

# THE YALE LAW JOURNAL

## COMMENT

### Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court

In the wake of the Snowden disclosures, both Congress and the public have taken a harder look at the work of the courts created by the Foreign Intelligence Surveillance Act (FISA), focusing in particular on the “secret body of law”<sup>1</sup> they have created in the process of authorizing, modifying, and denying government surveillance requests. Numerous commentators have bemoaned both the FISA courts’ secretive nature and the content of specific legal interpretations revealed in their leaked opinions.<sup>2</sup> But an overlooked yet fundamental problem with the FISA courts’ work is that judge-made law can be generated only through stare decisis,<sup>3</sup> a doctrine that we argue is not justified when applied to secret opinions of the type the FISA courts produce. As a result, we conclude that the FISA courts should either publish all opinions that are precedential or cease writing precedential opinions at all.

This Comment joins other work in arguing that the legitimacy of stare decisis depends upon widespread publication.<sup>4</sup> The doctrine of stare decisis itself

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1. Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 6, 2013, <http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html> [<http://perma.cc/FAQ3-LETQ>].
  2. See, e.g., Nadia Kayyali, *What You Need To Know About the FISA Court—and How It Needs To Change*, ELEC. FRONTIER FOUND. (Aug. 15, 2014), <https://www.eff.org/deeplinks/2014/08/what-you-need-know-about-fisa-court-and-how-it-needs-change> [<http://perma.cc/Y3XU-8AT7>].
  3. Simply put, judicial opinions “make law” when judges are bound by the doctrine of stare decisis to follow these opinions’ reasoning in later cases. See *infra* Part II.A.
  4. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions To Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 770 (1995) (“Published opinions that state the facts and the reasoning upon which decisions rest are essential to the operation of stare decisis . . . .”); William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A*

emerged only with the consistent and reliable publication of court opinions,<sup>5</sup> and legal processes that do not result in the issuance of publicly available opinions, such as settlements and arbitrations, generally lack stare decisis norms altogether.<sup>6</sup> Although previous scholarship has discussed the proper role of stare decisis in the context of “unpublished” opinions,<sup>7</sup> which make up around eighty percent of all United States courts of appeals opinions<sup>8</sup> (and are usually publicly available despite their name),<sup>9</sup> this Comment provides the first examination of the tenability of stare decisis as applied to truly secret opinions like those of the FISC. Many have noted that stare decisis typically comes with both costs and benefits. But, we argue, in the absence of publication these costs are exacerbated and the benefits are substantially reduced. Therefore, without publication, stare decisis becomes harder to justify and should be avoided when it comes to truly secret opinions of the type the FISA courts produce.

Part I provides general background on the FISA courts and examines when and how they generate binding precedent. Part II proceeds by discussing the nature of stare decisis: its central role in creating judge-made law and its costs and justifications, particularly as applied to secret opinions. We ultimately determine that FISA judges should either label an opinion as binding precedent and publish it *or* mark the opinion as non-precedential and retain discretion not to publish it. Part III concludes with concrete recommendations for implementing our suggestions in the FISA courts.

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*Critique*, 46 OHIO ST. L.J. 313, 314 (1985) (“The development of ‘hidden’ precedents mocks the concept of stare decisis . . .”).

5. See Dragich, *supra* note 4, at 770-75; Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 34-36 (1959).
6. See J. Kirkland Grant, *Securities Arbitration: Is Required Arbitration Fair to Investors?*, 24 NEW ENG. L. REV. 389, 412 (1989) (“[A]rbitrators are not bound by stare decisis and need not justify or explain their decisions.”); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 221 (1999) (“A judicial precedent requires not only an aggrieved party who files a lawsuit, but also that the case goes to trial, and perhaps appeal, without a settlement.”).
7. See sources *supra* note 4; see also *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000) (leaving open whether no-citation rules for unpublished opinions are unconstitutional).
8. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 39 tbl. S3 (2002).
9. These are generally available on the court website. See, e.g., *Opinions and Orders*, U.S. CT. APPEALS FED. CIRCUIT, <http://www.ca9.uscourts.gov/opinions-orders> [<http://perma.cc/9P5J-PPRY>]. They are also published in the Federal Appendix. See *Federal Appendix (National Reporter System)*, THOMSON REUTERS, <http://legalsolutions.thomsonreuters.com/law-products/Reporters/Federal-Appendix-National-Reporter-System/p/100000796> [<http://perma.cc/3YAA-FYX3>] (“This product covers opinions and decisions . . . issued by the U.S. courts of appeals that are not selected for publication in the *Federal Reporter*.”).

## I. PRECEDENT IN THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS

### A. *The Foreign Intelligence Surveillance Court*

The Foreign Intelligence Surveillance Act, enacted in 1978,<sup>10</sup> sets up the Foreign Intelligence Surveillance Court (FISC), a specialized Article III court with the power to hear and grant government requests for foreign surveillance.<sup>11</sup> The FISC's work consists almost entirely of ex parte proceedings granting, modifying, and denying government requests for the authority to conduct surveillance or searches, or to compel the production of tangible things.<sup>12</sup>

Pursuant to the statute, the FISC consists of eleven Article III district court judges, selected by the Chief Justice of the United States.<sup>13</sup> All applications are considered by a single judge and cannot be reheard by another judge of the FISC except when the court sits en banc.<sup>14</sup> FISA provides for both en banc consideration and appeals to the Foreign Intelligence Surveillance Court of Review (Court of Review). En banc review involves a panel of all eleven FISC judges and must be ordered by a majority of the FISC judges based on a determination that "(i) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (ii) the proceeding involves a question of exceptional importance."<sup>15</sup> According to public records, the FISC has sat en banc only once,<sup>16</sup> but it is impossible to know how many sittings and opinions remain secret. The Court of Review, which consists of three district or circuit judges also designated by the Chief Justice, has issued only two public decisions.<sup>17</sup>

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10. See Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

11. 50 U.S.C. § 1803(a)(1) (2012).

12. *In re Release of Court Records*, 526 F. Supp. 2d 484, 488 (FISA Ct. 2007); ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43362, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES 2 (2014), <https://www.fas.org/sgp/crs/intel/R43362.pdf> [<https://perma.cc/2U92-YMPU>].

13. 50 U.S.C. § 1803(a)(1) (2012).

14. *Id.*

15. *Id.* § 1803(a)(2)(A).

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

17. *Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*, PRIVACY & C.L. OVERSIGHT BOARD 14 (Jan. 23, 2014), [http://www.pclomb.gov/library/215-Report\\_on\\_the\\_Telephone\\_Records\\_Program.pdf](http://www.pclomb.gov/library/215-Report_on_the_Telephone_Records_Program.pdf) [<http://perma.cc/3KY2-6QUA>]; see *In re Directives* [re-

B. *Stare Decisis and the FISA Courts*

In terms of its core function, the FISC is effectively a federal district court.<sup>18</sup> The vast majority of its work involves a single judge's determinations of the legality of government requests to authorize surveillance or compel production. Although it is hard to be certain without more publicly available information, FISC judges likely treat their opinions as non-precedential, as is standard practice for federal district courts.<sup>19</sup> The relatively few public FISC opinions do cite earlier FISC opinions and principles of law,<sup>20</sup> but we have seen no clear evidence to suggest that the judges feel formally *bound* by those earlier opinions in any manner that would set them apart from other Article III district courts.

In contrast, en banc opinions and Court of Review opinions apparently do have the force of stare decisis. With en banc rulings, this point is evident from the statute: the court may sit en banc only to "secure or maintain uniformity" or to decide a "question of exceptional importance."<sup>21</sup> These bases for en banc jurisdiction suggest that individual FISC judges must give stare decisis effect to any en banc panel decision that is not overturned by the Court of Review because, absent such a practice, the en banc panels would not fulfill one of their two statutory purposes: to secure or maintain uniformity.

Court of Review opinions can be precedential, but they are not *necessarily* precedential. The Court of Review is an appellate court, and like other Article III appellate courts, it has the power to bind both lower courts (in this case, the FISC) and later Court of Review panels.<sup>22</sup> The Court of Review probably has the same discretion as federal courts of appeals to designate opinions as pre-

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dacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008); *In re Sealed Case*, 310 F.3d 717.

18. *In re Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things*, No. BR 13-158 (FISA Ct. 2013), at 2 n.2, <http://www.uscourts.gov/uscourts/courts/fisc/br13-158-Memorandum-131218.pdf> [<http://perma.cc/FB34-VEQL>] ("Although [the FISC] is not a district court, it possesses similar inherent authority, except to the extent that it is limited by FISA.>").
19. See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 800-04 (2012).
20. See, e.g., *In re Application of the FBI for an Order Requesting the Prod. of Tangible Things From [Redacted]*, No. BR 13-109, 12 (FISA Ct. Aug. 29, 2013) (citing a previous FISC opinion: "*See In Re Production of Tangible Things From [Redacted]*, Docket No. BR 08-13, Supp. Op. (Dec. 12, 2008) (discussing Section 215 and Section 2703)"), <http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf> [<http://perma.cc/A9TV-6887>].
21. 50 U.S.C. § 1803(a)(2)(A) (2012).
22. However, since the Court of Review always effectively sits en banc—there are only three judges on the court at any given time, and they always sit as a panel of three—the binding effect of opinions on later Court of Review panels is likely more informal than formal.

dential and non-precedential; at least, no statutory provision declares otherwise.<sup>23</sup> The two public Court of Review opinions are published in redacted form in the Federal Reporter.<sup>24</sup> As with the published case of the FISC sitting en banc, these published Court of Review cases are certainly precedential.<sup>25</sup> We do not know the volume, if any, of secret non-precedential Court of Review opinions, or whether there are non-public Court of Review opinions that are nonetheless treated as precedential.

As we have demonstrated in this Part, the FISA courts currently generate at least some amount of formally binding precedent that they are under no legal obligation to publish.<sup>26</sup> In Part II, we take up the task of determining whether the justifications for the doctrine of stare decisis support affording secret opinions of this type binding precedential force. We conclude, ultimately, that they do not.

## II. STARE DECISIS AND SECRET LAW

Judges' power to bind future judges to the reasoning and interpretations of law advanced in their opinions comes from the doctrine of stare decisis,<sup>27</sup> Latin for "to stand by decided matters."<sup>28</sup> Stare decisis can operate either horizontally, by binding other judges on the issuing court, or vertically, by binding judg-

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23. The Order establishing the rules for the Court of Review states: "Except as otherwise provided herein, or by the Foreign Intelligence Surveillance Act of 1978, (92 Stat. 1783 et seq.), the statutes and Federal Rules of Appellate Procedure prescribing the jurisdiction, authority and procedures of the United States Courts of Appeal shall apply *mutatis mutandis* to this Court." FISA Ct. R. 5 (1980), <http://www.fas.org/irp/agency/doj/fisa/fiscr-rules.pdf> [<http://perma.cc/HG7P-TSWC>].
  24. See *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008); *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).
  25. See Orin Kerr, *Hints and Questions About the Secret Fourth Amendment Rulings of the FISA Court*, VOLOKH CONSPIRACY (July 7, 2013, 1:37 AM), <http://volokh.com/2013/07/07/hints-and-questions-about-the-secret-fourth-amendment-rulings-of-the-fisa-court> [<http://perma.cc/YLH4-8Q8Y>] ("It's just the FISC following the FIS Court of Review to which it is bound under principles of vertical stare decisis.").
  26. The published opinions currently available may constitute the entire work of the Court of Review – that is, there may in fact be no extant unpublished precedential opinions from the Court of Review or the en banc FISC, but the current legal regime does allow for such opinions to exist.
  27. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 57-58 (1921) ("Stare decisis is at least the everyday working rule of our law. . . . [A judge makes law through issuing opinions because] in fashioning [the law for the parties to a case], he will be fashioning it for others.").
  28. *Stare Decisis*, MERRIAM-WEBSTER (2015), <http://www.merriam-webster.com/dictionary/stare%20decisis> [<http://perma.cc/9VZ9-QFXZ>].

es at lower levels of the judicial hierarchy.<sup>29</sup> Stare decisis gives a panel of judges the power to make law within any jurisdiction where they have horizontal or vertical stare decisis authority, because judges in that jurisdiction will be obligated to respect precedent even when they would otherwise be inclined to reason differently.

A. *The Costs of Stare Decisis in the FISA Context*

The benefits of and justifications for stare decisis are discussed in the next Part, but it is important to establish as an initial matter that stare decisis also involves serious costs, which are exacerbated by the FISA courts' secrecy and institutional context.

Stare decisis's most prominent cost is binding judges to interpretations of law that they find unpersuasive, raising the fundamental question of when and why such a restraint on judges' decision-making autonomy is justified.<sup>30</sup> In an ideal world, stare decisis would insulate valid principles of law from arbitrary and unprincipled revision without entrenching "bad" precedent against further review.<sup>31</sup> In reality, stare decisis hinders defection from both appealing and unappealing precedent.

This cost of stare decisis is heightened in the secret law context, because the incentive to invest extra effort in writing opinions is less powerful without the promise, and constraints, of public scrutiny.<sup>32</sup> The general principle, evidenced by the congressional testimony of Judge Kozinski of the Ninth Circuit,<sup>33</sup> is that publication induces judges to write more thorough, carefully reasoned opinions. Secrecy deprives FISA court judges of helpful external

29. See, e.g., Mead, *supra* note 19, at 800.

30. See, e.g., Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

31. See, e.g., Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2034 (1996) (arguing that "stare decisis has the potential to import injustice irremediably into the law").

32. See, e.g., Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (outlining a theory of Supreme Court jurisprudence based explicitly on the political constraints facing the Court); Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011).

33. See *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 14 (2002) (statement of J. Alex Kozinski, United States Court of Appeals for the Ninth Circuit) ("The time—often a huge amount of time—that judges spend calibrating and polishing opinions need not be spent in cases decided by an unpublished disposition that is intended for the parties alone.").

feedback from scholars,<sup>34</sup> the public, and Congress. Because secrecy reduces judges' incentives and ability to make good precedent, the risk of entrenching bad precedent is unusually high in the context of the FISA courts.

Moreover, doctrinal entrenchment is particularly problematic in the FISA courts, where secrecy and institutional context indicate that outside efforts at doctrinal reform are less likely to be effective than they are with courts that publish their opinions.<sup>35</sup> Unlike published opinions, secret opinions cannot provoke the public into lobbying for a legislative override<sup>36</sup> or judicial overruling<sup>37</sup> – two important paths of legal reform.<sup>38</sup> Perhaps to hedge against the risks of limited external oversight, FISA limits FISC and Court of Review judges to non-renewable, seven-year terms,<sup>39</sup> a provision suggesting that Congress envisioned a FISA court whose membership would be responsive to shifting factual circumstances and policy priorities.<sup>40</sup> Stare decisis, which requires judges to adhere to interpretations of law that they might otherwise reject as unjust or unpersuasive, constrains these judges' ability to adapt to such factual and policy shifts. Consequently, doctrinal entrenchment, by undermining FISA's statutory design and cramping efforts at reform from within, further exacerbates the costs of stare decisis in the FISA context.

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34. See, e.g., Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399 (2012) (discussing citations of law review articles by the Supreme Court).
  35. Since the contents of secret opinions are not widely available, it is difficult for the general public even to know whether doctrinal reform is necessary.
  36. For a history of congressional overrides of Supreme Court opinions, see Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014).
  37. For a famous example of public outrage leading to a judicial overruling, see Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987) (discussing the role public outrage and state-level legislative action had on the Supreme Court's 1976 overruling of a 1972 opinion banning capital punishment).
  38. Letter from Ron Wyden and Mark Udall, U.S. Senators, to Eric Holder, U.S. Att'y Gen. (Mar. 15, 2012) <https://www.documentcloud.org/documents/325953-85512347-senators-ron-wyden-mark-udall-letter-to.html> [<https://perma.cc/4YTS-4669>] (“[I]t is impossible to have an informed public debate about what the law should say when the public doesn’t know what its government thinks the law says.”).
  39. 50 U.S.C. § 1803(d) (2012).
  40. This tenure restriction limits any single judge’s influence over the FISA courts’ long-term development. Granting secret opinions stare decisis power undermines the goals embodied in this limitation by preferring earlier iterations of the FISA courts over later ones, perhaps thereby restricting the ability of the Chief Justice to reshape the relevant law through transformative appointments. See Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988) (detailing the concept and historical use of transformative judicial appointments).

*B. The Inapplicability of Stare Decisis Rationales to Secret Opinions*

Defenses of stare decisis usually fall into one of three categories: 1) it promotes the rule of law;<sup>41</sup> 2) it promotes the *appearance* of the rule of law;<sup>42</sup> or 3) it expresses judicial deference to the legislative branch by allowing Congress to correct interpretations of law it finds faulty.<sup>43</sup> A closer examination of each of these justifications reveals their basic inapplicability to secret opinions.

The most common and forceful justification for stare decisis is that it promotes stability in the rule of law,<sup>44</sup> holding judges accountable to the public and keeping them from acting capriciously.<sup>45</sup> By promising fidelity to past statements of law, stare decisis “keep[s] the law standardized so it may be knowable to all . . . .”<sup>46</sup> It also helps to guarantee consistency in adjudication by limiting judicial discretion and ensuring that “like cases be decided alike.”<sup>47</sup> Because stare decisis makes the law consistent and knowable, this doctrine invites public reliance on judicial pronouncements.<sup>48</sup>

But these rule of law justifications for stare decisis largely wither when deprived of the sunlight publication provides. As discussed above, lack of publicity creates an increased risk of entrenching bad precedent and reduces incentives for judges to do their most careful work,<sup>49</sup> thereby undermining the ability of stare decisis to promote the rule of law. Though it will not necessarily act capriciously or incautiously absent public scrutiny, a court is not constrained by a public that cannot access its opinions.

To be sure, the rule of law justifications for stare decisis do not entirely disappear when applied to secret opinions: intelligence agencies do have a consid-

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41. See *infra* notes 44-48 and accompanying text.

42. See *infra* notes 52-53 and accompanying text.

43. See *infra* notes 55-57 and accompanying text.

44. See *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (“The principle of stare decisis is designed to promote stability and certainty in the law.”).

45. See, e.g., *Eubank Heights Apartments, Ltd. v. Lebow*, 669 F.2d 20, 23 n.2 (1st Cir. 1982) (“Stare decisis imposes very substantial constraints upon this court’s willingness to depart from previously adjudicated decisions.”); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) (“*Stare decisis* serves to take the capricious element out of law and to give stability to a society.”).

46. Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 413 (1924).

47. See, e.g., *Phillips v. Vasquez*, 56 F.3d 1030, 1039 (9th Cir. 1995) (Kleinfeld, J., concurring).

48. See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2028 (1994) (“[R]eliance interests often tip the balance in favor of retaining a rule of law that might otherwise be overturned.”).

49. See *supra* Part II.A.

erable reliance interest in FISA courts' opinions, and stare decisis does help guarantee that like cases are decided alike. The NSA and FBI are aware of and reliant on prior dispositions of the FISA courts<sup>50</sup> that the American public can neither know about nor rely upon. But stare decisis may not be a necessary condition for at least partially realizing that benefit. Even absent any formal stare decisis norm, courts tend to preserve significant consistency in their opinions because of the persuasive value of past decisions, awareness of the costs of disrupting established programs, and the fact that courts are repeat decision makers.<sup>51</sup> There is no reason to suppose the FISA courts would act differently.

Stare decisis is also defended on the ground that it increases the "perceived integrity of the judicial process" by promoting the appearance of the rule of law.<sup>52</sup> When courts cavalierly overrule their own precedent, they may reduce the public's confidence in the view that judges are constrained by the principles of law they espouse.<sup>53</sup> However, granting binding precedential value to secret opinions fails to promote the appearance of the rule of law, precisely because these opinions are secret. It is impossible for the public to ascertain the analytical coherence of secret opinions or the frequency with which they overrule past interpretations. As demonstrated by the public outrage at the perception that the FISA courts have created a secret body of judicial precedent,<sup>54</sup> denying the

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50. As is typical in warrant applications, only the government party seeking the warrant is allowed to attend most FISC proceedings, since including the party the warrant is sought against would often defeat the purpose of the application itself. However, calls for a "public advocate" to be introduced into FISC proceedings have been made by a number of political figures, including President Obama. See Ellen Nakashima & Greg Miller, *Obama Calls for Significant Changes in Collection of Phone Records of U.S. Citizens*, WASH. POST, Jan. 17, 2014, [http://www.washingtonpost.com/politics/in-speech-obama-to-call-for-restructuring-of-nsas-surveillance-program/2014/01/17/e9d5a8ba-7f6e-11e3-95c6-0a7aa80874bc\\_story.html](http://www.washingtonpost.com/politics/in-speech-obama-to-call-for-restructuring-of-nsas-surveillance-program/2014/01/17/e9d5a8ba-7f6e-11e3-95c6-0a7aa80874bc_story.html) [<http://perma.cc/4XB4-LVCM>] ("Obama also called on Congress to establish a panel of public advocates who can represent privacy interests before the FISC, which hears government applications for surveillance in secret.").
51. See generally NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* (2008) (providing a detailed explication of the many ways "precedent" can and should influence and govern decision making through both formal institutional channels and cognitive processes).
52. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it . . . contributes to the actual and *perceived* integrity of the judicial process." (emphasis added)); *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) ("*[S]tare decisis* . . . contributes to the integrity of our constitutional system of government, both *in appearance* and in fact." (emphasis added)).
53. See, e.g., ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 50 (1976) ("[Overruling precedent] undermine[s] the belief that judges are not unrestrainedly asserting their individual or collective wills, but following a law which binds them as well as the litigants.").
54. See, e.g., Alison Frankel, *Do Surveillance Court's Secret Rulings Violate U.S. Constitution?*, REUTERS: ON THE CASE (July 8, 2013), <http://blogs.reuters.com/alison-frankel/2013>

force of stare decisis to secret opinions may promote the appearance of the rule of law better than the status quo does, by limiting the reach and legal impact of the FISA courts' secret rulings.

Finally, courts invoke stare decisis to defer to tacit legislative assent; in other words, courts sometimes interpret legislative silence as a sign that Congress has acquiesced to standing precedent.<sup>55</sup> Stare decisis is therefore observed most scrupulously in matters of statutory construction – since the legislature is “free to change [an] interpretation of its legislation”<sup>56</sup> – and observed most leniently in the arena of constitutional adjudication, where judicial opinions can be overturned only by courts themselves or through constitutional amendment.<sup>57</sup>

This final defense for stare decisis is severely weakened when applied to secret opinions. The legislature is not always given access to secret opinions of the FISA courts,<sup>58</sup> and even when it is, secret opinions cannot generate the type of public pressure frequently necessary to spur legislative correction. Gag orders are sometimes issued pursuant to programs authorized by the FISA courts, further stifling public discussion and oversight by the parties most directly affected.<sup>59</sup> Even members of Congress face significant obstacles to speaking publicly about the classified FISA court opinions that they read and might find troubling.<sup>60</sup>

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/07/08/do-surveillance-courts-secret-rulings-violate-u-s-constitution [http://perma.cc/73Y3-F4EC].

55. *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (“If there is any inconsistency or illogic in [observing stare decisis in this case], it is . . . to be remedied by the Congress and not by this Court.”).
56. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).
57. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 235 (1997) (“The doctrine of stare decisis . . . is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.”).
58. Only select members of Congress are given access to FISC opinions. Letter from Reggie B. Walton, Presiding Judge, Foreign Intelligence Surveillance Court, to Dianne Feinstein, U.S. Senator 1 (Mar. 27, 2013) <http://graphics8.nytimes.com/packages/pdf/opinion/Feinsteinletter.pdf> [http://perma.cc/DU3G-J7BS] (“[T]he Executive Branch provides the [Senate] Intelligence and Judiciary Committees with all significant FISC opinions, albeit in classified form.”).
59. *See, e.g., Craig Timberg & Cecilia Kang, Google Challenges U.S. Gag Order, Citing First Amendment*, WASH. POST, June 18, 2013, [http://www.washingtonpost.com/business/technology/google-challenges-us-gag-order-citing-first-amendment/2013/06/18/96835c72-d832-11e2-a9f2-42ee3912ae0e\\_story.html](http://www.washingtonpost.com/business/technology/google-challenges-us-gag-order-citing-first-amendment/2013/06/18/96835c72-d832-11e2-a9f2-42ee3912ae0e_story.html) [http://perma.cc/D893-N4W6].
60. *See, e.g., Sen. Ron Wyden & Sen. Mark Udall, How Can Congress Debate a Secret Law?*, HUFFINGTON POST: BLOG (May 25, 2011, 1:56 P.M.), [http://www.huffingtonpost.com/sen-ron-wyden/how-can-congress-debate-a\\_b\\_866920.html](http://www.huffingtonpost.com/sen-ron-wyden/how-can-congress-debate-a_b_866920.html) [http://perma.cc/XK53-UY2C]. Though revealing classified information on the floor in either house would likely have serious consequences internally in terms of committee assignments and the member's relation-

Granting stare decisis value to secret opinions threatens to entrench legal precedent that has not been subjected to the many direct and indirect benefits of public scrutiny. These problems overpower the residual benefits stare decisis may provide in the context of secret opinions. Taken together, the analysis in this Comment suggests that the justifications most commonly offered in defense of stare decisis—rule of law, appearance of the rule of law, and deference to legislative authority—do not support affording binding precedential value to secret opinions of the kind sometimes issued by the FISA courts.<sup>61</sup>

### CONCLUSION AND RECOMMENDATIONS

Because the theoretical justifications for stare decisis depend largely on publication, the FISA courts should publish any opinion that they consider binding precedent. The courts could retain discretion over whether to publish opinions not treated as binding on future judges.<sup>62</sup> Therefore, every precedential opinion of the Court of Review and every FISC en banc opinion should be published in redacted form. On the other hand, the need to publish the ordinary work of the FISC is not as urgent, at least not for the reasons explored in this Comment.<sup>63</sup>

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ship with leadership, members of Congress are protected by the Constitution's Speech and Debate Clause and cannot be prosecuted for statements made on the floor of either house. See U.S. CONST. art. I, § 6, cl. 1; *Gravel v. United States*, 408 U.S. 606, 616 (1972).

61. One important counterargument against our concern with the role of stare decisis in generating secret judge-made law is that other governmental bodies make law in secret, apparently without the theoretical problems we have identified here. For example, secret executive orders and secret opinions of the Office of Legal Counsel (OLC) can contain interpretations of law that are in many ways as binding within the executive branch as judicial pronouncements are. While this may be a comparison worth further explication elsewhere, the lawmaking function of Article III courts differs in myriad ways from the lawmaking function of the executive branch, where stare decisis norms do not play the same role in generating law. Most obviously, the fundamental source of the Executive's legal authority is Article II rather than Article III, and the traditions and constitutional delegation of powers to each respective branch varies tremendously. Compare U.S. CONST. art. III, §§ 1-2, with *id.* art. I, §§ 1, 8; *id.* art. II, §§ 1-3. Ultimately, however, the theoretical foundation of secret law in non-judicial contexts is a broader question and falls outside the scope of this Comment.
62. To be clear, it is not our project to engage with the broader debate over the legitimacy of the FISA courts' ability to decide cases in secret. Consequently, we neither endorse nor preclude the possibility that all decisions of the FISA courts should be published for reasons unrelated to stare decisis—our exclusive concern here.
63. To the extent that there are de facto precedential legal interpretations in the FISA courts, other public legitimacy rationales might support en banc consideration and publication, but we do not address those rationales here.

In the absence of publication, the FISC judges should afford no formal deference to past interpretations – even the opinions of the Court of Review or the en banc FISC. Though this recommendation might seem surprising, it emerges from this Comment’s conclusion that granting the force of stare decisis to secret opinions is unjustified at the theoretical level.

It is possible for publication of precedential materials to be achieved simply as a matter of discretion: the executive branch may release these opinions,<sup>64</sup> as may the authoring judge of any opinion.<sup>65</sup> But the best option, because it limits the ability of judges and executive branch officials to make additional judgment calls about disclosure, is for Congress to demand publication of such opinions by amending FISA. Under this recommendation, the Court of Review would retain its discretion to write non-precedential or precedential opinions as the situation requires, but FISA would demand the publication of all binding precedent. One of the many proposals for FISA court reform involves a version of this requirement: Senate Bill 1467 would require the FISA courts to release any opinions containing a “significant construction or interpretation of law.”<sup>66</sup> We endorse this proposal but would define “significant constructions” of law as those that will have the force of stare decisis.

Some will undoubtedly claim that any increase in the level of FISA court publication, even with redaction, is inconsistent with protecting national security. Another worry is that, even with publication of opinions, the necessary redactions may severely inhibit the public value of those opinions to the point that publication is pointless.<sup>67</sup> Such predictions are difficult to assess, but if the additional public understanding created by the release of past FISA court opinions is any guide,<sup>68</sup> the release of future opinions will likely continue to spur thoughtful commentary and enhance public understanding of the law.

This Comment has described a theoretical problem with secret precedential opinions and applied this framework to the FISA courts. We recognize that some may object to this proposal on the grounds that it fails to acknowledge

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64. JARED P. COLE, CONG. RESEARCH SERV., R43404, DISCLOSURE OF FISA OPINIONS—SELECT LEGAL ISSUES, 4 (2014), <http://www.fas.org/sgp/crs/secret/R43404.pdf> [<http://perma.cc/R4YZ-788A>].

65. *Id.* at 3.

66. S. 1467, 113th Cong. § 6 (2013).

67. Concerns about redaction have been raised by FISA court judges themselves. See Letter from Reggie B. Walton to Dianne Feinstein, *supra* note 58, at 2 (“[I]n most cases, the facts and the legal analysis are so inextricably intertwined that excising the classified information from the FISC’s analysis would result in a remnant void of much or any useful meaning.”).

68. See, e.g., David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL’Y REV. 487, 513–18 (2006) (discussing, based on its published opinion, the Court of Review’s analysis of the PATRIOT Act).

pressing security needs. However, we advocate a middle path between universal publication and the status quo of near-total secrecy. We hope that publication will induce FISA court judges to write precedential opinions with the same eye to public scrutiny that they apply in carrying out their other jobs as district and circuit court judges. More broadly, we hope to have drawn much-needed attention to the problem of applying stare decisis in secret courts.

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