ARTICLE

FLYING SAUCERS AND THE IVORY DOME: CONGRESSIONAL OVERSIGHT CONCERNING UNIDENTIFIED ANOMALOUS PHENOMENA

Dillon Guthrie[*]

"There is no indication that they are anything other than illusions . . . . [I]n every instance we have found a more reasonable explanation than that it represents an object from outer space or a potential threat to our security."—Secretary of Defense Robert McNamara, Testimony Before the House Committee on Foreign Affairs, 1966.[1]

"UAP clearly pose a safety of flight issue and may pose a challenge to U.S. national security . . . . We were able to identify one reported UAP with high confidence. In that case, we identified the object as a large, deflating balloon. The others remain unexplained."—Office of the Director of National Intelligence, Preliminary Assessment: Unidentified Aerial Phenomena, 2021.[2]

ABSTRACT

Once dismissed for decades, the topic of unidentified anomalous phenomena ("UAP"), previously labeled as unidentified aerial phenomena and unidentified flying objects ("UFOs"), now attracts the sustained attention of Congress. In the annual U.S. defense and intelligence authorization measure enacted in each of the last four years, lawmakers have included bipartisan provisions tightening oversight of this matter. One Senate-passed UAP bill would even have directed the federal government to exercise eminent domain over any "technologies of unknown origin and biological evidence of non-human intelligence." Relenting to this pressure, the national security establishment has grudgingly acknowledged that UAP are not the "illusions" Secretary McNamara told Congress about but real—and that they may challenge national security. So, who knew what about UAP when? Meanwhile, researchers at Harvard University, Stanford University, and elsewhere have begun to study these phenomena in earnest. This Article cannot determine whether UAP are natural occurrences, drones, secret U.S. or foreign advanced technologies, something else entirely, or some combination of these possible explanations. But

[*] Dillon Guthrie is an attorney in Washington, D.C., who has served as a counsel at the Federal Reserve Bank of New York, an advisor on the Senate Committee on Foreign Relations, and a legislative aide to Senator John Kerry.

[1] *Foreign Assistance Act of 1966: Hearings on H.R. 12449 and H.R. 12450 Before the H. Comm. on Foreign Affs.,* 89th Cong. 331 (1966) (statement of Robert McNamara, Sec'y of Def.) (responding to questions from Rep. Cornelius Gallagher (D-N.J.) about "unidentified flying objects").

[2] OFF. OF THE DIR. OF NAT'L INTEL., PRELIMINARY ASSESSMENT: UNIDENTIFIED AERIAL PHENOMENA 3–4 (2021), https://www.dni.gov/files/ODNI/documents/assessments/Prelimary-Assessment-UAP-20210625.pdf [https://perma.cc/8XWS-WE6V].

legal and policy analyses have not kept pace with these developments, leaving a chasm rather than a foundation upon which legislators, other policymakers, academia, and the business community may build.

This Article begins to fill that space by studying UAP statutes and related governmental actions in five areas. First, this Article surveys congressional efforts to refine the historically laden definitions of these phenomena, shaping governmental efforts that hinge on the overarching import of these terms. Second, the activities of a novel office within the Department of Defense created to gather, analyze, and report to Congress on UAP data are evaluated, together with other U.S. governmental and international actors. Third, requirements providing for the gradual, if uncertain, declassification and public disclosure of UAP governmental records are discussed. Fourth, this Article analyzes one mechanism Congress created for persons to allege without retaliation that the government or contractors may be conducting secret UAP retrieval, research, reverse-engineering, or similar activities. Fifth, implications for contractors and others of prior statutory prohibitions against federal funding of any such unauthorized UAP activities are assessed. What emerges does not paint a full picture given the secrecy, ridicule, and conspiracism that continue to pall any serious discussion of UAP. But, by charting the strange waters of these UAP laws, this Article hopes to indicate routes of passage along which future legislation, policy, and scholarship may be ventured—if not free from hazard, then at least with a map.

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INTRODUCTION

The National Defense Authorization Act for Fiscal Year 2025 (the "FY 2025 NDAA"), signed into law by President Joseph Biden in December 2024, contains unusual provisions on unidentified anomalous phenomena ("UAP"), formerly known as unidentified aerial phenomena and, before that, unidentified

flying objects ("UFOs").[3] The statute, which, as in prior years, includes the annual intelligence authorization measure, reflects ongoing legislative interest in the matter of UAP, reinforcing several recent oversight hearings—the first on the topic in more than five decades—and enactments in prior years' defense and intelligence spending authorization measures.[4] The bipartisan actions extend congressional oversight into a mysterious and often sensationalized area that has fascinated and vexed the public for the greater part of a century. Taken as a whole, these actions mark significant progress for transparency. Yet each year's gains have been hard-won and modest, leaving many issues unresolved.

These evolving laws show how much lawmakers have attuned themselves to the problems posed by UAP, which are reported to be violating military and other restricted airspace with apparent impunity. Despite statutory reporting obligations to Congress, defense and intelligence officials have not provided the public with satisfactory explanations for many of these incursions.[5] In December 2023, for instance, "drones" or "uncrewed aerial systems" repeatedly swarmed Langley Air Force Base in Virginia, prompting the military to call in reconnaissance assets from the National Aeronautics and Space Administration ("NASA") to assess the situation.[6] The intrusions continued unabated, causing fighter aircraft at the base, which is tasked with defending Washington, D.C., to relocate.

Then, in November 2024, more unidentified "drones" or "small unmanned aerial systems" were alleged to have swarmed military bases in the United

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[3] *See* Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, §§ 6801–02, 138 Stat 1773, 2515–16 (2024).

[4] *See* Eleanor Watson, *Pentagon Officials Testify at First Public UFO Hearing in More Than 50 Years*, CBS NEWS (May 17, 2022, 4:21 PM), https://www.cbsnews.com/news/ufo-hearing-congress-pentagon-watch-live-stream-today-2022-05-17/ [https://perma.cc/QH58-SMG5]; National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 1683, 135 Stat. 1541, 2118–23 (2021) (codified at 50 U.S.C. § 3373); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 1673, 136 Stat. 2395, 2959–62 (2022) (codified at 50 U.S.C. § 3373b); National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, §§ 1687, 1841–1843, 7343, 137 Stat. 136, 621–22, 699–706, 1063–64 (2023) (codified as amended in scattered sections of 44 U.S.C. and 50 U.S.C.); *see generally Mission, Activities, Oversight, and Budget of the All-Domain Anomaly Resolution Office*: *Hearing Before the Subcomm. on Emerging Threats and Capabilities of the S. Comm. on Armed Servs.*, 118th Cong (2023) [hereinafter Senate 2023 AARO Hearing], https://www.armed-services.senate.gov/imo/media/doc/23-31_04-19-2023.pdf [https://perma.cc/SCS6-5VVL]. For an overview of Congress's earlier attempts at oversight of the UAP issue, *see* JAMES P. LOUGH, UFO BRIEFING BOOK: A GUIDE TO CONGRESSIONAL OVERSIGHT OF THE UAP PHENOMENON 48–64 (2021).

[5] *See, e.g.*, 10 U.S.C. § 130i(g) (requiring briefings to the appropriate congressional committees concerning intrusions into certain U.S. facilities by any "unmanned aircraft" or "unmanned aircraft system," without specifying UAP).

[6] Joseph Trevithick & Tyler Rogoway, *Mysterious Drones Swarmed Langley AFB for Weeks*, THE WARZONE (Mar. 15, 2024, 7:29 PM), https://www.twz.com/air/mysterious-drones-swarmed-langley-afb-for-weeks [https://perma.cc/8PUP-JT82].

Kingdom used by the United States.[7] Additional incursions in November and December 2024 were reported in New Jersey, California, Ohio, and other U.S. states.[8] At one point, overflights caused the airspace of Wright-Patterson Air Force Base, headquarters of the Air Force's National Air and Space Intelligence Center and the Space Force's National Space Intelligence Center, to temporarily close, and other U.S. military installations reported incursions as well.[9] Despite the shut-down of the airspace of one of the Air Force's most sensitive bases "due to [a] security threat," the White House National Security Communications Advisor stated that federal, state, and local agencies could not "corroborate any of the reported visual sightings" of the drones.[10] Asked weeks after the New Jersey sightings had begun, President Biden stated that there was "[n]othing nefarious, apparently, but they're checking it all out."[11]

In truth, the President had called the Secretary of Defense at least four times, seeking answers.[12] Congress would receive a classified briefing on the mysterious incursions that left many lawmakers dissatisfied with the government's explanation or lack thereof.[13] Although some accounts dismissed the incidents as "communal fever" or "panic," the Federal Aviation Administration ("FAA") saw fit to ban drones in the skies over critical infrastructure throughout New Jersey and New York.[14] Adding to the speculation, President Donald Trump called it "ridiculous

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[7] *See* Charlie D'Agata & Emmet Lyons, *U.S. Says Unexplained Drone Sightings Near U.K. Military Bases Ongoing*, CBS NEWS (Nov. 26, 2024, 12:23 PM), https://www.cbsnews.com/news/us-air-force-drone-sightings-uk-military-bases-unexplained-ongoing/ [https://perma.cc/REE4-BYCW].

[8] *See* Joe Edwards & John Feng, *Map Shows US Military Bases Swarmed by Mystery Drones*, NEWSWEEK (Dec. 18, 2024, 6:50 AM), https://www.newsweek.com/map-shows-us-military-bases-mystery-drones-2002561 [https://perma.cc/R3YH-P85W].

[9] *See id.*

[10] Scott Wang et al., *White House Downplays Mystery Drones As Key Lawmakers Demand Answers*, NBC NEWS (Dec. 12, 2024, 2:52 PM), https://www.nbcnews.com/politics/congress/white-house-downplays-mystery-drones-key-lawmakers-demand-answers-rcna183995 [https://perma.cc/47QG-39UU]; Howard Altman, *Drone Incursions Closed Wright-Patterson Air Force Base's Airspace Friday Night*, THE WARZONE (Dec. 15, 2024), https://www.twz.com/air/drone-incursions-closed-wright-patterson-air-force-bases-airspace-friday-night [https://perma.cc/FG2D-JCUT].

[11] Remarks in an Exchange with Reporters Prior to Departure for Greenville, Delaware, 2024 DAILY COMP. PRES. DOC. 1 (Dec. 17, 2024).

[12] *See* Lara Seligman, Kristina Peterson & Gordon Lubold, *Inside the Monthlong White House Effort to Quell New Jersey Drone Frenzy*, WALL ST. J. (Dec. 22, 2024, 10:00 AM), https://www.wsj.com/politics/national-security/biden-drone-response-new-jersey-reactions-7084ef90 [https://perma.cc/B5UA-JBY7].

[13] *See* Martha McHardy, *Classified Mystery Drone Briefing: What We Know*, NEWSWEEK (Dec. 18, 2024, 8:21 AM), https://www.newsweek.com/classified-drone-sightings-briefing-what-we-know-2002666 [https://perma.cc/8G3A-WPPJ].

[14] *See* Michael Wilson, Alyce McFadden & Tracey Tully, *How Drone Fever Spread Across New Jersey and Beyond*, N.Y. TIMES (Dec. 24, 2024), https://www.nytimes.com/2024/12/24/nyregion/new-jersey-new-york-drones.html [https://perma.cc/ZC7E-8UE7]; Sean Kirkpatrick, *The U.S. Drone Panic Mirrors UFO Overreactions*, SCI. AM. (Dec. 27, 2024), https://www.scientificamerican.com/article/the-u-s-drone-panic-mirrors-ufo-overreactions/ [https://perma.cc/DN8H-PS67].

that they are not telling you about what is going on with the drones," pledging greater transparency early in his second term.[15] These incidents occurred more than two decades after the September 11, 2001, terrorist attacks saw jetliners fly into restricted urban airspace to devastating effect and the reorganization of the U.S. Intelligence Community ("IC") to prevent such a catastrophe from recurring. The government has bewilderingly claimed, however, that none of the sightings—though many remain unexplained—posed any national security concerns.[16] Whatever these objects are, their appearance is alarmingly common, prompting questions by legislators about the military's control of U.S. airspace.[17]

On one level, the Langley, New Jersey, and other incidents illustrate the current dynamic over UAP—one characterized by a caucus of increasingly suspicious lawmakers met by inadequate admissions or deflections sometimes shading into outright recalcitrance by elements of the national security establishment.[18] On another level, the incidents show how terms like "drones" and "uncrewed aerial systems" are used to suggest—without total confidence—a prosaic cause, such as a foreign adversary, private operator, or other non-state actor. The term "UAP" is often not used, perhaps because it implies something truly anomalous to which policymakers have no ready answer, or carries embarrassing connotations of "little green men."[19] Yet the "U" in "UAP" simply stands for

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[15] Ashleigh Fields, *Trump: 'I'm Going to Give You a Report on Drones About 1 Day into the Administration'*, THE HILL (Jan. 10, 2025, 8:20 AM), https://thehill.com/homenews/administration/5078647-donald-trump-administration-mysterious-drones-response/ [https://perma.cc/PZ6C-4QG2].

[16] *See id.*; Joint Statement by Dep't of Homeland Sec., Fed Aviation Admin., Fed. Bur. of Investigation & Dep't of Def. on Ongoing Response to Reported Drone Sightings, (Dec. 16, 2024), https://www.dhs.gov/news/2024/12/16/dhs-fbi-faa-dod-joint-statement-ongoing-response-reported-drone-sightings [https://perma.cc/N86Z-655R].

[17] *See* Letter from Rep. Keith Self (R-Tex.), Rep. Jared Moskowitz (D-Fla.), Rep. Dan Crenshaw (R-Tex.), Andrew Ogles (R-Tenn.), Ralph Norman (R-S.C.), Rep. Matthew Rosendale, Sr. (R-Mont.) & Brad Finstad (R-Minn.) to Lloyd Austin, Sec'y of Def. (May 10, 2024), *available at* Keith Self (@RepKeithSelf), TWITTER (May 15, 2024, 2:27 PM), https://x.com/RepKeithSelf/status/1790811140588556350 [https://perma.cc/H4KU-NJMA]; Wang, *supra* note 10; Filip Timotija, *John Kirby Drone Statement 'Very Misleading at Best': New Jersey Rep*, THE HILL (Dec. 17, 2024, 9:00 AM), https://thehill.com/homenews/state-watch/5043815-chris-smith-john-kirby-mysterious-drone-sightings/ [https://perma.cc/PEQ8-GW9S]; McHardy, *supra* note 13.

[18] For another example, *see, e.g.,* Jim Little, *Matt Gaetz Says Photo of UFO 'Orb' not of 'Human Capability' Taken by Eglin Air Force Base*, PENSACOLA NEWS J. (July 26, 2023, 5:58 PM), https://www.pnj.com/story/news/politics/2023/07/26/matt-gaetz-investigated-ufo-incident-near-eglin-air-force-base/70470761007/ [https://perma.cc/LY5R-QWWP] (recounting a congressional delegation's visit to Eglin Air Force to investigate a military flight crew's reported UAP encounter: "'We were not afforded access to all of the flight crew, and initially, we were not afforded access to images and to radar (data),' Gaetz said. 'Thereafter, we had a bit of a discussion about how authorities flow in the United States of America, and we did see the image, and we did meet with one member of the flight crew who took the image.'").

[19] For another example of this vagueness at play, *see, e.g.*, Chris Eberhart, *Energy Czar Makes UFO Admission During GOP Lawmaker's Fiery Exchange—and That's Not Where It Ends*, FOX NEWS (June 13, 2024, 8:47 AM), https://www.foxnews.com/us/energy-czar-makes-ufo-admission-during-gop-lawmakers-fiery-exchange-thats-not-where-ends [https://perma.cc/DU86-3RAU]

"unidentified" and does not, therefore, necessarily preclude or suggest any particular explanation, be it boring or strange.

Indeed, this vagueness in the term "unidentified" has bedeviled attempts to distinguish between prosaic and truly anomalous UAP and thus to formulate sensible policy for either. Definitional ambiguity, together with undue compartmentalization of UAP information within the national security establishment, has permitted evasion of congressional oversight. Lawmakers are trying to reestablish that oversight. But Congress must resolve both issues to restore the constitutional balance.

Seeking clarity, Congress has twice passed legislation defining UAP to concentrate on anomalous cases. To break down informational stovepipes, it also created within the Department of Defense ("DoD") the All-Domain Anomaly Resolution Office ("AARO"), designed to gather and analyze data on UAP—so redefined—across the government and to report its findings to lawmakers.[20] To provide for the gradual disclosure to the public of such information, the National Defense Authorization Act for Fiscal Year 2024 (the "FY 2024 NDAA") established at the National Archives and Records Administration ("NARA") the Unidentified Anomalous Phenomena Records Collection (the "Collection").[21] Following rumors that federal government employees or government contractors have conducted secret UAP crash-retrieval, reverse-engineering, research, development, or similar activities without legislative authorization, Congress conferred immunity on certain persons reporting such allegations to AARO while shielding them from retaliation.[22] The FY 2024 NDAA also restricted funding for any such governmental or contractor activities under the Act until the Secretary of Defense or the Director of National Intelligence ("DNI")—who heads the IC, which comprises eighteen offices flung across ten agencies—discloses them to key lawmakers and congressional committees.[23] The National Defense Authorization Act for Fiscal Year 2025 did not renew these funding restrictions.

(featuring the testimony of the Secretary of the U.S. Department of Energy, Jennifer Granholm, describing unidentified incursions over certain nuclear facilities, as well as lawmakers asking whether the incursions represented "UAP" or mere "drones").

[20] *See* 50 U.S.C. § 3373(a), (c).

[21] *See* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 1841(a), 137 Stat. 136, 699–700 (2023).

[22] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 1673(b), 136 Stat. 2395, 2960–61 (2022) (codified at 50 U.S.C. § 3373b(b)); *see, e.g.*, *Unidentified Anomalous Phenomena: Implications on Nat'l Security, Public Safety, and Gov't Transparency: Hearing Before the H. Comm. on Oversight & Accountability, Subcomm. on Nat'l Security, the Border, and Foreign Affs.*, 118th Cong. 12 (2023) [hereinafter 2023 House Hearing on Unidentified Anomalous Phenomena], https://www.congress.gov/118/meeting/house/116282/documents/HHRG-118-GO06-Transcript-20230726.pdf [https://perma.cc/B3HJ-2C56].

[23] *See* National Defense Authorization Act for Fiscal Year 2024 §§ 1687, 7343.

These developments are unprecedented, legitimizing a topic long ridiculed and confounding observers. Has Congress, as some wonder, fallen under a collective UAP hysteria or prey to a sophisticated disinformation campaign orchestrated by the very military and intelligence agencies it supervises?[24] Are UAP atmospheric or other natural phenomena? Drones? Or are UAP advanced U.S. technology, for which narratives about extraterrestrials conveniently explain away sightings of secret American aerospace projects?[25] Do UAP represent similar technology by one or more foreign adversaries, a breakthrough that, once realized, could destabilize the prevailing, American-led international order?[26] Or is the U.S. government standing in trepidation and befuddlement at the precipice of stunning disclosures about, in the words of one Senate-passed UAP transparency bill, "non-human intelligence?"[27] Is some combination of these scenarios true? And how, given the apparent want of replicable, published evidence concerning the fraction of UAP that may defy present scientific understanding, alongside a surfeit of eye-witness accounts, documentary evidence, and eyebrow-raising remarks by former President Barack Obama and former Directors of the Central Intelligence Agency ("CIA") Vice Admiral Roscoe Hillenkoetter (in 1960) and John Brennan (in 2020) that something strange is afoot, can anyone know what to make of it all?[28]

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[24] *See* Marina Koren, *UFOs Are Officially Mainstream*, THE ATLANTIC (July 26, 2023), https://www.theatlantic.com/science/archive/2023/07/ufo-fever-congress-hearing-aliens/674835/ [https://perma.cc/6DV4-2ETE]; Holman W. Jenkins, Jr., *The UFO Bubble Goes Pop*, WALL ST. J. (Dec. 2, 2022, 4:36 PM), https://www.wsj.com/articles/the-ufo-bubble-goes-pop-disinformation-pentagon-uap-sightings-china-nelson-nasa-secrets-11670010814 [https://perma.cc/377J-S23B].

[25] *See* Julian E. Barnes, *The Truth Has Not Always Been Out There*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/us/politics/ufo-report-us-pentagon.html [https://perma.cc/MA2E-W4YH].

[26] *See* Garrett M. Graff, *The U.S. Government UFO Cover-up is Real—But It's Not What You Think*, THE ATLANTIC (Nov. 17, 2023), https://www.theatlantic.com/ideas/archive/2023/11/us-government-ufo-uap-alien-cover-up/676032/ [https://perma.cc/GM6F-BK4M].

[27] National Defense Authorization Act for Fiscal Year 2024, S. 2226, 118th Cong. § 9003(13) (2023) (as passed by the Senate, July 27, 2023); *see* Christopher Mellon, *Disclosure and National Security: Should the U.S. Government Reveal What It Knows About UAP?*, THE DEBRIEF (Nov. 22, 2023), https://thedebrief.org/disclosure-and-national-security-should-the-u-s-government-reveal-what-it-knows-about-uap/ [https://perma.cc/D46C-Y8QN].

[28] *See, e.g.*, Reis Thebault, *For Some Navy Pilots, UFO Sightings Were an Ordinary Event: 'Every Day for at Least a Couple Years'*, WASH. POST (May 17, 2021, 9:47 PM), https://www.washingtonpost.com/nation/2021/05/17/ufo-sightings-navy-ryan-graves/ [https://perma.cc/Y9DK-TPS4]; Ralph Blumenthal & Leslie Kean, *'Project Blue Book' Is Based on a True U.F.O. Story. Here It Is.*, N.Y. TIMES (Jan. 15, 2019), https://www.nytimes.com/2019/01/15/arts/television/project-blue-book-history-true-story.html [https://perma.cc/YZD3-HHRU] (citing a 1947 memorandum by Air Force Lieutenant General Nathan Twining which reported that "the phenomenon reported is something real and not visionary or fictitious," characterized by "extreme rates of climb, maneuverability (particularly in roll), and motion which must be considered evasive when sighted or contacted by friendly aircraft and radar."); Jason Abbruzzese, *Obama on UFO Videos: 'We Don't Know Exactly What They Are'*, NBC NEWS (May 18, 2021), https://www.nbcnews.com/science/weird-science/obama-ufo-videos-dont-know-exactly-are-rcna963 [https://perma.cc/Z75E-TXPD] (reporting the remarks of former President Barack Obama: "What is true, and I'm actually being serious here, is that there is footage and records of objects in the skies that we don't know exactly what they are. . . . We can't explain how they move, their trajectory. They did not have an easily explainable pattern."); *Air*

To attempt to answer what has awakened this interest from its long slumber, this Article centers around a more limited, scrutable set of findings—legislative ones—trading a wild imagination for tamer analysis in the interest of greater certainty. To ground this analysis, it is first presumed that the Senate Select Committee on Intelligence ("SSCI"), the Senate Committee on Armed Services ("SASC"), one sitting and one former Senate Majority Leader, and other highly cleared lawmakers and officials—to quote Justice Bushrod Washington, "more tedious than difficult to enumerate"—are neither hallucinating, duped, nor passing laws about piffle.[29] Granted, legislative findings are not scientific facts. Individual

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Force Order on 'Saucers' Cited, N.Y. TIMES (Feb. 28, 1960), https://timesmachine.nytimes.com/timesmachine/1960/02/28/119097456.html?pageNumber=30 [https://perma.cc/6WLX-48G4] (quoting former CIA Director Vice Admiral Hillenkoetter: "[B]ehind the scenes, high-ranking Air Force officers are soberly concerned about UFO's [*sic*]. But through official secrecy and ridicule, many citizens are led to believe the unknown flying objects are nonsense."); Interview by Tyler Cowen with John Brennan (Dec. 16, 2020), https://conversationswithtyler.com/episodes/john-o-brennan/ [https://perma.cc/3LZL-U7XQ] (featuring the remarks of former CIA Director John Brennan: "Some of the phenomena we're going to be seeing continues to be unexplained and might, in fact, be some type of phenomenon that is the result of something that we don't yet understand and that could involve some type of activity that some might say constitutes a different form of life.").

[29] Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230); *see, e.g.*, S. REP. NO. 116-233, at 11 (2020) ("[T]he [Senate Select] Committee [on Intelligence] remains concerned that there is no unified, comprehensive process within the Federal Government for collecting and analyzing intelligence on unidentified aerial phenomena, despite the potential threat."); S. REP. NO. 116-48 (2019), Classified Annex, Enclosure 2, "Advanced Operational Capabilities Collection, Exploitation, and Research," *cited in* INSPECTOR GEN., DEP'T OF DEF., UNCLASSIFIED SUMMARY OF REPORT NO. DODIG-2023-109, "EVALUATION OF THE DOD'S ACTIONS REGARDING UNIDENTIFIED ANOMALOUS PHENOMENA" 2 n.2 (2024), https://media.defense.gov/2024/Jan/25/2003381266/-1/-1/1/UNCLASSIFIED%20SUMMARY_UNIDENTIFIED%20ANOMALOUS%20PHENOMENA%20SECURE.PDF [https://perma.cc/X79Y-T39C]; 169 CONG. REC. S5930 (daily ed. Dec. 13, 2023), (containing the statement of Sen. Chuck Schumer (D-N.Y.): "We have also been notified by multiple credible sources that information on UAPs has also been withheld from Congress, which, if true, is a violation of the laws requiring full notification to the legislative branch"); Harry Reid, Opinion, *What We Believe About U.F.O.s*, N.Y. TIMES (May 21, 2021) (updated June 3, 2021), https://www.nytimes.com/2021/05/21/special-series/harry-reid-ufo.html [https://perma.cc/XD65-CT5X] ("I believe that there is information uncovered by the government's covert investigations into unidentified aerial phenomena that can be disclosed to the public without harming our national security."); Television Interview by Jake Tapper with Sen. Mitt Romney (R-Utah), CNN (June 27, 2021), http://www.cnn.com/TRANSCRIPTS/2106/27/sotu.01.html [https://perma.cc/98N6-65XK] (Jake Tapper: "The director of national intelligence just a few days ago released a new report on 144 sightings of what they call unidentified aerial phenomena. Virtually all of them remain unexplained. Whatever these are, they appear to not only be technology that the United States does not have, but technology that we cannot even explain . . . . How concerned are you about these objects? And where do you think they come from?" Sen. Romney: "Well, I don't believe they're coming from foreign adversaries. If they were, why, that would suggest that they have a technology which is in a whole different sphere than anything we understand. And, frankly, China and Russia just aren't there. And [n]either are we, by the way."); Tom McCarthy, *UFO Report Details 'Difficult to Explain' Sightings, Says US Ex-Intelligence Director*, THE GUARDIAN (Mar. 22, 2021, 9:43 AM), https://www.theguardian.com/us-news/2021/mar/22/us-government-ufo-

legislators and Congress collectively have erred before and will again. Congressional enactments and their accompanying legislative intent must be greeted with caution. But they must be greeted.

These laws implicate complexities around not only the statutory definition of UAP, discussed in Part I, but also Congress's attempts to reorient elements of the DoD and IC to understand and disclose to lawmakers what they know about these phenomena, a topic explored in Part II. Bound up with those labors, yet distinct from disclosure to Congress, disclosure to the American public of UAP records is analyzed in Part III. Protections for persons making disclosures to AARO about governmental or contractor UAP activities are discussed in Part IV and are distinguished from traditional "whistleblowing." In Part V, prior funding restrictions by Congress on unauthorized UAP programs are analyzed. This Article concludes by offering a few observations on possible future congressional actions, both legislative and, perhaps more decisively, investigative.

I. A ROSE BY ANY OTHER NAME? BY CAPTURING BOTH PROSAIC AND ANOMALOUS OBJECTS, "UNIDENTIFIED" BLURS CONGRESSIONAL FOCUS ON TRULY ANOMALOUS UAPS' BEYOND-NEXT-GENERATION CAPABILITIES.

A. A Short History of the Long Tale of UAP Reveals Definitional Ambiguity from the Start.

Strange things seen mainly in the skies have been called many names for a long time. During World War II, American military aviators in the European and Pacific theaters used the phrase "Foo Fighters" to describe "balls of light" that would "fly near or with the aircraft and maneuver rapidly."[30] Following the War, sightings from 1946 to 1947 throughout Scandinavia of "ghost rockets" evidently defying explanation intrigued the public.[31] American and British intelligence

report-sightings [https://perma.cc/J8LZ-CLQW] ("'Frankly, there are a lot more sightings than have been made public,' [former DNI John Ratcliffe] said. . . . 'And when we talk about sightings, we are talking about objects that have been seen by [N]avy or [A]ir [F]orce pilots, or have been picked up by satellite imagery, that frankly engage in actions that are difficult to explain, movements that are hard to replicate, that we don't have the technology for.'"); Martha McHardy, *Donald Trump's Ex-National Security Adviser on UFO Reports: 'Inexplicable'*, NEWSWEEK (Sept. 7, 2024, 3:41 PM), https://www.newsweek.com/ufo-sightings-herbert-raymond-mcmaster-interview-1950267 [https://perma.cc/BM8A-SZY6] (quoting former National Security Adviser H.R. McMaster as saying, "There are things that cannot be explained. I don't know what the explanation is for those unexplainable things, but I will say that there are phenomena that have been witnessed by multiple people that are just inexplicable by any kind of science available to us.").

[30] REPORT OF MEETINGS OF SCIENTIFIC ADVISORY PANEL ON UNIDENTIFIED FLYING OBJECTS CONVENED BY THE OFFICE OF SCIENTIFIC INTELLIGENCE, CENTRAL INTELLIGENCE AGENCY 8 (1953) [hereinafter ROBERTSON PANEL], https://www.cia.gov/readingroom/docs/CIA-RDP81R00560R000100030027-0.pdf [https://perma.cc/EEE7-HMYU].

[31] *See* GREG EGHIGIAN, AFTER THE FLYING SAUCERS CAME: A GLOBAL HISTORY OF THE UFO PHENOMENON 14–19 (2024).

officials also took an interest.[32] They wondered whether the sightings represented Soviet-captured advanced German weapons systems, such as the V-1 rocket.[33] Other terms, like "flying saucers," "flying discs," "unidentified aerial objects," "unidentified flying objects" or "UFOs," and, most phantasmic of all, the "phenomena," would enter the vernacular.[34] Of these, "UFOs" would attain prominence; the term is credited to Captain Edward Ruppelt, Director between 1949 and 1953 of Project BLUE BOOK, one of the Air Force's investigations into these phenomena. According to Captain Ruppelt, the military preferred "UFOs" to "flying saucers" and "flying discs," terms that were "misleading when applied to objects of every conceivable shape and performance."[35] But "UFOs" would become tied to the ridicule that has stalked the topic, frustrating scientific inquiry and political debate.

The addition of "unidentified" acknowledged simply that UFOs cover a range of phenomena that are, at least at first, unknown. In a report commissioned by the Air Force, a panel helmed by Dr. Edward Condon defined a UFO in 1969 as "the stimulus for a report . . . [of] something seen in the sky (or an object thought to be capable of flight but seen when landed on the earth) which the observer could not identify as having an ordinary natural origin."[36] Most sightings eventually were attributed to natural or manmade causes. By one estimate, around ninety to ninety-five percent of UFO sightings consist of:

> "weather balloons, flares, sky lanterns, planes flying in formation, secret military aircraft, birds reflecting the sun, planes reflecting the sun, blimps, helicopters, the planet Venus or Mars, meteors or meteorites, space junk, satellites, sundogs, ball lightning, ice crystals, reflected light off clouds, lights on the ground or lights reflected on a cockpit window," and more.[37]

In practice, this plenitude of mundane explanations has drowned out alternative causes even where the actual cause could not be identified with surety. Following a wave of UFOs tracked crossing the heavily guarded airspace of Washington, D.C., in 1952, Air Force General John Samford could only offer "temperature inversions" as the likely culprit, with the Air Force hurrying on to relate that the great bulk of UFO sightings could be explained adequately as hoaxes, mistakes, or

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[32] *Id.* at 17–18.
[33] *See id.*
[34] Gideon Lewis-Kraus, *How the Pentagon Started Taking U.F.O.s Seriously*, NEW YORKER (Apr. 30, 2021), https://www.newyorker.com/magazine/2021/05/10/how-the-pentagon-started-taking-ufos-seriously [https://perma.cc/RWF8-BALQ]; *see also* EDWARD J. RUPPELT, THE REPORT ON UNIDENTIFIED FLYING OBJECTS 16 (1956).
[35] RUPPELT, *supra* note 34, at 18–19.
[36] EDWARD U. CONDON, FINAL REPORT OF THE SCIENTIFIC STUDY OF UNIDENTIFIED FLYING OBJECTS 13 (Daniel S. Gillmor ed., 1969) [hereinafter CONDON COMMITTEE REPORT].
[37] Michael Shermer, *UFOs, UAPs and CRAPs*, SCI. AM. (Apr. 1, 2011) (quoting LESLIE KEAN, UFOS: GENERALS, PILOTS AND GOVERNMENT OFFICIALS GO ON THE RECORD 12 (2010)), https://www.scientificamerican.com/article/ufos-uaps-and-craps [https://perma.cc/ZGS9-W9ZE].

naturally occurring phenomena.[38] The rest he characterized as sightings by "credible observers of relatively incredible things."[39]

It is this remainder of "relatively incredible" cases over which much ink has been spilled. One fount of that outpouring comes from the ambiguity injected by the seemingly innocuous term "unidentified," which speaks clumsily to a state of knowledge at a particular moment and so encompasses objects both mundane and extraordinary.[40] Consequently, two opposing camps have settled. The first camp seeks to attribute UAP parsimoniously to ordinary explanations, largely in the interests of promoting air traffic safety (from things like manmade drones, debris, and airborne clutter) and protecting national security (through enhanced domain awareness).[41] UAP characterized as neither hallucinations nor misidentifications fall within the demesnes of flight safety and national security without the need to posit anything weird. The remaining percentage of cases that cannot be explained parsimoniously go unresolved. Often, this camp cites poor data or an acceptable, even natural, error rate in any attempt to resolve all observations in a bustling sky.[42]

The second camp focuses on those remaining rare anomalies that it argues cannot be explained as the planet Venus or a balloon—or by any prevailing paradigm.[43] Anomaly is the lacuna of paradigm. And scientific paradigms have been wrong before and, therefore, probably will be again.[44] Lacking hard evidence of the sort adduced by the first camp to ground prosaic, plausible explanations, the

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[38] *See* Austin Stevens, *Air Force Debunks 'Saucers' As Just 'Natural Phenomena'*, N.Y. TIMES (July 30, 1952), https://timesmachine.nytimes.com/timesmachine/1952/07/30/84338117.pdf [https://perma.cc/LD6W-3LPJ]; RUPPELT, *supra* note 34, at 223–24.

[39] Lewis-Kraus, *supra* note 34; *see also* RUPPELT, *supra* note 34, at 209–28 (detailing the 1952 Washington, D.C., UFO flyover).

[40] *See also* OFF. OF THE DIR. OF NAT'L INTEL. & DEP'T OF DEF., FISCAL YEAR 2023 CONSOLIDATED ANNUAL REPORT ON UNIDENTIFIED ANOMALOUS PHENOMENA 8 (2023), https://www.dni.gov/files/ODNI/documents/assessments/FY2023-Consolidated-Annual-Report-UAP-Oct2023.pdf [https://perma.cc/ZA8B-MD78] (noting that "only a very small percentage of UAP reports display interesting signatures").

[41] *See, e.g.*, Shermer, *supra* note 37, at 12.

[42] *See, e.g.*, *Activities of the All-Domain Anomaly Resolution Office*: *Hearing Before the Subcomm. on Emerging Threats and Capabilities of the S. Comm. on Armed Servs.*, 118th Cong. 16 (2024) [hereinafter Senate 2024 AARO Hearing] (statement of Jon Kosloski, Director, All-Domain Anomaly Resolution Office), https://www.armed-services.senate.gov/imo/media/doc/11-19-24_-_sub_-_transcript.pdf [https://perma.cc/9W85-B2DY] (circularly stating that "AARO does not believe every object is a bird, a balloon, or a UAV. We do have some very anomalous objects. It is just the nature of resolution. We can only resolve things that we understand.").

[43] *See, e.g.*, Christopher Mellon, *If the Government Has UFO Crash Materials, It's Time to Reveal Them*, POLITICO (June 3, 2023, 7:00 AM), https://www.politico.com/news/magazine/2023/06/03/ufo-crash-materials-intelligence-00100077 [https://perma.cc/A3HS-XV7U].

[44] *See generally* Larry Laudan, *A Confutation of Convergent Realism*, 48 PHIL. OF SCI. 19 (1981), https://philosophy.hku.hk/courses/dm/phil2130/AConfutationOfConvergentRealism2_Laudan.pdf [https://perma.cc/HVG5-Z77H] (arguing that, because the history of science contains so many theories determined for long periods of time to be empirically successful yet later shown empirically to be false, many of our current theories determined to be empirically successful are, by simple meta-induction, likely empirically false, too).

second camp points to a roster brimming with General Samford's "credible observers."[45] Of course, this second camp also hopes to understand UAP because of the problems they pose to civilian flight safety and perhaps to national security.[46] But the second camp questions the sometimes self-justifying explanations and too-casual standards of proof that some within the first camp proffer; adherents of the second camp often ask what it means to be "adequately" explained, why corroborated eyewitness testimony here lacks probative force, and why exactly "extraordinary claims require extraordinary evidence," as popularized by Dr. Carl Sagan.[47] Some in the second camp also accuse the government of downplaying the topic, as during the Cold War, when U.S. defense planners fretted that a glut of UAP reports would overwhelm air notification systems designed to funnel reports of Soviet activity.[48] Whether or not by design, these tactics reduced the subject of UAP to ridicule that only lately has begun to ebb.[49]

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[45] Lewis-Kraus, *supra* note 34.

[46] *See, e.g.*, Christopher Mellon, Opinion, *The Questions Congress Should—but Didn't—Ask About UFOs*, THE HILL (May 31, 2022, 7:30 AM), https://thehill.com/opinion/national-security/3506349-the-questions-congress-should-but-didnt-ask-about-ufos/ [https://perma.cc/A8C7-SAZL]; Melissa Quinn, *Democratic Congressman André Carson Wants Hearings on UFO Sightings*, CBS NEWS (July 4, 2021, 12:14 PM), https://www.cbsnews.com/news/andre-carson-ufos-congress-hearings-face-the-nation/ [https://perma.cc/6XBD-ARCV] (reporting on the concerns expressed by Rep. André Carson (D-Ind.) that UAP pose technological and national security concerns given the potential for foreign adversary surprise and sightings around military installations); Aliza Chasan, *Some UFO Reports from Military Witnesses Present Potential Flight Concerns, Government UAP Report Says*, CBS NEWS (Oct. 18, 2023, 9:27 PM), https://www.cbsnews.com/news/ufo-uap-departmnet-of-defense-report/ [https://perma.cc/UB8Q-YZWB].

[47] *See* CONDON COMMITTEE REPORT, *supra* note 36, at 26 ("As a practical matter, we take the position that if an UFO report can be plausibly explained in ordinary terms, then we accept that explanation even though not enough evidence may be available to prove it beyond all doubt."). For a recent polemic invoking Sagan's standard, *see* Sean Kirkpatrick, *Here's What I Learned as the U.S. Government's UFO Hunter*, SCI. AM. (Jan. 19, 2024), https://www.scientificamerican.com/article/heres-what-i-learned-as-the-u-s-governments-ufo-hunter/ [https://perma.cc/E79X-3M9E] ("Carl Sagan popularized the maxim that 'extraordinary claims require extraordinary evidence.' This advice should not be optional for policy makers."); *compare* MARC KAUFMAN, FIRST CONTACT: SCIENTIFIC BREAKTHROUGHS IN THE HUNT FOR LIFE BEYOND EARTH 124 (2011) (noting that "[w]hile Sagan's standard sounds right and may be entirely appropriate," it is a difficult standard to "define and interpret"), *with* BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY 26 (Simon & Brown 2010) (1912) ("The truth about physical objects must be strange. It may be unattainable, but if any philosopher believes that he has attained it, the fact that what he offers as the truth is strange ought not to be made a ground of objection to his opinion.").

[48] *See* ROBERTSON PANEL, *supra* note 30, at 25–26 ("The Panel further concludes . . . [t]hat the continued emphasis on the reporting of these phenomena does, in these parlous times, result in a threat to the orderly functioning of the protective organs of the body politic. We cite as examples the clogging of channels of communication by irrelevant reports, the danger of being led by continued false alarms to ignore real indications of hostile action, and the cultivation of a morbid national psychology in which skillful hostile propaganda could induce hysterical behavior and harmful distrust of duly constituted authority.").

[49] *See* NAT'L AERONAUTICS & SPACE ADMIN., UNIDENTIFIED ANOMALOUS PHENOMENA: INDEPENDENT STUDY TEAM REPORT 4 (2023), https://smd-cms.nasa.gov/wp-content/uploads/2023/09/uap-independent-study-team-final-report.pdf [https://perma.cc/J2F2-

B. Today's Statutory Definition Has Attempted with Qualified Success to Fix This Definitional Ambiguity.

The National Defense Authorization Act for Fiscal Year 2022 (the "FY 2022 NDAA") would, however, mark a sea change.[50] There, Congress for the first time defined UAP and required more information about them. The FY 2022 NDAA defined UAP as any: (a) "airborne objects that are not immediately identifiable;" (b) "transmedium" objects that likewise are not immediately identifiable; or (c) "submerged objects or devices" not immediately identifiable and that "display behavior or performance characteristics" suggesting relation to their airborne counterparts.[51] Transmedium objects are those "observed to transition between space and the atmosphere, or between the atmosphere and bodies of water."[52]

Although the FY 2022 NDAA referred to UAP as "unidentified aerial phenomena," Congress would relabel UAP as "unidentified anomalous phenomena" the following year in the National Defense Authorization Act for Fiscal Year 2023 (the "FY 2023 NDAA").[53] The moves from "UFOs" to "unidentified aerial phenomena" and to "unidentified anomalous phenomena" evidence three main developments. First, the new acronyms soften any lingering stigma by dispensing with the much-maligned "UFOs." Second, the replacement of "aerial" with "anomalous" recognizes that UAP are observed not only in the skies but also underwater and across other domains. Just as the military some seventy years ago adopted "UFOs" to capture more accurately "flying" objects of different shapes, "UAP" contemplates phenomena detected in many domains and so not limited to flight. Third, the latest definition's inclusion of "anomalous" reflects the desire of the second camp, newly ascendant after congressional action, to explain that percentage of truly anomalous cases.

Even as revised, the statutory definition poses two main challenges. First, there is no definition for objects observed only in the space domain. That omission, although a technicality, seems glaring if the extraterrestrial hypothesis—that some UAP are craft intelligently controlled by non-human beings visiting or sending

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MNF2] ("The negative perception surrounding the reporting of UAP poses an obstacle to collecting data on these phenomena. NASA's very involvement in UAP will play a vital role in reducing stigma associated with UAP reporting, which almost certainly leads to data attrition at present."); *see, e.g.*, DONALD E. KEYHOE, ALIENS FROM SPACE: THE REAL STORY OF UNIDENTIFIED FLYING OBJECTS 15 (1973) (quoting Air Force Colonel Harold Watson, chief of intelligence at Wright-Patterson Air Force Base, as saying, "At the end of nearly every report tracked down stands a crackpot, a religious fanatic, a publicity hound or a malicious practical joker.").

[50] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021).

[51] 50 U.S.C. § 3373(n)(8).

[52] *Id.* § 3373(n)(7).

[53] National Defense Authorization Act for Fiscal Year 2022 § 1683(l)(5); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 1673(c)(1), 136 Stat. 2395, 2962 (2022).

probes from faraway planets—remains viable.[54] Instead, the statute limits UAP to those that, on the one hand, are observed in the atmosphere or water and, on the other hand, move between space and the atmosphere or between the atmosphere and water.[55] Thus, data of any unidentified, spaceborne-only objects may be exempt from the definition. Consequently, the FY 2024 NDAA's requirement that the Secretary of Defense and the DNI notify Congress about any secret UAP information the DoD, the IC, or their respective contractors possess could be construed not to apply to spaceborne-only objects.[56]

Whether the statutory drafting represents a conscious choice to exclude observations of the space domain by sensitive collection platforms remains unsettled. The ambiguity could amount to an oversight, as SSCI in an earlier report urged the term UAP to be "updated to include space and undersea and that the scope of the [Pentagon's UAP] Office shall be inclusive of those additional domains."[57] Nonetheless, SSCI's report expresses an expectation, not binding law. Nor is it assured that the number, frequency, or type of UAP spotted would increase if the definition clearly included spaceborne-only objects. The government's 2023 UAP report (the "2023 UAP Report"), which the Office of the Director of National Intelligence ("ODNI") and, through AARO, the DoD prepared for Congress, mentioned spaceborne (and transmedium) UAP, but only to say that none were recently reported.[58] In 2024, the government reported forty-nine UAP incidents in the space domain; none of these reports "originated from space-based sensors or assets," and were reported instead by military or commercial pilots or ground observers.[59] Spaceborne UAP are now being reported on some basis, if perhaps not a statutory one. But it remains an open question why no UAP evidently have been tracked by space assets, some of which presumably possess collection capabilities tailored to the space domain that pilots and ground observers reporting spaceborne UAP do not.

Second, the conflation of the prosaic with the anomalous caused by "unidentified" endures. As mentioned, the statutory definition's reference to "phenomena" compounds this ambiguity in the same way, encompassing both natural or prosaic causes and truly exceptional, "anomalous" ones. A phenomenon is any "fact or situation that is observed to exist or happen," especially "one whose cause or explanation is in question," such as a "remarkable person, thing, or

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[54] *See* CONDON COMMITTEE REPORT, *supra* note 36, at 24 (defining the extraterrestrial hypothesis).
[55] *See* 50 U.S.C. § 3373(n)(7).
[56] *See id.* § 3373(f); National Defense Authorization Act for Fiscal Year 2024 §§ 1687(a)–(b), 7343(b)–(c).
[57] S. REP. NO. 117-132, at 12–13 (2022).
[58] *See* OFF. OF THE DIR. OF NAT'L INTEL. & DEP'T OF DEF., *supra* note 40, at 5.
[59] *See* ALL-DOMAIN ANOMALY RESOL. OFF., U.S. DEP'T OF DEF., FISCAL YEAR 2024 CONSOLIDATED ANNUAL REPORT ON UNIDENTIFIED ANOMALOUS PHENOMENA 4 (2024), https://media.defense.gov/2024/Nov/14/2003583603/-1/-1/0/FY24-CONSOLIDATED-ANNUAL-REPORT-ON-UAP-508.PDF [https://perma.cc/FR2P-DRA4].

event."[60] By describing the entire observable world, "phenomenon" describes everything and therefore nothing, even while intimating an openness to a range of possible explanations not yet illuminated through scientific methods. The FY 2022 NDAA defined UAP as airborne, submerged, or transmedium objects that are not "immediately identifiable."[61] Objects whose capabilities convey or suggest a familiar explanation (like the planet Venus or a balloon), but are not at once attributed, still fall within the definition. Even ordinary objects whose identification is delayed owing to communications, bureaucratic, or other routine breakdowns in the attribution process are UAP, perversely adding more noise instead of isolating the signal. Again, the result is to downplay, in the words of the 2023 UAP Report, the "very small percentage" of UAP demonstrating "interesting signatures, such as high-speed travel and unknown morphologies."[62]

What is more, AARO's statutory mandate, which charges the office with explaining UAP cases—and so depends on the term's definition—does not restrict AARO to investigating only anomalous ones. As AARO's first Director told Congress:

> When previously unknown objects are successfully identified it is AARO's role to quickly and efficiently hand off such readily explainable objects to the intelligence, law enforcement, or operational safety communities for further analysis and appropriate action. In other words, AARO's mission is to turn UAP into SEP, somebody else's problem.[63]

True, resolving anomalous cases requires first excluding them from ordinary ones. But the secondary mystery of how AARO handles those cases that it cannot make "somebody else's problem" abides. In the 2023 UAP Report, the ODNI and the DoD appeared satisfied with mentioning a "very small percentage" of anomalies.[64] Of a total of 757 UAP reports received by AARO between May 1, 2023 and June 1, 2024, the office placed 444 such reports in an "Active Archive" for lacking sufficient data; despite the name, these reports appear to be passively stored unless "additional data becomes available."[65] But what then? Does explaining a minority of cases and referring them elsewhere while placing most cases in an unresolved archive owing to insufficient, yet unarticulated, evidentiary requirements, highlight AARO's parsimonious success or an unalloyed failure to resolve the uncategorized remainder? Does AARO's mission ally it with the first or the second camp in this war of the roses?

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[60] *Phenomenon*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).
[61] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 1683(l)(4), 135 Stat. 1541, 2123 (2021).
[62] *Id.* at 8.
[63] Senate 2023 AARO Hearing, *supra* note 4, at 13 (statement of Sean Kirkpatrick, Director, All-Domain Anomaly Resolution Office).
[64] *See* OFF. OF THE DIR. OF NAT'L INTEL. & DEP'T OF DEF., *supra* note 40, at 8.
[65] *See* ALL-DOMAIN ANOMALY RESOL. OFF., *supra* note 59, at 5.

Whatever the answer, progress has been made. The FY 2023 NDAA's replacement of "aerial" with "anomalous" in the term UAP points AARO toward prioritizing the extraordinary. It also indicates that UAP pose a wider problem, one existing across more than just the aerial domain, as evidenced by the Navy's well-known encounters with underwater UAP near carrier battle groups and submarines.[66] Traditional explanations for incidents such as these should be less available for the reason that neither Venus nor a mylar balloon swims beneath the sea. More obviously including spaceborne-only objects as UAP would exclude many prosaic explanations for the same reason. In other words, the beyond-next-generation performance characteristics of certain UAP in these other domains cannot be easily described by causes attributed to airborne phenomena—let alone by phenomena that move across air, water, and space with the same relative ease. And Congress charged AARO with resolving all, not most or many, such anomalies.

Despite accusations that it has obfuscated transparency into UAP, the DoD has adapted to this evolving terminology even before the FY 2023 NDAA's revised definition.[67] More recently, the Joint Chiefs of Staff in a May 2023 memorandum (the "JCS UAP Memorandum") distinguished "unidentified anomalous phenomena" from "identifiable, non-anomalous phenomena."[68] In the memorandum, the Joint Chiefs of Staff instructed the combatant commanders, other U.S. military leadership, and DoD counterintelligence elements to "report all UAP incidents, incursions, and engagements" using a standard reporting form.[69] UAP detections subject to the memorandum's reporting requirements include "phenomena that demonstrate apparent capabilities or material that exceed known performance envelopes" and include "airborne, seaborne, spaceborne, and/or

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[66] *See* Helene Cooper, Ralph Blumenthal & Leslie Kean, *'Wow, What Is That?' Navy Pilots Report Unexplained Flying Objects*, N.Y. TIMES (May 26, 2019), https://www.nytimes.com/2019/05/26/us/politics/ufo-sightings-navy-pilots.html [https://perma.cc/UD2E-5UPC]; TIM GALLAUDET, BENEATH THE SURFACE: WE MAY LEARN MORE ABOUT UAP BY LOOKING IN THE OCEAN 9 (2024), https://thesolfoundation.org/wp-content/uploads/2023/07/Sol_WhitePaper_Vol1N1.pdf [https://perma.cc/LA9R-E6TQ]; Bryan Bender, *Senators Get Classified Briefing on UFO Sightings*, Politico (June 20, 2019, 2:32 PM), https://www.politico.com/story/2019/06/19/warner-classified-briefing-ufos-1544273 [https://perma.cc/W8ZE-QRWE].

[67] *See* Media Roundtable Interview with Under Secretary of Defense for Intelligence and Security Ronald Moultrie and Sean Kirkpatrick (Dec. 16, 2022), https://www.defense.gov/News/Transcripts/Transcript/Article/3249303/usdis-ronald-moultrie-and-dr-sean-kirkpatrick-media-roundtable-on-the-all-domai/ [https://perma.cc/5HZ7-D46T] (featuring Under Secretary Moultrie saying, "I just said unidentified anomalous phenomena, whereas in the past the Department [of Defense] has used the term unidentified aerial phenomena. This new terminology expands the scope of UAP to include submerged and trans-medium objects.").

[68] Memorandum from the Joint Staff J3 of the Joints Chiefs of Staff to the Chief of Naval Operations, U.S. Navy, et al. 2–3 (May 19, 2023) [hereinafter JCS UAP Memorandum], https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/UFOsandUAPs/24-F-0067-UAP_JS_GENADMIN.pdf [https://perma.cc/4Q49-V7GR].

[69] *Id.* at 2.

transmedium" objects.[70] Thus, spaceborne-only objects patently fall within the scope of the memorandum's reporting requirements. In contrast, phenomena not subject to the JCS UAP Memorandum are characterized as small, unmanned aircraft systems, i.e., drones, and "other capabilities or materials that do not exceed known or predicted performance capabilities."[71]

The JCS UAP Memorandum is significant for several reasons. Not least of these is its acknowledgement that "observing, identifying, and potentially mitigating UAP has become a growing priority," noting the "potentially ubiquitous presence of UAP"[72]—a nod to incidents like the one at Langley. Definitionally, the JCS UAP Memorandum comports with the shift in Congress to focus on anomalous cases. And, as assessed in Part II(A)(2), the JCS UAP Memorandum contains important insights into the DoD's understanding of the possible intentions behind certain UAP.

C. The Once, Twice, and Possibly Future UAP Disclosure Act Would Deemphasize "Unidentified" and Instead Define UAP by Five—Now Six—Observables Characterizing Beyond-Next-Generation Capabilities and Anomalous Effects.

Attempts in Congress to clarify the definition of UAP along the lines of the JCS UAP Memorandum have garnered bipartisan but insufficient bicameral support. Legislation sponsored by Senate Majority Leader Chuck Schumer and Senator Mike Rounds (the "UAP Disclosure Act") in 2023 and again in 2024 would have redefined UAP with the same relative precision of the JCS UAP Memorandum.[73] In 2023 and 2024, the bill was co-sponsored by members of the Senate defense, intelligence, and international relations committees but lacked a champion in the House.[74] It was offered initially in 2023 as an amendment to the Senate version of the FY 2024 NDAA and, in 2024, of the FY 2025 NDAA.[75]

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[70] *Id.* at 3.
[71] *Id.* at 2.
[72] *Id.*
[73] 169 CONG. REC. S2953–54 (2023) (S. Amend. No. 797 to S. 2226, 118th Cong. (2023) [hereinafter 2023 UAP Disclosure Act], § __03(21)), https://www.congress.gov/118/crec/2023/07/13/169/120/CREC-2023-07-13-pt1-PgS2953.pdf [https://perma.cc/WB4H-846K]; 170 CONG. REC. S4943–44 (2024) (S. Amend. No. 2610 to S. 4638, 118th Cong. (2024) [hereinafter 2024 UAP Disclosure Act], § __03(22)), https://www.congress.gov/118/crec/2024/07/11/170/115/CREC-2024-07-11-pt1-PgS4943.pdf [https://perma.cc/W825-8UH8].
[74] *See* Press Release, Senate Democrats, Schumer, Rounds Introduce New Legislation to Declassify Government Records Related to Unidentified Anomalous Phenomena & UFOs—Modeled After JFK Assassination Records Collection Act—as an Amendment to NDAA (July 14, 2023), https://www.democrats.senate.gov/newsroom/press-releases/schumer-rounds-introduce-new-legislation-to-declassify-government-records-related-to-unidentified-anomalous-phenomena-and-ufos_modeled-after-jfk-assassination-records-collection-act--as-an-amendment-to-ndaa [https://perma.cc/34YR-N92N]; 169 Cong. Rec. S2953 (2023); 170 Cong. Rec. S4943 (2024).
[75] *See* 169 CONG. REC. S2953 (2023); 170 CONG. REC. S4943 (2024).

Among its other aims, the UAP Disclosure Act would have, first, created an independent review panel modeled after the JFK Assassination Records Review Board to advise the President on declassifying and disclosing to the public the government's UAP records.[76] Second, the bill would have ordered the government to "exercise eminent domain over any and all recovered technologies of unknown origin and biological evidence of non-human intelligence that may be controlled by private persons or entities in the interests of the public good."[77] Unsatiated by this tantalizing reference, the UAP Disclosure Act then defined "non-human intelligence" as "any sentient intelligent non-human lifeform regardless of nature or ultimate origin that may be presumed responsible for unidentified anomalous phenomena or of which the Federal Government has become aware."[78]

In its third aspiration, the proposed definition of UAP, the bill could still prove more consequential. The UAP Disclosure Act would have defined UAP by referencing certain characteristics known as the "five observables" common to sightings, moving away from the hapless "unidentified." These are: (1) positive lift—the generation of lift, including to loiter for extended durations—despite the absence of control surfaces such as ailerons, or the generation of heat or exhaust through traditional propulsion; (2) instantaneous acceleration; (3) hypersonic velocity; (4) transmedium travel (which the FY 2022 NDAA already contemplated); and (5) low-observability, such as through cloaking or jamming.[79] The bill also excluded "temporarily non-attributed objects"—meaning natural phenomena, "mundane human-made airborne objects," and domestic and "known foreign systems" initially mistaken for UAP.[80] It would have included objects in the space domain, although it did not define that domain formalistically as lying above the Kármán Line (approximately 62 miles above mean sea level), as does the JCS UAP Memorandum and AARO's 2024 report (the "2024 UAP Report"), or functionally as the domain of orbital flight, as does the Space Force, inviting

[76] *See* 169 CONG. REC. S2956–57 (2023) (2023 UAP Disclosure Act § __07); Press Release, Senate Democrats, *supra* note 74; 170 CONG. REC. S4946–47 (2024) (2024 UAP Disclosure Act § __07).
[77] 170 CONG. REC. S4949 (2024) (2024 UAP Disclosure Act § __10).
[78] *Id.* at S4943 (2024 UAP Disclosure Act § __03(13)). But presumed by whom? What is the strength of this presumption? How and by whom may this presumption be rebutted?
[79] *See id.* at S4944 (2024 UAP Disclosure Act § __03(22)); S. 2226, 118th Cong. § 9003(22) (2023); National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 1683(l)(5), 135 Stat. 1541, 2123 (2021); Jackie Alemany, *Transcript: UFOs & National Security with Luis Elizondo, Former Director, Advanced Aerospace Threat Identification Program*, WASH POST (June 8, 2021, 7:19 PM), https://www.washingtonpost.com/washington-post-live/2021/06/08/transcript-ufos-national-security-with-luis-elizondo-former-director-advanced-aerospace-threat-identification-program/ [https://perma.cc/8B54-CGCW]; Kevin H. Knuth, Matthew Szydagis & David Mason, Presentation on the Flight Characteristics and Physics of UAP 3 (Aug. 2021), https://www.altpropulsion.com/wp-content/uploads/2021/08/Kevin-Knuth-UAP-Flight-Characteristics.pdf [https://perma.cc/8UZ6-TUQH].
[80] *See* 170 CONG. REC. S4943–44 (2024) (2024 UAP Disclosure Act § __03(20)).

ambiguity over the definition of "space" that elsewhere has muddled U.S. space policy.[81]

Additional language indicated that some UAP may have injured U.S. service members and others who have come into close contact with UAP. The UAP Disclosure Act included a little-discussed "sixth observable," described as "[p]hysical or invasive biological effects to close observers and the environment" caused by UAP [82] Despite the cause for concern, this sixth observable is not without precedent. AARO already is required to include in its annual report an "assessment of any health-related effects for individuals that have encountered unidentified anomalous phenomena."[83] The JCS UAP Memorandum requires documentation of "UAP effects on persons."[84] Information concerning "UAP-related health incidents (e.g., physiological, psychological effects and whether persistent or transitory)" is to be documented and retained in the affected service member's medical records, but not be sent with the UAP report, attempting to strike a balance between an individual's health privacy and understanding of these phenomena.[85]

Acknowledging the array of historical terms summarized in Part I(A), the UAP Disclosure Act further characterized UAP as encapsulating "flying discs," "flying saucers," "unidentified aerial phenomena," "UFOs," and "unidentified submerged objects."[86] The bill would define UAP to include all such anomalous objects, whatever the label, that may have come into possession of the executive branch, including the military and IC, as well as the "Department of Energy and its

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[81] *See id.* at S4944 (2024 UAP Disclosure Act § __03(22)); JCS UAP Memorandum, *supra* note 68, at 3; ALL-DOMAIN ANOMALY RESOL. OFF., U.S. DEP'T OF DEF., *supra* note 59, at 16. BHAVYA LAL & EMILY NIGHTINGALE, WHERE IS SPACE? AND WHY DOES THAT MATTER? 2, 8 (2014), https://aerospace.csis.org/wp-content/uploads/2019/09/Where-is-Space_-And-Why-Does-That-Matter_.pdf [https://perma.cc/2CF2-DC94] (noting that the Kármán Line itself fluctuates because of changes in air density and, is therefore, somewhat functional in its approach as well); U.S. SPACE FORCE, SPACEPOWER: DOCTRINE FOR SPACE FORCES 3, 5 (2020) (defining the physical dimension of the space domain as comprising the orbital environment, where objects move primarily subject to gravity's curvature or "pull" rather than to frictional or atmospheric forces such as drag).

[82] *See* 170 CONG. REC. S4944 (2024) (2024 UAP Disclosure Act § __03(22)(A)(vi)). For a background of the "six observables" of UAP, as well as other anomalous health incidents, *see generally* THE SOL FOUNDATION, ANOMALOUS HEALTH THREATS: HEALTH SECURITY CONSIDERATIONS FOR UAP (2024), https://thesolfoundation.org/wp-content/uploads/2024/07/Sol_WhitePaper_Vol1N4.pdf [https://perma.cc/FJ8K-EPUW].

[83] 50 U.S.C. § 3373(k)(B)(xii); *see also* Bryan Bender, *'This is Urgent': Bipartisan Proposal for UFO Office Pushes New Boundaries*, POLITICO (Nov. 17, 2021, 5:21 PM), https://www.politico.com/news/2021/11/17/this-is-urgent-bipartisan-proposal-for-ufo-office-pushes-new-boundaries-522845 [https://perma.cc/ZRS6-GZPZ] (quoting Sen. Kirsten Gillibrand (D-N.Y.) as stating "When you tell people, 'don't report a sighting of something that's odd or out of the norm because people will say 'you're crazy,' or you'll lose your credibility as an airman or as a naval aviator, you're obviously not going to report it if something is wrong with your health.").

[84] JCS UAP Memorandum, *supra* note 68, at 5.

[85] *Id.* at 4.

[86] 170 CONG. REC. S4944 (2024) (2024 UAP Disclosure Act § __03(22)(B)).

progenitors, the Manhattan Project, the Atomic Energy Commission, and the Energy Research and Development Administration."[87] Mentioning the Department of Energy (the "DoE") seems strange but, as will be discussed, other legislation and congressional inquiries may have preoccupied themselves with the DoD and IC, neglecting other potentially relevant agencies. Though UAP were described expansively, the bill's definition, perhaps unintentionally, would remain separate from existing law defining UAP for purposes of AARO's mission, protecting UAP whistleblowers, and restricting funding for any alleged undisclosed UAP programs run by the government or a contractor.[88]

Although the UAP Disclosure Act passed the Senate easily in 2023, it failed in the House and was not made into law.[89] Rumors circulated that the measure encountered opposition from the House defense and intelligence committees possibly owing, as discussed in the Introduction, to the bill's eminent domain provision. In the Senate, the UAP Disclosure Act bypassed formal committee consideration even though it was co-sponsored by members of relevant committees. Instead, the bill was offered on the floor as an amendment to the FY 2024 NDAA, leaving the formal views of the Senate's defense and intelligence committees unspoken. In 2024, the UAP Disclosure Act was not included in either chamber's version of the FY 2025 NDAA.[90]

All told, Congress's piecemeal approach, while perhaps unavoidable, to such a foundational definitional matter risks disharmony across enactments and confusion over the problem to be solved. The persistence of "unidentified" in the definition of UAP sends mixed signals to AARO and other agency stakeholders, saddling them with a terminology partly to blame for the lack of progress in prioritizing anomalous cases. Yet, when viewed at a distance, these successive laws plot a trenchant arc by Congress toward greater exactitude. The terminology offered by the UAP Disclosure Act suggests much more. But, for the moment, the executive branch has its hands full fulfilling its mission arising under the current statutory definition.

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[87] *Id.* (2024 UAP Disclosure Act § __03(23)(F)).

[88] *See id.* at S4943 (in §__03, clarifying that the definitions provided in the UAP Disclosure Act apply only to "this division," which refers to Division G, relating to declassification of government UAP records, not to AARO's mandate, whistleblower matters, or restrictions on governmental or contractor UAP programs, whose usages of the term "unidentified anomalous phenomena" reference 50 U.S.C. § 3373(n)(8)).

[89] *Compare* 169 CONG. REC. S3729, S3129–30, S3725–26, S3389–96 (2023) (announcing that S. 2226 passed on a vote of 86 to 11, after incorporating by unanimous consent S. Amend. No. 935, an amendment in the nature of a substitute containing the UAP Disclosure Act as Division G) *with* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, §§ 1687, 1841–1843, 7343, 137 Stat. 136, 621–22, 699–706, 1063–64 (2023) (not containing the UAP Disclosure Act).

[90] *See* Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, §§ 6801–02, 138 Stat 1773, 2515–16 (2024) (not containing the UAP Disclosure Act).

II. UNDERSTANDING THE FEDERAL GOVERNMENT'S UAP ARCHITECTURE.

A. The All-Domain Anomaly Resolution Office Is Charged with Leading the Government's UAP Policy—But It Has Not Determined Whether UAP Pose a Threat, Has Started in Fits, May Lack Access, and Must Vie with More Established Players at Home and Abroad.

1. AARO's Mission and Activities Are Novel and Spell an Uncertain Future.

AARO's mission is to craft policies and procedures for the collection, analysis, classification, and sharing of UAP data within the federal government and to report that data to key lawmakers and congressional committees. In 2021, Congress ordered the establishment of AARO, located within the sprawling Office of the Secretary of Defense, to serve as the government's clearinghouse for all UAP information, including from the DoD, IC, NASA, DoE, and civil aviation authorities.[91] AARO must report its findings to the House and Senate defense, appropriations, international relations, homeland security, and commerce committees.[92] These reports include an annual unclassified report on AARO's activities and findings, as well as semiannual classified briefings.[93] AARO also must produce a historical assessment of the government's involvement in the UAP topic since January 1, 1945.[94] In the first volume of that assessment, released in March 2024, AARO concluded that it had found "no evidence" that any U.S. governmental "investigation, academic-sponsored research, or official review panel has confirmed that any sighting of a UAP represented extraterrestrial technology."[95] It is not apparent what AARO judged to be evidence, nor why it considered the extraterrestrial hypothesis just to rule it out, while neglecting other available hypotheses.[96]

But AARO was not formed to passively receive and collate reports of UAP sightings for lawmakers. As analyzed in Part IV, the office also acts as a secure mechanism for the "authorized reporting" of:

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[91] *See* 50 U.S.C. § 3373(a), (c), (f).
[92] *Id.* § 3373(c), (j), (k), (n).
[93] *Id.* § 3373(k), (l).
[94] *Id.* § 3373(j).
[95] 1 ALL-DOMAIN ANOMALY RESOL. OFF., U.S. DEP'T OF DEF., REPORT ON THE HISTORICAL RECORD OF U.S. GOVERNMENT INVOLVEMENT WITH UNIDENTIFIED ANOMALOUS PHENOMENA (UAP) 7 (2024), https://media.defense.gov/2024/Mar/08/2003409233/-1/-1/0/DOPSR-CLEARED-508-COMPLIANT-HRRV1-08-MAR-2024-FINAL.PDF [https://perma.cc/W3ZS-V46N]; *see also* Rae Hodge, *Pentagon Report Denies UFOs are Aliens. Experts Accuse the Government of Misrepresenting the Truth*, SALON (Mar. 14, 2024, 12:00 PM), https://www.salon.com/2024/03/14/pentagon-report-denies-ufos-are-aliens-experts-accuse-the-government-of-misrepresenting-the-truth/ [https://perma.cc/22GJ-6EP4].
[96] *See, e.g.*, JACQUES VALLÉE, PASSPORT TO MAGONIA 109 (1969) (alternatively positing the "interdimensional hypothesis"—that UAP represent emanations of a "parallel universe, which coexists with our own.").

> any activity or program by a department or agency of the Federal Government or a contractor of such department or agency relating to unidentified anomalous phenomena, including with respect to material retrieval, material analysis, reverse engineering, research and development, detection and tracking, developmental or operational testing, and security protections and enforcement.[97]

That is, AARO must analyze reports of—if not investigate—allegations that the government or a contractor is running its own UAP projects. AARO must also develop and execute a "science plan" to understand characteristics of UAP that "exceed the known state of the art in science or technology," including in propulsion, materials, and sensors.[98] The stated goal of the science plan is to lay a foundation to potentially "replicate" any such advanced technologies.[99]

These are odd requirements if UAP solely represent natural or manmade phenomena, although the prospect of technological surprise by a terrestrial power remains possible. AARO's progress in executing the science plan remains unknown. The office's website features several scientific "spherical drones papers" discussing, for example, unmanned aerial vehicles, but none discussing the beyond-next-generation UAP described by the FY 2022 NDAA's UAP replication provision.[100] The initial bill establishing AARO, offered by Senator Kirsten Gillibrand and Senator Marco Rubio as an amendment to the FY 2022 NDAA, also envisioned an "Aerial and Transmedium Phenomena Advisory Committee" composed of scientific experts largely to be drawn from outside the military and IC.[101] But the provisions creating that panel were quietly stripped from the enacted version of the FY 2022 NDAA.[102] During a November 2024 Senate defense subcommittee hearing, AARO's Director lamented the lack of coordination between the office and the outside scientific community, but no attempt appears to have been made to revive the proposed advisory panel.[103]

Above all, these missions show that Congress created AARO to enlarge congressional oversight. The office is to relay sensitive information to the legislative branch about UAP "material retrieval, material analysis, reverse engineering, [and] research and development."[104] Of course, this mandate does not mean necessarily that AARO deals with extraterrestrials, aliens, or, in the words of

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[97] 50 U.S.C. § 3373b(a)(1).
[98] 50 U.S.C. § 3373(g).
[99] *See id.*
[100] *Education & Resources*, ALL-DOMAIN ANOMALY RESOL. OFF., https://www.aaro.mil/Resources/ [https://perma.cc/LG36-MD3B] (last visited Jan. 15, 2025).
[101] 167 CONG. REC. S7815–16 (2021) (S. Amend. 4281 to S. Amend. 3867 to H.R. 4350, 117th Cong. (2021), § __(l)).
[102] *See* 50 U.S.C. § 3373.
[103] *See* Senate 2024 AARO Hearing, *supra* note 42, at 23 (statement of Jon Kosloski, Director, All-Domain Anomaly Resolution Office).
[104] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 1673(a)(1) 136 Stat. 2395, 2959 (2022).

the UAP Disclosure Act, "non-human intelligence." But Congress has taken the extraordinary step of defining UAP as "anomalous" phenomena.[105] And it has fixed a new office in the national security firmament to guide the government's effort in understanding them.[106] Now, Congress is fixated on whether there have been attempts to reverse-engineer UAP.

AARO's formation followed a preliminary assessment on UAP delivered to Congress in 2021 by the ODNI (the "2021 Preliminary UAP Assessment"). Noting the poor quality of UAP data that has frustrated efforts to explain many UAP observations, the assessment concluded that these phenomena likely lack a single explanation.[107] Rather, the assessment categorized UAP as some combination of: (1) airborne clutter; (2) natural phenomena; (3) special U.S. government or industry programs; (4) foreign adversary systems; or (5) other unidentified phenomena.[108] In a departure from prior reports like the Condon Committee Report and the Air Force's Project BLUE BOOK, which in 1966 attributed UAP mostly to prosaic explanations,[109] the public version of the 2021 Preliminary UAP Assessment identified only one of the 144 UAP it examined (a balloon), even though eighty of the examined UAP were observed by multiple sensors.[110] In the 2023 UAP Report, co-authored with AARO, the ODNI documented 801 UAP reports since the reporting obligations began.[111] Within a year, the aggregate number of UAP reported to AARO would more than double, from 801 to 1,652 reports as of October 24, 2024.[112] Although most of the reported UAP displayed "ordinary characteristics," a "very small percentage" demonstrated "interesting signatures, such as high-speed travel and unknown morphologies."[113] But if there is no evidence that this minute percentage comprises U.S. or foreign aerospace applications, then what are they—and what are their intentions?

2. AARO Has Not Reconciled the Government's Contradictory Threat Analyses.

The 2021 Preliminary UAP Assessment was noteworthy for more than its inability to attribute any of the studied UAP to U.S. or foreign adversary

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[105] *See* 50 U.S.C. § 3373(n)(8).
[106] *See id.* § 3373(a).
[107] OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 2, at 5–6.
[108] *Id.*
[109] Brian O'Brien, et al., *Special Report of the USAF Scientific Advisory Board, Ad Hoc Committee to Review Project "Blue Book", March 1966*, *in* CONDON COMMITTEE REPORT, *supra* note 36, at 1279, 1279–80 ("Although about 6% (646) of all sightings (10,147) in the years 1947 through 1965 are listed by the Air Force as 'Unidentified,' it appears to the Committee that most of these cases so listed are simply those in which the information available does not provide an adequate basis for analysis.").
[110] *See* OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 2, at 4 ("We were able to identify one reported UAP with high confidence. In that case, we identified the object as a large, deflating balloon. The others remain unexplained.").
[111] *See* OFF. OF THE DIR. OF NAT'L INTEL. & DEP'T OF DEF., *supra* note 40, at 5.
[112] *See* ALL-DOMAIN ANOMALY RESOL. OFF., U.S. DEP'T OF DEF., *supra* note 59, at 4.
[113] OFF. OF THE DIR. OF NAT'L INTEL. & DEP'T OF DEF., *supra* note 40, at 8.

technology. Breaking even more with the past, the report found that UAP, aside from posing a flight safety hazard, "may pose a challenge to U.S. national security."[114] The DoD's Inspector General would later agree with this tentative conclusion, finding in the unclassified version of a 2024 report (the "DoD IG Report") that the Pentagon lacked "assurance that national security and flight safety threats to the United States from UAP have been identified and mitigated."[115] SSCI had earlier expressed concern that UAP presented a "potential threat."[116] Even starker, the JCS UAP Memorandum stated that some UAP might pose a threat. First, it noted that some military UAP reports might include "UAP engagement[s]," which are defined as any "kinetic or non-kinetic response to a UAP, intended to deny, disrupt, or destroy the phenomenon and/or its object(s)."[117] Recall that the JCS UAP Memorandum expressly excluded from the definition of "UAP" prosaic objects, meaning that UAP engagements by definition are those involving anomalous objects.[118] Second, a "UAP hazard," which does "not demonstrate hostile intent," is distinguished from a "UAP threat," which denotes a "force-protection and/or national-security risk to persons, materiel, or information by UAP that demonstrate hostile intent."[119]

No matter how subtly parsed, the 2021 Preliminary UAP Assessment, the DoD IG Report, SSCI's finding, and the JCS UAP Memorandum do not square with the conclusion of the Robertson Panel, which in 1953 found "no indication that these phenomena constitute a direct physical threat to national security."[120] Secretary of Defense Robert McNamara echoed the Robertson Panel in a 1966 hearing before the House Foreign Affairs Committee, denying "categorically" that there was anything to UAP sightings at all.[121] Sitting next to him, General Earle Wheeler, Chairman of the Joint Chiefs of Staff, agreed.[122] Only after these and similar outward conclusions by the Air Force that UFOs were harmless did their study migrate to the Condon Committee and others formally outside the government's reach.[123] To this day, the Air Force maintains on its website that "[n]o UFO reported, investigated and evaluated by the Air Force was ever an indication of threat to our national security."[124] But, according to a now-public memorandum entitled "Flying Discs" housed in NARA's Collection, the Air Force in 1948 secretly monitored "phenomena in the atmosphere which can be construed to be of

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[114] OFF. OF THE DIR. OF NAT'L INTEL., PRELIMINARY ASSESSMENT, *supra* note 2, at 3.
[115] INSPECTOR GEN., DEP'T OF DEF., *supra* note 29, at 6.
[116] S. REP. NO. 116-233, at 11, *supra* note 29.
[117] JCS UAP Memorandum, *supra* note 68, at 4.
[118] *See id*. at 2–3.
[119] *Id*. at 4.
[120] ROBERTSON PANEL, *supra* note 30, at 25.
[121] *See Foreign Assistance Act of 1966: Hearings on H.R. 12449 and H.R. 12450 Before the H. Comm. on Foreign Affs., supra* note 1, at 332.
[122] *See id.*
[123] *See* EGHIGIAN, *supra* note 31, at 192–93.
[124] *Unidentified Flying Objects and Air Force Project Blue Book*, U.S. AIR FORCE, https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104590/unidentified-flying-objects-and-air-force-project-blue-book/ [https://perma.cc/MB6P-W4Q5] (last visited Jan. 15, 2025).

concern to the national security."[125] In the memorandum, the Air Force ordered round-the-clock fighters equipped with photographic equipment and "such armament as deemed advisable" to collect data about these phenomena.[126] Former CIA Director Vice Admiral Roscoe Hillenkoetter's observation in 1960 appears to be accurate: "[B]ehind the scenes, high-ranking Air Force officers are soberly concerned about UFOs. But through official secrecy and ridicule, many citizens are led to believe the unknown flying objects are nonsense."[127]

But what explains the disconnect over the fundamental question the national security establishment is supposed to answer? Do UAP threaten national security or not? Neither AARO, the DNI, the Secretary of Defense, nor the Air Force has attempted in unclassified form to reconcile these conflicting views. By law, AARO must analyze the extent to which any UAP have ties to foreign government or non-state actors, or otherwise threaten the United States.[128] But it has yet to find anything there. The 2021 Preliminary UAP Assessment and the 2023 UAP Report concluded that no UAP studied represented foreign adversary technology, although they did not definitively exclude the prospect.[129] Unlike the 2021 Preliminary UAP Assessment, the 2023 UAP Report remained silent on the question of whether UAP posed a threat, reiterating only that UAP may pose a flight safety hazard.[130] The 2024 Report likewise remained silent on this question.[131] In neither report, nor in the first part of AARO's historical assessment, are the Robertson Panel's, Secretary McNamara's, or other historical assessments referenced or distinguished in light of the apparent facts today.

Given this inconsistency and the gravity of the potential implications, the issue should be squarely addressed. One solution to resolve this contradiction and help to restore the IC's credibility would be for Congress or the DNI to escalate the importance of a threat assessment by ordering a National Intelligence Estimate ("NIE") to conduct one, as well as to examine UAP more wholistically. An NIE represents the most formal and rigorous assessment of a national security issue by the IC.[132] Although past NIEs have been incorrect or politicized, commissioning an NIE with the lessons of these past failures in mind would elevate the UAP topic,

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[125] Memorandum from Air Force Off. of Intel. to Air Force Dir. of Plans and Operations, Air Materiel Command (Feb. 12, 1948), https://catalog.archives.gov/id/40989310?objectPage=4 [https://perma.cc/979K-V3P9].
[126] *Id.*
[127] *Air Force Order on 'Saucers' Cited*, *supra* note 28.
[128] *See* 50 U.S.C. § 3373(c)(4), (5).
[129] *See* OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 2, at 6 ("We currently lack data to indicate any UAP are part of a foreign collection program or indicative of a major technological advancement by a potential adversary."); OFF. OF THE DIR. OF NAT'L INTEL. & DEP'T OF DEF., *supra* note 40, at 2 ("Although none of these UAP reports have been positively attributed to foreign activities, these cases continue to be investigated.").
[130] *See* OFF. OF THE DIR. OF NAT'L INTEL. & DEP'T OF DEF., *supra* note 40, at 2.
[131] *See generally* ALL-DOMAIN ANOMALY RESOL. OFF., U.S. DEP'T OF DEF., *supra* note 59.
[132] RICHARD A. BEST, JR., CONG. RSCH. SERV., RL33733, INTELLIGENCE ESTIMATES: HOW USEFUL TO CONGRESS? 1 (2011).

promote information-sharing, and marshal disparate IC members toward a common analytical enterprise.[133] As the National Security Act of 1947 (the "National Security Act") requires an NIE to include alternative views, one addressing UAP would present a plurality of perspectives. Such openness would be welcome given the lack of a public UAP policy, the monolithic presentation in the 2021 Preliminary UAP Assessment and the 2023 UAP Report, the Air Force's outlying views, and the government's overall lack of candor. To date, however, UAP reports remain the especial province of AARO.

3. AARO Has Yet to Overcome Daunting Organizational and Informational Hurdles.

Like Hamlet's Denmark, AARO's province is a troubled one, plagued by bureaucratic confusion, staffing shortfalls, budgetary scrums, feuding agencies, and excessive secrecy. Like Hamlet, AARO has been loath to prosecute its mission with vigor. And it has not, despite its animating principle, resolved all anomalies. Far from it. Despite its statutory mandate and earlier concerns by SSCI and SASC harkening back at least to 2019, AARO has yet to establish, in the words of the DoD IG Report, any "overarching UAP policy," undermining flight safety and national security, if not AARO's entire reason for being.[134]

The lack of progress may owe partly to AARO's reporting lines. Formally part of DoD, where it answered to the Under Secretary of Defense for Intelligence and Security ("USD(I&S)") on administrative matters, AARO answers to the Principal Deputy Director of National Intelligence within the ODNI on operational and security matters.[135] Following criticism that the USD(I&S) had blocked efforts for greater transparency into UAP, AARO now answers to a more senior official, the Deputy Secretary of Defense, while otherwise continuing to report to the ODNI.[136] This confused organization contributed to a finding in the DoD IG Report that AARO under the watch of the USD(I&S) was not fully operational, even though Congress created the office in 2021.[137] The DoD projected AARO to achieve full operating capability by the end of the federal government's 2024 fiscal

[133] It should be noted, however, that many of these IC elements drafted the ODNI and DOD's 2023 UAP report. *See* OFF. OF THE DIR. OF NAT'L INTEL. & DEP'T OF DEF., *supra* note 40, at 4.
[134] INSPECTOR GEN., DEP'T OF DEF., *supra* note 29, at 6. *See generally* S. REP. NO. 116-233, *supra* note 29; S REP. NO. 116-48, *supra* note 29.
[135] *See* 50 U.S.C. § 3373(b)(3)(B).
[136] *See* Brandi Vincent, *Hicks Takes Direct Oversight of Pentagon's UAP Office; New Reporting Website to Be Launched*, DEFENSESCOOP (Aug. 30, 2023), https://defensescoop.com/2023/08/30/hicks-takes-direct-oversight-of-pentagons-uap-office-new-reporting-website-to-be-launched/ [https://perma.cc/64QM-LN8H].
[137] *See* INSPECTOR GEN., DEP'T OF DEF., *supra* note 29, at 7.

year, or by September 30, 2024.[138] The DoD confirmed that the office had at last reached full operational capability as of October 1, 2024.[139]

Although AARO launched its own UAP reporting form in 2023, given the office's initial failure to launch, the DoD IG Report recommended that the Army, Navy, Air Force, and, with respect to the regional military commanders, the Chairman of the Joint Chiefs of Staff, develop their own interim guidance for the detecting, reporting, collection, analysis, and identification of UAP.[140] The JCS UAP Memorandum, as well as mostly consistent UAP reporting requirements by the Marine Corps, have done much to address the DoD IG Report's recommendation, although the other Services have not released, at least not publicly, their own UAP reporting procedures.[141] But a nascent AARO now faces the added burden of handling UAP reports from the entire U.S. military.

Staffing and funding woes have also hobbled AARO. In December 2023, AARO's controversial inaugural Director, who had served in the role for less than two years, resigned.[142] Shortly before stepping down, the Director issued a personal statement criticizing members of Congress who alleged a UAP cover-up as "insulting" to government employees, contravening the Pentagon's studiously observed deference to the legislative branch.[143] AARO also lacked a Deputy Director for a long time, but that post has since been filled.[144] In August 2024, the DoD announced the appointment of a permanent Director of AARO after having left the role unfilled for approximately eight months.[145] AARO also went

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[138] *See id.*; Brandi Vincent, *Pentagon's UAP Investigation Hub Works to Reach Full Operational Capability*, DEFENSESCOOP (Jan. 10, 2024), https://defensescoop.com/2024/01/10/pentagons-uap-investigation-hub-works-to-reach-full-operational-capability/ [https://perma.cc/GVE7-HNJU].

[139] *See* Brandi Vincent, *AARO Functioning at Full Operational Capability as Lawmakers Prep for Classified UAP Briefing*, DEFENSESCOOP (Dec. 5, 2024), https://defensescoop.com/2024/12/05/aaro-full-operational-capability-lawmakers-prep-classified-uap-briefing/ [https://perma.cc/92S7-Y6GR].

[140] INSPECTOR GEN., DEP'T OF DEF., *supra* note 29, at 7–10.

[141] *See* USMC Reporting Requirements for Unidentified Anomalous Phenomena (Dec. 8, 2023), https://documents2.theblackvault.com/documents/dod/2024-USMCFOIA-001666.pdf [https://perma.cc/3F4X-GPAE].

[142] *See* Lara Seligman, *Pentagon UFO Boss to Step Down Next Month*, POLITICO (Nov. 7, 2023, 5:01 PM), https://www.politico.com/news/2023/11/07/pentagon-ufo-boss-00125883 [https://perma.cc/D2HD-GF4K].

[143] *See* Nomaan Merchant & Tara Copp, *The UFO Congressional Hearing Was 'Insulting' to U.S. Employees, a Top Pentagon Official Says*, AP (July 29, 2023, 1:15 AM), https://apnews.com/article/congress-ufos-uaps-pentagon-aliens-631ad4d174ee9559580935ec11afcf3f [https://perma.cc/VHX5-HH98].

[144] *See* 50 U.S.C. § 3373(b); Press Release, Dep't of Def., Department of Defense Announces the Deputy Director, All-Domain Anomaly Resolution Office (Nov. 8, 2023), https://www.defense.gov/News/Releases/Release/Article/3583493/department-of-defense-announces-the-deputy-director-all-domain-anomaly-resoluti/ [https://perma.cc/DBH7-4R98].

[145] Press Release, Dep't of Def., Department of Defense Announces the New Director, All-Domain Anomaly Resolution Office (Aug. 26, 2024), https://www.defense.gov/News/Releases/Release/Article/3884318/department-of-defense-announces-the-new-director-all-domain-anomaly-resolution/ [https://perma.cc/2LRW-AWJF].

underfunded in its early days due to a mistake in the congressional appropriations process.[146] Furthermore, although the DNI is required to ensure that the IC provides all UAP data to AARO, that information might not be flowing freely.[147] Because so many IC elements collect and analyze their own information, compartmentalization may thwart AARO's own efforts, even while its establishing statute on the whole grants the office wide-ranging access to UAP data within "each element of the intelligence community."[148] Indeed, the very structure of AARO, which reports to the Secretary of Defense and the DNI, and is staffed by personnel from the DoD and IC, seems built to break down these stovepipes.[149]

It does not help matters that AARO succeeds a dizzying kaleidoscope of prior DoD task forces and overlaps with the past and current UAP activities of other military and intelligence outfits.[150] Within the DoD, publicly known UAP legacy programs include the Airborne Object Identification and Management Synchronization Group ("AOIMSG"), which reported to the Airborne Object Identification and Management Executive Council ("AOIMEXEC"),[151] an acronym fit to be yodeled on Old MacDonald's farm. Other UAP organizations have included the Unidentified Aerial Phenomena Task Force ("UAPTF"),[152] the Advanced Aerospace Threat Identification Program ("AATIP"),[153] the Advanced Aerospace Weapon System Applications Program ("AAWSAP"),[154] and, between 1947 and 1969, the U.S. Air Force's official UAP investigations under Projects

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[146] Nancy A. Youssef & Lindsay Wise, *Pentagon's Unidentified-Object Office Is Underfunded, Senators Say*, WALL ST. J. (Feb. 14, 2023, 1:53 PM), https://www.wsj.com/articles/pentagons-unidentified-object-office-is-underfunded-senators-say-b435af26 [https://perma.cc/S88L-2GWE]; *see* Press Release, Sen. Gillibrand, Gillibrand Secures Full Funding for UAP Office in Senate Defense Bill Markup (June 23, 2023), https://www.gillibrand.senate.gov/news/press/release/gillibrand-secures-full-funding-for-uap-office-in-senate-defense-bill-markup/ [https://perma.cc/ZX2N-M6YS].

[147] 50 U.S.C. § 3373(f); *see* 50 U.S.C. § 3003(4); *Members of the Intelligence Community*, OFF. OF THE DIR. OF NAT'L INTEL., https://www.dni.gov/index.php/what-we-do/members-of-the-ic [https://perma.cc/5DPS-JBUJ] (last visited Jan. 15, 2025).

[148] 50 U.S.C. § 3373(f)(1)(A).

[149] *See id.* § 3373(b), (d), (f), (h).

[150] *See, e.g.*, Marianne Levine et al., *The Truth Is Out There: UFO Fever Grips Congress*, POLITICO (Feb. 14, 2023, 12:08 PM), https://www.politico.com/news/2023/02/14/ufo-fever-capitol-hill-00082671 [https://perma.cc/8W86-XP4R].

[151] *See* Press Release, Dep't of Def., Department of Defense Announces the Establishment of the Airborne Object Identification and Management Synchronization Group (AOIMSG) (Nov. 23, 2021), https://www.defense.gov/News/Releases/Release/Article/2853121/dod-announces-the-establishment-of-the-airborne-object-identification-and-manag/ [https://perma.cc/2VUV-5DB4].

[152] *See* Press Release, Dep't of Def., Establishment of Unidentified Aerial Phenomena Task Force (Aug. 14, 2020), https://www.defense.gov/News/Releases/Release/Article/2314065/establishment-of-unidentified-aerial-phenomena-task-force/ [https://perma.cc/P6CX-WVZX].

[153] *See* Bryan Bender, *The Pentagon's Secret Search for UFOs*, POLITICO MAG. (Dec. 16, 2017), https://www.politico.com/magazine/story/2017/12/16/pentagon-ufo-search-harry-reid-216111/ [https://perma.cc/KF23-59QD].

[154] *See* Lewis-Kraus, *supra* note 34 ("The Advanced Aerospace Weapon System Applications Program was announced in a public solicitation for bids to examine the future of warfare. U.F.O.s were not mentioned, but according to [Sen. Harry] Reid the subtext was clear."); INSPECTOR GEN., DEP'T OF DEF., *supra* note 29, at 1 (confirming that AAWSAP was a UAP program).

SIGN, GRUDGE, and BLUE BOOK.[155] Within the CIA, the Office of Scientific Intelligence (since absorbed into the CIA's Directorate of Science & Technology) investigated UAP following the 1952 Washington, D.C., flyover described by General Samford, if not earlier.[156]

Suspicions seeded by this perennial shuffling of bureaucratic chairs have only grown thanks to a posture by the government that is best characterized as secretive. To illustrate, DoD witnesses testifying before Congress in 2022 shied away from answering basic questions in an unclassified session, while appearing unprepared to speak about the long-suspected correlation between UAP sightings and nuclear vessels, weapons, and installations.[157] The same year saw the DoD blanket under cover of secrecy just about everything concerning its UAP activities, announcing with respect to a prior task force that "[e]xcept for its existence, and the mission/purpose, virtually everything else about the UAPTF is classified."[158] As a result, the continued public release by the Pentagon of UAP videos and other data collected by its personnel, such as three Navy videos taken between 2004 and 2015 and released by the DoD in 2020 showing still-unexplained UAP, has all but stopped.[159]

The clamp-down has troubling implications for transparency. More pointedly, it raises questions about whether the DoD has violated the Freedom of Information Act (the "FOIA"), a landmark government transparency statute, or otherwise acted arbitrarily by reversing course with the stricter classification.[160] And none of the photographs the Air Force ordered fighters to take beginning in 1948 appear to have been released, even though any relevant declassification period

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[155] Gerald Haines, *CIA's Role in the Study of UFOs, 1947-90*, 1 STUD. IN INTEL. 67, 68 (1997), https://apps.dtic.mil/sti/pdfs/ADA525986.pdf [https://perma.cc/E6HD-ZTE9].

[156] *Id.*

[157] *See Hearing on Unidentified Aerial Phenomena Before the Subcomm. on Counterterrorism, Counterintel., and Counterproliferation of the H. Permanent Select Comm. on Intel.*, 117th Cong. 41 (2022), (Rep. Raja Krishnamoorthi (D-Ill.): "Do we have any sensors underwater to detect on submerged UAPs?" Ron Moultrie, Under Sec'y of Def. for Intel. and Sec.: "I think that would be more appropriately addressed in closed session, sir."); *id.* at 36 (Rep. Mike Gallagher (R-Wis.): "It has also been reported that there have been UAP observed and interacting with and flying over sensitive military facilities, not just ranges but some facilities housing our strategic nuclear forces . . . . I am not commenting on the accuracy of this. I am simply asking you whether you are aware of it." Scott Bray, Deputy Dir. of Naval Intel.: "I have heard stories. I have not seen the official data on that."); Alemany, *supra* note 79.

[158] Dep't of Def., *Briefing Card: UAP Report to Congress* 2 (May 17, 2021), https://sgp.fas.org/othergov/dod/uap-brief.pdf [https://perma.cc/JE9L-WZQR].

[159] Alan Yuhas, *The Pentagon Released U.F.O. Videos. Don't Hold Your Breath for a Breakthrough.*, N.Y. TIMES (Sept. 1, 2021), https://www.nytimes.com/2020/04/28/us/pentagon-ufo-videos.html [https://perma.cc/Y2WQ-93GB].

[160] *See* 5 U.S.C. § 552(a)(4)(B), (b)(1) (as amended by Congress in 1974, following the Supreme Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), to provide for the *de novo*, *in camera* review by courts of national security records to ensure that agencies have properly classified them).

should have long since lapsed.[161] Furthermore, because those fighters used 1948-era collection systems to obtain any such footage, the government cannot well argue that releasing such historical records would reveal to foreign adversaries the capabilities of advanced U.S. imaging technology.

Aside from operational confinements, AARO's establishing statute also may have limited the office. Although AARO may receive "authorized disclosure[s]" relating to UAP that are classified or protected by a nondisclosure agreement, AARO may not receive disclosures that the Secretary of Defense concludes likely relate to special access or otherwise compartmentalized access programs already "explicitly and clearly reported to the congressional defense or intelligence committees."[162] How is this restriction supposed to work? AARO's establishing statute does not contain any formal mechanism for the Secretary of Defense to intervene by reviewing UAP disclosures before their delivery to AARO. Additionally, even the Secretary of Defense may not have access to all compartmentalized access programs. As discussed in Part III(A), the White House and different agencies like the DoE may establish these secret programs and, while routinely required to disclose the programs to relevant lawmakers and oversight panels, would not always be required to disclose them to other agency heads absent a need to know.[163] AARO is required to report to the heads of the appropriate congressional committees "any instances in which data relating to unidentified anomalous phenomena was not provided" to it "because of classification restrictions on that data or for any other reason."[164] This statutory requirement suggests that AARO's access otherwise may be blocked. If so, Congress is required to know about it.

Given the law's plain language, by what right could any other agency refuse AARO? In practice, AARO's access to potentially relevant information remains contested. The office's own leadership has muddied these waters, stating at one point that it was operating only under Title 10 of the U.S. Code, which governs military, not intelligence, activities, the latter of which Title 50 of the U.S. Code governs.[165] The line between the military and IC, governed as they are by separate authorities, is rife with ambiguity, and the subject is itself the cause of endless strife

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[161] Exec. Order No. 13,526, § 1.5, 75 Fed. Reg. 707, 709 (Jan. 5, 2010) (ordering the declassification of most classified information after twenty-five years from the date of classification).
[162] 50 U.S.C. § 3373b(a)(4)(A).
[163] *See* Exec. Order No. 13,526, §§ 1.8, 5.3, 75 Fed. Reg. at 711, 724–25.
[164] 50 U.S.C. § 3373(l)(4).
[165] *See* Senate 2023 AARO Hearing, *supra* note 4, at 31–32 (featuring the statement by AARO's Director that "[t]here are some authorities that we need. We currently are operating under Title 10 authorities but we have good relationships across the other agencies. But having additional authorities for collection tasking, counter-intelligence . . . those are all things that would be helpful, yes."); MICHAEL E. DEVINE, CONG. RSCH. SERV., R45175, COVERT ACTION AND CLANDESTINE ACTIVITIES OF THE INTELLIGENCE COMMUNITY: SELECTED DEFINITIONS IN BRIEF 2 (2019), https://crsreports.congress.gov/product/pdf/R/R45175/5 [https://perma.cc/E8UW-TBVW].

between the military and IC.[166] At one time, AARO's Director stated that having additional authorities under Title 50 to access classified counterintelligence information and activities relating to UAP would be helpful.[167] Still other authorities—contained within Title 42 of the U.S. Code—govern the DoE, which maintains its own information classification regime that AARO's establishing statute does not single out.[168] AARO's Acting Director would later state, however, that AARO had "unprecedented access to classified programs," as "[n]obody blocked where [AARO] could go or the questions [AARO] asked."[169] Testifying before Congress, AARO's Director stated that:

> Congress has gone out of its way to create the organization AARO specifically to conduct these sorts of investigations and has uniquely empowered them to have access to all UAP-related information, whether that is historic or current. And we take that responsibility and those authorities very seriously.[170]

Was AARO, therefore, able to unlock all information relating to UAP intelligence, counterintelligence, and DoE activities?

AARO's wranglings over sensitive information perturb a grander contest, not only among rival agencies but, as discussed in the Introduction, between Congress and the executive branch. AARO's establishing statute—a bill passed by both legislative chambers and signed into law by the President—gives the office authority to access UAP information regardless of which agency possesses it.[171] But the agencies themselves usually classify information within their ken, not directly under statutory authority but pursuant to authority delegated to them under an executive order, which is only signed by the President and whose legal effect is sometimes debatable.[172] Here, Executive Order 13,526 ("EO 13,526") prescribes an independent and uniform system for classifying, protecting, and declassifying

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[166] *See generally* Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT'L SEC. J. 85 (2011).
[167] *See* Senate 2023 AARO Hearing, *supra* note 4, at 32 (statement of Sean Kirkpatrick, Director, All-Domain Anomaly Resolution Office).
[168] *See* JENNIFER K. ELSEA, CONG. RSCH. SERV., RS21900, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 2 & n.9 (2023).
[169] *Media Engagement with Acting AARO Director Tim Phillips on the Historical Record Report Volume 1*, DEP'T OF DEF. (Mar. 6, 2024), https://www.defense.gov/News/Transcripts/Transcript/Article/3702219/media-engagement-with-acting-aaro-director-tim-phillips-on-the-historical-recor/ [https://perma.cc/67NV-SHT7].
[170] Senate 2024 AARO Hearing, *supra* note 42, at 17 (statement of Jon Kosloski, Director, All-Domain Anomaly Resolution Office).
[171] *See* 50 U.S.C. § 3373(f)(1)(A) (by instructing, however, the DNI and Secretary of Defense to make DoD and IC UAP-related information available to AARO, omitting the DoE and any reference to the separate classificatory scheme under the Atomic Energy Act); 50 U.S.C. § 3373b(a).
[172] *See* Exec. Order No. 13,526, § 1.3, 75 Fed. Reg. at 707, 708.

national security information.[173] Although not invoked by name as the statutory basis for EO 13,526, the National Security Act directs the President, "by Executive order or regulation, establish procedures to govern access to classified information which shall be binding upon all departments, agencies, and offices of the executive branch of Government."[174]

Thus, claims by AARO or others that UAP-related information may be classified under a particular title of the U.S. Code are, with the exception of the Atomic Energy Act, inaccurate, as the information would be classified pursuant to EO 13,526.[175] Nonetheless, absent an unconventional statute like the one governing AARO, agencies may often use their delegated authority under executive order to classify information and withhold it from other agencies. And persons interested in making an "authorized disclosure" to AARO have on at least one instance declined to do so on the belief that AARO lacks authority within the executive branch to receive such information classified by another agency, despite AARO's statute saying precisely the opposite.[176] Moreover, the same law expressly immunizes persons who provide such information to AARO, as discussed in Part IV.[177]

Still, a few observations are possible. First, AARO is unable to receive an "authorized disclosure" concerning UAP connected to highly secretive U.S. projects already known to Congress. If, as some allege, the government or a contractor is conducting activities disclosed to Congress related to reverse-engineering UAP, then nesting it within such a compartmentalized program might block AARO from learning about it.[178] The claim by AARO's former Director that the office found no evidence of secret UAP programs could well reflect this statutory limitation on the office.[179] On the other hand, AARO's authority to otherwise access by its own initiative classified UAP data throughout the defense and intelligence communities seems unseasoned, although the legislative intent

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[173] *See id.* at 701 ([B]y the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows . . . ."); 32 C.F.R. §§ 2001.1, 2003.1–2 (2024) (implementing Exec. Order No. 13,526 as binding on "agencies," meaning "any 'Executive agency' as defined in 5 U.S.C. 105; any 'Military department' as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into the possession of classified information.").

[174] 50 U.S.C. 3161(a); *see* Exec. Order No. 13,526 § 6.2, 75 Fed. Reg. at 707, 730 (providing, however, that nothing in such order supersedes the National Security Act of 1947).

[175] *Cf.* notes 165–167 and accompanying text (seemingly incorrect testimony by Sean Kirkpatrick, Director, All-Domain Anomaly Resolution Office).

[176] *See* Steph Whiteside, *Whistleblower David Grusch Refused to Meet with Pentagon UFO Office*, NEWSNATION (May 3, 2024, 9:56 PM), https://www.newsnationnow.com/space/ufo/grusch-refused-meeting-ufo-office/ [https://perma.cc/24NQ-9WQZ]; 50 U.S.C. §§ 3373(f)(1)(A), 3373b(b)(1) (stating that an authorized disclosure to AARO "shall be deemed to comply with any regulation or order issued under the authority of Executive Order 13526 (50 U.S.C. 3161 note; relating to classified national security information) or chapter 18 of the Atomic Energy Act of 1954 (42 U.S.C. 2271 et seq.)").

[177] *See* 50 U.S.C. § 3373b(b)(1).

[178] *See* Mellon, *supra* note 43.

[179] *See* Kirkpatrick, *supra* note 47.

appears unmistakable.[180] Congress anticipated that other agencies might attempt to foil the office's access. AARO has not done itself any favors by vacillating over the extent of its own authorities.

Second, this restriction on AARO's right to receive information reinforces the point that the chief concern of the lawmakers on SSCI and SASC who principally drafted these provisions was one of oversight. If key panels are apprised already of relevant programs, then the information need not go through AARO. The office remains a conduit, but a superfluous one so long as other roads to Congress lie open. But this unusual informational flow places AARO in an unenviable spot. It must arrange for the scientific study of UAP and report to Congress, but it is restricted from resolving anomalies potentially attributable to such programs. And here, Congress, which AARO is supposed to inform, may have the better information.

Third, AARO's unorthodox role has confused many in the public eager for "disclosure." But disclosure to whom? If legislative committees have been kept in the dark, a question discussed in Part V(B), then the chief object of these committee-crafted laws is to disclose UAP information to Congress to restore oversight. In contrast, UAP legislation like the UAP Disclosure Act is oriented toward disclosure to the public, having been offered directly on the Senate floor instead of through committee, tracing by parliamentary procedure a distinction between disclosure to Congress and disclosure to the American people.

B. An Intricate Machine or a Rube Goldberg Contraption? Other Federal UAP Initiatives Threaten to Crowd Out AARO and Stymie a Whole-of-Government Solution.

Outside DoD and the IC, several other agencies have brushed against the topic of UAP. The FAA encourages the reporting not only of "unmanned aircraft" systems—drones—but also of "UFO/unexplained phenomena activity."[181] That said, the FAA does not collect its own UFO or UAP reports from air traffic control personnel but instructs them to refer sightings to the National UFO Reporting Center—a private, nongovernmental entity—or a similar organization.[182] On behalf

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[180] *See* 50 U.S.C. § 3373(f)(1)(A).

[181] *UAS Sightings Report*, FED. AVIATION ADMIN. (last updated Jan. 6, 2025), https://www.faa.gov/uas/resources/public_records/uas_sightings_report [https://perma.cc/KE8E-PJ9A]; FAA Order No. JO 7110.65AA – Air Traffic Control, § 9-8-1 (Apr. 20, 2023), https://www.faa.gov/air_traffic/publications/atpubs/atc_html/chap9_section_8.html [https://perma.cc/W3FV-885M].

[182] *See* FAA Order No. JO 7110.65AA, § 9-8-1; *see also* H.R. 6967, 118th Cong. (2023) (requiring the FAA to establish policies and procedures for reporting UAP); *Unidentified Anomalous Phenomena: Exposing the Truth: Hearing Before the Subcomm. on Cybersec., Info. Tech. & Gov't Innovation and the Subcomm. on Nat'l Sec., the Border, and Foreign Affs. of the H. Comm. on Oversight & Accountability*, 118th Cong. (2024) (written statement of Mike Gold, Former NASA Associate Administrator of Space Policy and Partnerships; Member of NASA UAP Independent Study Team, at 3), https://www.congress.gov/118/meeting/house/117722/witnesses/HHRG-118-

of the FAA, NASA administers the Aviation Safety Reporting System, which, although not established to collect and analyze UAP reports, was recommended by NASA's UAP study group panel to be expanded for that purpose.[183]

The DoE might also be involved. The UAP Disclosure Act found "credible evidence and testimony" that UAP records remain classified under the Atomic Energy Act, the DoE's establishing law, including as "transclassified foreign nuclear information."[184] The Atomic Energy Act also grants the Atomic Energy Commission latitude to classify any materials "capable of releasing substantial quantities of atomic energy," which conceivably could include certain recovered or reverse-engineered UAP as "special nuclear material" subject to the commission's regulations and information classification system, which exists apart from information classified by executive order.[185]

At the White House, President Biden ordered the National Security Council ("NSC") to craft policies for the detection, analysis, and disposition of UAP following the take-downs in February 2023 of several initially "unidentified aerial objects" over North America.[186] How the NSC, whose deliberations executive privilege and other constitutional executive powers may shade from disclosure to Congress,[187] rivals, complements, or otherwise interacts with AARO remains a mystery.

According to documents that the DoD released in 2024, the Under Secretary of the Department of Homeland Security ("DHS") for Science and Technology also desired to study UAP, attempting to establish within DHS beginning in 2011 a secret program called KONA BLUE to evaluate "Advanced Aerospace Vehicles" (yet another legacy term for UAP), among certain other anomalous phenomena.[188] KONA BLUE had the support of then-Senate Majority Leader Harry Reid, who

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GO06-Wstate-GoldM-20241113.pdf [https://perma.cc/JE2Q-GV2A] (criticizing the FAA's procedures as unclear, difficult to follow, and obsolete)).

[183] *See* NAT'L AERONAUTICS & SPACE ADMIN., *supra* note 49, at 18.

[184] 170 CONG. REC. S4943 (2024) (2024 UAP Disclosure Act § __02(a)(4); *see* 10 C.F.R. § 1045.30 (2024) (defining transclassified foreign nuclear information).

[185] *See* 42 U.S.C. §§ 2071, 2014(aa).

[186] *See* Pres. Joseph R. Biden, *Remarks by President Biden on the United States' Response to Recent Aerial Objects* (Feb. 16, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/16/remarks-by-president-biden-on-the-united-states-response-to-recent-aerial-objects/ [https://perma.cc/2UBY-5KE6].

[187] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 708 (1974).

[188] *See* Memorandum from Steven J. Cover, Chief, Spec. Access Program Control Off., & Tara O'Toole, Under Sec'y for the Off. of Sci. & Tech., Dep't of Homeland Sec., to Jane Holl Lute, Deputy Sec'y, Dep't of Homeland Sec. 1–2 (Dec. 12, 2011), https://www.aaro.mil/Portals/136/PDFs/UAP_RECORDS_RESEARCH/AARO_DHS_Kona_Blue.pdf [https://perma.cc/3KLR-LGUP] (PDF page 48); *see generally KONA BLUE: Prospective Special Access Program Presentation* 8, https://www.aaro.mil/Portals/136/PDFs/UAP_RECORDS_RESEARCH/AARO_DHS_Kona_Blue.pdf [https://perma.cc/3KLR-LGUP] (PDF page 9).

spearheaded AAWSAP's creation, as well as Senator Joseph Lieberman.[189] Senator Reid had tried to move parts of AAWSAP to an unacknowledged "special access program"—a type of highly classified governmental program, as discussed in Part V(A)—within the DoD, but the Deputy Secretary of Defense, denied the request around 2009.[190] Following the denial, Senator Reid gained the support of senior DHS leadership to study UAP under the aegis of a special access program there.[191] The move to create a DHS special access program employing personnel with the clearances and, one imagines, the "need to know" required to access alleged UAP materials and research housed in potential special access programs in other agencies, was part of an earlier push by key senators to assert oversight.

Public documents show that the push failed. According to AARO, DHS leaders rejected KONA BLUE for "lacking merit."[192] But the denial did not seem to rest on any controversy involving KONA BLUE's proposed objects of study, which the DHS' top scientist supported. Rather, after consulting with the department's general counsel, the Deputy Secretary of the DHS declined to approve KONA BLUE in 2013 because the program "as proposed did not require extraordinary security measures" of the type reserved for special access programs, and the proposed project was terminated.[193] As for KONA BLUE's curriculum, it would have included not only research into advanced aerospace vehicles but also the study of the "physiological and psychological effects of interaction with vehicles and anomalous phenomena,"[194] consistent with the later UAP Disclosure Act's description of the "sixth observable" nearly a decade later and the JCS UAP Memorandum.[195] Thus, KONA BLUE demonstrates that elements of the government not only have been interested in UAP since well before the recent

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[189] *See* Minutes of the November 21, 2011, Meeting of the Special Access Program Oversight Comm. of the Dep't of Homeland Sec. 1, https://www.aaro.mil/Portals/136/PDFs/UAP_RECORDS_RESEARCH/AARO_DHS_Kona_Blue.pdf [https://perma.cc/3KLR-LGUP] (PDF page 43).

[190] *See* Memorandum from James R. Clapper, Jr., Under Sec'y of Def. for Intel., Dep't of Def., to William Lynn III, Deputy Sec'y of Def., Dep't of Def. (c. Nov. 17, 2009), https://www.dia.mil/FOIA/FOIA-Electronic-Reading-Room/FileId/170015/ [https://perma.cc/U347-QQPL].

[191] *See generally Program History and Background of Advanced Aerospace Threat and Identification Program*, https://www.aaro.mil/Portals/136/PDFs/UAP_RECORDS_RESEARCH/AARO_DHS_Kona_Blue.pdf [https://perma.cc/3KLR-LGUP] (PDF page 43).

[192] *See* ALL-DOMAIN ANOMALY RESOL. OFF., DEP'T OF DEF., *supra* note 95, at 35.

[193] *See* Memorandum for the Record from Steven J. Cover, Chief, Special Access Program Control Off., Dep't of Homeland Sec. (June 5, 2013), https://www.aaro.mil/Portals/136/PDFs/UAP_RECORDS_RESEARCH/AARO_DHS_Kona_Blue.pdf [https://perma.cc/3KLR-LGUP] (PDF page 50).

[194] Dep't of Homeland Sec., Information Presented in Accordance with DHS Special Access Program Implementation Guidelines Contained in Appendix 1 of DHS Instruction 140-04-001, at 2 (undated), https://www.aaro.mil/Portals/136/PDFs/UAP_RECORDS_RESEARCH/AARO_DHS_Kona_Blue.pdf [https://perma.cc/3KLR-LGUP] (PDF page 18).

[195] *See* 170 CONG. REC. S4944 (2024) (2024 UAP Disclosure Act § __03(22)(A)(vi)); JCS UAP Memorandum, *supra* note 68, at 5.

legislation, but also have had some inkling about their potential adverse health effects.[196] More fantastically, KONA BLUE proposed to: (1) "[e]xpand on remote viewing and remote communication to communicate, retrieve data, and transport across dimensional/space-time barrier;" (2) "[d]evelop remote viewing countermeasures;" and (3) "[s]tudy consciousness interactions with, and control of, technology."[197] AAWSAP studied some of these topics, as well.[198] Is the cosmos stranger than we fathom, or were the DoD and DHS using taxpayer dollars to dabble in pseudo-science?

C. There Is No Acknowledged U.S. UAP Foreign Policy, but That Could Change.

Internationally, there appears to be scant overt cooperation on UAP. In 1971, the United States and the Soviet Union committed by treaty (the "Accidents Measures Agreement") to notify each other if their respective missile warning systems detected "unidentified objects," including, "in the event of signs of interference with these systems or with related communications facilities, if such occurrences could create a risk of outbreak of nuclear war between the two countries."[199] That "unidentified objects" have been linked at least since 1971 to possible interference with nuclear missile detection assets comports with the fourth observable—low-observability, including through active or passive jamming—and should give cause for concern. There does not appear to be any public study of notifications of unidentified objects under the Accidents Measures Agreement nor whether any such objects were, in today's nomenclature, "anomalous." In 1977, Grenada proposed at the General Assembly of the United Nations ("UN") a resolution that would have created an international study of UFOs,[200] and the

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[196] For an even earlier example referring to the "sixth observable," *see* DEF. INTEL. AGENCY, ANOMALOUS ACUTE AND SUBACUTE FIELD EFFECTS ON HUMAN BIOLOGICAL TISSUES (2010), https://www.dia.mil/FOIA/FOIA-Electronic-Reading-Room/FileId/170026/ [https://perma.cc/GP5K-YQVK].

[197] Dep't of Homeland Sec., *supra* note 194, at 2.

[198] *See generally* DEF. INTEL. AGENCY, THE SPACE-COMMUNICATION IMPLICATIONS OF QUANTUM ENTANGLEMENT AND NONLOCALITY (2010), https://www.dia.mil/FOIA/FOIA-Electronic-Reading-Room/FileId/170047/ [https://perma.cc/5JQ5-2YMC]; DEF. INTEL. AGENCY, TECHNOLOGICAL APPROACHES TO CONTROLLING EXTERNAL DEVICES IN THE ABSENCE OF LIMB-OPERATED INTERFACES (2010), https://www.dia.mil/FOIA/FOIA-Electronic-Reading-Room/FileId/170071/ [https://perma.cc/7RS5-VR8G].

[199] Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between The United States of America and The Union of Soviet Socialist Republics, U.S.-U.S.S.R., art. 3, Sept. 30, 1971, 22 U.S.T. 1590 [hereinafter Accidents Measures Agreement]; *see generally* HELEN CALDICOTT & CRAIG EISENDRATH, WAR IN HEAVEN 18 (2007); Memorandum from the Sec'y of Def. to the Assistant to the President for Nat'l Sec. Affs. (c. 1976/1977), https://nsarchive.gwu.edu/sites/default/files/documents/Doc-3-1977-nd-molink-nucflash-nlc-12-17-9-2-9.pdf [https://perma.cc/V94A-Q8GT].

[200] *See generally* Request for the Inclusion of an Item in the Provisional Agenda of the Thirty-Second Session: Establishment of an Agency or a Department of the United Nations for Undertaking, Co-Ordinating and Disseminating the Results of Research into Unidentified Flying Objects and Related Phenomena, U.N. GAOR, 32nd Sess. U.N. Doc. A/32/l42 (Aug. 31, 1977),

country's Prime Minister, Eric Gairy, raised the topic in a bilateral meeting with President Jimmy Carter the same year.[201] The resolution did not succeed.[202] More recently, San Marino, a small republic surrounded by Italy, voted in January 2023 to petition the UN Secretary-General for the endowment of a UN office to serve as an international forum to discuss the study of UAP.[203]

The United States and its allies, particularly within the "Five Eyes" intelligence-sharing group (comprising also Australia, Canada, New Zealand, and the United Kingdom), have exchanged information concerning UAP as lately as 2023.[204] The Inspector General of the IC serves as the Executive Secretariat of the Five Eyes Intelligence Oversight and Review Council[205] and, therefore, must be "appropriately accountable to Congress."[206] On January 12, 2024, the IC Inspector General briefed lawmakers in a classified session about one whistleblower's allegations that the U.S. government operated a secret UAP program, but it does not appear that Congress has begun to pry into any international arrangements.[207] Transparency in this area may come slowly, as arrangements between the IC and its foreign counterparts are notoriously opaque, including to Congress.[208]

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https://digitallibrary.un.org/record/660850/files/A_32_142_Add.1-EN.pdf [https://perma.cc/8KGE-ZYGZ].

[201] *See* Memorandum of Conversation Between President Carter and Prime Minister Gairy (Sept. 9, 1977), *in* U.S. DEP'T OF STATE, 23 FOREIGN RELATIONS OF THE UNITED STATES: MEXICO, CUBA, AND THE CARIBBEAN, 1977-1980 751, 753, https://static.history.state.gov/frus/frus1977-80v23/pdf/frus1977-80v23.pdf?_gl=1*87ivl8*_ga*NjQzMzIzMDk4LjE3Mjg5MzUxMDE.*_ga_GWKX1LXFD1*MTcyODkzNzYwNC4xLjEuMTcyODkzNzYwNy41Ny4wLjA [https://perma.cc/5Y2Q-KH7A [https://perma.cc/YVY6-MCH7].

[202] *See UK "Foiled" Gairy on UFOs*, BBC (Mar. 14, 2011, 2:02 PM), https://www.bbc.co.uk/caribbean/news/story/2011/03/110314_ufo.shtml [https://perma.cc/3RHC-ZZ6K].

[203] *See* Tim McMillan, *San Marino Could Become the U.N.'s New "Geneva" for UFOs*, THE DEBRIEF (Sept. 17, 2021), https://thedebrief.org/san-marino-could-become-the-u-n-s-new-geneva-for-ufos/ [https://perma.cc/ZGL4-T4DV]; *Consiglio Grande e Generale: Torna il Dossier CIS nel Comma Sulle Istanze d'Arengo. Sessione Verso l'Epilogo*, RTV SAN MARINO (Jan. 19, 2023), https://www.sanmarinortv.sm/news/politica-c2/cgg-torna-il-dossier-cis-nel-comma-sulle-istanze-d-arengo-sessione-verso-l-epilogo-a235226 [https://perma.cc/C8TP-WXVC].

[204] *See* Brandi Vincent, *Five Eyes Alliance Remains Tight-Lipped on How It's Collaborating on Uncovering UAPs*, DEFENSESCOOP (June 15, 2023), https://defensescoop.com/2023/06/15/five-eyes-alliance-remains-tight-lipped-on-how-its-collaborating-on-uncovering-uap/ [https://perma.cc/XBB4-F6K8].

[205] Charter of the Five Eyes Intelligence Oversight and Review Council art. 5 (Oct. 2, 2017), https://www.dni.gov/files/ICIG/Documents/Partnerships/FIORC/Signed%20FIORC%20Charter%20with%20Line.pdf [https://perma.cc/5FJ6-LFCL].

[206] 50 U.S.C. § 3033(b)(1).

[207] *See* Kayla Guo & Julian E. Barnes, *U.F.O.s Remain a Mystery to Lawmakers After Classified Briefing*, N.Y. TIMES (Jan. 12, 2024), https://www.nytimes.com/2024/01/12/us/politics/ufos-aliens-classified-briefing.html [https://perma.cc/NGS4-4RSH].

[208] *See* MICHAEL E. DEVINE, CONG. RSCH. SERV., R45720, UNITED STATES FOREIGN INTELLIGENCE RELATIONSHIPS: BACKGROUND, POLICY AND LEGAL AUTHORITIES, RISKS, BENEFITS 8 (2019), https://crsreports.congress.gov/product/pdf/R/R45720/2 [https://perma.cc/2SJV-HRLP].

Other earthly powers, including Brazil, Chile, China, France, Japan, Peru, Russia, and Uruguay, have also examined these phenomena in some form.[209] That America's foes may be conducting their own UAP intelligence, crash-retrieval, and reverse-engineering activities would give the U.S. national security establishment a ready excuse to keep their own efforts hidden, helping to explain the secrecy. As during the Cold War, disclosing too much of what, if anything, the U.S. national security establishment knows about the beyond-next-generation capabilities that certain UAP may possess could tip its hand to rival powers, exacerbating what may be a secret arms race already underway among terrestrial powers to master UAP technology.[210]

The finding of the Accidents Measures Agreement that unidentified objects near strategic weapons assets could lead to a nuclear exchange carries chilling implications when assessed alongside any such secret arms race.[211] Perhaps UAP have rendered nuclear weapons inert or otherwise have limited their efficacy, as alleged by former Air Force Captain and nuclear missile crew commander Robert Salas, among others.[212] Conversely, nuclear weapons might interfere with UAP. In either hypothetical, continued secrecy and nondeployment (or limited deployment) of any conjectured U.S., Russian, or other foreign aerospace systems mimicking beyond-next-generation UAP capabilities could be grounded in the same interest as that of the Accidents Measures Agreement—avoiding nuclear war.

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[209] *See* Ed Browne, *Dmitry Rogozin: Aliens Could Have Visited Earth, Russia Investigating UFOs*, NEWSWEEK (June 16, 2022, 10:55 AM), https://www.newsweek.com/russia-space-agency-roscosmos-dmitry-rogozin-ufos-aliens-1715162 [https://perma.cc/Z54U-MXHM]; Stephen Chen, *China Military Uses AI to Track Rapidly Increasing UFOs*, S. CHINA MORNING POST (June 4, 2021, 11:51 PM), https://www.scmp.com/news/china/science/article/3136078/china-military-uses-ai-track-rapidly-increasing-ufos [https://perma.cc/5YRT-V4ZX]; Chris Bockman, *Why the French State Has a Team of UFO Hunters*, BBC (Nov. 4, 2014), https://www.bbc.com/news/magazine-29755919 [https://perma.cc/2MTY-TPH9]; Yuta Ogi, *In the Name of Security, Diet Group Planned to Study UFOs*, THE ASAHI SHIMBUN (May 29, 2024), https://www.asahi.com/ajw/articles/15284878 [https://perma.cc/P48G-PVU7]; Press Release, Francisco Guerreiro, Member of the Eur. Parl., UAP Check: 'European Commission Event on UAP—The Historical EU Context' (Mar. 21, 2024), https://www.franciscoguerreiro.eu/pt/media/uap-check--european-commission-event-on-uap-–-the-historical-eu-context [https://perma.cc/PV4V-A7XB]; *see also* THE SOL FOUNDATION, UAP IN CROWDED SKIES: ATMOSPHERIC AND ORBITAL THREAT REDUCTION IN AN AGE OF GEOPOLITICAL UNCERTAINTY 17–18 (2024), https://thesolfoundation.org/wp-content/uploads/2024/03/Sol_WhitePaper_Vol1N2.pdf [https://perma.cc/BM6X-GD7A].

[210] *See* Leslie Kean & Ralph Blumenthal, *Intelligence Officials Say U.S. Has Retrieved Craft of Non-Human Origin*, THE DEBRIEF (June 5, 2023), https://thedebrief.org/intelligence-officials-say-u-s-has-retrieved-non-human-craft/ [https://perma.cc/9VHV-WJBT] (quoting Karl Nell, a retired Army Colonel who served on the UAPTF, that the "assertion concerning the existence of a terrestrial arms race occurring sub-rosa over the past eighty years focused on reverse engineering technologies of unknown origin is fundamentally correct").

[211] *See* Accidents Measures Agreement, *supra* note 199, art. 3.

[212] Micah Hanks, *UFOs Disabled Weapons at Nuclear Facilities, According to These Former USAF Officers*, THE DEBRIEF (Oct. 20, 2021), https://thedebrief.org/ufos-disabled-weapons-at-nuclear-facilities-according-to-these-former-usaf-officers/ [https://perma.cc/6U2M-YFSH].

Put differently, if such advanced systems represent a first-strike capability against one's own strategic arsenal, then a policy of nuclear retaliation against the civilian population (a countervalue target) of any nation that deploys them against that arsenal could deter these systems' deployment.[213] Such reasoning would apply with even greater force if nuclear weapons were also effective against UAP or a similar manmade system (a counterforce target). Deconflicting unidentified objects under the Accidents Measures Agreement or other arrangement with a foreign power would be necessary for an effective deterrence regime. And preventing proliferation of such capabilities would limit the available explanations for any unidentified objects, smoothing the deconfliction process and buttressing that regime. There may be stability in secrecy. Or the opposite: These systems could operate in an ever-shifting "gray zone," one between cooperation and conflict, where foreign adversaries surveil if not harass each other. And where the indistinct specter of conflagration still looms should events spiral out of control.

Thus, there could be an opportunity for multilateral, open, and American-led diplomacy to introduce some rule-based order. Initial areas of discussion could include a wider, more fulsome, and transparent mechanism for reporting UAP incidents than the 1971 treaty between the U.S. and the Soviet Union. Other multilateral arrangements, whether under UN or other international auspices, could facilitate the scientific study of UAP and—hypothetically—guide arms control and technology transfer talks regarding any successful reverse-engineering of UAP technologies.[214] But the conclusion of any U.S. or foreign threat assessments concerning the intentions and capabilities behind UAP would dictate the response by each country and the international community, including whether to hold preliminary talks regarding an over-the-horizon concept of planetary security. Nevertheless, the U.S. should heed British Prime Minister William Gladstone's advice that the "first principle of foreign policy is good government at home."[215] Until Congress and the executive branch hammer out what its domestic policy is, UAP diplomacy may be further delayed.

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[213] *See* THOMAS SCHELLING, ARMS AND INFLUENCE 78–79, 264–69 (1966) (describing a policy of deterrence and the interplay of communications with foreign adversaries and such a policy).
[214] *See* THE SOL FOUNDATION, *supra* note 209, at 22–29 (proposing greater international cooperation on UAP by amending the Chicago Convention, the International Civil Aviation Organization, and the Outer Space Treaty).
[215] W.E. GLADSTONE, POLITICAL SPEECHES IN SCOTLAND, NOVEMBER AND DECEMBER 1879 117 (1879).

III. DECLASSIFICATION AND DISCLOSURE: THE NATIONAL ARCHIVES' UAP RECORDS COLLECTION PROMOTES TRANSPARENCY, BUT EXECUTIVE BRANCH DISCRETION OVER CONTINUED SECRECY REMAINS.

At home, despite the House's rejection of the UAP Disclosure Act, the FY 2024 NDAA retains important disclosure provisions.[216] Unlike the other UAP laws, which assert congressional oversight over AARO, whistleblower matters, and funding, the FY 2024 NDAA's provisions are intended to foster disclosure to the American people. To shepherd this process, the Act established at NARA the Collection, which consists of "all Government, Government-provided, or Government-funded records relating to unidentified anomalous phenomena, technologies of unknown origin, and non-human intelligence (or equivalent subjects by any other name with the specific and sole exclusion of temporarily non-attributed objects)."[217]

Lifting a few strands from the UAP Disclosure Act, the FY 2024 NDAA's provisions concerning the Collection, while recognizing a multiplicity of unknown phenomena, referred to both "non-human intelligence" and "technologies of unknown origin," and excluded from the Collection's scope "temporarily non-attributed objects."[218] Substantively, the Collection comprises three categories of UAP records, those: (1) previously transmitted to NARA or publicly disclosed in unredacted form; (2) required to be transmitted to NARA after the enactment of the FY 2024 NDAA; and (3) whose disclosure is postponed under the FY 2024 NDAA.[219] Thus, despite the Collection's extensiveness, not all of its records are to be disclosed to the public even though, with important exceptions, they ought to be transmitted to NARA for safekeeping.[220]

Procedurally, Congress gave several deadlines for the Collection's establishment. The Archivist of the United States (the "Archivist"), who heads NARA, was to "commence establishment" of the Collection within sixty days following the enactment of the FY 2024 NDAA, or by February 20, 2024.[221] Consistent with this requirement, a website of the Collection is now public and contains a growing body of historical, UAP-related records.[222] Under the FY 2024 NDAA, each federal agency must identify and organize UAP records in its

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[216] *See* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, §§ 1687, 1841–1843, 7343, 137 Stat. 136, 621–22, 699–706, 1063–64 (2023).
[217] *Id.* § 1841(a)(1)(A), (C).
[218] *Compare id.* § 1841(a)(1)(C), *with* 170 CONG. REC. S4943, S4949 (2024) (2024 UAP Disclosure Act §§ __03(13), __10), *and* S. 2226, 118th Cong. § 9003(20) (2023).
[219] *See* National Defense Authorization Act for Fiscal Year 2024 § 1841(a)(2).
[220] *Cf. id.* § 1841(b) (only requiring public disclosure of "records transmitted . . . for disclosure to the public").
[221] *See id.* § 1841(a)(1)(A).
[222] *See Records Related to Unidentified Anomalous Phenomena (UAPs) at the National Archives*, NAT'L ARCHIVES & RECS. ADMIN (Oct. 10, 2024), https://www.archives.gov/research/topics/uaps [https://perma.cc/LM4B-V3QV].

possession and prepare them for inclusion in the Collection.[223] To assist the agencies with the identification, organization, and transmission of these records to the Collection, the Archivist must prepare and make available to these agencies within forty-five days after enactment, or by February 5, 2024, an identification aid for the creation of "a uniform system for cataloguing and finding every unidentified anomalous phenomena record" that is subject to declassification review.[224] Agencies are required to use the Archivist's form in creating their own identification aids to locate and categorize UAP records under their care.[225] Within 300 days following enactment of the FY 2024 NDAA, or by October 17, 2024, agencies are required to "review, identify, and organize" such records for disclosure to the public and delivery to the Archivist.[226] On February 6, 2024, NARA notified federal agency records managers of this requirement.[227] On May 8, 2024, NARA released guidance to assist agencies in preparing UAP records for transmission to the Collection, including required metadata elements.[228]

Other provisions, though mainly affecting government agencies, could reach government contractors and other private actors. The FY 2024 NDAA stated that UAP records "created" by non-federal governmental sources generally may not be withheld, redacted, reclassified, or postponed for public disclosure.[229] On its own, this provision appears to cover private-sector keepers of *any* "unidentified anomalous record created by a person or entity outside the Federal Government."[230] This provision, while applying to all private persons, runs along other terms directed at "each head of a Government office," and the law, lacking any enforcement mechanism, seems ill-equipped to penalize private entities.[231] Elsewhere, the law states that the Collection is to consist of all "Government, Government-provided, or Government-funded records," which would seem to

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[223] *See* National Defense Authorization Act for Fiscal Year 2024 § 1842(a).
[224] *Id.* § 1842(d).
[225] *See id.* § 1842(d)(2).
[226] *Id.* § 1842(c)(1). Although October 17, 2024, is 300 days following December 22, 2023 (the date on which the President signed the FY 2024 NDAA into law), NARA has stated that the 300-day review, identification, and organization deadline instead expired October 20, 2024: "No later than September 30, 2025, federal agencies must transfer to NARA digital copies of all UAP records identified by October 20, 2024, that can be publicly disclosed, including those that were publicly available on December 22, 2023, the date of the enactment of the Act." *Compare* National Defense Authorization Act for Fiscal Year 2024 § 1842(c)(1) (signed into law December 22, 2023) *with Unidentified Anomalous Phenomena Records Collection, Frequently Asked Questions*, NAT'L ARCHIVES & RECS. ADMIN. (Oct. 25, 2024), https://www.archives.gov/research/topics/uaps/faqs [https://perma.cc/R2MR-NJL2].
[227] *See* Adam Mazmanian, *New Legislation Mandates a Governmentwide Repository of Records Dealing with "Unidentified Anomalous Phenomena,"* NEXTGOV/FCW (Feb. 6, 2024), https://www.nextgov.com/digital-government/2024/02/national-archives-tees-new-rules-ufo-records/393982/ [https://perma.cc/H24B-HYDA].
[228] *See Guidance to Federal Agencies on Unidentified Anomalous Phenomena Records Collection*, NAT'L ARCHIVES & RECS. ADMIN. (May 8, 2024), https://www.archives.gov/records-mgmt/uap-guidance [https://perma.cc/X6F8-G7VN].
[229] *See* National Defense Authorization Act for Fiscal Year 2024 § 1842(a)(2)(C).
[230] *Id.*
[231] *See id.* § 1842(a)(1).

exclude private records.[232] For comparison, FOIA, having been subjected to well-tested and litigated procedures, specifies that "agency records" subject to FOIA include records maintained for, not just created or funded by, "an agency by an entity under Government contract, for the purposes of records management."[233] The FY 2024 NDAA's prohibition against the destruction, alteration, or mutilation of UAP records, while not stated expressly to apply only to government agencies, also appears amidst other requirements explicitly falling on the government.[234] And the 300-day review period deadline on its face applies only to agencies, not contractors or other private persons.[235]

The FY 2024 NDAA's declassification sections are likewise porous. Take the 300-day deadline for agencies to "review, identify, and organize" covered UAP records for disclosure to the public and transmission to the Archivist.[236] On further analysis, there does not appear to be any deadline for actual transfer to the Archivist after this reviewing, identifying, and organizing is done. Another provision instructs agencies to finish preparing these materials "[a]s soon as practicable."[237] Agencies may refrain from transmitting UAP records to the Archivist, first, until "approval for postponement" of declassification and, second, pending "completion of other action authorized" by the statute.[238]

Perversely, approval for the postponement and completion of these other authorized actions could include the continued classification, until eventual declassification, by the responsible agency. It is necessary to differentiate the continued classification of records even after they are transmitted to the Archivist from the withholding of these records from the Archivist in the first place. The FY 2024 NDAA states that the agency that originally classified particular UAP records may postpone their disclosure *to the public* if it determines that there is clear and convincing evidence that public release would, as paraphrased: (1)(A) threaten U.S. military defense, intelligence operations, or foreign relations outweighing the public interest in disclosure, and (B) such disclosure would reveal intelligence agents or sources requiring continued protection or secrecy, or reveal any U.S. military defense, intelligence operations, or foreign relations, the disclosure of which would demonstrably and substantially impair national security; (2) violate the Privacy Act of 1974; (3) reasonably be expected to constitute an unwarranted invasion of privacy outweighing the public interest in disclosure; or (4) compromise

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[232] *Id.* § 1841(a)(1)(C).
[233] 5 U.S.C. § 552(f)(2)(B). The term "government offices" as used in the FY 2024 NDAA is also subject to confusion, unlike FOIA's reference to "agencies," which has been interpreted to include most government units but not, for instance: (1) the Offices of the President and Vice President, *see* Banks v. Lappin, 539 F. Supp. 2d 228, 234 (D.D.C. 2008); (2) Congress, *see* United We Stand Am., Inc. v. IRS, 359 F.3d 595, 597 (D.C. Cir. 2004); and (3) the courts, *see* DeMartino v. FBI, 511 F. Supp. 2d. 146, 148 (D.D.C. 2008).
[234] *See* National Defense Authorization Act for Fiscal Year 2024 § 1842(a)(2).
[235] *See id.* § 1842(a)(1).
[236] National Defense Authorization Act for Fiscal Year 2024 § 1842(c)(1).
[237] *Id.* § 1842(a)(1).
[238] *Id.* § 1842(e).

a confidential arrangement currently requiring protection between a federal agent and a cooperating individual or foreign government, and public disclosure would be so harmful that it outweighs the public interest.[239] These are not explicit grounds entitling an agency to refuse to transmit records to the Archivist altogether.

But the law proceeds to state that agencies may handle classified information in accordance with the "relevant authorities" within EO 13,526.[240] As discussed in Part V, EO 13,526 also controls highly secretive and compartmentalized "black" projects within the executive branch, allowing for their continued classification and compartmentalization on a need-to-know basis. Information about these and other secret programs, in theory, including programs relating to UAP, is not required to be transmitted to the Archivist until, as the FY 2024 NDAA instructs, the information is approved for postponement of declassification, a process governed by EO 13,526. The process under the order for declassification would thus appear to qualify as "other action authorized" by the statute, completion of which is necessary before transmission of the underlying information to the Archivist.[241]

Confusing matters more, these incorporated grounds for continued classification under EO 13,526—and hence withholding by an agency *from the Archivist*—overlap with the enumerated reasons under the FY 2024 NDAA for withholding *by the Archivist* of records within its possession *from the public*.[242] This torturous interplay raises the question of how the FY 2024 NDAA, or the UAP Disclosure Act on which it is loosely modelled, aids disclosure in this way. Because EO 13,526 has long provided a mechanism for declassification, it is unclear why any UAP records that should have been declassified pursuant to that order have not been made public already, regardless of the FY 2024 NDAA.[243] That is, should the President decline to change course by declassifying UAP-related information kept secret for decades, it is puzzling why the President would act differently under the FY 2024 NDAA, which preserves the continued classification under executive order.

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[239] *See id.* § 1843(a).
[240] *Id.*
[241] National Defense Authorization Act for Fiscal Year 2024 § 1842(e).
[242] *Compare, e.g.,* Exec. Order No. 13,526 § 3.3(b)(6), 75 Fed. Reg. at 715 (exempting from automatic declassification after twenty-five years information that would, if revealed, "cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States"), *with* National Defense Authorization Act for Fiscal Year 2024 § 1843(a)(1)(C) (exempting from disclosure to the public covered UAP information that would, if revealed, "demonstrably and substantially impair" the "conduct of foreign relations of the United States"). In practice, "automatic declassification" is anything but. *See* Brian Greer & Wendy Leben, *Dispelling Myths: How Classification and Declassification Actually Work*, JUST SECURITY (June 2, 2023), https://www.justsecurity.org/86777/dispelling-myths-how-classification-and-declassification-actually-work/ [https://perma.cc/JB74-695E].
[243] Exec. Order No. 13,526 § 3.3(a), 75 Fed. Reg. at 714.

Whatever its substantive result, the FY 2024 NDAA is significant for establishing a process for disclosure—and signaling congressional resolve. Some deadlines and accountability remain. Every covered UAP record must be publicly disclosed in the Collection within twenty-five years of the record's creation unless the President certifies that an "identifiable harm" to U.S. military defense, intelligence operations, or foreign relations outweighs the public's interest in disclosure.[244] The congressional homeland security, defense, and intelligence committees oversee the Collection.[245] The head of any agency who postpones a UAP record for public disclosure must notify these panels within fifteen days of the decision to do so.[246] This notification requirement does not expressly apply to postponement by the President, only agency heads. While creation of the Collection signals a major step in the incremental drama of UAP disclosure, what it will accomplish remains hard to gauge, considering these loopholes and the discretion retained by the executive branch.

Early signs are not promising. On October 20, 2024, NARA announced without explanation that the deadline for agencies' transmission of records to the Collection had been delayed to September 30, 2025.[247] Its statutory authority to pronounce the delay is not mentioned, and the FY 2024 NDAA does not, as discussed, set any deadline for actual transfer to the Archivist. NARA did, however, "request that agencies transfer materials on a rolling basis and as soon as possible rather than waiting until the deadline."[248]

IV. AUTHORIZED DISCLOSURES AND UAP WHISTLEBLOWERS.

A. Congress Has Protected Disclosures to AARO Alleging UAP Sightings, Reverse-Engineering, and Similar Programs.

In the FY 2023 NDAA, Congress conferred protections on certain categories of persons alleging not only UAP sightings but also UAP reverse-engineering and related activities by the government or contractors.[249] Additional protections inserted into the Senate-passed FY 2024 NDAA did not win approval in the version signed into law.[250] Nonetheless, before the FY 2023 NDAA's

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[244] National Defense Authorization Act for Fiscal Year 2024 § 1842(g)(2)(D).
[245] *Id.* § 1841(e).
[246] *Id.* § 1843(c).
[247] Memorandum from William Fischer, Chief Records Officer for the U.S. Government (Acting) and Chris Naylor, Executive for Research Services, Nat'l Archives & Recs. Admin, to Federal Agency Records Officers (Oct. 10, 2024), https://www.archives.gov/records-mgmt/memos/ac-04-2025. [https://perma.cc/R5FY-V28G].
[248] *Id.*
[249] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 1673, 136 Stat. 2395, 2959–62 (2022).
[250] *Compare* S. 2226, 118th Cong. div. M, tit. VI §§ 601–605 (as passed by the Senate, July 27, 2023) (containing stronger protections for, and prohibitions on retaliation against, whistleblowers), *with* National Defense Authorization Act for Fiscal Year 2024 div. G (no longer containing the title relating to "Whistleblower Matters" in the final bill.).

enactment, insiders—who hold security clearances and occupy sensitive government posts—faced ridicule, employer retaliation, and possible litigation for breaking their secrecy oaths and confidentiality agreements by discussing protected UAP information. Now, covered individuals who make an "authorized disclosure" by reporting these matters to AARO are relieved from contravening obligations under any nondisclosure agreement.[251] The law also considers an authorized disclosure to comply with EO 13,526, the separate secrecy regime under 42 U.S.C. §§ 2162–2169 (comprising the Atomic Energy Act), and 18 U.S.C. § 798 (forming part of the Espionage Act), the last of which establishes penalties for unauthorized disclosures—including publication—of classified communications intelligence.[252] Agency heads who supported any UAP investigations or activities are required by the FY 2023 NDAA to scour their files for any such nondisclosure agreements and orders and provide copies of them to AARO, which, in turn, must transmit them to Congress.[253] Private contractors face no such requirement for self-diligence.[254]

In several ways, the FY 2023 NDAA's protected disclosure provisions are limited. They do not permit the *public* disclosure of such UAP claims, nor do they permit the reporting of the claims to anyone besides AARO. Nor does the law conclusively protect all persons making authorized disclosures to AARO from retaliation. Because the FY 2023 NDAA incorporated from the National Security Act a proscribed "personnel action," not everyone might be protected. The National Security Act defines a "personnel action" as, "with respect to an employee in a position in a *covered intelligence community* element (*other than a position excepted from the competitive service due to its confidential, policy-determining, policymaking, or policy-advocating character*) or a contractor employee," a disciplinary or corrective action, termination, demotion, or other significant change.[255]

This incorporation by reference of "personnel action" invites ambiguity over what persons are protected by the law. On the one hand, the FY 2023 NDAA prohibits a personnel action against "any individual" making an authorized

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[251] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 § 1673(b)(1)(A).

[252] See *id.* § 1673(b)(1)(B), (C); 18 U.S.C. § 798(a)–(b) (unlike other sections of the Espionage Act, such as 18 U.S.C. § 793, which penalizes unlawful disclosures of "information respecting the national defense"—a concept defined by common law—penalizing unlawful disclosures of communications-related "classified information" and so incorporating classification designations by U.S. government agencies under executive order); *See* United States v. Morison, 844 F.2d 1057, 1071–72 (4th Cir. 1988) (discussing the meaning of national defense information—distinct from classified information—under the Espionage Act); Gorin v. United States, 312 U.S. 19, 28, 31 (1941) (holding in a prosecution under the Espionage Act that national defense information refers to a "generic concept of broad connotations" that is a question of fact to be determined by the jury).

[253] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 § 1673(b)(3).

[254] *See id.*

[255] 50 U.S.C. § 3234(a)(3) (emphasis added); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 § 1673(d)(7).

disclosure to AARO, potentially making its coverage expansive.[256] On the other hand, the incorporated definition of "personnel action," as used in the National Security Act from which it is borrowed wholesale, includes actions taken against only certain categories of employees or a contractor of an IC agency.[257]

Hence, a "personnel action" in the underlying National Security Act excludes, first, individuals occupying any "position excepted from the competitive service due to its confidential, policy-determining, policymaking, or policy-advocating character."[258] This exclusion applies to "Schedule C" employees of the federal government.[259] These employees hold "positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials."[260] But the carve-outs also could deprive persons holding positions outside the competitive service due to their "policymaking, or policy-advocating" character. The competitive service consists of all civil service positions in the executive branch except: (1) positions exempted by statute; (2) positions whose appointments as a rule are subject to the advice and consent of the Senate; and (3) positions in the Senior Executive Service.[261] This language is not used in Schedule C and thus could refer to other non-competitive service employees, such as Senate-confirmed officials. Because disclosures to AARO may relate to allegedly secret UAP activities pursued without congressional assent—if true, a violation of the Constitution's prohibition on the expenditure of funds not appropriated by Congress[262]—not mere policy squabbles, it should be wondered why such senior officials could fall outside of the FY 2023 NDAA's protections.

Second, regardless of rank, members of the U.S. military are similarly not protected against any personnel action for making disclosures to AARO because they are not in the competitive service, which is to say, the civil service. That said, UAP reports from military service members are routed to AARO in accordance with the JCS UAP Memorandum. Third, the definition of "personnel action" applies only to a "covered intelligence community element" or an employee of one of its contractors.[263] Federal employees, whether Schedule C, Senate-confirmed, or otherwise, within certain segments of potentially relevant agencies—including other components of DoD, DoE, and DHS (or their respective contractors)—might not be covered under the anti-retaliation provision at all.[264]

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[256] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 § 1673(b)(2)(A).
[257] 50 U.S.C. § 3003(4).
[258] *Id.* § 3234(a)(3).
[259] 5 C.F.R. § 213.3301.
[260] *Id.*
[261] *See* 5 U.S.C. § 2102(a).
[262] *See* U.S. CONST. art. 1, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").
[263] 50 U.S.C. § 3234(a)(3).
[264] *See* 50 U.S.C. § 3003(4) (defining the term "intelligence community" referenced by the term "personnel action" to include: "(A) the Office of the Director of National Intelligence; (B) the Central Intelligence Agency; (C) the National Security Agency; (D) the Defense Intelligence

The FY 2023 NDAA also directs the Secretary of Defense and the DNI to establish procedures to enforce its anti-retaliation provisions.[265] Although covered by the law's anti-retaliation requirement, military and IC contractors are not obligated to institute corresponding procedures. Nevertheless, they could voluntarily take steps to protect themselves from possible complaints by persons who might make authorized disclosures alleging that contractor inaction to appropriately route and examine such reports let retaliation fester. Contractor procedures could also improve corporate governance. If any underlying UAP activities were compartmentalized in corporate structures, including legacy acquisitions, then boards of directors (including their relevant committees, such as a classified business or security committee), senior management, audit, and other functions might be unaware of them and thus be unable to discharge their fiduciary duties. Boards of directors of defense companies, among others, already implement and maintain governance structures designed to protect their classified business activities, while seeking to ensure proper oversight. In principle, private-sector UAP activities therefore should not be categorically any different in this respect than other secret projects run by government contractors.[266]

B. Is an Authorized Disclosure to AARO the Same as a Whistleblower Complaint?

Another shortcoming, less in the FY 2023 NDAA's construction than its construal, is the potential conflation of persons making authorized disclosures to AARO with true "whistleblowers." Again, AARO is placed in an awkward position. Disclosures to it could, in theory, allege illegality and misconduct related to government or contractor UAP efforts. But AARO is not an agency inspector general, ombudsman, or watchdog. How should AARO treat whistleblowers who in parallel lodge allegations with these well-established organizations, and who also elect to make an authorized disclosure to it? And should whistleblowers having complaints with, say, an agency inspector general even approach AARO?

Agency; (E) the National Geospatial-Intelligence Agency; (F) the National Reconnaissance Office; (G) *other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs*; (H) *the intelligence elements* of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy; (I) *the Bureau of Intelligence and Research* of the Department of State; (J) *the Office of Intelligence and Analysis* of the Department of the Treasury; (K) *the Office of Intelligence and Analysis* of the Dep't of Homeland Security; [and] (L) such other elements of any department or agency" as may be designated by the President, or the DNI and the head of the department or agency concerned (emphasis added)).

[265] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 § 1673(b)(2)(B), 136 Stat. 2395, 2960 (2022).

[266] *See, e.g.*, Lockheed Martin Corp., *Classified Business and Security Charter* (as amended Oct. 6, 2023), https://www.lockheedmartin.com/en-us/who-we-are/leadership-governance/board-of-directors/classified-business-security-committee-charter.html [https://perma.cc/Y7TP-MFBK].

Although government whistleblowing, an ocean unto itself, lies beyond the waters of this Article, it should be noted that some have urged Congress to enact both UAP-specific whistleblower measures and reforms to better protect IC whistleblowers more generally. Given persistent rumors of secret UAP programs run without congressional authorization, both courses may be warranted. Lawmakers could begin by considering existing private-sector whistleblower programs as a model, mindful that whistleblower programs for government employees are rare. In governing the private sector, whistleblower programs covering the reporting of violations of anti-money laundering and securities laws are regarded as largely successful and provide monetary awards to whistleblowers.[267] Within the government, certain programs, including within the DoD, permit monetary awards for reporting waste, fraud, and abuse.[268] Making monetary awards available through a purpose-built UAP whistleblower program could motivate individuals in any program, no matter how artfully concealed, to come forward, fostering transparency while leaving AARO free to focus on its core mission. More generally, the FY 2025 NDAA revised the Intelligence Community Whistleblower Protection Act of 1998 (the "ICWPA") to facilitate reporting to the IC Inspector General of alleged misdeeds by current—and, in some cases, former—IC employees.[269] These revisions could foster disclosure of UAP-related activities, not only to the IC Inspector General, but also to the appropriate congressional authorities, who may be notified of such reports.[270]

Thus, existing channels for whistleblowers may provide some relief, although any unauthorized or improperly reported UAP programs, likely being highly classified, could present unique obstacles. Whether such programs are legal could compound these difficulties. Aside from the Church Committee, a Senate panel that in 1975 began to uncover widespread abuses in the IC and the Federal Bureau of Investigation ("FBI")—and would evolve into the SSCI—few precedents guide how to unearth such deeply entrenched secrecy.[271] Even so, existing paths include the filing of a complaint with the applicable agency's inspector general or possibly under the False Claims Act (the "FCA"), whose *qui tam* provision allows persons to bring claims on the government's behalf against

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[267] *See, e.g.*, 31 U.S.C. § 5323 (establishing monetary awards for whistleblowers for violations of money laundering and certain sanctions laws); 15 U.S.C. § 78u-6 (establishing monetary awards for whistleblowers for securities laws violations).

[268] *See* 5 U.S.C. § 4512(a) ("The Inspector General of an agency, or any other agency employee designated under subsection (b), may pay a cash award to any employee of such agency whose disclosure of fraud, waste, or mismanagement to the Inspector General of the agency, or to such other designated agency employee, has resulted in cost savings for the agency.").

[269] *See* Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, §§ 6701–03, 138 Stat 1773, 2511–15 (2024).

[270] *See* 50 U.S.C § 3033(k).

[271] *See generally* RUSSELL MILLER, US NATIONAL SECURITY, INTELLIGENCE AND DEMOCRACY: FROM THE CHURCH COMMITTEE TO THE WAR ON TERROR (2008) (containing background on the Church Committee).

companies and other persons alleged to have defrauded the federal government.[272] How such an issue could be litigated, however, is fraught with difficulties, including those implicated by the state secrets privilege, which protects national security information from being disclosed in litigation.[273]

At their core, the FY 2023 NDAA's immunity and anti-retaliation provisions, like many of Congress's UAP enactments, signal more than they have achieved. In addition to resolving the ambiguity over "personnel action," improvements could strengthen the law's limited immunity to assuage the fears of persons making authorized disclosures that they might face claims in a variety of fora and under statutory, administrative, military tribunal, contractual, and arbitral authorities. Stating that no criminal or civil action may lie in any court (envisioned by the Senate's version of the National Intelligence Authorization Act for Fiscal Year 2024 but left unenacted) nor in any arbitration proceeding, adjudication under the Administrative Procedure Act or in a military proceeding should clarify the law

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[272] *See, e.g.*, OFF. OF THE DIR. OF NAT'L INTEL., INTEL. CMTY. DIRECTIVE 120, INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTION 2 (2014) (creating a process for IC whistleblower protections and prohibitions on retaliation), https://www.dni.gov/ICIG-Whistleblower/resources/ICD_120.pdf [https://perma.cc/9WXZ-J33U]; 31 U.S.C. §§ 3729–3733. Under the FCA, whistleblowers, called relators, may be eligible to receive a monetary award for successful *qui tam* actions, on top of recouping legal fees and expenses. *See* 31 U.S.C. § 3730(d). A *qui tam* action for a government employee, as distinct from a contractor or other private-sector worker, may, however, rest on less sure footing. Because the FCA requires a relator to be the "original source" and have "independent knowledge" of the information underlying a *qui tam* action, the act could bar government employees who must report fraud as a stated condition of their employment from bringing such actions. *See* United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990). *But see* United States ex rel. Holmes v. Consumer Ins. Group, 318 F.3d 1199, 1212–13 (declining to conclude that government employees are ineligible from bringing *qui tam* actions under the FCA); United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1494 (11th Cir. 1991) ("[N]othing in the False Claims Act prohibits a government employee from filing a *qui tam* action based upon information acquired while working for the government.").

[273] *See* United States v. Reynolds, 345 U.S. 1, 10 (1953) (articulating the privilege as appropriate where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."). Other laws potentially relevant for UAP whistleblowers include: (1) the Defense Contractor Whistleblower Protection Act, 10 U.S.C. § 4701, and related provisions of the Federal Acquisition Regulations, *see* 48 C.F.R. §§ 3.909-1, 4.1202, 52.203-19 (generally prohibiting government funds for any contract with any person that requires its employees or subcontractors to sign confidentiality agreements or statements restricting them from lawfully reporting waste, fraud, or abuse, but preserving in 48 C.F.R. §§ 3.909-1(b), 52.203-19(d) the restrictions of any classified information agreements); (2) the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (protecting disclosures alleging mail, wire, bank, shareholder, and securities fraud under rules of the Securities and Exchange Commission ("SEC")) ; (3) the Dodd-Frank Act and related regulations, *see* 15 U.S.C. § 78u-6(h); 15 U.S.C. § 78m(b)(3); 17 C.F.R. § 240.0-6 (protecting whistleblowing to the SEC alleging violations of the federal securities laws, which may, however, separately permit the nondisclosure of "matters concerning the national security" or information classified pursuant to executive order); (4) the Taxpayer First Act, 26 U.S.C. § 7623 (protecting disclosures about tax fraud or underpayment of taxes); (5) Anti-Money Laundering Act, 31 U.S.C. § 5323(g) (protecting disclosures alleging violations of the Bank Secrecy Act); and (6) various state laws.

in this regard.[274] The law should feature a savings clause that an authorized disclosure will not violate *any* law, not just named ones like a single section of the Espionage Act, as other laws not covered by the FY 2023 NDAA's immunity (including the rest of the Espionage Act) have been used to punish public disclosures of classified or national defense information.[275]

Congress should also consider clarifying the distinction between authorized disclosures to AARO and reporting allegations of UAP-related misconduct through agency inspectors general and other channels. At a minimum, Congress should ensure that AARO is not burdened with the task of handling claims of waste, fraud, abuse, or other misconduct, as these allegations customarily are required to be routed to the appropriate agency inspector general, if not Congress, for redress.[276] Rather, AARO should uncover the truth about UAP, no matter whether it is found and be it boring or bizarre. But AARO should at the same time reasonably inform persons making authorized disclosures of these other avenues for relief, such as through an inspector general, to ensure well-defined lanes. More forcefully, Congress could consider including allegations of any UAP program as automatically constituting a matter of "urgent concern" under the ICWPA.[277] Such an automatic classification would expedite direct reporting to the appropriate congressional committees (as well as committee members), thereby expediting whistleblower complaints and reinforcing oversight.

V. SECRET PROGRAM FUNDING LIMITATIONS AND CONSIDERATIONS FOR CONTRACTORS INDICATE THAT UAP ACTIVITIES HAVE BYPASSED CONGRESS.

The FY 2024 NDAA indicated that one or more UAP-related secret programs were being run without statutorily required reporting to lawmakers.[278] Thus, the FY 2024 NDAA prohibited funding under the Act for that fiscal year of any such program until the Secretary of Defense or DNI disclosed their relevant details to the appropriate congressional committees and leadership. The Senate's version of the National Intelligence Act for Fiscal Year 2025, which was bundled into the Senate's version of the FY 2025 NDAA, contained a similar restriction on any IC element for new secret programs, but not on the DoD.[279] Nevertheless, the

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[274] *See* S. 2226, 118th Cong. div. M, tit. XI § 1102(e) (as passed by the Senate, July 27, 2023).
[275] *See, e.g.*, 18 U.S.C. §§ 641, 793, 794, 795, 797, 952, 1030(a), 1924, 2071; 50 U.S.C. § 783(b).
[276] *See, e.g.*, 5 U.S.C § 416; 10 U.S.C § 141; 50 U.S.C § 3517; 50 U.S.C § 3033.
[277] *See* 5 U.S.C § 416(a)(2).
[278] *See* National Defense Authorization Act for Fiscal Year 2024, Pub. L. 118-31, §§ 1687, 7343, 137 Stat. 621–22, 1063–64 (2023).
[279] *See* National Intelligence Authorization Act for Fiscal Year 2025, S. 4443, 118th Cong. § 308 (2024); *id.* § 309 (also prohibiting the transfer of any IC secret project without prior notification to the congressional intelligence committees and leadership); 170 CONG. REC. S5706 (daily ed. July 31, 2024) (containing S. Amend. No. 2309 to S. 4638, 118th Cong. (2024), the Intelligence Authorization Act for Fiscal Year 2025, proposed as an amendment to the FY 2025 NDAA and at § 1003, prohibiting funding under that year's intelligence measure (not the entire FY 2025 NDAA) for any such undisclosed UAP National Intelligence Programs, as defined in 50 U.S.C. § 3003(6), along with an expanded reporting requirement).

House version of the FY 2025 NDAA did not contain any such funding restrictions, nor, for that matter, contain any other UAP provisions.[280] The FY 2025 NDAA agreed between the chambers and enacted into law did not renew any of the funding restrictions from the FY 2024 NDAA.[281]

But why not? The details rousing Congress to take these actions in the FY 2024 NDAA, like so much with the UAP matter, remain unknown. But one whistleblower, retired Air Force Major David Grusch, testified publicly in July 2023 under oath before a House oversight subcommittee that congressional dollars had been misappropriated for secret governmental or contractor UAP programs.[282] Mr. Grusch stated that he gained knowledge of this alleged misconduct while serving as a senior intelligence officer for the National Geospatial-Intelligence Agency, where he analyzed UAP as part of the UAPTF and then AARO.[283] Far from mocking, lawmakers and the IC's Inspector General have taken these claims seriously but not resolved them in public view.[284] They should.

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[280] *See* National Defense Authorization Act for Fiscal Year 2025, S. 4638, 118th Cong. §§ 1544, 804 (2024) (as in last year's defense authorization measure, restricting funding under the specified division of the FY 2025 NDAA and reimbursement for independent research and development for UAP-related programs not disclosed to the appropriate congressional committees but, unlike in last year's defense authorization measure, only targeting such programs within the DoD, not the ODNI or broader IC, but now removing at § 804 the exception of special access programs experiencing cost overruns from reporting to the congressional defense committees); Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, H.R. 8070, 118th Cong. (2024); *see also* S. 170 CONG. REC. S6303 (daily ed. Sept. 19, 2024) (containing S. Amend. No. 3290 to S. 4638, 118th Cong. (2024), a manager's amendment to the Senate version of the FY 2025 NDAA, and at § 1003, similarly restricting UAP funding under the specified division of the act but, unlike the current Senate version, stating that the activities subject to the act's limitations are only those within the National Intelligence Program and, consequently, not reaching any programs outside the IC).

[281] *See generally* Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159 138 Stat 1773 (2024) (not containing such provisions).

[282] *See* 2023 House Hearing on Unidentified Anomalous Phenomena, *supra* note 22, at 26 (question by Rep. Moskowitz: "[H]ow does a program like that get funded?" David Grusch: "I will give you generalities. I can get very specific in a closed session. But misappropriation of funds and self-fund [sic.]." Rep. Moskowitz: "Does that mean that there is money in the budget that is set to go to a program, but it does not, and it goes to something else?" Mr. Grusch: "Yes. I have specific knowledge of that. Yes.").

[283] *Id.*

[284] *See* Guo & Barnes, *supra* note 207 ("[S]ome lawmakers saw tantalizing hints in [IC Inspector General] Mr. Monheim's presentation that there might have been something to Mr. Grusch's claims and, while the rules of a classified briefing barred them from actually repeating what they had learned, they suggested the inspector general had found some of the claims credible. Which ones? No one would say. 'This is the first real briefing that we've had that we've now made, I would say, progress on some of the claims Mr. Grusch has made,' said Representative Jared Moskowitz, Democrat of Florida. 'This is the first time we kind of got a ruling on what the I.G. thinks of those claims.'").

A. The Struggle Between the Executive and Legislative Branches Over Classified Projects May Have Enabled UAP Programs to Evade Congressional Oversight.

At the heart of Congress's prior funding restrictions in the FY 2024 NDAA and Mr. Grusch's allegations lie some of the most closely guarded programs within the federal government. EO 13,526 envisions these programs as special access or equivalent programs. Their actual creation requires the authorization of either the President or the Secretaries of State, Defense, Energy, or Homeland Security, the Attorney General, the DNI, or their principal deputies.[285] Recognizing the harmful effects of undue secrecy, EO 13,526 states that the number of such programs is to be kept to an "absolute minimum."[286] Such a program may be established only if demanded by statute or upon finding that the: (1) specific information to be protected by the program is exceptionally threatened or vulnerable; and (2) normal criteria for access to information classified at the same level cannot protect the information in question from unauthorized disclosure.[287] These programs provide for the compartmentalization of a particular program or other information, not the classification level, e.g., Secret or Top Secret, of the information itself.[288]

Congress does, however, play a role, having enacted the National Security Act by which the executive branch's classificatory scheme is authorized by positive law.[289] Although the executive branch traditionally establishes and runs these programs, EO 13,526 itself notes that Congress may also legislate their creation.[290] For instance, the Atomic Energy Act provides for the separate classification of nuclear secrets, which are governed only in part by EO 13,526.[291] Whether

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[285] Exec. Order No. 13,526 § 4.3, 75 Fed. Reg. at 722–23. "Covert action"—generally, any secret activity by the federal government to influence political, economic, or military conditions abroad—is distinct from special or controlled access programs. *See* 50 U.S.C. § 3093 (governing such programs). It may be asked without being answered here whether any UAP-related secret crash retrieval activities overseas by the U.S. government (or a contractor if deemed to be the government in these circumstances) qualifies as covert action. Such activities would not appear to be conducted primarily for acquiring intelligence (an exception to the definition of covert action and its attendant reporting requirements) but rather to deny a foreign actor of UAP-related materials and to obtain them for the United States for exploitation. These activities might, therefore, be construed as undertaken to "influence political, economic, or military conditions abroad." *See* 50 U.S.C. § 3093(e) (defining covert action). Covert action is generally required to be reported to the congressional intelligence committees and leadership. *See* 50 U.S.C. § 3093(b)–(d), (g).

[286] Exec. Order No. 13,526 § 4.3(a), 75 Fed. Reg. at 722.

[287] *See id.* § 4.3(a)(1)–(2).

[288] MICHAEL E. DEVINE, CONG. RSCH. SERV., IF12080, CONTROLLED ACCESS PROGRAMS OF THE INTELLIGENCE COMMUNITY 1 (2022).

[289] 50 U.S.C. 3161.

[290] *See* Exec. Order No. 13,526 § 4.3(a), 75 Fed. Reg. at 722.

[291] *See* 42 U.S.C. § 2162; 10 C.F.R. § 1045.5(a) (2024). *But see* 10 C.F.R. § 1045.180(d) (2024) ("The classification and declassification of RD [Restricted Data], FRD [Formerly Restricted Data], and TFNI [Transclassified Foreign Nuclear Information] is governed by the AEA [Atomic Energy Act] and this part and is not subject to E.O. 13,526 or successor orders."). *See generally* ARVIN QUIST, 1 SECURITY CLASSIFICATION OF INFORMATION 78 (2002) ("The Atomic Energy Act

established by executive action or statute, disclosure of these programs is required in some form to select congressional committees and leadership under separate laws enshrining Congress's oversight of secret programs.[292] Thus, information may be classified by executive order, statute, or both, with the courts sometimes involved but often giving the political branches ample rein in their tug-of-war over classified information and hence the shaping of national security policy.[293] For its part, Congress has resisted claims by the executive that classification of information by executive order deprives Congress of any claim to that information in furtherance of its constitutional oversight duties.[294] But the executive seldom hands that information to Congress freely, contending that the Constitution and a smattering of statutes entitle the executive to prevent disclosure (including to lawmakers) to protect national security.[295]

Nevertheless, Congress took aim in the FY 2024 NDAA at two agency chiefs who administer these programs: the Secretary of Defense and the DNI. DoD calls this form of secret program a special access program ("SAP"). The equivalent within the IC is a controlled access program ("CAP"). A SAP is any "program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level."[296] There are three levels of SAPs. The first, an acknowledged SAP, is one "whose existence is acknowledged but its specific details (technologies, materials, techniques, etc.) are classified."[297] Second, an unacknowledged SAP has "protective controls ensuring the existence of the program is not acknowledged, affirmed, or made known to any person not

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of 1946 was the first and, other than its successor, the Atomic Energy Act of 1954, to date the only U.S. statute to establish a program to restrict the dissemination of information.").

[292] *See* 10 U.S.C. § 119 (governing congressional reporting for DoD special access programs); 50 U.S.C. § 3091a (governing congressional reporting for IC special access programs); 50 U.S.C. § 2426 (governing congressional reporting for National Nuclear Security Administration special access programs); 50 U.S.C. § 3348 (governing congressional reporting for all other "department or agency" special access programs and so not clearly capturing any that may be established by the White House, which, apart from any assertion of executive privilege or other constitutional right, could be exempt from the law's reporting obligations if not deemed here to be a "department or agency").

[293] *See supra* note 252 and accompanying text.

[294] *See, e.g.*, DEVINE, *supra* note 165, at 2.

[295] *See, e.g.*, ELSEA, *supra* note 168, at 1–2.

[296] OFF. OF THE DIR. OF NAT'L INTEL., INTEL. CMTY. STD. 700-1, GLOSSARY OF SECURITY TERMS, DEFINITIONS, AND ACRONYMS 25–26 (2008), https://irp.fas.org/dni/icd/ics-700-1.pdf [https://perma.cc/HH7R-SBMD]; *see* U.S. DEP'T OF DEF., DIRECTIVE 5205.07, SPECIAL ACCESS PROGRAM POLICY 13–15 (2024) [hereinafter Directive for Special Access Program (SAP) Policy], https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/520507p.pdf?ver=2020-02-04-142942-827 [https://perma.cc/53J6-TWYH]; U.S. DEP'T OF DEF., INSTRUCTION NO. 3204.01, POLICY FOR OVERSIGHT OF INDEPENDENT RESEARCH AND DEVELOPMENT (IR&D),§ 3(b) (2020) [hereinafter Policy for IR&D Oversight], https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/320401p.pdf?ver=2018-10-29-085530-263 [https://perma.cc/MK6Z-S4L2].

[297] MARK L. REAGAN, OFF. OF COUNTERINTEL., DEF. INTEL. AGENCY, TERMS & DEFINITIONS OF INTEREST FOR DOD COUNTERINTELLIGENCE PROFESSIONALS, at GL-2 (2011).

authorized for such information."[298] Third, a waived SAP is a more secret kind of an unacknowledged SAP "for which the Secretary of Defense has waived applicable reporting."[299] To exercise the waiver, the Secretary of Defense must determine that ordinary reporting to Congress would "adversely affect national security."[300] A waived SAP is to be used only in extremely limited circumstances.[301] Whereas the Secretary of Defense is required to more fulsomely describe to the congressional defense committees other SAPs, including their major milestones and estimated costs, waived SAPs are reported differently. They need be described only in truncated form to the chair and ranking member of the congressional defense committees, alongside a stated justification for the waiver.[302]

Before entering the murky world of SAPs, a cleared individual may be required to sign a Special Access Program Indoctrination Agreement ("SAPIA"), which contains confidentiality provisions prohibiting the unauthorized disclosure of SAP-covered information.[303] As discussed in Part IV, a SAPIA would be one type of "nondisclosure agreement" rendered inert for an authorized disclosure to AARO.[304] Untested, however, is whether a SAPIA—or any other agreement—

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[298] *Id.* at GL-175.
[299] *Id.* at GL-180.
[300] 10 U.S.C. § 119(e)(1).
[301] *See* REAGAN, *supra* note 297, at GL-180.
[302] *See* 10 U.S.C. § 119(e)(2). Administering SAPs is taxing. Departmental failures in overseeing SAPs have created scandals before, but reforms seem to add only more complexity, making future lapses likely. *See, e.g.*, U.S. GEN. ACCT. OFF., GAO-88-152, SPECIAL ACCESS PROGRAMS: DOD CRITERIA AND PROCEDURES FOR CREATING THEM NEED IMPROVEMENT 5–9 (1988), http://archive.gao.gov/d34t11/135887.pdf [https://perma.cc/M3DH-8GKB]. SAPs are overseen by the Special Access Program Oversight Committee (SAPOC), which is chaired by the Deputy Secretary of Defense and formally approves each SAP; Directive for Special Access Program (SAP) Policy, *supra* note 296, at 3–4. The DOD's SAP Central Office (SAPCO), which reports to the Deputy Secretary of Defense, is responsible for coordinating SAPs across agencies and Congress, ensuring the department speaks with one voice. *See id.* at 5–6. SAPs fall within three main areas: acquisition, intelligence, and operations and support, each of which is overseen by the corresponding Under Secretary of Defense through several other DoD SAP governance structures. *See id.* at 2–3. One of these structures, the Senior Review Group, chaired by the Under Secretary for Acquisition, Technology, and Logistics, functions as the main working group executing the daily governance process, advising the Deputy Secretary of Defense and performing oversight and management of SAPs. *See id.* at 3, 5. *See also* CTR FOR DEV. OF SEC. EXCELLENCE, DEF. COUNTERINTEL. & SEC. AGENCY, STUDENT GUIDE: COURSE: SPECIAL ACCESS PROGRAM (SAP) OVERVIEW (2020) 21–23 (PDF pagination), https://www.cdse.edu/Portals/124/Documents/student-guides/SA001-guide.pdf [https://perma.cc/W4JG-HVN8].
[303] *See* U.S. DEP'T OF DEF., INSTRUCTION 5205.07, SPECIAL ACCESS PROGRAM (SAP) SECURITY MANUAL: PERSONNEL SECURITY 10 (2020), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/520507_vol2.pdf [https://perma.cc/EDA9-DTWY]; U.S. DEP'T OF DEF., DD FORM 2836, SPECIAL ACCESS PROGRAM INDOCTRINATION AGREEMENT 1 (2000) [hereinafter SAPIA Form], https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2836.pdf [https://perma.cc/PYX8-FLNJ].
[304] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 1673(b)(1)(A), 136 Stat. 2395, 2960–61 (2022).

purporting to bind an individual for a SAP or other similarly classified program would be enforceable in other situations. After all, a contract is unenforceable as a general principle of common law not only if the underlying activities are illegal or if legislation makes it so, but also if the interest in its enforcement is "clearly outweighed" by public policy to the contrary."[305]

Within the IC, the equivalent of an SAP is a CAP. CAPs resemble their DoD siblings but do not come in as many varietals or rival the intricacy of SAP governance, reflecting the ODNI's relatively recent creation in 2004. The sheer scale of DoD acquisition, the subject of many SAPs, may also account for this difference in complexity. As defined by the ODNI, a CAP is a "top-level control system" and any compartment or sub-compartment—a reference to the practice of "nesting" secret programs in others to enhance security.[306] There are unacknowledged CAPs, which have protective controls to ensure that the existence of such programs is not acknowledged, affirmed, or made known to any unauthorized person.[307] Like the Secretary of Defense, the DNI reports on CAPs to the congressional intelligence committees, as well as to the congressional appropriations committees, the Senate Majority and Minority Leaders, the Speaker of the House, and the House Minority Leader.[308]

Lastly, the FY 2024 NDAA's undefined reference to "restricted access" activities could refer to CAPs. Alternatively, "restricted access" activities could apply to all other programs not protected as fully as SAPs or CAPs, such as programs protected within the DoD by alternative compensatory control measures. These lesser security measures are applied to programs for which standard DoD security measures are considered insufficient, but which do not warrant the fuller protections of a SAP.[309]

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[305] *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981).

[306] *See* OFF. OF THE DIR. OF NAT'L INTEL., INTEL. CMTY. DIRECTIVE 906, CONTROLLED ACCESS PROGRAMS (2015) [hereinafter ODNI Directive 906], https://www.dni.gov/files/documents/ICD/ICD-906.pdf [https://perma.cc/YK6X-KKDK] (providing examples of potential CAPs those within the communications intercepts or signals intelligence, Talent-Keyhole, which refers largely to spy satellites, and human intelligence areas).

[307] *See id.* at 2.

[308] *See* 50 U.S.C. § 3091a. The DNI exercises "authority over CAPs pertaining to intelligence sources, methods, and activities" but not "military operational, strategic, or tactical programs." ODNI Directive 906, *supra* note 306, at 1. As with SAPs, governance of CAPs involves a top-level CAP Program Manager, who may be the head of one of the agencies or offices comprising the IC, as well as a Control Officer and a Senior Review Group. *See id.* at 2. Cleared individuals also must sign a non-disclosure agreement. *See id.* at 3. Information about CAPs is shared within the IC according to separate ODNI policy, underscoring the mission of the ODNI to coordinate the IC and break down information stovepipes. *See* OFF. OF THE DIR. OF NAT'L INTEL., INTEL. CMTY. DIRECTIVE 501, DISCOVERY AND DISSEMINATION OR RETRIEVAL OF INFORMATION WITHIN THE INTELLIGENCE COMMUNITY (2009), https://www.odni.gov/files/documents/ICD/ICD-501.pdf [https://perma.cc/2963-T9XY].

[309] *See* 3 U.S. DEP'T OF DEF., 5200.01, MANUAL: DOD INFORMATION SECURITY PROGRAM: PROTECTION OF CLASSIFIED INFORMATION 29 (2020), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/520001m_vol3.pdf [https://perma.cc/2PVT-SG6H].

B. Congress Once Brandished the Purse to Extend Its Oversight Concerning UAP But Has Not Done So Again.

The FY 2024 NDAA prohibited both the obligation and expenditure of funds it authorized for "any activities involving unidentified anomalous phenomena protected under any form of special access or restricted access limitations," unless the Secretary of Defense or the DNI described such activities to the appropriate congressional committees and congressional leadership.[310] The prohibition was limited to funds authorized under the FY 2024 NDAA, not any other law, including any prior multi-year authorization or standalone funding measure for another agency, such as the DoE.[311] The FY 2025 NDAA did not renew these limitations. The appropriate congressional committees referred to by the FY 2024 NDAA are the House and Senate intelligence, defense, and appropriations committees; congressional leadership meant the Senate Majority and Minority Leaders, the Speaker of the House, and the House Minority Leader.[312] Moreover, no independent research and development ("IR&D") funding for these UAP activities was permitted as an indirect expense under government contracts, unless the underlying "material and information" was made available to these congressional committees and leadership.[313] By and large, federal law permits contractors to recover a portion of their IR&D costs as part of the general and administrative expenses they charge to existing contracts with the DoD.[314] But the effect of the IR&D prohibition for undisclosed UAP programs remains obscured. The Federal Acquisition Regulatory Council, which assists in the direction and coordination of government-wide procurement policy and regulatory activities, did not report any open cases for new acquisition regulations to implement the prohibition.[315]

Nonetheless, these limitations could have unpredictably frozen or delayed funds authorized by the FY 2024 NDAA for agencies and contractors conducting "any activity" involving UAP activities protected by special or restricted access

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[310] National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, §§ 1687, 7343(b), 137 Stat. 136, 621, 1063–64 (2023).
[311] *See id.* §§ 1687(a), 7343(a).
[312] *See id.* §§ 1687(c)(1)–(2), 7343(a)(1)–(2).
[313] *See id.* §§ 1687(b), 7343(c).
[314] *See* 10 U.S.C. § 3762; 48 C.F.R. § 231.205-18; *see also* Policy for IR&D Oversight, *supra* note 296, at 2, § 3(b); 2023 House Hearing on Unidentified Anomalous Phenomena, *supra* note 22, at 26 (question of Rep. Moskowitz: "Do you think U.S. corporations are overcharging for certain tech they are selling to the U.S. Government and that additional money is going to programs?" Mr. Grusch: "Correct, through something called IR&D.").
[315] *See* 41 U.S.C. § 1302(a); *see, e.g.*, U.S. DEP'T OF DEF. OPEN FAR CASES AS OF 11/1/2024 (2024), https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf [https://perma.cc/UW8J-LS9J]. The lack of any regulations could owe to the IR&D funding prohibitions being effective only for the duration of that year's authorization. Nonetheless, it could be argued that Congress, by legislating to prohibit IR&D funding for any undisclosed UAP program, saw no need for any implementing regulations. Rather, the statute itself makes such IR&D funding an "expressly unallowable cost" without need of regulation—and for which penalties could be assessed. *See* 48 C.F.R. § 31.001, 31.110.

controls. Although the reporting requirements by the Secretary of Defense and the DNI seem straightforward, funding could have been delayed while each official prepared to brief Congress—presumably, for the first time given the statute's unique requirements. These committees or lawmakers could (and often do) respond by asking follow-up questions, requesting additional information, or objecting outright to the described use of funds, especially if oversight is perceived as lacking historically. Follow-up questions or objections concerning the sufficiency of the Secretary of Defense or the DNI's explanations could cast into doubt whether either official provided the description required by the FY 2024 NDAA, creating ambiguity as to the legality of funds spent after a briefing perceived by lawmakers as deficient. Such legislative tactics, like "holds," might not be binding but rather could present "political questions"—conflicts between the legislative and executive branches left unresolved by the courts.[316] Holds and similar tactics can also imperil future funding (and therefore any long-term contract involved), cooperation on nominations (in the Senate), and even unrelated legislation.[317]

Because the FY 2024 NDAA prohibited the obligation and expenditure of funds for these activities without further specifying whose obligation or expenditure was prohibited, agencies and contractors could have been put in further limbo. For context, the JCS UAP Memorandum contemplates that UAP "objects and materials" are to be "secured in manner consistent with DoD Foreign Material Exploitation policies and doctrine and are transferred to appropriate location(s) and entit(ies) following coordination with AARO no later than 30 days after the event."[318] Presumably, certain "entit(ies)" that receive UAP "objects and materials" under the JCS UAP Memorandum could have been affected by these prohibitions. And it is not clear how companies would have known whether the Secretary of Defense or DNI fulfilled their UAP reporting obligations to Congress.

The different formulation with respect to IR&D funds—which did not require the Secretary of Defense or the DNI to describe the underlying activities but nebulously required related "material and information" to be "made available" somehow to the appropriate congressional committees and leadership—may have posed similar challenges.[319] Here, too, the extent to which congressional panels or leaders could have objected based on the sufficiency of the materials or information made available could have spelled trouble. It is not stated whether Congress drafted the FY 2024 NDAA's funding limitations with a view to a particular contractor or category of contractors. But contractors wishing to anticipate future enactments could consider adopting procedures to understand whether, and, if so, to what extent, they could be engaged in any UAP activities that were or may be again

[316] *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (outlining the factors that may suggest the existence of such non-justiciable political questions).
[317] *See* Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 337–39 (2002) ("There are many reasons for placing a hold, but often it is to obtain information that the executive branch has refused to release to Congress.").
[318] JCS UAP Memorandum, *supra* note 68, at 7.
[319] *See supra* notes 312–314 and accompanying text.

covered by such restrictions. Establishing or enhancing such an understanding would improve corporate governance, positioning senior leadership to take a proactive approach to the ODNI and DoD as part of those agencies' requirements to describe any UAP contractor programs to Congress. Doing so would further assist directors and officers in meeting their fiduciary duties.

A few additional considerations merit pause. For one, the FY 2024 NDAA did not expressly require the Secretary of Defense and the DNI to disclose to the appropriate congressional committees and congressional leadership only programs within their respective agencies. Rather, the Secretary of Defense and the DNI were ordered to notify the congressional committees of UAP programs protected under "*any* form of special access or restricted access limitations."[320] One reading could produce the odd result where the Secretary of Defense and the DNI reported to Congress concerning any secret UAP programs maintained elsewhere—establishing, in other words, a statutory "need to know" by these two officials of other clandestine activities funded by the FY 2024 NDAA. Under this interpretation, any such programs funded by the Act but created by the White House should be reported to Congress through the Secretary of Defense and DNI, which could raise concerns about executive privilege and constitutional prerogatives.[321]

President Biden bristled at these UAP funding limitations. Issuing a signing statement to the FY 2024 NDAA, the President asserted discretion to withhold such information from Congress. The signing statement noted that certain provisions of the law (not only those related to UAP) would require disclosure to Congress of "highly sensitive classified information, including information that could reveal critical intelligence sources or military operational plans or could implicate executive branch confidentiality interests."[322] Curiously, the signing statement targeted, among other sections of the FY 2024 NDAA, Section 1687—the UAP funding limitations and reporting requirements on the Secretary of Defense—but not the corresponding requirements on the DNI.[323] President Biden stated that the Constitution vested the President with the authority to prevent the disclosure of sensitive information and protect U.S. national security. Acknowledging the "legitimate needs" of Congress to perform its oversight functions, the signing statement maintained that the President would comply with the specified provisions of the FY 2024 NDAA "pursuant to the traditional accommodation practice and consistent with due regard for the protection from unauthorized disclosure of

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[320] National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, §§ 1687(a), 7343(b), 137 Stat. 136, 621, 1064 (2023) (emphasis added).

[321] *See supra* note 292 and accompanying text (questioning whether such programs administered by the White House may be exempt from statutory reporting obligations to Congress).

[322] Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2024, 2023 DAILY COMP. PRES. DOC. 01145 (Dec. 22, 2023), https://www.govinfo.gov/content/pkg/DCPD-202301145/pdf/DCPD-202301145.pdf [https://perma.cc/Z6WH-LP5N].

[323] *See id.* ("Certain provisions of the Act [(the FY 2024 NDAA)], including sections 856(c), 1221(a)(7), 1269, 1687, 7315, and 7351 would require the President and other officials to submit reports and plans to committees of the Congress . . . .").

classified information."[324] In issuing the statement, President Biden reaffirmed his view that information classified under executive order may lie outside the reach of Congress.[325]

For another, why were the FY 2024 NDAA's funding limitations needed in the first place? Statutes codifying congressional oversight of secret programs already exist—and are not constrained by expenditures for a particular fiscal year or agency.[326] If these laws already require disclosure in some form of all secret programs to Congress, then why is another law requiring disclosure of secret UAP programs to Congress needed? If these laws are insufficient, then why not amend them? Another question is why the FY 2025 NDAA did not renew the funding limitations from the prior fiscal year. SSCI thought they were justified for the IC, while SASC did not for the DoD.[327] The House intelligence and defense committees demurred completely. Perhaps SASC's omission could be attributed to its having established oversight with the heightened restrictions in the FY 2024 NDAA, such that these pre-existing now laws sufficed. The opposite could be true for SSCI. Or these limitations for the 2025 fiscal year encountered opposition from the executive branch and others within Congress, either for national security reasons or, as illustrated in this Article, the difficulties in administering them.

The novelty of any such UAP programs, once uncovered, could compound these ambiguities, complicating efforts by Congress and corporate boards to strengthen oversight. Where accountability to the legislative branch is more mature, a well-trodden path for congressional notifications, holds, hearings, statutory instructions, and appropriations has been smoothed over time, promoting predictability.[328] Although SAPs and CAPs are subject to procedures for informing Congress, UAP programs are alleged to have circumvented these in some indistinct manner. Whether these existing statutory reporting obligations on the Secretary of Defense and the DNI were adequate is unknown and would depend on several factors. The factors include the duration, responsible agencies, expenditures,

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[324] *Id.*

[325] For other signing statements containing similar language, seemingly unique to the Biden Administration, *see* Statement on Signing the Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, 2024 DAILY COMP. PRES. DOC. 01100 (Dec. 23, 2024), https://www.govinfo.gov/content/pkg/DCPD-202401100/pdf/DCPD-202401100.pdf [https://perma.cc/6P9Y-E7UA]; Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2023, 2022 DAILY COMP. PRES. DOC. 01143 (Dec. 23, 2022), https://www.govinfo.gov/content/pkg/DCPD-202201143/pdf/DCPD-202201143.pdf [https://perma.cc/BZV4-XKLC]; Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2022, 2021 DAILY COMP. PRES. DOC. 01090 (Dec. 27, 2021), https://www.govinfo.gov/content/pkg/DCPD-202101090/pdf/DCPD-202101090.pdf [https://perma.cc/TE8K-V7M7].

[326] *See* 10 U.S.C. § 119; 50 U.S.C. § 3091a; 50 U.S.C. § 2426; 50 U.S.C. § 3348.

[327] *See* notes 279–280 and accompanying text (examining differences between the draft National Intelligence Authorization Act for Fiscal Year 2025 and the draft FY 2025 NDAA).

[328] *See, e.g.*, 22 U.S.C. § 2776 (outlining under the congressional review process of foreign arms sales initiated by the executive branch under the Arms Export Control Act).

objectives, underlying activities of any hypothetically undisclosed UAP program—and why the funding restrictions were not renewed.

TOWARD A CONCLUSION: ROUTES FOR FUTURE INVESTIGATIONS AND LEGISLATION.

Whatever the ultimate explanations for UAP, these enactments herald a new phase. Despite lacking answers for the public, Congress is asking important questions. Legislatively, it could in the near-term tighten once more the statutory definition of UAP by referencing the now "six observables" to aim the government toward understanding truly anomalous objects, pass the transparency-related provisions of the UAP Disclosure Act, cabin executive branch discretion over the public disclosure of UAP records in the Collection, create a formal UAP whistleblower program, and normalize meaningful oversight. Lawmakers are growing restless. At a hearing in 2023, Representative Andy Ogles threatened to use the Holman Rule against any official who blocks a congressional UAP investigation.[329] The rule, unique to the House, allows germane amendments to appropriations measures that would reduce the salary of or fire specific federal employees, or cut a specific program.[330] There may, however, be something of a catch-22. Without lawmakers first having obtained all the relevant facts, more sweeping proposals lack the evidence needed to sway the weightier part of Congress of their need. But whistleblowers might not surface to provide those facts because they perceive they lack sufficient protections, which only Congress can provide through legislation.

A. By Prioritizing an Investigation, Lawmakers Can More Nimbly Bring to Light Facts for Later Legislation, But They and Whistleblowers Must Anticipate Potential Pitfalls in National Security's Separation of Powers.

Making laws is not all Congress can do. Its powers to investigate and publicly disclose the executive branch's UAP activities through open hearings could prove more potent.[331] Unlike a bill, a congressional inquiry needs no majority from both chambers; not much more than the dogged determination of a few well-placed members of Congress is needed to prosecute an investigation. This is not to say that UAP legislation is unnecessary. Far from it. Legislation extending oversight is vital. One such measure, included in the FY 2025 NDAA, charges the Comptroller General of the United States, who leads the Government Accountability Office, with reviewing AARO, including the compliance by that

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[329] *See* 2023 House Hearing on Unidentified Anomalous Phenomena, *supra* note 22, at 44.

[330] *See* RULES OF THE HOUSE OF REPRESENTATIVES, 118TH CONGRESS 36 (2023) [hereinafter Rules of the House of Representatives] (Rule XXI, cl. 2(b)), https://cha.house.gov/_cache/files/5/3/5361f9f8-24bc-4fbc-ac97-3d79fd689602/1F09ADA16E45C9E7B67F147DCF176D95.118-rules-01102023.pdf [https://perma.cc/5H5G-78EF].

[331] *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

office in discharging its statutory mandate.[332] But provisions, as in the UAP Disclosure Act, that would orchestrate a "controlled disclosure campaign" on the American public and make long-term dispositions of UAP-related materials through eminent domain raise ethical questions.[333] The legislation's unsuccessful parliamentary track record further cautions against these provisions' political viability. Strategically, as with almost any congressional investigation, disclosure to lawmakers of the problem typically occurs before the legislative cure.

That investigation is underway. For example, at a November 2024 House hearing, a journalist delivering sworn testimony to lawmakers in open session spoke on the record about documents submitted to Congress containing allegations by an anonymous UAP "whistleblower" of the existence of an unacknowledged special access program, apparently codenamed "IMMACULATE CONSTELLATION," that monitors and consolidates observations of UAP activity across multiple sensor platforms.[334] The DoD denied that IMMACULATE CONSTELLATION was one of its SAPs; rather, the journalist apparently was informed that the alleged program was controlled by the White House to avoid congressional reporting requirements on the DoD.[335] Another witness at the hearing, Luis Elizondo, a former senior counterintelligence officer who led AATIP, affirmed when questioned under oath that the government had long operated a UAP crash retrieval and reverse-engineering program.[336] Later that month, AARO's new Director would testify before a Senate panel to reiterate that UAP are real and that certain UAP remain truly anomalous and display advanced performance capabilities; the Director did not attribute any such UAP to U.S. or known foreign adversary systems.[337]

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[332] *See* Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, § 6801, 138 Stat 1773, 2515–16 (2024). The executive branch has, however, taken the position that the Government Accountability Office (formerly called the General Accounting Office), Congress's watchdog, may not have the authority—including, potentially, the constitutional authority—to analyze intelligence activities undertaken by the President. *See* Investigative Auth. of the Gen. Acct. Off., 12 Op. O.L.C. 171 (1988), *construed in* Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915, 932–33 (2011).

[333] *See* 169 CONG. REC. S2956–57 (2023) (2023 UAP Disclosure Act §§ __09(c)(3), __10(a)); 170 CONG. REC. S4946–47 (2024) (2024 UAP Disclosure Act §§ __09(c)(3), __10(a)).

[334] *See Unidentified Anomalous Phenomena: Exposing the Truth*, *supra* note 182 (written statement of Michael Shellenberger, at 6), https://oversight.house.gov/wp-content/uploads/2024/11/Written-Testimony-Shellenberger.pdf [https://perma.cc/9C2V-VNAE].

[335] *See id.*; Ross Coulthart, *Report Names 'Immaculate Constellation' UAP Program: Journalist*, NEWSNATION (Nov. 13, 2024, 12:48 PM), https://www.newsnationnow.com/space/ufo/report-immaculate-constellation-uap-journalist/ [https://perma.cc/ME7R-BW4H]; *see supra* note 292 and accompanying text.

[336] Adam Gabbatt & Marina Dunbar, *Startling Claims Made at UFO Hearing in Congress, But Lack Direct Evidence*, THE GUARDIAN (Nov. 13, 2024, 9:11 PM), https://www.theguardian.com/us-news/2024/nov/13/house-ufo-hearing [https://perma.cc/NSF5-4BP3].

[337] *See* Senate 2024 AARO Hearing, *supra* note 42, at 16, 21–22, 24.

Augmenting this power of the inquisitional pulpit, key committees, members, and leadership routinely receive classified briefings, including by DoD and IC inspectors general, about whistleblower matters, and hear directly from whistleblowers who report matters to Congress under IC whistleblowers laws.[338] Already, under the ICWPA, IC whistleblowers may report matters of urgent concern—as well as less urgent matters—not only to the congressional intelligence committees themselves but also their members, thereby expanding the circle within Congress that may be apprised of UAP whistleblower matters.[339] Mr. Grusch was one such whistleblower. House and Senate rules permit each chamber's intelligence committee to declassify information by vote, although the power, untested constitutionally, has been exercised only once.[340]

Although the extent of Congress's powers here is fraught with tension with the executive branch, courts have been hesitant to either facilitate Congress's access to information classified pursuant to executive order or bless the executive's withholding of it from Congress.[341] Often, an informal accommodation between the two branches is arranged.[342] All the same, the Constitution grants Congress unmistakable power to provide for the common defense, which requires access to classified information.[343] In one notable example, the Supreme Court held that the

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[338] *See* 5 U.S.C § 416; 50 U.S.C. § 3033(k)(5)(A).

[339] 50 U.S.C. § 3033(k)(5)(D)(iii).

[340] *See* Rules of the House of Representatives, *supra* note 330, at 15 (Rule X, cl. 11(g)(1)); S. Res. 400, 94th Cong. § 8(a) (1976); Molly E. Reynolds, *The Little-Known Rule that Allowed Congress to Release Devin Nunes's Memo*, LAWFARE (Jan. 30, 2018, 4:04 PM), https://www.lawfaremedia.org/article/little-known-rule-allowed-congress-release-devin-nuness-memo [https://perma.cc/HRJ6-WVJZ]. *Compare* Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) (holding that the President's "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 that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant"), *with* EPA v. Mink, 410 U.S. 73, 83 (1973) (concluding that "Congress could certainly have provided that the Executive Branch adopt new [classification] procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.").

[341] *See generally* LOUIS FISHER, CONG. RSCH. SERV., RL30966, CONGRESSIONAL ACCESS TO EXECUTIVE BRANCH INFORMATION: LEGISLATIVE TOOLS (2001).

[342] *See, e.g.*, United States v. AT&T, 567 F.2d 121, 127, 130 (D.C. Cir. 1977) (declining to invoke the political question doctrine in a dispute between the legislative and executive branches over a congressional subpoena, temporarily enjoined at the behest of the Department of Justice, of sensitive national security information possessed by a telecommunications company and rather directing the branches to seek a settlement because the Constitution contemplates an implicit "mandate to seek optimal accommodation" thereby "affirmatively furthering the constitutional scheme."). *But see* Bruce Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 841–43 (1985) (arguing that "conflicts between Congress and the executive branch over classified information are nonjusticiable political questions" because of the lack of any judicially discoverable or manageable standards).

[343] *See* U.S. CONST. art. 1, § 8; Transcript of Oral Argument at 57–58, Am. Foreign Serv. Ass'n v. Garfinkel, 488 U.S. 923 (1988) (No. 87-2127); *see also* U.S. CONST. art. 1, § 9 (enshrining Congress's power of the purse); U.S. CONST. art. 1, § 5 (granting Congress the authority to determine rules and omit recording proceedings that "require Secrecy").

Constitution's Speech and Debate Clause protected legislators (and their aides) from liability for disclosing the classified Pentagon Papers—a government history of U.S. involvement in Vietnam commissioned by Secretary McNamara showing that the Johnson Administration had lied to Congress and the public about the war there—by entering them into the Congressional Record.[344] Perhaps with this precedent in mind, Representative Mike Gallagher entered into the record of a 2022 House UAP hearing notes of an alleged conversation between Dr. Eric Davis, an aerospace engineer and astrophysicist, and Admiral Thomas Wilson, former Director of the Defense Intelligence Agency, discussing an apparently classified UAP reverse-engineering program.[345] Obstruction of due congressional inquiry and contempt of Congress are both crimes.[346]

Yet the boundaries of Congress's authority to require classified information from the executive branch—and the limits of immunity for lawmakers and staff pertaining to classified information—have not been resolved definitively in court.[347] In the mid-1970s, the Church Committee considered whether it could release to the American people certain classified information as part of its investigation.[348] One member of the IC, the National Security Agency ("NSA"), objected.[349] According to one interpretation, even the Speech and Debate Clause does not shield lawmakers from the Espionage Act, one section of which criminalizes disclosure, including by publication of classified communications

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[344] *See* Gravel v. United States, 408 U.S. 606, 616 (1972) ("[T]he Speech or Debate Clause at the very least protects [then-Senator Mike Gravel] from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible . . . . [F]or the purpose of construing the privilege a Member and his aide are to be 'treated as one'"). Nevertheless, members of Congress and staff may be punished under House or Senate rules from divulging information obtained in secret sessions. *See* CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R42106, SECRET SESSIONS OF THE HOUSE AND SENATE: AUTHORITY, CONFIDENTIALITY, AND FREQUENCY 2 (2014). For a concise history of the Pentagon Papers and how the contest over their publication, which involved prior restraint and the Espionage Act, could provide a roadmap for UAP disclosure, *see* RALPH ENGELMAN & CAREY SHENKMAN, A CENTURY OF REPRESSION: THE ESPIONAGE ACT AND FREEDOM OF THE PRESS 117–28 (2022).

[345] *See Hearing on Unidentified Aerial Phenomena Before the Subcomm. on Counterterrorism, Counterintel., & Counterproliferation of the H. Permanent Select Comm. on Intel.*, 117th Cong. 38–39 (2022); Notes of Meeting Between Eric Davis & Admiral Thomas Wilson (Oct. 16, 2002), https://www.congress.gov/117/meeting/house/114761/documents/HHRG-117-IG05-20220517-SD001.pdf [https://perma.cc/TT6B-V8NA] (submitted to the above hearing record by Rep. Gallagher).

[346] *See* 18 U.S.C. § 1505; 2 U.S.C. § 192.

[347] *See, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975) (holding that the Speech and Debate Clause generally protects members of Congress from harassment by the other branches).

[348] *See* James Hudec, *Provision of Cryptologic Information to the Congress*, CRYPTOLOGIC SPECTRUM, Summer 1981, at 12, 12–13 (1981), https://www.nsa.gov/portals/75/documents/news-features/declassified-documents/cryptologic-spectrum/provision.pdf [perma.cc/RX8Y-7274].

[349] *See id.*

intelligence, and another that criminalizes unauthorized retention of sensitive national defense information with the requisite intent.[350]

Although the Espionage Act relieves from criminality the "furnishing, upon lawful demand" of classified communications intelligence to a "regularly constituted" congressional committee, the NSA argued that any demand resulting in the information's public disclosure by Congress could not be lawful.[351] It pointed to other statutes purporting to entrust to the executive branch the protection of information from public release—including by Congress.[352] But the NSA did not object as strenuously to such information being provided to a relevant committee—as opposed to individual members—in closed session.[353] Despite the NSA's and executive branch's objections, following internal debate and upon the advice of the Senate parliamentarian, the Church Committee did in the end hold an open session discussing the information.[354] No prosecution of Senator Frank Church, the eponymous committee's chair, or other committee members commenced over any of the committee's disclosures. Other examples abound of the public release by members of Congress—either wittingly or unwittingly—of executive-classified information without legal repercussions.[355] If prosecution for any of these disclosures had occurred, such weaponization of the Espionage Act or any other law to prosecute sitting members of Congress or their staff investigating the federal government would have been without precedent, as it remains to this day.

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[350] *See id.*; 18 U.S.C. §§ 793, 798.

[351] 18 U.S.C. § 798(c); *see also* 18 U.S.C. § 1924(b) (a newer statute, though lacking a willfulness requirement, excluding "the provision of documents and materials to the Congress" by government workers and contractors from punishment by fine or imprisonment, and excluding any reference to a "lawful demand" or "regularly constituted committee"). Although a subpoena would satisfy the requirement for a lawful demand, it is unclear whether less demands short of a subpoena would. Other statutes prohibiting the unlawful removal or retention of government documents, which would include classified material, do not contain corresponding express carve-outs for the removal or retention or such documents for disclosure to Congress. *See, e.g.*, 18 U.S.C. §§ 641, 793(c), 793(e), 2071.

[352] *See* Hudec, *supra* note 348, at 13 (invoking 50 U.S.C. § 403(d)(3), subsequently recodified and hence, by analogy, 50 U.S.C. §§ 3036(d)(2), 3024(f)(1)(A), (i), (j)); *see also Gravel*, 408 U.S. at 626 ("While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts.").

[353] *See* Hudec, *supra* note 348, at 13.

[354] *See id.* The Church Committee also evidently obtained a legal opinion, since requested by the author, from the Congressional Research Service analyzing the legality of public disclosure of classified information by Congress, although the memorandum, as with the committee's other records, remains under seal at the Archives until October 1, 2026. *See* S. Res. 474, 96th Cong. (1980).

[355] Although lawmakers do not hold security clearances (which are issued by the executive branch), they are entitled to classified information by virtue of their election to Congress, swear an oath to protect such information, and may be punished under their chamber's rule for revealing it. That punishment is rarely meted out. *See* John M. Donnelley, *When It Comes to Security Clearances, Rules for Others Don't Apply to Congress*, ROLL CALL (Jan. 12, 2021, 3:55 PM), https://rollcall.com/2021/01/12/when-it-comes-to-security-clearances-rules-for-others-dont-apply-to-congress/ [https://perma.cc/4ZEJ-WNHZ]; Clark, *supra* note 332, at 941–951.

Congress's rights to other information held by individuals, contractors, and certain private persons are more assured than its rights to information classified by the executive branch. For instance, Congress generally may subpoena contracts and other documents protected by confidentiality or privacy of information.[356] Thus, documents protected from disclosure by the Trade Secrets Act, the Privacy Act, or under exceptions to FOIA are not exempt from production to Congress.[357] And Congress traditionally does with this information what it pleases. "Once documents are in congressional hands," the Court of Appeals for the District of Columbia Circuit wrote, "courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties."[358] Congress may also compel testimony it has immunized under the federal use immunity statute.[359]

But any powers and protections of Congress might not extend beyond all doubt to persons who provide Congress with classified information without leave of the executive branch. In rejecting prior restraint of the Pentagon Papers, the Supreme Court left open the prospect of criminal prosecution of those involved in the leak, including, in theory, the media.[360] Statutes such as the Espionage Act were implicated, as they could in theory also be implicated for UAP disclosure, even if the disclosures went first to Congress rather than to the press. One provision of the Act criminalizes, at least on its face, mere willful communication or retention of tangible national defense information.[361]

To illustrate, take the 1976 House subcommittee subpoena of three telecommunications carriers to discuss their warrantless "national security" wiretaps of certain communications upon "request" by the FBI.[362] In response to the subpoena, the executive branch notified the carriers that disclosure to the congressional subcommittee would constitute a violation of the Espionage Act, and the carriers did not appear.[363] The subcommittee duly voted to hold the relevant

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[356] *See* TODD GARVEY, CONG. RSCH. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 44–67 (2017).

[357] *See* DAVID M. MCINTOSH, MARK GITENSTEIN & SEAN P. MCDONNELL, UNDERSTANDING YOUR RIGHTS IN RESPONSE TO A CONGRESSIONAL SUBPOENA 6–7 (2014), https://docs.pogo.org/resource/2018/7_white-paper-congressional-subpoena.pdf [perma.cc/5528-9R6J].

[358] FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 970 (D.C. Cir. 1980).

[359] 18 U.S.C. § 6002.

[360] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 730 (1971).

[361] 18 U.S.C. § 793(d), (e). Given the breadth of these subsections of the Espionage Act, their "overriding question of interpretation is whether newspapers, their reporters, their informants, or anyone who investigates, accumulates, informs about, or retains defense information as a prelude to public speech is covered . . . . On their face, however, the purposes of subsections 793(d) and (e) are mysterious because the statutes are so sweeping as to be absurd." Harold Edgar & Benno Schmidt Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 967, 1032 (1973).

[362] *See* Hudec, *supra* note 348, at 13–14.

[363] *See id.* at 14.

executive branch employees in contempt.[364] Intervening, the Department of Justice obtained a preliminary injunction of the congressional subpoena.[365] The intervention placed the Court of Appeals for the District of Columbia Circuit in the tight spot of deciding the balance between legislative and executive branches, and the court directed—twice—the branches to resolve the dispute by informal accommodation.[366] The second time, the court effectively decided the issue for the executive branch, as the injunction of the congressional subpoena remained in effect pending settlement.[367]

Still, the odd reservation of executive-branch authority aside, using the Espionage Act or laws like the Computer Fraud and Abuse Act against individuals for disclosing classified information to Congress—let alone for any UAP programs not authorized by or reported to Congress—would be without precedent.[368] Nor is it settled how discreetly furnishing information to Congress would satisfy, by way of illustration, the requirement under one section of the Espionage Act that the information be obtained "with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation."[369] Moreover, the ICWPA, while establishing a process for furnishing classified information to the congressional intelligence committees (and their members), does not say whether it is the only way to inform Congress of alleged misdeeds. That is, the ICWPA provides for furnishing such information free from an adverse employment action, while all such disclosures to Congress may remain unfettered by prosecution or suit.[370] Even employer retaliation for making disclosures of classified information outside the ICWPA could rest on precarious legal footing, to say nothing of the prudence in risking congressional wrath by

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[364] *See id.*; Press Release, Subcomm. on Gov't Info. & Individual Rts. of the H. Comm. on Gov't Operations, *Abzug Panel Recommends Contempt Citation for FBI and NSA Employees* 1–2 (Feb. 25, 1976), https://www.fordlibrarymuseum.gov/sites/default/files/pdf_documents/library/document/0014/21619430.pdf [https://perma.cc/68A2-8Y2Q].

[365] *See* United States v. AT&T, 551 F.2d 384, 388 (D.C. Cir. 1976).

[366] *See id.* at 395; AT&T, 567 F.2d at 127.

[367] *See* AT&T, 567 F.2d at 133.

[368] *See supra* note 252 and accompanying text; *see also* 50 U.S.C. § 3234 (further prohibiting any adverse personnel action against any employee of a covered IC element for the "lawful" disclosure of information to any member of a congressional intelligence committee that the employee reasonably believes evidences a violation of federal law or constitutes "mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety").

[369] 18 U.S.C. § 793(a).

[370] *See* 50 U.S.C. 3161 (in providing that "the President shall, by Executive order or regulation, establish procedures to govern access to classified information which shall be binding upon all departments, agencies, and offices *of the executive branch*" not addressing the criminal or contractual consequences, if any, for sharing such information with Congress as adjudicated by the *judicial branch*) (emphasis added); *see supra* note 252 and accompanying text (discussing the distinction between information classified by the executive branch and national defense information, which is determined in court proceedings).

harassing whistleblowers.[371] From one perspective, this judicially interpreted silence concerning Congress's and the executive branch's rights to sensitive information could give cold comfort to prospective UAP whistleblowers wanting to inform Congress, including members outside the intelligence committees so to widen the audience sufficient to pass informed legislation. Who would want to be the first person prosecuted or sued for such a disclosure?

From another perspective, however, this constitutional silence gleams as a feature, not a fault—one that sways the Damoclean sword of the Espionage Act's uncertainty to deter disclosures to Congress for all but the most pressing public policy matters. Even though the Act does not contain a public policy exception for disclosure, persons have surreptitiously informed lawmakers of classified information time and again without prosecution, suit, or even retaliation. Congress has been tipped off about classified matters well before the ICWPA came along in 1998. In this view, UAP informants to Congress should not be viewed *sui generis* but as the latest in a long lineage, albeit one expressed recessively, as many whistleblowers to Congress never see the light of day (or discovery by the executive branch).

Indeed, the example of the telecommunications carrier tells a cautionary tale against breaching this silence by invoking formal procedures like a subpoena. The two telecommunication carrier cases show how contests in court over classified information can end in a stand-off favoring one political branch over the other depending on the underlying facts. By contrast, Congress emerges triumphant if it simply obtains the information, regardless of how, just as the executive branch wins if it manages to keep the information. Here, too, possession is nine-tenths of the law. And once lawmakers acquire this information, they can disclose it publicly with relatively light consequences to themselves.[372] Congress thereby may provide a conduit for disclosure that the media should envy, particularly following the expanded use of the Espionage Act over decades to prosecute persons involved in leaking classified information to the press.[373] But persons seeking to provide Congress with UAP-related classified information must still navigate carefully the obscure yet turbulent waters of national security's separation of powers.

All told, short of a congressional investigation, perhaps in the form of a House, Senate, or joint UAP select committee, answering how the FY 2025 NDAA or any other law will normalize oversight and achieve disclosure—either to

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[371] For a discussion of one example of the security clearance-stripping and other employment consequences of telling Congress classified information without authorization by the executive branch see generally Michael J. Glennon, *Congressional Access to Classified Information*, 16 BERKELEY J. INT'L L., 126 (1998) (describing the revelation to Rep. Robert Torricelli (D-N.J.) by Richard Nuccio, a State Department official, of classified information pertaining to the possibly illegal involvement by the CIA in the death of a Guatemalan guerrilla commander).

[372] Clark, *supra* note 332, at 941–951.

[373] Jameel Jaffer, *The Espionage Act and a Growing Threat to Press Freedom*, NEW YORKER (June 25, 2019), https://www.newyorker.com/news/news-desk/the-espionage-act-and-a-growing-threat-to-press-freedom [https://perma.cc/K8TZ-75DP].

Congress or the public—remains a difficult question.[374] So too does whether today's architecture for oversight of secret programs requires demolition and reconstruction in the event these programs' existence is confirmed. In the longer term, Congress may require more expansive reforms.

B. Reforms May Eventually Find Expression in Legislation, but Larger Policy Questions Must First Be Grappled With.

Although it has not passed Congress, the UAP Disclosure Act suggests this future by ordering the U.S. government to exercise eminent domain over all unknown technologies and "biological evidence of non-human intelligence that may be controlled by private persons or entities in the interests of the public good."[375] Whether such an approach is warranted cannot be settled in a discussion intentionally restrained from (most) conjecture. But eminent domain as a policy tool to expropriate property from all manner of persons seems too blunt. Legally, it is not obvious why eminent domain would be appropriate as a way for the government to repossess any debris, technology, or other relevant material it could have transferred long ago for research and development by others outside the government. If such transfers constituted bailments, then the government surely would not buy things it owns already, even if they are "controlled" by (that is, bailed with) someone else. Would, therefore, the government, as the UAP Disclosure Act would have it do, cede the potentially decisive ground that it always owned, and never stopped owning, any such material? And how would that material be valued so that the government pays "just compensation" for the exercise of those eminent domain powers, as the Constitution demands?[376] Would that expense to the taxpayer, on top of amounts already paid—perhaps illegally—be justified? Furthermore, as the Constitution already grants the government eminent domain powers—ones refined by courts over centuries—it may be wondered why a specific statutory grant here is necessary. Either the UAP Disclosure Act's eminent domain provision purports to grant more than the Constitution gives, in which case it is unconstitutional, or less, which would seem to achieve less than the bill's sweeping intent.

Granted, some relevant material hypothetically in the hands of a contractor or other private person may have been obtained independent of any government

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[374] *See* Letter from Rep. Eric Burlison (R-Mo.), Rep. Tim Burchett (R-Tenn.), Rep. Moskowitz, Rep. Anna Paulina Luna (R-Fla.), Rep. Andy Ogles (R-Tenn.), Rep. Nancy Mace (R-S.C.), Rep. Troy Nehls (R-Tex.) & Rep. Matt Gaetz (R-Fla.) to Speaker of the House Mike Johnson & Democratic Minority Leader Hakeem Jeffries (Mar. 12, 2024); https://burlison.house.gov/sites/evo-subsites/burlison.house.gov/files/evo-media-document/UAP%20Select%20Subcommittee%2003.12.pdf [perma.cc/25BK-CRL5]; Rep. Tim Burchett (@RepTimBurchett), TWITTER (July 27, 2023, 11:59 AM), https://twitter.com/RepTimBurchett/status/1684956861898919936/photo/1 [perma.cc/6P4X-UX3F].

[375] 170 CONG. REC. S4949 (2024) (2024 UAP Disclosure Act § __10); S. 2226, 118th Cong. § 9010 (2023).

[376] *See* U.S. CONST. amend. V.

and, therefore, colorably owned by such persons outright. Eminent domain in this instance could be the appropriate remedy based on the individual facts and circumstances. But other fact patterns could blur this bright-line analysis. Suppose that a contractor obtained such materials using government funding, intelligence, or other support. Is the government in that instance the true owner or a mere finder?

More significantly, who would own or otherwise have rights to any technologies, applications, or other intellectual property—the rights in technical data in the parlance of government contracts—derived from exploitations facilitated in this manner by the government? Even in fairer circumstances, the question of who owns intellectual property developed under government contracts can create tension between the government and the contractor. The UAP Disclosure Act leaves open this critical issue of intellectual property. On the one hand, its definition of "technologies of unknown origin" subject to eminent domain includes "engineering models or processes. . . incorporating science and technology that lacks prosaic attribution or known means of human manufacture."[377] This reference conceivably includes certain intellectual property. On the other hand, the definition lacks other terms denoting intellectual property more holistically, such as patents, patent applications, various marks, and confidential and proprietary information, including trade secrets and know-how.

This is not some idle drafting question. Private persons who may have developed intellectual property based on "technologies of unknown origin" transferred to them by the government (presumably, absent a contract like an Other Transaction Agreement) could be sitting on a gold mine. And this intangible hoard could lie beyond the reach of the UAP Disclosure Act. But there may be a silver lining. If "technologies of unknown origin" do not include intellectual property, then such property, even if "controlled" by private persons, would fall outside the Act's eminent domain provision, sidestepping the awkward question of why the government would buy back property it merely bailed. In this event, the government would remain unfettered by the UAP Disclosure Act to exercise eminent domain over such intellectual property actually owned by private persons. Otherwise, the government would be better suited by demanding it back as part of the bailed goods or receiving a license.

Or is UAP-related information or technology already subject to restrictions or other rights by the federal government? The UAP Disclosure Act noted, for instance, that UAP information might remain secret as "transclassified foreign nuclear information" under the Atomic Energy Act.[378] And the DoE has broad rights over "special nuclear material."[379] Bizarre "UFO patents" could provide additional clues. Beginning in 2018, the Navy obtained several patents for technologies that could relate to many of the UAP observables discussed in Part

[377] S. 2226 § 9003(19).
[378] *Id.* § 9002(a)(4).
[379] *See* 42 U.S.C. §§ 2014, 2071.

I(C). The patents included a "plasma compression fusion device," a "high-frequency gravitational wave generator," and a "craft using an inertial mass reduction device."[380] Some have dismissed the patents as mad science or disinformation.[381] After all, publishing for the world to see such know-how could dull America's technological edge.[382] And foreign adversaries would not respect U.S. intellectual property laws prohibiting them from replicating military technologies for their own benefit.[383]

Even so, the patents could position the Navy to claim property rights not against foreign powers, but against domestic contractors. These contractors could have helped the government to develop these technologies but have been barred by secrecy order from receiving a patent themselves under the Invention Secrecy Act.[384] The Invention Secrecy Act prevents the disclosure, including through publication and patent, of inventions and technologies that could endanger U.S. national security.[385] Claims that the U.S. and foreign adversaries are engaged in an arms race to back-engineer UAP technology could mean that other countries already possess the knowledge disclosed in the "UFO patents," limiting the fall-out from their publication.[386] That several of these patents were rejected initially for lack of "enablement"—basically, for disclosing insufficient information to permit one reasonably skilled in the art to make or use the invention—could indicate the Navy's desire to avoid over-disclosure.[387] Or it could mean that the patents are bunkum.

These conjectured fact patterns could be but few among many. Who, therefore, owns such hypothetical material—perhaps decades later after little to no documentation—could be in the end unanswerable. Rather than brook costly and interminable eminent domain litigation, cooperation in the form of a statutory, public-private consortium to research and develop such technologies could prove more fruitful. Underlying all these potential ambiguities lies an even cloudier one: by what right—statute, regulation, executive order, presidential emergency action

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[380] *See* U.S. Patent Application Pub. No. 2019/0295733 A1 (filed Mar. 22, 2018), https://patentcenter.uspto.gov/applications/15928703 [perma.cc/EDK7-Q34B]; U.S. Patent No. 10,322,827 (filed Feb. 14, 2017) (issued June 18, 2019); U.S. Patent No. 10,144,532 (filed Apr. 28, 2016) (issued Dec. 4, 2018).

[381] *See* Ariel Cohen, *What Is Behind the U.S. Navy's 'UFO' Fusion Energy Patent?*, FORBES (Dec. 10, 2021), https://www.forbes.com/sites/arielcohen/2021/02/08/what-is-behind-the-us-navys-ufo-fusion-energy-patent/ [perma.cc/CT6P-AVXK].

[382] *See* Bernardo Kastrup, *Salvatore Pais's Mysterious 'UFO Patents': What Do They Really Mean?*, THE DEBRIEF (Jan. 21, 2024), https://thedebrief.org/salvatore-paiss-mysterious-ufo-patents-what-do-they-really-mean/ [perma.cc/2V63-MGA6].

[383] *See id.*

[384] *See* 35 U.S.C. § 181.

[385] *See id.*

[386] *See* Kean & Blumenthal, *supra* note 210.

[387] *See* Brett Tingley, *Navy's Advanced Aerospace Tech Boss Claims Key 'UFO' Patent Is Operable*, THE WARZONE (Oct. 17, 2019), https://www.twz.com/29232/navys-advanced-aerospace-tech-boss-claims-key-ufo-patent-is-operable [perma.cc/63SB-GYS3]; United States v. Telectronics, Inc., 857 F.2d 778, 785–87 (Fed. Cir. 1988).

document, or otherwise—could the government have entered such understandings with any contractors? The answer in turn may surface long-unresolved legal questions about the extent of congressional and presidential powers.[388] Alongside this dilemma runs a presumption that anyone developing such materials, possibly under a sole source contract, has some relevant capability that should not be set lightly aside.

C. Anomaly's Open Water Beckons.

From the legislative findings examined in this Article, it may be presumed that "there is a there there." What that is, this Article does not pretend to know. But Congress has not on mere whim for now four years running passed binding law in this area. No. Instead, it has repeatedly refined the definition of "UAP" to focus on anomalous objects displaying beyond-next-generation capabilities. It has created an office to understand these phenomena and report to Congress about them. Recognizing the need for meaningful disclosure to the American public, Congress drew from portions of the UAP Disclosure Act to establish the Collection at NARA. And it has acted to protect personnel reporting alleged UAP sightings and reverse-engineering programs, while at one time conditioning certain federal funds on the disclosure of any such programs to the appropriate legislative authorities. Congressional investigators have sounded the call. This record shows at a minimum that lawmakers on powerful oversight committees are concerned that elements within the national security establishment, including its contractors, have disobeyed the laws governing congressional funding and oversight of secret programs. That is serious enough. Until the constitutional balance is restored, the truth of the government's activities, like the UAP themselves, remains unidentified.

[388] *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (outlining theories of executive power).