essential to the judicial power marks state court discussions. *See, e.g.*, *State v. Johnson*, 3 S.C.L. 155, 158 (S.C. 1802) (per curiam) ("Justices of peace have a power derived from the common law, and necessarily attached to their offices, of committing and confining for gross misbehavior in their presence.")

[19] State courts further recognize the inherent judicial power to inquiry into an attorney's authority to practice. *King of Spain v. Oliver*, 14 F. Cas. 577, 578 (C.C.D. Pa. 1810) (No. 7814) (recognizing authority to inquire into legal qualifications of

counsel as "inherent in all courts.") They also see it as well within the court's domain to direct and control judicial clerks. *Yates v. New York*, 6 Johns. 337, 372-73 (N.Y. 1810) (noting courts' inherent authority to control clerks and other officers of the court).

APPENDIX C: JUDICIAL SCRUTINY OF EXECUTIVE BRANCH CLASSIFICATION AND PUBLICATION OF RELATED MATERIALS

Amicus note: The foregoing brief addresses the profound constitutional concerns raised by the Government's claim that (a) the FISC lacks jurisdiction over its own opinions, (b) the public has no right to the law, and (c) the Executive Branch controls judicial opinions. Also concerning is the extent to which the Government's argument is based on a mischaracterization of Supreme Court doctrine and judicial practice. Department of the Navy v. Egan *does not do nearly the work the Government would like it to do. And while Article III courts are at times deferential to Executive Branch assertions of national security vulnerabilities, they also routinely and properly push back, inspect documents, and insist that certain materials be made public. Appendix C provides the framing for these cases.*

I. OVERVIEW

In its opening brief to the FISCR, the Executive Branch argued that the request for public access to the court's opinions, and the suggestion that the court has control over what portions of its opinions are released, were "completely devoid of merit." Opening Brief for the United States, *In re: Certification of Questions of Law to the FISCR*, No. 18-01, at 2-3 (FISA Ct. Rev. Feb. 23, 2018) [hereinafter Gov't FISCR Op. Br.]. The Government objected to the FISC engaging in "an independent review of classified national security information, followed by release of information by the FISC, based on the FISC's supposed authority to override (or ignore) the government's classification decisions." *Id.* at 18-19. Such a step would "usurp[]the Executive's constitutional function" if the court were to conduct a review and "make[] its own disclosure decisions." *Id.* Setting the constitutional issues,

addressed in this brief, to the side, the Government's argument is built on the mischaracterization of a key case and a failure to acknowledge the role that courts actually do play in providing a check on the Executive Branch.

II. THE EXECUTIVE MISCHARACTERIZES *DEPARTMENT OF THE NAVY V. EGAN*

The executive mischaracterizes *Dep't of the Navy v. Egan* to support its claim that the Executive Branch has complete control of classified information.[20] *See Dep't of*

[20] A parallel trend is appearing in government submissions to other Article III courts. It has not always been the case: in the years immediately following *Egan*, the executive appropriately appealed to it in security clearance or background check cases. *See, e.g.*, Brief for Appellees, *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996) (No. 96-5036); Brief for Appellees at 11-12, *Ryan v. Reno*, 168 F.3d 520 (D.D.C. Sept. 24, 1998) (No. 98-5036), 1998 WL 35240401. The Department of Justice still uses it in access-related contexts. *See, e.g.*, Brief of Defendant-Appellee, *Toy v. Holder*, 714 F.3d 881 (5th Cir. Oct. 23, 2012) (No. 12-20471), 2012 WL 5294782, at *32. Over the past decade, however, the government has increasingly begun to claim that the case supports a broad reading of Executive Branch power and expected judicial deference. *See, e.g.*, Brief for the Petitioners, *Kerry v. Din*, 135 S.Ct. 2128 (Nov. 26, 2014), (No. 13-1402), 2014 WL 6706838, at *42; Brief for the United States, *General Dynamics Corp. v. U.S.*, 563 U.S. 478 (Dec. 13, 2010) (Nos. 09-1298, 09-130), 2010 WL 5099376, at *23; Reply Brief for Defendant-Appellants, *ACLU v. Dep't of Def.*, No. 17-779, 2017 WL 5152276, at *12-13, *36-37 (2d Cir. Nov. 3, 2017); Brief for Respondents-Appellants, *Dhiab v. Obama*, 787 F.3d 563 (D.C. Cir. Mar. 6, 2015) (No. 14-5299), 2015 WL 1004459, *41, *42, *48; Brief of the Plaintiff-Appellee, *United States v. Sedgahaty*, 728 F.3d 885 (9th Cir. Aug. 3, 2012) (No. 6:05-CR-60008-HO), 2012 WL 3342732, at *115; Brief for the Appellees, *Tenenbaum v. Ashcroft*, 407 Fed. App'x 4 (6th Cir. Dec. 2, 2009) (No. 09-1992), 2009 WL 4831977, at *17, *19, *34; Brief for the Defendants-Appellants, *John Doe Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. Feb. 14, 2008) (No. 07-4943), 2008 WL 6082598, at *42; Brief of Appellant, *Horn v. Huddle*, 699 F. Supp. 2d 236 (D.D.C. Sept. 24, 2009) (No. 09-5311), 2009 WL 6155285, at *3, *27.

the Navy v. Egan, 484 U.S. 518 (1988). According to the government, *Egan* supports the proposition that the authority to make national security judgments related to classified material lies solely with the Executive Branch.[21] The executive also uses *Egan* to buttress the assertion that, unlike the executive, the judiciary is ill-suited to make national security determinations.[22] In its June 2017 opposition to the motion of the ACLU for access to the court's opinions, the government characterized *Egan* as "holding that predictive judgments related to national security risks 'must be made by those with the necessary expertise in protecting classified information.'" United

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[21] *See, e.g.,* United States' Reply Br. at 6, *In re: Certification of Questions of Law to the FISCR*, No. 18-01 (FISA Ct. Rev. Mar. 5, 2018) [hereinafter U.S. Reply Br.]; Opening Brief for the United States at 21-22, *In re: Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. 18-01 (FISA Ct. Rev. Feb. 23, 2018) [hereinafter U.S. Opening Br.]; United States' Opposition to the Motion of the ACLU for the Release of Court Records, at 11, *In re Opinions and Orders of this Ct. Containing Novel or Significant Interpretations of Law*, No. Misc. 16-01 (FISA Ct. June 8, 2017) [hereinafter U.S. Opp. to Mot. of ACLU in No. Misc. 16-01]; United States' Response to Movant's En Banc Opening Br. at 6, *In re Opinions & Orders of This Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (May 1, 2017) [hereinafter Gov't En Banc Resp. Br.]; United States' Legal Brief to the En Banc Court in Response to the Court's Order of March 22, 2017, at 11 n.4 *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. No. Apr. 17, 2017) [U.S. Legal Br. to En Banc Ct. in Resp. to Ct. Order].

[22] *See, e.g.*, U.S. Opening Br. at 21 (citing *Egan* at 529 for "holding that predictive judgments related to national security risks 'must be made by those with necessary expertise in protecting classified information.'"); U.S. Opp. to Mot. of ACLU in No. Misc. 16-01, at 13 (raising concern that the FISC might err in making the determination as "judges with expertise in national security matters cannot 'equal [the expertise] of the Executive Branch,'" with "see also *Egan* at 529" that those with the necessary expertise must make such determinations).

States' Opposition to the Motion of the ACLU for the Release of Court Records, at 11, 12, 13, *In re Opinions and Orders of this Ct. Containing Novel or Significant Interpretations of Law*, No. Misc. 16-01 (FISA Ct. June 8, 2017) [hereinafter U.S. Opp. to Mot. of ACLU in No. Misc. 16-01]; *Cf.* U.S. Opening Br. at 21.

These claims do not square with the facts and holding of the case itself, which dealt with a two-track system for an agency to take adverse actions against government employees. *See Egan*, 484 U.S. at 526; 5 U.S.C. §§ 7511-14. Under the statute, employees had a right to a hearing in their appeal to the Merit Systems Protection Board—a non-Article III tribunal. *See* 5 U.S.C. §§ 7513(d), 7532(c)(3). What the Court actually held was that the *statute* did not give the *Board* control over security clearance determinations. *Egan*, 484 U.S. at 530-32.[23] That decision had to

[23] The Board's presiding official had determined that it was impossible to ascertain whether the denial of the respondent's security clearance was justified, in part because the agency had not provided evidence that it had "conscientiously weighed the circumstances surrounding [the respondent's] alleged misconduct and reasonably balanced it against the interests of national security." App. to Pet. For Cert. 65a, cited and quoted in *Egan*, 484 U.S. at 523. The government, in response, claimed that the Board could only determine (a) whether the required removal procedures had been followed; and (b) whether a security clearance was a condition for the position. *Id.* The court noted in response that "the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. The court's analysis was based on the security clearance environment. It noted, "after all," that as Commander in Chief, the President holds the authority "to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch." *Id*. It then went on to note the Government's "'compelling interest' in withholding national security information from unauthorized persons *in*

be made by the appropriate agency inside the Executive Branch with the necessary expertise. *Id.* at 527. To the extent that the court looked to the Commander in Chief powers, it was as to whether the executive had the authority to classify information in the first place, as well as to give, or deny, access to that information to individuals hired by the Executive Branch. *Id.* at 527-28. The Court explained, "no one has a 'right' to a security clearance." *Id.*

Despite the Government's effort to credit this case with standing for the broader proposition that the Executive has untrammeled authority to classify material—including judicial opinions—the case says nothing of the sort.[24] The court itself

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the course of executive business." *Id*. (emphasis added). The court cited in support the case of *Snepp v. United States*, which dealt with whether a prepublication agreement signed in the course of executive branch employment prevented a former emplooyee from publishing his book without approval from the CIA. *Snepp v. United States*, 444 U.S. 507, 508 (1980).

[24] This problem, while most pronounced in regard to *Egan*, is not limited to that case. Another case frequently cited in support of overbroad Executive Branch authorities is *CIA v. Sims*. 471 U.S. 159 (1985). In that case, individuals were seeking access to the names and institutional affiliations of those working on MKULTRA. 471 U.S. 178-79. The Court noted that "Congress did not mandate the withholding of information that may reveal the identity of an intelligence source; it made the Director of Central Intelligence responsible only for protecting against unauthorized disclosures." *Id.* at 180. The Court went on to suggest, "[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Id.* Although the holding was appropriately narrow ("We hold that the Director of Central Intelligence properly invoked § 102(d)(3) of the National Security Act of 1947 to withhold disclosure of the identities of the individual MKULTRA researchers as protected "intelligence sources." *Id.* at 181), the Government looks to the case in support of broad judicial deference to the executive

noted at the beginning of the decision "the narrow question presented by this case." *Id.* at 520. The statute in question did not transfer control over security clearances to the Board, as access to classified material *within the Executive Branch* is overseen by the agency most directly involved in the sensitive areas. *Id.* at 530-32.

III. ARTICLE III COURTS REGULARLY CONFRONT CLASSIFIED MATERIAL

According to the Government, the "claim of unilateral FISC power to override the Executive's classification decisions is completely devoid of merit." U.S. Reply Br. at 20-22. For the government, there is no role for the court when it comes to national security information. U.S. Opp. to Mot. of ACLU in No. Misc. 16-01, at 12. *See also* U.S. Legal Br. to En Banc Ct. in Resp. to Ct. Order at 11 n.4.

This assertion turns a blind eye to the actual role that the judiciary plays in scrutinizing executive branch efforts to assert national security interests to prevent information from becoming public. Article III courts routinely confront classified material in the context of litigation.[25] Hundreds, if not thousands, of cases that never

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branch *whenever* national security matters are on the line. *See, e.g.*, U.S. Dep't of Justice, *Guide to the Freedom of Information Act, Exemption 1*, at 6 (2014_, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption1.pdf [hereinafter DOJ FOIA Guide] (citing *CIA v. Sims* in support of the proposition that the judiciary is and ought to be extremely deferential to the executive when national security matters are on the line).

[25] *See, e.g.*, *Snepp v. U.S.* 444 U.S. 507 (1980) (holding that a prior employee of Central Intelligence Agency who published a book on CIA activities in South Vietnam without first submitting it to the agency for prepublication review breached a fiduciary obligation); *New York Times v. United States*, 403 U.S. 713 (1971) (holding that the Nixon Administration's efforts to prevent publication of classified

come before FISC involve classified materials, giving rise to (a) Executive Branch assertions of the state secrets privilege, (b) Exemption 1 claims under the Freedom of Information Act (FOIA), (c) use of the Classified Information Procedures Act (CIPA), and (d) other efforts to keep the material from reaching the public domain.

From 2001 to 2009, for instance, the Government claimed state secrets in upwards of one hundred cases. Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 87 (2010). The cases involved a wide range of matters: breach of contract; patent disputes; trade secrets; fraud; employment termination; wrongful

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information violated the First Amendment); *United States v. Reynolds*, 345 U.S. 1 (1953) (holding in a suit under the Tort Claims Act and motion under the Federal Rules of Civil Procedure for production of the Air Force's accident investigation report following the death of civilians on board a military aircraft, that the cause for state secrets privilege must be reasonably demonstrated by the Government); *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988) (Espionage Act prosecution in connection with publication of satellite photographs of Soviet aircraft carrier in *Jane's Defence Weekly)*; *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (holding that the Classified Information Procedure Act altered the existing law of evidence regarding admissibility); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972) (holding that former CIA employee was required to submit any publication 30 days prior to publication to the agency, but limiting the order to the contractual language); *In re Guantanamo Bay Litig.*, 624 F.Supp.2d 27 (D.D.C. 2009) (intervenors moving to require public access to "every factual return in actions challenging the United States' detention of alleged enemy combatants at United States Naval Base in Guantanamo Bay, Cuba."); *Stillman v. CIA*, 517 F.Supp.2d 32 (D.D.C. 2007) (author of book on Chinese nuclear weapons program brought action against Department of Energy, Department of Defense, and Central Intelligence Agency for delaying prepublication review and challenging the system as an unconstitutional prior restraint); *Jabra v. Kelly*, 62 F.R.D. 424 (E.D. Mich. 1974) (granting in part and denying in part the government's assertion of state secrets privilege).

death and personal injury; negligence; allegations of torture; environmental degradation; breach of espionage contracts; defamation; criminal conduct; and assertions of constitutional violations. *Id.* Since 2009, courts have disposed of another 74 state secrets cases, dealing with everything from defamation, discrimination, and personal injury and wrongful death, to constitutional concerns related to the First, Fourth, Fifth, and Eighth Amendments. *State Secrets Archives*, Georgetown Law, http://apps.law.georgetown.edu/state-secrets-archive/ (last visited June 12, 2018).

FOIA suits, which provide citizens with access to Executive Branch documents, frequently implicate classified material. Under the Freedom of Information Act, Exemption 1 protects information that has been deemed classified "under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive order."[26] 5 U.S.C. § 552(b)(1) (2012). The Government makes broad use of

[26] Not long after the original passage of FOIA, Members of Congress brought suit against the Executive Branch to compel the President to disclose nine Top Secret and Secret documents prepared in relation to an underground nuclear test. *EPA v. Mink*, 410 U.S. 73, 74-75 (1973). At that time Exemption 1 related to matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 250, 251 (1966). The Court found that the statutory language neither authorized nor permitted *in camera* inspection of the contested documents. M*ink*, 410 U.S. at 84. Therefore, merely upon a showing that the documents had been classified according to the governing Executive Order as involving "highly sensitive matter that is vital to our national defense and foreign policy" was sufficient to meet

Exemption 1. Since 1977, it has asserted it in at least 377 FOIA cases to come before the Courts of Appeals and one other court—a fraction of the total.[27]

More than 50 cases, the courts have noted the discovery of classified information by defendants and in 89 cases procedures involving classified information. Data Set

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the standard for Exemption 1. *Id.* In his concurrence, Justice Stewart invited the legislature to clarify its intent. *Id*. at 94. Congress responded by amending FOIA, to expressly provide for *de novo* review by the courts and for *in camera* review of classified materials. 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974); H.R. Rep. No. 93-876, at 127 (1974). Congress also replaced the language (information "required to be classified" under Executive Order) with information "authorized" under the "criteria" of an Executive Order to allow the court, "if it chooses to undertake review of a classification determination, including examination of the records in camera, [to] look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive Order." *Id.* The committee explained, "The in camera provision is permissive and not mandatory. It is the intent of the committee that each court be free to employ whatever means it finds necessary to discharge its responsibilities." *Id.* at 128. As acknowledged by the Executive Branch, "In so doing, congress sought to ensure that agencies properly classify national security records and that reviewing courts remain cognizant of their authority to verify the correctness of agency classification determinations." DOJ FOIA Guide, *supra*, at 4-5.

[27] Between 1977 and 2012, the Government claimed Exemption 1 based on national security or foreign affairs in 264 FOIA cases to come before the Courts of Appeals and the D.C. District Court. FOIA Data Set Constructed by Professors Susan Mart and Tom Ginsburg, Obtained and Held by FISC Amicus Curiae May 21, 2018. *See also* Susan Nevelow Mart & Tom Ginsburg, *[Dis-]informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 Admin. L. Rev. 725 (2014) (empirical study based on the data set). The D.C. District Court statistics only include 38% of the total FOIA cases heard by them during this period. *Id.* The numbers thus reflect only a fraction of the total number of FOIA Exemption 1 cases. The Department of Justice has listed another 113 cases 2013-2018 with references to Exemption 1. *U.S. Dep't of Justice Court Decisions*, U.S. Dep't of Justice https://www.justice.gov/oip/court-decisions?topic=831&body=&date%5Bvalue%5D%5Bmonth%5D=&date%5Bvalue%5D%5Byear%5D= (last visited June 12, 2018).

held by Amicus Curiae. Hundreds more cases discuss CIPA in the context of civil claims, without engaging the statute directly. *See, e.g.*, *Dhiab v. Trump*, 852 F.3d 1087 (D.C. Cir. 2018). In addition, dozens of cases cover areas like prepublication review, where the Government is simply trying to keep classified information from becoming public. *See, e.g.*, *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988); *McGehee v. CIA*, 718 F.2d 1137 (D.C. Cir. 1983); *Knopf v. Colby*, 509 F.2d 1362 (4th Cir. 1975); *Marchetti*, 466 F.2d at 1309; *Bernsten v. CIA*, 618 F. Supp. 2d 27 (D.D.C. 2009).

IV. ARTICLE III COURTS REGULARLY SCRUTINIZE CLASSIFIED MATERIAL

The Government erroneously states that FOIA is the only context in which the courts subject national security classification assertions to scrutiny. *See* Gov't En Banc Resp. Br. at 6. *See also* Reply Br. for Def.-Appellants, *ACLU v. Dep't of Def.*, No. 17-779, 2017 WL 5152276, at *12-13 (2d Cir. Nov. 3, 2017); Br. for the Appellees, *Tenenbaum v. Ashcroft*, 407 Fed. App'x 4 (6th Cir. Dec. 2, 2009) (No. 09-1992), 2009 WL 4831977, at *48. While Article III courts often abide by Executive Branch national security determinations, when confronted by classified information, they also subject the government claims to scrutiny.

A. Non-FOIA Cases

Nearly fifty years ago, the D.C. Circuit rejected an effort by the Government to claim absolute control over classified documents provided to the courts—the same argument the Government is making in the present case:

> The government's position—sharpened at oral argument yesterday—is that this determination by the executive official is conclusive upon the court, and the court has no judicial authority to require the production of the documents in the possession of an executive department, once the head of that department has filed this formal claim of privilege. Government counsel further asserts that this executive determination is conclusive even where the document only relates to certain factual material that is essential for disposition of the lawsuit, and even where the document is such that the court may readily separate factual material to be disclosed to the other party from the kind of recommendations and discussion that would be an integral part of the decision-making process. *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F. 2d 788, 792 (D.C. Cir. 1971).

The D.C. Circuit stated: "*In our view, this claim of absolute immunity for documents in possession of an executive department or agency, upon the bald assertion of its head, is not sound law*." *Seaborg*, 463 F. 2d 788, 792 (D.C. Cir. 1971).

Courts routinely look at material in camera, ex parte, to make their own determination as to whether it should, or should not, be in the public domain.[28] In

[28] *See, e.g.*, *Mohamed v. Jeppensen DataPlan*, 614 F.3d 1070 (9th Cir. 2010) (en banc court reviewing documents claimed to endanger national security in camera, ex parte); *Stillman*, 517 F. Supp. 2d at 38 (court reviewed manuscript ex parte, *in camera* along with affidavits from government officials and public source documentation before concluding that the information was properly classified); *U.S. v. Moussaoui*, 65 Fed. App'x. 881, 888 (4th Cir. 2003) (court noting its duty to review government redactions; *Penguin Books USA Inc. v. Walsh*, 756 F. Supp. 770 (S.D.N.Y. 1991) *vacated by Penguin Books USA Inc. v. Walsh*, 929 F.2d 69 (2d Cir. 1991) (court finding that the procedures established by Office of Independent Counsel for prepublication review of books by former employees failed to comport

cases involving prepublication review, courts scrutinize both the material and government claims to secrecy. In *Knopf v. Colby*, for example, the U.S. District Court for E.D. Va. entered an order allowing publication of all but 26 out of 168 items the CIA was trying to suppress. 509 F.2d 1362, 1365, 1366 (4th Cir. 1975), *cert denied*, 421 U.S. 908 (1975). During the trial, witnesses were called to testify. *Id.* at 1365. Unable to articulate who had classified the information, or why certain items had been classified, counsel questioned them further. *Id.* at 1365-66. The District Court judge raised concern "that the deputy directors were making ad hoc classifications of material after having read the Marchetti-Marks manuscript." *Id.* at 1366. Even as it overturned the lower court's specific decision in this case, the Court of Appeals noted that in its decision in *Marchetti*, it had foreseen "no particular problem in separating the grain from [the] chaff," in distinguishing between material properly and improperly classified. *Id.* at 1367. The Court determined "that the deletion items should be suppressed only if they are found both to be classified *and*

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with First Amendment prior restraint standards where comments made following review of former associate counsel's book on Iran-Contra affair lacked clarity, review was not speedy but was subject to undue delay, and form-letter responses lacked specificity); *Ellsberg v. Mitchell*, 709 F.2d 51, 59 n. 37 (D.C. Cir. 1983) (noting that under the circumstances "careful *in camera* examination of the [classified] material is not only appropriate…but obligatory."); *Jabra*, 62 F.R.D. at 430 (examining the disputed information *in camera* before granting in part and denying in part government's assertion of the state secrets privilege).

classifiable under the Executive Order." *Id.* at 1367 (emphasis added). *See also Marchetti*, 466 F.2d at 1309.

Similarly, in *McGehee v. CIA*, the court considered whether a former CIA employee's article, revealing CIA disinformation programs in Iran, Vietnam, Chile, and Indonesia, had been appropriately classified as "Secret." 718 F.2d 1137, 1139 (D.C. Cir. 1983). The government misleading characterizes this case as "holding that the court's role was limited to 'merely determin[ing] that the CIA properly classified the deleted items,' as the court 'cannot second-guess' the executive branch's national security judgments." Gov't En Banc Resp. Br. at 6. But that is not what the court said. The District Court had conducted de novo review of the affidavits submitted for *in camera* inspection and determined that the CIA had appropriately classified the material. *McGehee*, 718 F.2d at 1140. The Court of Appeals determined that the CIA classification scheme was constitutional in light of the government's substantial interest in national security *as well as* the fact that the criteria applied was neither overbroad nor excessively vague; that "in reviewing whether specified information reasonably could be expected to cause actual serious harm if divulged, courts should accord deference to the CIA's reasoned explanation of its classification decision," and that, *in this case*, the material was properly classified. *Id.* at 1140. "We conclude that reviewing courts should conduct a de novo review of the classification decision, while giving deference to reasoned and detailed CIA explanations of that

classification decision." *Id.* at 1148. The court acknowledged that the judiciary also had a role to play in policing the boundaries of the secrecy agreement itself, which did "not extend to unclassified materials or to information obtained from public sources." *Id.* at 1141. Such information could not be censored.

The courts further facilitate declassification in prepublication review situations by providing time and a forum for Executive Branch agencies to meet with the parties suing for materials to be made public. *See, e.g.*, *Berntsen*, 618 F. Supp. 2d at 27 (lawsuit by former covert CIA agent whose manuscript was stuck in prepublication review filed in 2005; August 2008 the PRB completed its review of the 97 items the author wanted to publish and agreed to withdraw its objections to all but 18 of them).

Scores of other cases show a judiciary willing and able to press the executive branch on classification claims.[29] In *Al-Haramain Islamic Foundation, Inc. v. Bush*, a statutory and constitutional challenge brought against the Terrorism Surveillance Program, the court conducted a thorough "independent determination of whether the information is privileged," explaining, "*We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept*

[29] Even in specialized Article I courts, while state secrets claim may receive deference, "the validity of the assertion must nonetheless be judicially assessed." *Foster v. United States*, 12 Ct. Cl. 492 (Ct. Cl. 1987).

at face value the government's claim or justification of privilege." 507 F. 3d 1190, 1203 (9th Cir. 2007).

In *Hepting v. AT&T Corp.*, the government had already disclosed to the public the general contours of the terrorist surveillance program—a situation not unlike the one currently before the FISC, where the public already has knowledge, from the Executive Branch, of the existence of the §215 metadata collection program.

> Because the government contends that the primary reasons for rejecting Plaintiffs' arguments are set forth in the Government's in camera, ex parte materials, *the court would be remiss not to consider those classified documents in determining whether this action is barred by the privilege*.

Hepting v. AT&T Corp., No. C-06-672 VRW, 2006 WL 1581965, at *1 (N.D. Cal. June 6, 2006).

The general approach, accepted by Article III courts, is that examination of the Government's claim must be done on an item by item basis. In 1989, the D.C. Circuit addressed the role of the court in "preserving the secrecy of 'classified' information and the private interest of the litigant." *In re United States*, 872 F. 2d 472, 473 (D.C. Cir. 1989). In that case, the plaintiff had brought a torts claim against the government related to COINTELPRO surveillance. Instead of answering the complaint, the executive moved to dismiss it on numerous grounds, including an invocation of state secrets privilege. The lower court denied the motion, directing the government to answer the complaint. The government sought mandamus, which was denied. The Circuit Court refused to accept the broad assertion by the government, affirming the

district court's conclusion that "an item by item determination of privilege will amply accommodate the Government's concerns. *Id*. at 478. It explained, "*a court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.*" *Id.* at 478 (emphasis added). For the court, reviewing the Government's claim that material would harm national security "did not reject" the idea that some matters should remain classified. *Id.* "[O]n the contrary, in stating its reasons for denying the motion to dismiss, the court demonstrated a perceptive understanding of a wholesome respect for the state secrets privilege." *Id.*

B. FOIA and CIPA

Courts routinely hold in camera, ex parte hearings in challenges to FOIA Exemption 1 claims. *See* discussion *infra* Part V. The same is true of CIPA cases, where district courts are obliged to first ascertain whether the information held by the government is discoverable. Classified Information Procedures Act (CIPA) § 6(a), 18 U.S.C.A. app. 3 §6(a) (West 2018). Where it is discoverable, but privileged, the court must look to whether the material is material and relevant to the defense—a determination entirely in the district court's discretion. *Id.* § 4; Fed. R. Crim. P. 16(d)(1).

For instance, in *United States v. Aref*, "The district court held a series of ex parte, in camera conferences with the Government relating to the classified information. The court also held an ex parte, in camera conference with defense counsel to assist

the court in deciding what information would be helpful to the defense." *United States v. Aref*, 533 F.3d 72, 76-77 (2d Cir. 2015). In *United States v. Hamama*, the court "reviewed the Government's brief, a classified declaration of a United States Government official, [and] copies of the classified materials that the Government [sought] to withhold from discovery." *United States v. Hamama*, No. 08-20314, 2010 WL 330375, at *5 (E.D. Mich. Jan. 21, 2010). *See also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 118-19 (2d Cir. 2008) (district court holding five in camera hearings, portions of which were conducted ex parte). The courts' general approach, drawn from *Roviaro v. United States*, is that where the information is relevant and helpful to the defense, the Government privilege must give way. *See Roviaro v. United States*, 353 U.S. 53, 60 (1957) (limiting the scope of the informer's privilege); *United States v. Moussaoui*, 382 F.3d 453, 471-72 (4th Cir. 2004) (applying *Roviaro* to CIPA); *Aref*, 533 F.3d at 80 (applying the *Rovario* standard in the CIPA context); *U.S. v. Hamama*, 2010 WL 330375, at *3 (E.D. Mich, Jan. 21, 2010) (applying *Roviaro* to CIPA).

V. COURTS CAN AND DO DENY EXECUTIVE BRANCH EFFORTS TO KEEP INFORMATION HIDDEN FROM THE PUBLIC

Article III courts do not just review and scrutinize Executive Branch classification assertions, but they also deny Government efforts to keep information hidden from the public. As the D.C. Circuit recognizes, courts "must take seriously the

government's predictions about the security implications of releasing particular information to the public," but ultimately, a court "make[s] its own decision" about what material should, and should not, remain classified. *ACLU v. FBI*, 429 F. Supp. 2d 179, 188 (D.D.C. 2006). Sometimes that means releasing information that the government would rather not see light of day.[30] In *New York Times v. United States*, the Court rejected the executive's national security assertion, holding that it was not strong enough to overcome the First Amendment's prohibition on prior restraint. *N.Y. Times*, 403 U.S. 713. In *Horn v. Huddle,* a case in which the government asserted state secrets in response to a *Bivens* action brought by a former employee of the Drug Enforcement Agency, Judge Royce Lamberth explained, "The deference generally granted the Executive Branch in matters of classification and national security must yield when the Executive attempts to exert control over the courtroom." *In re Sealed Case* (*Horn v. Huddle*), 647 F. Supp. 2d 55, 66 (D.D.C.

[30] *See, e.g., Rahman v. Chertoff*, No. 05 C 3761, 2008 WL 4534407 (N.D. Ill. Apr. 16, 2008) (district court denying government's invocation of state secrets privilege); *Jabra*, 62 F.R.D. at 424 (granting in part and denying in part government's assertion of the state secrets privilege); *Hepting*, 2006 WL 1581965, at *1 (court holding that information did not constitute state secrets where the executive had publicly disclosed the general contours of the "terrorist surveillance program."); *Smith*, 780 F.2d at 1102 (determining following a CIPA hearing that some of the information could be made public). Even Article I courts note that while deference should be granted to government agencies, "the validity of the assertion must nonetheless be judicially assessed." *Foster*, 12 Ct Cl. at 492.

2009) (vacated on other grounds). In that case, the court declassified significant amounts of material after it discovered that the Government had misled it.

A. FOIA Determinations

In Exemption 1 cases, courts routinely conduct in camera review. In 102 of the 264 FOIA foreign affairs and national security cases that arose between 1977 and 2012, for instance, the Court did so. Forty-nine of these cases resulted in partial disclosure. Data Set held by Amicus Curiae. *See also ACLU v. FBI*, 429 F. Supp. 2d 179 (D.D.C. 2006) (conducting *in camera* item-by-item review, and finding 55 of 57 documents properly withheld/ordering remaining 2 documents to be disclosed). While, in many cases, the court upholds the agency determination, in many others, it finds the affidavit inadequate, conducts *in camera* review and orders the partial or full release of the materials, or requests that the government supplement their affidavit with further showings. In all cases, the final decision in determining whether information should be made public lies with the court.

The burden is on the government to demonstrate that the material must be withheld. As one court observed, "[T]he district court may, in its discretion, order *in camera* review of the unredacted documents themselves. Still, '*the district court's inspection prerogative is not a substitute for the government's burden of proof, and should not be resorted to lightly*.'" *Halpern v. FBI*, 181 F.3d 279, 295 (quoting *Church of Scientology v. United States Dep't of the Army,* 611 F.2d 738,

743 (9th Cir. 1980), *overruled by Animal Legal Def. Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016)) (emphasis added). *See also Donovan v. FBI*, 806 F.2d 55, 60 (2d Cir. 1986), *abrogated on other grounds DOJ v. Landano*, 508 U.S. 165 (1993) (stating "It is undisputed that a court confronted with an Exemption 1 claim should accord due weight to the agency's characterization of the information. It must be remembered, however, that the burden is with the agency to justify nondisclosure.").

In 1980 the D.C. Circuit articulated a series of factors to determine whether in camera review was required: (1) judicial economy; (2) conclusory nature of the agency affidavits; (3) bad faith on the part of the agency; (4) disputes concerning the contents of the documents; (5) an agency request for an in camera inspection; and (6) a strong public interest in disclosure. *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980) *disavowed by Founding Church of Scientology of Washington D.C., Inc. v. Smith*, 721 F.2d 828 (D.C. Cir. 1983) (only with respect to the application of Exemption 2).

The D.C. circuit has explained its standard of review for Exemption 1: "The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role." *Gardels v. CIA*, 689 F.2d 1101, 1105 (D.C. Cir. 1982).

See also Larson v. Dep't of State, 565 F.3d 857, 865 (D.C. Cir. 2009); *Pub. Citizen v. Dep't of State*, 276 F.3d, 634, 645 (D.C. Cir. 2002); *Halperin v. CIA*, 629 F.2d 144, 147-48 (D.C. Cir. 1980); *Summers v. Dep't of Justice*, 517 F. Supp. 2d 231, 238 (D.D.C. 2007) (cited in DOJ FOIA Guide, *supra*, at 5, n.20) (highlighting the importance of reasonable specificity and lack of bad faith).

The most common reason for not upholding Exemption 1 is where the government fails to sufficiently support the threat to national security.[31] Courts will not rely on "vague" or "ambiguous" standards. *Campbell*, 193 F. Supp. 2d. at 38. See also *Pub. Citizen v. Dep't of State*, 782 F. Supp. 144 (D.D.C. 1992) (finding a vague claim to anything related to foreign affairs as exempt from FOIA to go well beyond the scope of Exemption 1). Courts examine the material carefully. In a case seeking FBI and CIA files, for example, the court noted that "The agency's

[31] *See, e.g., Campbell v. U.S. Dep't of Justice*, 193 F. Supp. 2d 29, 37 (D.D.C. 2001) (following examination of the FBI's affidavits and indices the court concluded that "[a]bsent any further justification or explanation as to why this conclusion must follow from the information's disclosure, the FBI fails to adequately explain a nexus with national security concerns [as] required under Exemption 1.") (internal quotations/citations omitted); *Armstrong v. Exec. Office of the President*, No. 89-142, 1995 U.S. Dist. LEXIS 22216 (D.D.C. July 28, 1995) (court reviewed classified documents *in camera* and determined that the government provided insufficient justification for the redactions, ordering the government to re-process the documents to partially release redacted information); *King v. U.S. Dep't of Justice*, 830 F.2d. 210, 224 (D.C. Cir. 1987) ("a categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure clearly inadequate"); *Keenan v. U.S. Dep't of Justice,* No. 94-1909, slip op. at 8-11 (D.D.C. Mar. 24, 1997) (finding insufficient support for FOIA exemption one where the Vaughn Index merely recites the executive order's language).

classification and withholding decisions on these two documents appear completely inconsistent and are in no way clarified by the terse and misleading description and justification provided in the Graves affidavit." *Jaffe v. CIA*, 516 F. Supp. 576, 583 (D.D.C. 1981).

Courts also decline to find that information has been properly withheld where there is a defect in the classification process. *See, e.g.*, *Hall v. C.I.A.*, 668 F. Supp. 2d 172, 188 (D.D.C. 2009) (denying summary judgment with respect to documents that were more than 25 years old).

Sometimes, the court offers the government further opportunity to defend its efforts to keep information out of the public domain. In 2010, for instance, a district court determined that the government's refusal to disclose audio and video recordings of detainees at Guantanamo Bay in response to a FOIA request from the International Counsel Bureau lacked sufficient justification. *Int'l Counsel Bureau v. Dep't of Def.*, 723 F. Supp. 2d 54 (D.D.C. 2010). In that case, it gave DOD further opportunity to justify the withholding. *Id. See also Lawyers Comm. For Human Rights v. INS*, 721 F. Supp. 522 (S.D.N.Y. 1989) (giving the CIA two weeks to provide a supplementary affidavit "providing a more detailed explanation for its withholdings.")

At times the court denies the classification claim altogether, as it did in the 2011 case of *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Reps*. There, the USTR

responded to requests for its documents by claiming a FOIA National Security Exemption. After considering USTR's justifications, the court found that USTR failed to "sufficiently demonstrated that disclosure of the document would harm the United States' national security interests." *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Reps.,* 777 F. Supp. 2d 77 (D.D.C. 2011).

B. CIPA

The Classified Information Procedures Act is another statute created to ensure that judicial processes can continue even though classified information is involved. As with FOIA, the statute is careful not to tread on judicial ground. Once a defendant files a notice describing the classified information she "reasonably expects to disclose or cause the disclosures of" at trial, at the government's request, the court must hold a pretrial hearing to address the "use, relevance or admissibility" of the classified information identified in the Section 5 notice. CIPA §§ 5(a), (b). If the court decides that certain information can be used, the government may then move either to replace the classified portion with statements admitting to the relevant facts, or substitute a summary of the information. *Id*. at § 6(c)(1)(A)-(B). If the Court denies the proposed admission or substitution, the government has two choices: either it can file an affidavit of the Attorney General objecting to [the] disclosure of the classified information at issue (requiring the dismissal of the indictment)—unless "the [C]ourt determines that the interests of justice would not be served by dismissal

of the indictment," or the government can file an immediate interlocutory appeal. *Id.* at §§ 6(e), 7. In either case, the court still has the final say.

The standard that is applied in CIPA is *not* a balancing test. That test was considered and rejected by Congress in its adoption of the statute. *Smith*, 780 F.2d at 111 (Butner, J., dissenting); *United States v. Libby*, 453 F. Supp. 2d 35, 42 (D.D.C. 2006). During the hearings on CIPA, DOJ requested language that would make evidence admissible only in circumstances in which it was "relevant and material." *Graymail, S. 1482: Hearing Before Subcomm. on Criminal Justice of S. Judiciary Comm.*, 96th Cong. 3, 18 (1980). That standard would have required the judiciary to balance the probative value of the evidence against the potential harm to national security. *Id*. at 9, 22. "This standard was rejected by Congress, which stated unambiguously that 'nothing in the [statute] is intended to change the existing standards for determining relevance and admissibility.'" *Smith*, 780 F.2d at 1106 (citing H.R. Rep. No. 96-1436, at 12 (1980) (Conf. Rep.)). When the government again tried to argue this standard, the court rejected it. *Libby*, 453 F. Supp. 2d 40. The issue was not whether the government had "a legitimate privilege in protecting documents and information concerning national security"—which it did, but the extent of that protection in light of the interests of the administration of criminal justice. *Id.* That was a question for the Court.

C. FISC

Despite the sensitive nature of the material addressed by the court, FISC and FISCR have released dozens of opinions and orders.[32] Unlike 2007, when Judge

[32] *See, e.g.*, Order, *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. 18-01 (FISA Ct. Rev. Mar. 16, 2008); Certified Question of Law, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. Rev. Jan. 5, 2018); Order, *In re Unknown Foreign Intelligence Surveillance Court Orders*, Not Docketed; Order, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. Mar. 22, 2017); Opinion and Order, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. Jan. 25, 2017); Order, *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 105B(g) 01-01 (FISA Ct. Dec. 23, 2014); Certification of Question of Law, *In [REDACTED] A U.S. Person* (FISA Ct. Feb 12, 2016) (No. PR/TT 2016-[REDACTED]); Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 15-99 (FISA Ct. Nov 24, 2015); Order Appointing and Amicus Curiae, *Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 15-99 (FISA Ct. Sept. 17, 2015); Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 15-99 (FISA Ct. Aug. 27, 2015); Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, Nos. BR 15-75/ Misc. 15-01; Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 15-75 (FISA Ct. Jun 29, 2015); Opinion and Order, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02 (FISA Ct. Aug. 7, 2014); Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 14-96 (FISA Ct. Jun. 27, 2014); Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 21, 2014); Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 20, 2014); Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 12, 2014); Opinion and Order, *In re Application of the Federal*

Bates first considered the First Amendment right of access claim, now more than 170 orders and opinions are in the public domain. *See* Br. Am. Curiae at App. A. In 2013 FISC required the government to conduct a declassification review of any opinions that did not overlap with ongoing litigation, noting the "publication would…assure citizens of the integrity of [FISC's] proceedings." *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13–02, 2013 WL 5460064, at *7 (FISA Ct., 2013). FISC's actions are consistent with the court's own rules. *See* FISC Rule 62.

Bureau of Investigation for an Order Requiring the Production of Tangible Things, No. BR 14-01 (FISA Ct. Mar. 7, 2014); Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 14-01 (FISA Ct. Jan. 3, 2014); Memorandum Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things* No. BR 13-158 (FISA Ct. Dec. 18, 2013); Memorandum Opinion and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 13-158 (FISA Ct. Oct. 11, 2013); Opinion and Order, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02 (FISA Ct. Sept. 13, 2013); Amended Memorandum opinion and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-109 (FISA Ct. Aug. 29, 2013); Opinion and Order, *In re Motion for Consent to Disclosure of Court Records or, in the Alternative, A Determination of the Effect of the Court's Rules on Statutory Access Rights*, No. 13-01 (FISA Ct. June 12, 2013); In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property (FISA Ct. June 11, 1981), *reprinted in* S. Rep. No. 97-280, at 16-19 (1981).

VI. THE GOVERNMENT IS CAPABLE OF PROVIDING SPECIFIC EXPLANATIONS FOR WHY CERTAIN INFORMATION SHOULD NOT BE MADE PUBLIC

The foregoing cases demonstrate that the courts play a critical role in determining whether the government has met its burden of establishing that certain information relevant to the administration of justice should not enter the public domain. They also are instructive in showing that the government is entirely capable of providing specific explanations for why certain information should not be made public.[33]

In 2009, for example, intervenors moved to require public access to "every factual return in actions challenging United States' detention of alleged enemy combatants at United States Naval Base in Guantanamo Bay, Cuba." *In re Guantanamo Bay Litig.*, 624 F. Supp. 2d 27 (D.D.C. 2009). The court held that, while public access to "every document in every factual return" was not required by the First Amendment the government "was capable of screening returns to identify classified material that could harm national security if publicly released." *Id.* In

[33] *See also* the Vaughn Index, an itemized index that correlates with each document (or portion thereof) that is withheld from FOIA requests consistent with specific FOIA exemptions and the relevant portion of the nondisclosure justification. 32 C.F.R. § 701.39. It "may contain such information as: date of document; originator; subject/title of document; total number of pages reviewed; number of pages of reasonably segregable information released; number of pages denied; exemption(s) claimed; justification for withholding; etc." *Id.* Such an index could be made available to the FISC, as a basis for making the determination of which matters of fact would be withheld from publication.

Lawyers Comm. For Human Rights v INS, the court observed: "It is in both plaintiffs' and the general public's interest to create as full a public record as possible. While it appears that the FBI has attempted to create a full public record, the CIA's efforts have fallen short." *Lawyers Comm. for Human Rights v. INS,* 721 F. Supp. 522 (S.D.N.Y. 1989).

As a purely empirical matter, the foregoing cases challenge assertions by the Government that the courts do not have any role to play in reviewing classification determinations in the context of the judicial process. To the contrary, they routinely scrutinize government claims that certain information should not be in the public domain. For reasons established in the foregoing brief, such examination is critical if the judiciary is to fulfill its role in the administration of justice.