



How Americans Can Regulate Secret Lawmaking by the U.S. Government

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From left and right, we hear increasing criticism of secret lawmaking by U.S. officials. Each branch of government complains about secret laws made by the others. My research shows that secret law is a real issue. Americans need to take this phenomenon seriously – and our leaders need to articulate their positions on laws that are kept from public view. Here I describe what we know about secret law and why it matters, and I reflect on the rules of the road Americans should apply if they choose to accept some amount of secret law.

Congress, the Executive Branch, and the Judiciary Produce Secret Law

Most citizens understand that certain secret government activities are necessary – for example, top secret weapons programs and the clandestine collection of intelligence on foreign agents and suspected terrorists. But in a constitutional republic how do we ensure that classified activities remain in compliance with the law? The three branches of the U.S. federal government are subject to public oversight – for example, Congress debates funding the Pentagon, and the FBI must obtain warrants to do electronic surveillance. But Congress, the executive branch, and the courts also use secret law to manage national security programs, including important ones with substantial real-world implications.

- As my research shows, every year since the late 1970s Congress has enacted defense and intelligence bills that include separate secret “addenda.” With the force of law, these classified addenda are hidden in a safe inside a secure room. Over 36 years, Congress has passed 68 statutes containing 124 provisions that can reasonably be read to say that secret law is found in 94 classified legislative addenda. Most of these 124 secret provisions concern funding for the National Security Agency, the Central Intelligence Agency, and other intelligence programs. They include provisions governing telephone and internet surveillance, covert actions overseas, and spy satellites, in addition to general intelligence analysis. Public statute text and reports give hints that the classified legislative addenda get into the details of intelligence programs, and some have clear civil liberties implications. But beyond the rising rate of secret legislating in recent years, the reach and content of Congress’s secret law remains unclear.
- Under the Constitution and various statutes, the President and federal agencies have considerable lawmaking power. The President’s Executive Orders must be followed by federal agencies, as must legal opinions issued by the Department of Justice. Many Executive Orders, Justice Department opinions, and agency guidelines are classified or otherwise unpublished. Notable examples include Bush-era documents on interrogation, detention of U.S. citizens without trial, and warrantless surveillance, and Obama-era opinions about drone strikes on U.S. citizens and use of force against the Islamic State.
- In 2013, Edward Snowden leaked secret opinions of the Foreign Intelligence Surveillance Court that authorized the daily collection of the phone and internet records from millions of Americans. Congress objected, and in 2015 changed the law so that the phone data stays with phone companies and the government has to have suspicion of terrorist activity to review the records of particular Americans. However, future opinions about surveillance issued by the same court can remain secret so long as a summary is released.

Conflicting Considerations

Although none of Congress’s secret laws have ever surfaced, leaks and declassifications sometimes reveal rulings by the executive and the courts. Revelations can also happen via suits under the Freedom of

Information Act. But FOIA does not apply to Congress nor to the courts, and has a national security exception routinely invoked by the executive branch.

Secret law can be supported or criticized by invoking important but conflicting values. On the one hand, secret agents and programs that protect the country must be shielded from disclosure. Furthermore, officials need deliberative space, where advice can be frank and drafts circulated. On the other hand, secret law challenges self-government in a republic, because citizens cannot render informed decisions about secret laws nor the leaders who write them. Furthermore, people cannot govern their own behavior if they do not know what is legal and what could subject them to secret government surveillance. Finally, if one branch of government makes secret laws and does not share them, the other branches cannot exert checks and balances.

What Can Be Done?

Americans have three choices. One option is to “end it” – decide that secret law is incompatible with our democratic values and require that any document with legal force be published. Another possibility is to “live with it” – on the grounds that giving surveillance targets notice might allow bad actors to evade detection, and the present situation at least allows secret rules to be reviewed under seal by the people’s representatives in Congress.

A third option also exists – to “reform it” by better regulating secret law with rules of the road:

- Ensure that laws enacted openly by Congress are supreme – thus secret legal opinions must always defer to public laws as understood by the public.
- Require that secret laws cannot create new crimes or expand their definitions.
- Institute “bell ringers” to inform the public whenever new secret laws are made. For example, the Justice Department could post a notice that a new secret opinion has been issued – allowing citizens to ask Congress to review it. Congress should see all secret law.
- Secret laws should automatically expire or be declassified after a fairly short time, such as four years. At the very least, every presidential administration and third session of Congress should consciously decide whether to keep secret laws secret, and in force.

Ultimately, the fate of secret law is in the hands of U.S. citizens and the officials they elect. The country needs to come to terms with secret law.

Read more in Dakota S. Rudesill, “Coming to Terms with Secret Law,” *Harvard National Security Journal* 7 (2015).