## CP

### CP S – Secrecy – Internal Oversight – 2NC

**It creates internal oversight without leaking info to the judiciary.**

Beth **George 18**, Non-Resident Senior Fellow for the New York University School of Law's Reiss Center on Law and Security and is a member of the American Law Institute, "An Administrative Law Approach to Reforming the State Secrets Privilege," New York University Law Review, August 2018, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-84-6-George.pdf

Notably absent from state secrets privilege doctrine is a role for an inspector general and an accounting mechanism under which the government would have to report the number of times and the context in which it has invoked the privilege. The President could easily create this requirement, and it constitutes the most basic of internal oversight mechanisms.

Most executive agencies have an inspector general who investigates claims of abuse.151 Inspectors general have been successful at rooting out abuses within agencies. For example, in 2008 the FBI’s Inspector General reported that it had uncovered thousands of abuses of NSLs.152

An inspector general should be required to conduct internal over sight of the state secrets privilege. Because the executive branch is responsible for national security matters, it may have the most competence to determine whether there have been abuses and whether the rules are adequate. An independent inspector general would be in a better position than the judiciary to investigate whether the privilege is being abused: She would have access to all of the information across all jurisdictions and understand the context in which claims of privilege arise. Her objection to the use of the privilege would also not result in governmental cries of judicial incompetence.

**There’s a disincentive for abuse. Reputational costs outweigh benefits.**

Beth **George 18**, Non-Resident Senior Fellow for the New York University School of Law's Reiss Center on Law and Security and is a member of the American Law Institute, "An Administrative Law Approach to Reforming the State Secrets Privilege," New York University Law Review, August 2018, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-84-6-George.pdf

Furthermore, individual civil servants within the DOJ have every incentive not to rely on skimpy evidence or otherwise abuse the FISA process because they must seek the Attorney General’s sign-off every time they apply for FISA warrants. Their credibility within the institution, and perhaps even their job security, depends on not abusing the Attorney General’s credibility by seeking her clearance on applications that overreach or are outright false.

Although self-policing within the executive branch seems counterintuitive, there is evidence that it does reduce abuse. In a recent public dispute between the New York Police Department (NYPD) and the DOJ, the NYPD Chief argued that the DOJ was not aggressive enough with its applications for FISA warrants. In at least two cases, the DOJ refused to apply for FISA warrants for the NYPD because the DOJ did not believe the probable cause standard had been met.146 Attorney General Michael Mukasey replied that the DOJ was properly applying the standard and that it would not push beyond the limits of the law because of its “intensely practical desire to preserve our credibility before the court.”14

### S – Ex Flex – Congressional Oversight – 2NC

**It creates internal oversight without leaking info to the judiciary.**

Beth **George 18**, Non-Resident Senior Fellow for the New York University School of Law's Reiss Center on Law and Security and is a member of the American Law Institute, "An Administrative Law Approach to Reforming the State Secrets Privilege," New York University Law Review, August 2018, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-84-6-George.pdf

Notably absent from state secrets privilege doctrine is a role for an inspector general and an accounting mechanism under which the government would have to report the number of times and the context in which it has invoked the privilege. The President could easily create this requirement, and it constitutes the most basic of internal oversight mechanisms.

Most executive agencies have an inspector general who investigates claims of abuse.151 Inspectors general have been successful at rooting out abuses within agencies. For example, in 2008 the FBI’s Inspector General reported that it had uncovered thousands of abuses of NSLs.152

An inspector general should be required to conduct internal over sight of the state secrets privilege. Because the executive branch is responsible for national security matters, it may have the most competence to determine whether there have been abuses and whether the rules are adequate. An independent inspector general would be in a better position than the judiciary to investigate whether the privilege is being abused: She would have access to all of the information across all jurisdictions and understand the context in which claims of privilege arise. Her objection to the use of the privilege would also not result in governmental cries of judicial incompetence.

### 2NC – [Dispo]

## DA

### Overview – 2NC

#### 3. Independently, it’s the cornerstone of diplomacy and intel alliances, that’s Croner.

<<FOR REFERENCE>>

It is a shibboleth of the legal profession that bad facts can produce bad law, and the facts surrounding Zubaydah’s treatment at the hands of the CIA are abhorrent. Those facts have led many critics of the CIA’s activities to condemn the Supreme Court’s decision as condoning the use of the state secrets privilege to cover for what they view as unlawful and immoral conduct. Candidly, however, sustaining the state secrets privilege to protect against the potential harm to national security that would result from a damaging disclosure of information that might disrupt the U.S. diplomatic and clandestine intelligence relationship with an important foreign ally does not, in my view, pose any “long term implications for the rule of law and today’s battle between the forces of democracy and autocracy.” Rather than allowing the repugnant facts of Zubaydah’s treatment to dictate the outcome of an important decision affecting a critical evidentiary privilege, the Supreme Court’s decision represents the logical application of a privilege that serves a fundamental role in preserving an appropriate balance in the constitutionally created separation of powers between the three branches of government.

**The mere prospect of leaks wrecks the Five Eyes.**

* An intelligence alliance between the United States, United Kingdom, Canada, Australia, and New Zealand

Ellen **Nakashima 3/12**, two-time Pulitzer Prize-winning reporter covering intelligence and national security matters for The Washington Post, “FISA policy changes that address issues unearthed in review of Carter Page wiretap are a modest step forward, analysts say: The Senate is expected to pass the reform package, which drew bipartisan support,” The Washington Post (Online), 03/12/2020, ProQuest

Nicholas Lewin, a former federal terrorism prosecutor, said the issue was a difficult one "as there are fundamental values on both sides of the scale — liberty and security."

Baker, a former Justice Department attorney who handled FISA applications, cautioned that allowing such disclosure would have "a substantial negative impact" on the usefulness of FISA as a counterintelligence tool and would pose a "greater national security risk" to the nation.

"Foreign partners and sensitive human sources located overseas would be quite reticent to either share information with the FBI or allow information they generated to be used in FISA applications," he said, "because they would be quite concerned about the prospect that some defense attorney down the road could see that information."

**That causes Russian nuclear miscalculation.**

James **Rogers 14**, co-founder and a Senior Editor of European Geostrategy, Lecturer in European Security in the Department of Political and Strategic Studies at the Baltic Defence College in Tartu, “The geopolitics of the Atlantic Alliance,” European Geostrategy, 6-8-2014, http://www.europeangeostrategy.org/2014/06/geopolitics-atlantic-alliance/ via WebArchive

But NATO is only part of the story; incidentally, so is the EU – a project kick-started with the Schuman Declaration of 1950 to reconcile West Germany and France after the horrors of occupation and war. What is important is that all of these institutions are, in one way or another, part of a wider geopolitical constellation enabled and underpinned by the military, industrial and financial power of the UK and US. After all, the Euro-Atlantic structures are capped by a range of mutual UK-US intelligence sharing treaties, including the BRUSA Agreement and the UKUSA Agreement, both of which predate NATO. The former was inaugurated in 1943 during the height of the Second World War, while the latter was founded in 1946. These agreements facilitated the creation of the so-called Five Eyes’ intelligence network, recently brought to prominence by the leaks of the notorious Edward Snowden. The ‘Five Eyes’ includes the UK and US, along with Canada, Australia and New Zealand. Each of the five English-speaking countries takes responsibility for monitoring signals intelligence in different parts of the world, with the UK-based Government Communications Headquarters (GCHQ) and the US-based National Security Agency (NSA) operating as the hubs for the exchange and processing of knowledge and information. Other trusted nations, like Belgium, France, Denmark, the Netherlands and Norway, also gain access to this network on an ad-hoc basis.

But UK-US cooperation goes further than intelligence sharing. Although both allies had already signed up to the North Atlantic Treaty – and thus NATO’s Article Five – there was nevertheless concern that, should push come to shove (for example, in the event of a general European war), one side of the Atlantic would not help the other. While the British were somewhat worried about the US commitment, some mainland European allies questioned – in the event of nuclear escalation with the Russians – whether Washington really would risk the sacrifice New York City, Chicago and Los Angeles for Amsterdam, Oslo or Paris. The US-UK Mutual Defence Agreement, signed in 1958, was one step in solving that problem. Although it did not contain any formal declaration of solidarity, Washington and London nevertheless agreed to the first step of a mutual defence pact that remains, paradoxically, even deeper than that provided by NATO. The reason for this is because the treaty began the process of binding together the UK’s strategic nuclear forces with those of the US.

Of course, it is well-known that the British, Canadians and Americans came to work closely with one another during the Second World War to generate a viable atomic bomb, first under the aegis of the British-led ‘Tube Alloys’ programme and later in the much larger American-led ‘Manhattan Project’. This resulted in the ‘Gadget’, which was detonated over the deserts of New Mexico with a mighty flash in 1945, ushering in the ‘Atomic Age’ – possibly the defining moment of the twentieth century (and even, all time). After the war, however, and despite initially agreeing with the UK to continue nuclear cooperation, the US sought a nuclear monopoly, shutting London (and Ottawa) out of bilateral nuclear development through the McMahon Act of 1946. The British were furious, and set about pursuing a new atomic weapons project of their own, using the knowledge gleaned by their scientists working on the Manhattan Project during the war. The UK succeeded in developing its own ‘Gadget’ in 1952, unleashing it off the Australian coast, thus becoming the world’s third nuclear power (Russia exploded its first device in 1949). This was followed five years later by the successful test of a British hydrogen bomb.

In developing a full-scale nuclear capability, London’s real objective was not only the acquisition of the means to inflict massive and unacceptable damage on any enemy. Additionally, the British were also seeking a geopolitical outcome: the UK understood that Europe was becoming an increasingly contested space in a geopolitical context, not least as the Cold War took hold and intensified. London realised that Russia’s growing power, augmented by its many satellite states, annexed during the Second World War, could only be ‘balanced’ by drawing together the strength of the democracies on either side of the North Atlantic into one cohesive bloc. Moreover, the UK understood that by the late 1950s, better means of delivery were needed for its own nuclear weapons: the Vulcans, Victors and Valiants – the Royal AirForce’s strategic bombers – were already starting to become obsolete. Russia was starting to develop powerful new ballistic missiles with intercontinental reach; and for Britain to develop an effective response by itself would be extremely costly. London looked to Washington for help.

But this would require even deeper UK-US nuclear collaboration. At first, however, the US sensed an opportunity to regain its nuclear monopoly, at least within the West. The US Defence Secretary, Robert McNamara, wanted to render the UK dependent on his country’s own capabilities: Washington therefore tried to force London into accepting a dual-use policy, i.e. that the US would retain a veto over Britain’s capacity for deployment. The British, however, realised that this would diminish their influence, both in Washington, but particularly in relation to their European allies, meaning they wanted to hold onto their own nuclear autonomy. The opportunity for a breakthrough came with the Nassau Agreement in 1962, effectively the second step in UK-US mutual defence. After tough negotiations, and after a quiet stroll between the British Prime Minister, Harold Macmillan, and American President, John F. Kennedy, a deal was struck whereby the US would lease the UK its own delivery system – Polaris missiles – which the British would cap with their own thermonuclear warheads. These would then be carried by a new generation of Royal Navy nuclear submarines, powered by reactors modelled on American designs.

Apart from the enormous cost savings for the British, the ability to fire Polaris missiles was critical. Although any enemy with sufficiently sophisticated air surveillance systems would still be able to detect the speed and trajectory of any missiles in the event of a nuclear exchange (meaning it might realise who was firing them), it would not be able to readily determine whether the missiles were British or American in origin. That is to say, if the UK was attacked by Russia and London initiated a nuclear response, Moscow would not know whether it was being hit by the UK or the US (or both). This forced the Russians – as well as others – to factor uncertainty into their own nuclear warfighting and deterrence doctrines, making the cost of miscalculation ever greater, and the British-American ability to deter thus even stronger. In effect, it ensured that the Atlantic Alliance gained a material as well as an ideological tether, to keep the two sides together, even in the event of a European conflict in which the North American side did not really want to become involved.

Today, while Polaris has been replaced by the even-more lethal Trident, the UK-US backed geopolitical constellation known as the Atlantic Alliance is very much still alive. Of course, many other European countries continue to believe that their political and economic links with Washington will ensure the Americans shall come to their aid in the event of any future hostilities, and they may be right. The US knows that European security is vital, but only London has the capability to act as the final insurance policy for other Europeans. In short, it – and only it – retains the physical capacity to ultimately oblige the US to become involved in any general European conflict. And because of Britain’s close geographic proximity to mainland Europe and the fact that British geostrategy is decidedly liberal – in other words, to prevent the continent falling under a universal tyrant – the UK’s intervention is practically guarenteed should a surrounding great power make a bid for European hegemony.

So, due to the de-facto binding together of the British and American intelligence-gathering capabilities and nuclear deterrents, the enormous material resources of the US (and Canada) will likely always be at the disposal of the UK. Conversely, as the US continues to ‘pivot’ or ‘rebalance’ to the Indo-Pacific, for similar reasons – albeit reversed – Washington will automatically acquire the means to compel London, and by extension, other European capitals, into any conflict it may get drawn into in the Indo-Pacific. Thus, so long as the UK and US continue to cooperate with one another with intelligence gathering and sharing and nuclear deterrence, the Atlantic Alliance will retain its strategic relevance, irrespective of its geostrategic focus. If other European countries are serious about supporting the Atlantic Alliance, they would do well to increase their military spending. This will help London and Washington should the international situation turn more volatile in the twenty-first century, providing them with the means to continue to assert the Pax Atlantica and thus maintain a durable peace.

**And activates every nuclear hotspot.**

Patrick F. Walsh & Seumas Miller 16, Walsh is a former intelligence analyst who has worked in Australian national security and law enforcement intelligence environments, senior lecturer, intelligence and security studies at the Australian Graduate School of Policing and Security, Charles Sturt University; Miller is a professorial research fellow at the Centre for Applied Philosophy and Public Ethics (CAPPE) (an Australian Research Council Special Research Centre) at Charles Sturt University (CSU) (Canberra) and the 3TU Centre for Ethics and Technology at Delft University of Technology, Foundation Director of CAPPE, Foundation Professor of Philosophy at CSU, and served two terms as a head of the School of Humanities and Social Sciences at CSU., “Rethinking ‘Five Eyes’ Security Intelligence Collection Policies and Practice Post Snowden,” Intelligence and National Security, vol. 31, no. 3, Routledge, 04/15/2016, pp. 345–368

A final challenge is how ‘Five Eyes’ governments manage policies and procedures for security intelligence collection against allies particularly political leaders. Are such leaders legitimate targets? It is common knowledge that most states have active counter-espionage targeting campaigns which support a range of decision-making processes of government: political/ diplomatic and economic. Security intelligence collection targeting historically has provided states an advantage in gaining a better understanding of the political and economic intentions of foreign political leaders (friendly and less friendly). ‘Five Eyes’ countries are going to continue wanting to target authoritarian (China, Russia, Iran) and rogue states (North Korea, Syria) and states of concern (Libya, Iraq, Afghanistan). The ongoing instability along the Russian and Ukraine border is also a good example of the importance of having viable counter-espionage security intelligence collection efforts to better understand the secret (not public) agendas of foreign leaders. But the Snowden revelations, particularly those relating to the NSA intercepting very close allies such as German Chancellor Angela Merkel’s cell phone, do show a lack of poor judgement. As President Obama commented in July 2013, no doubt in part to reduce the fall out in relations between Berlin and Washington, if he is interested in what Merkel thinks he will pick up the phone. While it is unlikely that no political leader would ever categorically rule out ‘spying on other allies’, the threshold for such a decision needs to be much higher and for exceptionally critical national security reasons – not just because the technology exists. So the Snowden leaks will influence the development of stricter policy and risk management guidelines, including most likely cabinet authority for future communication interceptions of political leaders who are close allies. The NSA Special Review recommended that a policy be established that would define the process on when intelligence can be collected against political leaders of friendly and allied countries.

### AT: Turns – AT: Flex Bad – 2NC

#### 2. CP solves. They said unions can check the executive. CP solves the internal link to that.

#### 3. Internal oversight plank solves. Ensures the executive never absues secrecy.

#### It creates internal oversight without leaking info to the judiciary.

Beth George 18, Non-Resident Senior Fellow for the New York University School of Law's Reiss Center on Law and Security and is a member of the American Law Institute, "An Administrative Law Approach to Reforming the State Secrets Privilege," New York University Law Review, August 2018, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-84-6-George.pdf

Notably absent from state secrets privilege doctrine is a role for an inspector general and an accounting mechanism under which the government would have to report the number of times and the context in which it has invoked the privilege. The President could easily create this requirement, and it constitutes the most basic of internal oversight mechanisms.

Most executive agencies have an inspector general who investigates claims of abuse.151 Inspectors general have been successful at rooting out abuses within agencies. For example, in 2008 the FBI’s Inspector General reported that it had uncovered thousands of abuses of NSLs.152

An inspector general should be required to conduct internal over sight of the state secrets privilege. Because the executive branch is responsible for national security matters, it may have the most competence to determine whether there have been abuses and whether the rules are adequate. An independent inspector general would be in a better position than the judiciary to investigate whether the privilege is being abused: She would have access to all of the information across all jurisdictions and understand the context in which claims of privilege arise. Her objection to the use of the privilege would also not result in governmental cries of judicial incompetence.

#### 4. The United States federal government should establish Congressional foreign policy oversight committees that enact organizational reforms to address overlapping missions, byzantine bureaucracy, dysfunctional hierarchies, updates to foreign assisstance legislation to address emerging threats, obsolete programmatic constraints, and evolving interagency rules, which receive routine, secure briefings from intelligence agencies on covert action details.

Ryan Evans 18, founder of War on the Rocks, a media outlet on strategy, defense, and foreign affairs, as well as Bedrock Knowledge, a software company that scales knowledge in and of the modern workforce from the Fortune 500 to the armed services, "At a Crossroads, Part III: Reasserting Congress' Oversight Role in Foreign Policy," War on the Rocks, 6/19/2018, https://warontherocks.com/2018/06/at-a-crossroads-part-iii-reasserting-congress-oversight-role-in-foreign-policy/

The bill covered tremendous ground, ranging from international adoptions to Inspector General audits of the Broadcasting Board of Governors. However, to secure passage, the committees had to craft a bill that was mostly non-binding, consisting largely of Sense-of-Congress statements and reporting requirements, thereby limiting its impact.

Rather than trying to cover the gamut in a single bill, foreign policy oversight committees should break down their priorities into small, digestible chunks that will encounter less political headwind. While the committees do pass targeted legislation on a regular basis, such legislation focuses almost exclusively on providing direction for specific foreign policies, rather than addressing structural or management issues. For example, three-quarters of the way through the current Congress, only one of the 17 bills or resolutions reported out of the House Foreign Affairs Committee — the Cybersecurity Diplomacy Act introduced following former Secretary of State Tillerson’s elimination of the State Department Cyber Coordinator’s office — addresses structural or management concerns. And there is much to do in this arena: A shortlist of priorities would include organizational reforms to address overlapping missions, byzantine bureaucracy, and dysfunctional hierarchies; updates to foreign assistance legislation to address emerging threats, obsolete programmatic constraints, and evolving interagency roles; reforms to personnel training and career development; a reexamination of resource allocation and oversight processes; and attention to festering infrastructure needs. But all of this doesn’t need to be done at once as part of an annual authorization bill. Many pressing needs represent low-hanging fruit that could be addressed with bipartisan support and would be unlikely to encounter much resistance or require significant time on the House and Senate floors.

The committees have developed a preference for seeking to address organizational and programmatic reforms through comprehensive authorization bills instead of narrow, focused efforts, perhaps because of challenges obtaining time for debating such legislation on the House and Senate floor, perhaps as a strategy for building coalitions of supporters interested in various individual provisions, or perhaps simply out of habit. Pressing forward with targeted, tailored bills to address discrete subsets of the foreign policy enterprise, on the other hand, would improve their ability to make progress on oversight priorities, even if they don’t succeed in addressing all of these priorities immediately. That progress would enable the committees to enhance their oversight and give much-needed direction to the State Department, while paving the way for broader legislation in the future by gradually eliminating lingering minor issues.

Second, focus on bureaucratics and programmatics. Too often, the committees have focused their energies on high-profile foreign policy crises rather than the bureaucratic and programmatic issues so vital to ensuring the executive branch can respond to such crises effectively. For example, during the 18 months of the 115th Congress, the House Foreign Affairs Committee has held 17 committee or subcommittee hearings on Iran and North Korea alone, and only two examining State Department organizational or management issues (excluding annual budget hearings, which cover a broad array of topics). Though U.S. policy toward North Korea and Iran is clearly important, in the long run, how the State Department and related agencies are organized, manned, resourced, prioritized, and empowered to execute activities will determine how effective America’s response is to these issues and any other crisis.

Third, prioritize results over turf. Recent years have provided numerous examples of instances in which the foreign affairs committees, needing to pass important legislation but failing to obtain floor time to debate it, have refused opportunities to attach their legislation to other measures. While piling non-germane legislation on defense bills is not ideal, these committees must be greedy and legislatively opportunistic to escape their current quagmire.

To draw upon an example I experienced first-hand as a staff member for the Senate majority leader, consider the Senate Foreign Relations Committee’s proposed Embassy Security Act, introduced in 2013 following the attacks against U.S. diplomatic facilities in Benghazi, Libya. After a handful of senators blocked this urgent bipartisan legislation from passage by unanimous consent, committee leaders had an opportunity to attach the legislation to the must-pass defense authorization bill, and did so in the Senate, but let it drop from the conference agreement due to concerns about the appearance of ceding jurisdictional ground to the Armed Services Committee. Instead, the bill languished unpassed for three years before some, but not all, of its provisions finally passed in 2016. The price for maintaining the jurisdictional high ground amounted to three years of inaction and loss of key elements of the bill, including allocations of funding for implementing critical security measures.

Other congressional committees are far more assertive in their efforts to add priorities onto moving legislative vehicles. The foreign affairs committees’ territorialism is shortsighted and counterproductive. Given the huge number of competing bills and amendments, it makes little sense to stand on principle while opportunities to achieve meaningful legislation go by.

Indeed, there are some benefits to be found in purposefully considering foreign policy and defense legislation simultaneously. Many experts have argued for a more holistic Legislative Branch approach to national security oversight, such as the development of a single national security budget. There is undoubtedly value in approaches that enable lawmakers to draw connections between disparate national security activities, and to consider trade-offs across the entire U.S. government’s equities. While a unified budget may be distant notion today, a more feasible approach may be structuring simultaneous debate of State Department and/or foreign assistance authorization legislation and defense authorization legislation.

Investing in Foreign Policy Oversight

A viable legislative strategy, buttressed by refocused oversight, would help foreign policy committees regain their relative power and relevance in Congress. But effective foreign policy oversight also requires that these committees address many of the same challenges plaguing their counterpart committees in the intelligence and defense arenas.

One such challenge is how to handle cross-jurisdictional issues in collaboration with other oversight committees. Like the other committees examined in this series, foreign policy oversight committees face numerous cross-jurisdictional concerns. Congress’ foreign affairs committees formally share jurisdiction with the banking and commerce oversight committees on a range of international trade issues, including export controls, overseas trade promotion, the International Monetary Fund, and the Committee on Foreign Investment in the United States. Informally, they compete with the armed services committees on oversight of overseas military operations, security assistance, and decisions to use military force. And while the committees assert jurisdiction over diplomatic service, the fact that numerous government departments — including the Departments of Agriculture, Commerce, and Treasury and the Federal Bureau of Investigation — maintain substantial foreign service or embassy attaché programs can introduce challenges there, too.

One of the trickier issues has been the committees’ roles in overseeing covert action programs and other sensitive intelligence matters. In recent years, leaks have appeared to increasingly put highly secretive covert action programs in the headlines. Given the approval roles of U.S. ambassadors as chiefs of mission in the countries where such actions are conducted, foreign policy committees have argued they ought to be privy to details about covert action programs before they are in the headlines. Additionally, media coverage of alleged covert action programs has dramatically affected sensitive diplomatic initiatives with important countries, both partners and adversaries. Yet, the committees are currently denied access to covert action compartments.

Committee leaders have sought arrangements that would enable the committees’ chairmen and ranking members to receive routine briefings from the intelligence committees on relevant covert action details. Such an approach seems rational and justifiable, and memoranda of agreement between these committees, in coordination with the Executive Branch, could set the terms of access and provide for policing of these privileges.

Another potential approach would be to formally create a “Gang of Sixteen” — expanding the current Gang of Eight, which consists of the Republican and Democratic lawmakers in the House and Senate and on the two intelligence committees, to include committee leaders of both the defense and foreign policy oversight committees in the House and Senate. While cumbersome, this approach would appropriately recognize the increasingly multi-dimensional nature of our national security environment. It would also enable more fruitful consideration of cross-jurisdictional equities and help guard against situations in which the Gang of Eight can become captive, voluntarily or involuntarily, to the intelligence community.

Cross-committee memoranda of agreement could improve cross-jurisdictional oversight in other areas as well, such as complex operations involving military, humanitarian, and governance dimensions. Likewise, as previous articles in this series have proposed for other committees, tools such as joint hearings and cross-committee task forces may be beneficial. Whatever the mechanism, increasing collaboration across artificial jurisdictional lines is an imperative for effective oversight in our current security environment, which no longer lends itself to stovepiped concepts of U.S. government action and influence.

Conclusion

Oversight is a profound responsibility, deeply embedded in the Constitution’s grant of powers to the Legislative Branch. Effective oversight means a serious, objective, and persistent examination of whether the Executive Branch is making use of the taxpayer resources entrusted to it in ways that are effective, efficient, accountable, and in accordance with law and congressional direction. It also means — critically, in this era of increasingly sophisticated threats and responses — helping to educate the public. To achieve both goals, it must be conducted with balance, bipartisanship, and restraint against tendencies to pursue political vendettas.

#### 5. Courts are too inflexible and lack the non-legal expertise to design foreign policy.

Elliott Fuchs 22, JD, Georgetown University Law Center, BA, Yeshiva University, Bar admissions, New York, "No Damage Without Damage Control: The Judiciary's Refusal to Engage with the Foreign Affairs Docket," Volume 35, Issue 4, 2022

I. COURTS ARE NOT EQUIPPED TO DEAL WITH FOREIGN POLICY

Courts have never been a good breeding ground for foreign policy. Judges are not politicians, and their expertise is the law and its application, not strategy and diplomacy.9 As Chief Justice Roberts once reminded the American populace, judges are “not politicians; we’re judges, we’re a court . . . .”10 It can, and should, be reasonably argued that removing the designation of politician and replacing it with judge or justice removes the expectation of certain skills, capabilities, and competencies, perhaps even the very ones needed to thrive in the politics of foreign affairs. They are different jobs, after all, and they come with different job descriptions. Additionally, as early American history shows, juries—a staple of the judicial system—were and are totally inappropriate for disputes that involve or implicate sovereigns, especially foreign ones.11 Finally, as a practical matter, international law and its application domestically is generally murky territory, which makes it especially sensitive territory in which a court can inflame interna tional tensions.12

Taken together, the judiciary is not the forum for foreign policy and dispute resolution related to it.

A. INTERNATIONAL DISPUTE RESOLUTION REQUIRES ENGAGEMENT THAT EXTENDS BEYOND LAW

Because of the system under which the judiciary operates, courts are not capa ble of handling matters of international consequence. Foreign policy and diplo macy require strategy. They require a certain wheeling, dealing, and negotiating that extend beyond applying the rule of law. That is why even though “the consti tution expressly grants Congress the power to regulate foreign [policy,] law makers have for decades provided presidents special authority to negotiate” on behalf of the country.13 Foreign policy often requires swift and decisive decision making that cannot be properly appreciated by the administrative clutter and backlog of a judicial system.14 The Constitution recognizes that foreign policy requires a certain degree of discretion and flexibility, which is why it made the executive – through what some have called “residual powers”15 – the “sole organ”16 of this domain. To be sure, scholars have noted that the Supreme Court may have been lazy when coining the sole organ language.17 The executive has never truly been the sole organ of foreign policy. Congress has always had a role to play. The courts, as the very existence of this paper suggests, have had a more minor role to play too.18

Still, the “sole organ” language can be helpful because it reflects that the Office of the Presidency has a certain flexibility which offers it great structural “advantages vis-à-vis the [other branches] in obtaining foreign affairs information and in responding to changing world conditions.”19 The justice system, in con trast, offers no such flexibility.20 As a mere finder of fact and law, the judiciary’s involvement in foreign disputes is at best awkward.21

Furthermore, foreign affairs cases extend beyond specific questions of law. National security, economics, and environmental concerns are among the count less concerns that might come up in any particular foreign affairs deliberation. The resolution to these issues is not necessarily rooted in law, rather, they are remedied and their initiatives are spearheaded in the form of policy and strata gem.22 It is true, to be sure, that sometimes a case revolving around domestic law may extend beyond law and into the realm of domestic policy.23 But a court reviewing matters of domestic policy is different in kind than one reviewing for eign policy, precisely because the courts have not reiterated time and again that they are ill-equipped to deal with domestic policy, as they have in the interna tional context. Furthermore, in the context of domestic policy, the judiciary itself will have to deal with the consequences of its decisions. It might not have the ability to do so in the foreign policy context.

It is worth noting that scholars have argued that courts are as equipped to han dle foreign affairs cases as they are to handle any other case. One scholar in par ticular went as far as to say that if a court’s lacking expertise “should disqualify them from adjudicating foreign relations issues, it should also disqualify them from adjudicating most other issues in the federal courts.”24 Perhaps this is true. But, once again, the operative and fundamental difference in the international context is the extent to which the courts themselves have conceded that they are unable to properly decide these cases.

In sum, requiring the judiciary to render decisions affecting foreign policy requires courts to either leave important non-legal policy issues out of their rul ings, or worse, include them – and participate in an endeavor in which they are “uniquely incompetent.”25

#### 6. Judicial involvement collapses the credibility of foreign policy.

Elliott Fuchs 22, JD, Georgetown University Law Center, BA, Yeshiva University, Bar admissions, New York, "No Damage Without Damage Control: The Judiciary's Refusal to Engage with the Foreign Affairs Docket," Volume 35, Issue 4, 2022

B. THE JUDICIARY’S CONSTRUCTION DOES NOT LEND ITSELF WELL TOWARD FOREIGN AFFAIRS

The construction of the American judicial system, relying as it does so heavily on the layman, does not lend itself well toward the work of foreign diplomats and diplo macy. Furthermore, requiring judges to make foreign policy determinations – as these cases inevitably do – may make judges work beyond their mandate and make political calculations. This, as articulated below, may be problematic in light of the ethical standards expected of judges.

1. JURIES ARE INAPPROPRIATE TO DECIDE FOREIGN AFFAIRS CASES

As the court system saw in the early days of the Republic, juries are biased, and these biases were especially potent in matters relating to foreign policy.26 Historically, juries were biased during the Neutrality Crises,27 unwilling as they were to convict French privateers,28 just as they were biased when it came to British debt cases.29

This presented a serious issue for the young Republic because “foreigners would not invest in a society whose legal institutions appeared arbitrary or capri cious.”30 Crucial to a (young) country’s success is “the attractiveness of a coun try’s . . . policies. [As such,] [w]hen our policies are seen as legitimate in the eyes of others,” the country is better off.31

Thus, the Framers recognized that foreign policy issues needed to be “insulated from . .. public sentiment.”32 That being the case, it is strange that the Framers by way of Article III handed these issues to the court system, where the societal opinion is often the dispositive factor.

Though the first Judiciary Act worked toward resolving the issue of jury bias by “eliminating juries in cases that had a direct impact on the nation’s revenue and commerce,”33 the “jury continues to occupy a special place in the judicial process.”34 Where a case implicates foreign affairs, the jury presents a risk of bias against certain countries or their political leadership.35 Even where no bias is present, a jury’s arbitrary or capricious decision can hurt the American govern ment in the eyes of the international community if it perpetuates inequitable out comes. This is not to say, of course, that foreign sovereigns or foreigners will per se fail to succeed in domestic litigation. On the contrary, some suggest that foreigners fare better in our judicial system.36

Still, there is an unpalatable potential disconnect between the way our jury sys tem is structured and foreign diplomacy. It could, and probably would, be viewed as degrading to a foreign sovereign that twelve laymen, who may not understand international politics, will assess matters of importance to foreign sovereigns in a courtroom.

After all, the United States itself does not want the treasury’s fate left to the hands of juries.37 That is why, with the exception of tort lawsuits,38 jurisdiction for lawsuits against the United States government generally belongs to the United States Court of Federal Claims.39 Notably, the Court of Federal Claims does not utilize juries. Rather, the United States government only puts the risk of its own liability in the hands of experienced expert judges. It should be no surprise, then, that other governments also may not want to be assessed by juries. And indeed, part of the rationale of the Foreign Sovereign Immunity Act (“FSIA”) was that it was demeaning to foreign sovereigns to give them the status of an ordinary party in our courts.40 It is the desire of the U.S. government to afford foreign sovereigns the “dignity that is consistent with their status as sovereign entities.”41

Ultimately, the American judicial system is not engineered for cases impacting foreign sovereigns.

#### 8. At most, it creates conflicting voices, which is the worst of all worlds.

#### 9. Executive flexibility is good. An expansive Article II solves terror, WMD prolif, and rogue nations, and great power war.

John **Yoo 24**. JD, Distinguished Visiting Professor, School of Civic Leadership, University of Texas at Austin; Emanuel S. Heller Professor of Law, University of California at Berkeley School of Law; Nonresident Senior Fellow, American Enterprise Institute. “Presidential Power in War and Peace.” https://www.hoover.org/research/presidential-power-war-and-peace

The writings of Machiavelli, Hobbes, Locke, and Blackstone may have influenced them, but, more importantly, the Framers had learned the lessons of history. They understood that foreign affairs are unpredictable and involve the highest of stakes, making them unsuitable to regulation by pre-existing legislation. Foreign affairs can demand swift, decisive action, sometimes under pressured or emergency circumstances, that is best carried out by a branch of government that does not suffer from multiple vetoes or disagreements. Legislatures are too large and unwieldy to take the swift and decisive actions required to defend the nation or conduct war. Our Framers replaced the Articles of Confederation, which had failed in part because it had no unified executive, with the Constitution’s single president for precisely this reason. Even when it has access to the same intelligence as the executive branch, Congress’s loose, decentralized structure would paralyze American policy while foreign threats grow.

Congress has no political incentive to mount and see through its own wartime policy. Members of Congress, who are interested in keeping their seats at the next election, do not want to take stands on controversial issues where the future is uncertain. They will avoid like the plague any vote that will anger large segments of the electorate. They prefer that the president take the political risks and be held accountable for failure.

As a former Senate aide and later a Justice Department official in 2001–2003, I saw this firsthand. I helped draft the 2001 Authorization to Use Military Force (AUMF) in the wake of the 9/11 attacks that empowered the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” The 2001 AUMF did not limit its approval to a place or a time, such as to a specific region or for a set number of years but offered the President open-ended authority to pursue those responsible for the 9/11 attacks all over the world. As a Justice Department official, I maintained that the President needed no authority from Congress to defend the nation. But President George W. Bush welcomed Congress’s political support and so we at DOJ and the White House drafted the AUMF—not Congress. When we sat down to negotiate over the draft, congressional leaders made virtually no changes to the text—they wanted to be able to claim later (as they did) that they had no responsibility for an armed conflict to come that might become unpopular

I witnessed a similar dynamic at work with the Iraq War. As the United States moved toward war against Iraq in the fall of 2002, President Bush decided again to seek the support of Congress. At the Justice Department, we believed that the President did not lack constitutional authority to attack Iraq, but we set to work drafting another AUMF. I remember briefing a senior senator, who was complaining that the White House was making him take a vote on Iraq that he didn’t want to take, and then asked the meaning of specific phrases. As a former Judiciary Committee aide myself, I had to remind him that the Senate excelled at not voting on anything it didn’t want to, and further that it was up to Congress to decide on the meaning of the AUMF’s text. I suggested that the senator offer amendments with more specific definitions, to which he responded with a face that must have approached horror. The last thing he wanted, he said, was his fingerprints anywhere on the text of the AUMF—it would make him responsible for the course of the Iraq War later. Even though the House passed the AUMF 296-133, and the Senate by 77-23, the support of Members of Congress became scarce when the Iraq War ran into hardships in Bush’s second term.

Congress’s track record when it has opposed presidential leadership has not been a happy one. Perhaps the most telling example was the Senate’s rejection of the Treaty of Versailles at the end of World War I. Congress’s isolationist urge kept the United States out of Europe at a time when democracies fell and fascism grew in their place. Even as Europe and Asia plunged into war, Congress passed Neutrality Acts designed to keep the United States out of the conflict. President Franklin Roosevelt violated those laws to help the Allies and prepare the nation into war against the Axis. While pro-Congress critics worry about a president’s foreign adventurism, the more dire threat to our national security may come from passivity and inaction, rather than from activity and aggressiveness.

Many point to the Iraq and Vietnam Wars as examples of the faults of the “imperial presidency.” Neither war, however, could not have continued without the consistent support of Congress. Congress authorized hostilities in Southeast Asia in the Tonkin Gulf Resolution, and it enacted an Authorization to Use Military Force in 2002 for Iraq. But even more significantly, Congress opened the purse to raise and fund the large military forces necessary to conduct the wars. And Vietnam ushered in a period of congressional dominance that led to the passage of the ineffectual War Powers Resolution and accepted a series of American setbacks in the Cold War. Congress passed the Resolution in 1973 over President Nixon’s veto, and no president, Republican or Democrat, has accepted the constitutionality of its 60-day limit on the use of troops abroad. No federal court has ever upheld the resolution. Even Congress has never enforced it.

Despite the record of practice and the Constitution’s institutional design, critics nevertheless argue for a radical remaking of the American way of war. They typically base their claim on Article I, Section 8, of the Constitution, which gives Congress the power to “declare War.” But these observers read the eighteenth-century constitutional text through a modern lens by interpreting “declare War” to mean “start war.” When the Constitution was written, however, a declaration of war served diplomatic notice about a change in legal relations between nations. It had little to do with the domestic constitutional process for launching hostilities. In the century before the Constitution, for example, Great Britain—where the Framers borrowed the phrase “power to declare War”—fought numerous major conflicts but declared war only once beforehand. By the time of the Constitution’s ratification, Hamilton could observe in Federalist No. 25 that “the ceremony of a formal denunciation of war has of late fallen into disuse.”

Our Constitution sets out specific procedures for passing laws, appointing officers, and making treaties. There are none for waging war, because the Framers expected the president and Congress to struggle over war through politics, not law. Other parts of the Constitution support this reading. Article I, Section 10, for example, mandates that the states shall not “engage” in war “without the consent of Congress” unless “actually invaded, or in such imminent Danger as will not admit of delay.” This provision creates exactly the limits desired by anti-war critics, complete with an exception for self-defense. Notice that the Constitution here uses “engage” in war, not “declare” war to refer to launching hostilities. If the Framers had wanted to require congressional permission before the president could wage war, they simply could have repeated this provision and applied it to the executive

Presidents do not have complete freedom to take the nation to war. Congress has ample powers to control presidential policy. Under Article I, Section 8 of the Constitution, only Congress can raise the military, which gives it the power to block, delay, or modify war plans. Before 1945, for example, the United States had such a small peacetime military that presidents who started a war would have to go hat in hand to Congress to build an army and navy to fight it. Since World War II, it has been Congress that has authorized and funded our large standing military, one primarily designed to conduct offensive, not defensive, operations (as we learned all too tragically on 9/11) and to swiftly project power worldwide. If Congress wanted to discourage presidential initiative in war, it could build a smaller, less offensive-minded military.

Congress’s check on the presidency lies not just in the long-term raising of the military. It can also block any immediate armed conflict through the power of the purse. If Congress feels it has been misled in authorizing war, or it disagrees with the president’s decisions, all it need do is cut off funds, either all at once or gradually. It can reduce the size of the military, shrink or eliminate units, or freeze supplies. Using the power of the purse does not even require affirmative congressional action. Congress can just sit on its hands and refuse to pass a law funding the latest presidential adventure, and the war will end quickly. Congress need not even risk a presidential veto; it can simply decline to enact the funds needed to keep a war going. Even the Kosovo war, which lasted little more than two months and involved no ground troops, required special funding legislation.

The Framers expected Congress’s power of the purse to serve as the primary check on presidential war. During the 1788 Virginia ratifying convention, Patrick Henry attacked the Constitution for failing to limit executive militarism. James Madison responded: “The sword is in the hands of the British king; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist.” Congress ended America’s involvement in Vietnam by cutting off all funds for the war. It did the same to prevent President James Polk for pursuing even grander aims in the Mexican-American War of 1846–1848.

Our Constitution has succeeded because it favors swift presidential action in war, checked by Congress’s funding power. If a president continues to wage war without congressional authorization, as in Libya, Kosovo, or Korea, it is only because Congress has chosen not to exercise its easy check. If Congress wants to prevent future presidents from waging wars abroad, it can re-orient the U.S. military away from its expeditionary focus. Congress need not fund the Navy’s carrier battle groups, which serve as portable air bases to station off the shore of hostile enemies. It need not provide the Army with a worldwide network of large bases, expensive overseas deployments, and offensive weapons systems. But Congress instead funds an expeditionary military designed to fight offensive wars abroad, rather than one aimed at homeland and hemispheric defense. Rather than presidential adventurism, the story of the last 80 years has been one of cooperation between the branches of government in pursuing a hegemonic role in defending the West. We should not confuse Congress’s desire to escape political responsibility for military setbacks as a defect in the Constitution.

A radical change in the system for making war might appease critics of presidential power. But it could also seriously threaten American national security. In order to forestall another 9/11 attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility. It is not hard to think of situations where congressional consent cannot be obtained in time to act. Time for congressional deliberation, which can lead to passivity and inaction, will come at the price of speed and secrecy.

The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security. Presidents can seize the initiative while Congress can check them with its power of the purse. Instead of imposing a legalistic process, the Framers left war to politics. As we confront the new challenges posed not just by terrorism, rogue nations, and WMD proliferation, but the return of great power rivalry, the president must take the initiative to protect the nation’s security, ideally with the support of Congress, but alone if necessary.

**That causes extinction from threat networks.**

Kevin **Scott 16**. December 21; Chief Operating Officer at New Market Veterans, M.A. in Military Strategic Studies from the U.S. Naval War College, B.S. in Environmental Science from the University at Buffalo; Defense Technical Information Center, “Countering Threat Networks,” https://apps.dtic.mil/sti/citations/AD1025082

e. Threat networks are often the most complex adversaries that exist within the OEs and frequently employ asymmetric methods to achieve their objectives. Disrupting their global reach and ability to influence events far outside of a specific operational area requires unity of effort across combatant commands (CCMDs) and all instruments of national power. The assistance of friendly nations and international organizations is vital to address threat network financing, recruiting, propaganda, and operational cells that cross multiple regions and exist in areas where US influence and presence is limited. Joint staffs must realize that effectively targeting threat networks must be done in a comprehensive manner. This is accomplished by leveraging the full spectrum of capabilities available within the joint force commander’s (JFC’s) organization, from intergovernmental agencies, and/or from partner nations (PNs).

2. Policy and Strategy

a. DOD strategic guidance recognizes the increasing interconnectedness of the international order and the corresponding complexity of the strategic security environment. Threat networks and their linkages transcend geographic and functional CCMD boundaries. CTN planning and operations require extensive coordination as well as innovative, crosscutting approaches that utilize all instruments of national power. The national military strategy (NMS) describes the need of the joint force to operate in this complex environment.

b. The NMS and Guidance for Employment of the Force direct combatant commanders (CCDRs) to work with each other across regional and functional seams. CCDRs must be able to employ a joint force to work with interagency and interorganizational security partners in the operational area to shape, deter, and disrupt threat networks. They may employ a joint force with PNs to neutralize and defeat threat networks.

c. CCDRs develop their strategies by analyzing all aspects of the OE and developing options to set conditions to attain strategic end states. They translate these options into an integrated set of CCMD campaign activities described in CCMD campaign and associated subordinate and supporting plans. CCDRs must understand the OE, recognize nation-state use of proxies and surrogates, and be vigilant to the dangers posed by super-empowered threat networks. Super-empowered threat networks are networks that develop or obtain nation-state capabilities in terms of weapons, influence, funding, or lethal aid. The JFC and staff should plan to deter, neutralize, or defeat threat networks, as well as maintain capability to counter violent extremism and pay particular attention to the intersection between state and non-state actors in an array of threats. Those threats include proliferation of weapons of mass destruction (WMD) expertise, material, and technology. The proliferation of WMD is particularly important due to the existential threat WMD may pose to the US and its allies. In combination with US diplomatic, economic, and informational efforts, the joint force must leverage partners and regional allies to foster cooperation in addressing transnational challenges.

3. Challenges of the Strategic Security Environment

a. The strategic security environment is characterized by uncertainty, complexity, rapid change, and persistent conflict. Advances in technology and information have facilitated individual non-state actors and networks to move money, people, and resources, and spread violent ideology around the world. Non-state actors are able to conduct activities globally and nation-states leverage proxies to launch and maintain sustained campaigns in remote areas of the world. The problem is complicated by the participation of both witting and unwitting facilitators who may provide products or services to both state and non-state actors. The security environment is fluid with local, national, regional, and transnational threats constantly changing, adapting, and intersecting. Alliances, partnerships, cooperative arrangements, and inter-network conflict may morph and shift week-to-week or even day-to-day. Threat networks or select components often operate clandestinely. The organizational construct, geographical location, linkages, and presence among neutral or friendly populations are difficult to detect during JIPOE, and once a rudimentary baseline is established, ongoing changes are difficult to track. This makes traditional intelligence collection and analysis, as well as operations and assessments, much more challenging than against traditional military threats.

b. Deterring threat networks is a complex and difficult challenge that is significantly different from classical notions of deterrence. Deterrence is most classically thought of as the threat to impose such high costs on an adversary that restraint is the only rational conclusion. When dealing with violent extremist organizations and other threat networks, deterrence is likely to be ineffective due to radical ideology, diffuse organization, and lack of ownership of territory. However, cost imposition may be useful against state sponsors or state-based threat networks. Therefore, due to the complexity of deterring violent extremist organizations, flexible approaches must be developed according to a network’s ideology, organization, sponsorship, goals, and other key factors to clearly communicate that the targeted action will not achieve the network’s objectives.

### Impact – Secrecy – 2NC

**Secrecy is caps escalation, preserves alliances, and stunts arms race spirals.**

Joshua **Rovner 20**. Associate professor in the School of International Service at American University. "The Blessings of Secrecy." War on the Rocks. 2/11/2020. warontherocks.com/2020/02/the-blessings-of-secrecy

Keeping secrets from public view can improve the quality of statecraft. It encourages candor among policymakers and their advisors, who are more likely to speak truth to power if they can do so quietly. Those in power are more willing to accept the truth if they do not fear that it will undermine their political future. When the public expects that intelligence estimates will be part of the public debate, however, policymakers will have powerful incentives to politicize the process. Similarly, intelligence officials with strong policy preferences may be tempted to slant their own findings to sway the public debate.

Emerging scholarship suggests that keeping secrets makes it easier for states to get along. Secrecy facilitates arms control in peacetime, because states are more likely to comply with agreements if they do not fear revealing military capabilities that could make them more vulnerable in a future conflict. The aftermath of the Gulf War offers a good illustration. Saddam Hussein tried to obstruct weapons inspections in Iraq during the 1990s in part because he feared revealing information that would put his personal security at risk. Greater openness would reveal not just Iraq’s weakness, but could provide targeting information to Iraq’s foes in the event of a war. Paradoxically, forcing Iraq to be more transparent encouraged it to be more belligerent. This in turn fueled U.S. suspicions and bolstered the case for regime change.

States are more likely to adhere to norms if they don’t realize how often norms are broken; if they knew the truth, then they would worry less about international opprobrium. Similarly, obfuscating evidence about foreign states’ activities may contribute to stability. States may conceal intelligence of proliferation, for example, in order to avoid setting off a security dilemma that could lead to a regional arms race. It may seem counterintuitive to extend a blanket of secrecy to potential rivals, but doing so may help buy time for policymakers to craft a more effective and safer response.

In wartime, secrecy helps states control escalation. Great powers engage in covert action against one another — and allow one another to remain covert — rather than run the risk of overt engagements that could escalate unpredictably. Such tacit deals were especially important during the Cold War, as the United States and Soviet Union looked for ways to compete that did not invite Armageddon. But the same logic may be present today. States that fear war but want to impose costs on adversaries may be drawn to a range of covert alternatives below the level of armed conflict.

Should those efforts fail, secret diplomacy can help states end wars by opening subterranean lines of communication. Such peace feelers would likely cause domestic controversy if they were known and thus make it difficult for negotiators to make credible promises. Conducting peace talks in secret keeps the spoilers at bay. During the prolonged Northern Ireland peace process, for example, British intelligence reportedly maintained clandestine lines of communication with armed groups. Public revelations would have likely led to accusations that the government was negotiating with terrorists, thus complicating efforts to end the violence.

### Link – UQ – AT: Thumper – AT: Civil Rights Cases

#### National security considerations trump civil rights claims.

Anthony John Trenga 16, senior United States district judge of the United States District Court for the Eastern District of Virginia, "What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege," Duke University Law School, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1017&context=mjs, March 2016

In assessing the nature and scope of the privilege, judges acknowledge, as the Reynolds Court explicitly noted, that the “compromise” reflected in the states secrets privilege impacts the constitutional values imbedded in a transparent, adversarial process.87 From that perspective, some judges see the privilege potentially operating to undermine the public’s perception of the judiciary’s legitimacy and independence.88 Nevertheless, judges generally reject Due Process clause and First Amendment challenges based on claims that a civil litigant has the same due process rights as a criminal defendant to present all available evidence89 or that the state secrets privilege violates a plaintiff’s constitutional right of access to the courts, counsel, or information needed to respond to an assertion of the privilege.90 In short, regardless of how a judge views competing constitutional values, in the end, national security considerations takes precedence over any other consideration.91

### Link – Spillover – 2NC

Ashley S. Deeks 13, Associate Professor of Law, University of Virginia Law School, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," Fordham Law Review, vol. 82, no. 2, 2013, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4941&context=flr

A. Defining the Observer Effect

The phrase “observer effect” describes the impact on executive policy setting of pending or probable court consideration of a specific national security policy. The executive’s awareness of likely judicial oversight over particular national security policies—an awareness that ebbs and flows— plays a significant role as a forcing mechanism. It drives the executive branch to alter, disclose, and improve those policies before courts actually review them. The observer effect is distinct from the executive’s response to court orders that require the executive to make specific changes to a particular security policy. The observer effect leads to nonmandatory policy changes by the executive—even before a court reaches the merits of a case challenging that policy (or a related one)—as a result of newfound uncertainty about whether and how courts may evaluate those policies.

The effect leads the executive to select different policies than those it would adopt if it were certain that those policies would not face judicial consideration. Where the executive has a high degree of confidence that a court will review its policy, the executive has strong incentives to select a policy option it is confident a court would uphold.18 Where—as often is true in national security cases—there is more doubt about whether a court will intervene, the executive may take a greater gamble in setting a policy.19 As long as judicial review is reasonably foreseeable, however, the observer effect results in a form of executive deference to courts—or deference to a prediction about the type of national security policy an “average” court would uphold.20

The theory that the executive responds to an observer effect contains a critical assumption worth stating plainly: the executive views law— including case law—as binding and tends to comply with it. In The Executive Unbound, Eric Posner and Adrian Vermeule express doubt about this proposition, arguing that the executive is unfettered by legal constraints.21 Their critics highlight various ways in which that statement is false as a descriptive matter, including by offering examples of situations in which the executive has declined to pursue its preferred course of action because it viewed that course as legally unavailable.22 The observer effect offers additional support for the conclusion that the executive branch is attuned to the power of law by showing how the executive internalizes anticipated judicial responses to its policies when drawing policy lines.23

1. Triggering Event

Various litigation-related activity can trigger the observer effect. This ranges from the filing of a nonfrivolous case, to some indication from a court that it may reach the merits of a case (i.e., ordering briefing on an issue, or rejecting the government’s motion for summary judgment), to the court’s consideration of the issue on the merits. The observer effect most clearly comes into play when a court becomes seized with a national security case after an extended period of judicial noninvolvement in security issues. The observer effect then kicks in to influence the executive’s approach to the policy being challenged in the triggering case, as well as to future (or other preexisting) executive policies in the vicinity of that triggering case. The other executive policies affected by the triggering case must be loosely related to the policy being challenged in the triggering case, but need not overlap with that precise policy. Thus, a U.S. Supreme Court holding that the United States must provide certain review procedures to individuals being held as enemy combatants in a particular geographic location will trigger the observer effect for many future policies related to detention, whether or not those policies directly implicate the factual or legal scenarios in the case that the Court decided.26

#### 2. The plan’s initial loss affects all future executive decisionmaking.

Ashley S. Deeks 13, Associate Professor of Law, University of Virginia Law School, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," Fordham Law Review, vol. 82, no. 2, 2013, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4941&context=flr

In addition to an initial, unexpected development indicating that a court may review a national security policy on the merits, future uncertainty plays a critical role in eliciting the observer effect. Particularly where the executive loses a triggering case on the merits, that triggering case introduces significant uncertainty into the executive’s national security decisionmaking processes. This forces the executive to take into account the possibility of future judicial oversight over related policies, even as it remains unclear whether the court actually will end up reviewing a particular policy on the merits, and, if it does, whether the court will uphold, strike down, or modify that policy.37 Where the executive is confident that no court will entertain a case implicating a particular executive national security decision, the observer effect will not appear. For instance, courts have virtually never entertained a case challenging the executive’s initial decision to use military force abroad.38 There is therefore no jurisdictional uncertainty in those cases; we should expect no observer effect on executive decisions to initiate hostilities overseas.

#### Including sacrificing secrecy!

Ashley S. Deeks 13, Associate Professor of Law, University of Virginia Law School, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," Fordham Law Review, vol. 82, no. 2, 2013, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4941&context=flr

In short, the observer effect can prompt the government to establish, amend, or reveal national security policies. The government does so with a view to avoiding—if possible—or prevailing in pending or likely future litigation. Undertaking these policy shifts on its own accord allows the executive branch to retain what it sees as vital control over the shape of the policies, even if, as a result, the executive produces policies that are somewhat less assertive than it would prefer.

#### 3. Catch-22. They’ll either overcorrect and make bad policy designed for judges rather than allies, OR undercorrect and make good policy that gets swamped by litigation.

Ashley S. Deeks 13, Associate Professor of Law, University of Virginia Law School, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," Fordham Law Review, vol. 82, no. 2, 2013, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4941&context=flr

a. Policymaking Under Uncertainty

Consider how the executive makes policy in the wake of a specific court decision: in most cases, the decision gives the executive detailed guidance about the constitutional or statutory provisions at issue. The executive still must undertake some level of interpretation (both of the legal texts and of the court’s opinion), but there is judicial language on hand to guide the executive in revising its policies. In contrast, when the executive makes policy decisions pursuant to the observer effect, either in the face of pending litigation or in anticipation of possible litigation, the executive is forced to make educated guesses about what policies will satisfy the courts (or at least what policy content will persuade the courts not to intervene). The dearth of national security law doctrine can make this task particularly challenging.

Developing policy under uncertainty poses a risk that the executive will overcorrect, establishing policies that are insufficiently attentive to national security imperatives. Given the widespread understanding that the president (and Congress) have incentives to produce policies that favor security over rights protections, however, this risk seems limited.146 Policymaking under uncertainty poses the opposite risk as well: that the executive will undercorrect and face time-consuming litigation, notwithstanding its policy shifts. This litigation both imposes a resource drain on the government and exposes the government to a reasonable likelihood that a court will strike down its policy. The risk of undercorrection is a more robust one, and examples such as the Combatant Status Review Tribunals and its litigation aftermath should serve to remind the government of the perils of misgauging judicial signals.

#### 4. Uncertainty replacing national security expertise with judicial expertise-driven policymaking.

Ashley S. Deeks 13, Associate Professor of Law, University of Virginia Law School, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," Fordham Law Review, vol. 82, no. 2, 2013, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4941&context=flr

b. Interagency Power Shifts

The observer effect shifts power from some players within the executive to others.143 In particular, the effect entails a partial shift in power away from intelligence agencies and the State and Defense Departments toward the DOJ, which has the greatest expertise in interpreting court decisions and in predicting future judicial behavior.

Some (nonjudicial) audiences may find this shift troubling. For national security issues that implicate international law, including the laws of war, the Departments of State and Defense have longstanding interpretive expertise and in many cases negotiated the applicable treaty language. A phenomenon that shifts policy-setting power away from those expert agencies may be worrying. From a “good government” point of view, there also is something intuitively unsettling about allowing litigation to drive government policymaking: it suggests that the government is seeking not the “best” policy, but only one that will survive judicial review.

**5. Precedent. Plan gives them the grounds to question other issues in national security.**

**Deeks 13** (Ashley S., attorney-adviser in the Office of the Legal Adviser at the U.S. Department of State, advised on the law of armed conflict, including detention, the U.S. relationship with the International Committee of the Red Cross, intelligence issues, conventional weapons, and the legal framework for the conflict with al-Qaeda, “The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference”, Fordham Law Review, Vol. 82, No. 2, cl)

As courts gain confidence and experience in adjudicating these cases, these courts become more willing to second-guess executive claims that courts lack the institutional capacity and expertise to handle national security issues.302 If the designated circuit consistently takes a strongly nondeferential approach to executive policies, the executive has reduced incentives to make modest policy changes to fend off court involvement. In such cases, the observer effect will wither away. This suggests that assigning cases by statute to a particular circuit or set of courts has significant disadvantages. Congress should be attuned to the impact this has on the separation of powers in national security cases and, where it chooses to designate a circuit, should consider additional ways to ensure a suitable balance between court oversight and executive flexibility in policymaking.

**And starts a doctrinal slippery slope.**

Mathew Edwin **Miller 10**, JD from University of Michigan Law School, Associate at Latham & Watkins LLP, “The Right Issue, the Wrong Branch: Arguments against Adjudicating Climate Change Nuisance Claims,” Michigan Law Review, November, 109 Mich. L. Rev. 257, Lexis

However, to say that cases like American Electric Power are justiciable just because plaintiffs allege a public nuisance begs the question: Why should such claims automatically be justiciable? It contravenes the purpose and articulation of the political question doctrine to suggest that nuisances are categorically justiciable because political questions have historically excluded torts between private parties and have focused instead on governmental issues like gerrymandering, foreign policy, and federal employment. n70 Again, Baker demanded"discriminating" case-by-case inquiries, rejecting "resolution by any semantic cataloguing." n71 Similarly, the fact that other public nuisance claims have not presented political questions in the past should not preclude such a finding in the climate context. n72 Indeed, the argument for nonjusticiability rests on the notion that climate suits are unique and therefore defy classification among tort precedent. n73 [\*271] Extending the political question doctrine to a public nuisance allegation would surpass precedent in terms of claim-category application. Yet with respect to the theory behind the doctrine, such an extension is proper because cases like American Electric Power would push existing nuisance law to embrace acomplex, qualitatively unique phenomenon that cannot be prudentially adjudicated. n74 The Supreme Court has never held that torts cannot present political questions, so prudential constitutional principles should similarly apply to them. This Note simply argues that the facts, claims, parties, and relief demanded in this particular mode of litigation should fall under the nonjusticiability umbrella, wherever its limits may lie. n75 The following analysis of Baker invokes the American Electric Power situation specifically for the sake of convenience, but the arguments therein should be read to apply to injunctive climate nuisance claims generally.

[FOOTNOTE]

n75. This Note does not purport to suggest exactly where the line ought to be drawn in applying the political question doctrine to tort claims. A consideration of the potential doctrinal "slippery slope" - where courts might improperly refuse to adjudicate claims solely on the basis of complexity - is beyond the scope of the present discussion.

#### 6. Attention tradeoff. Preempting litigation drains the time and resources necessary for national security planning.

Ashley S. Deeks 13, Associate Professor of Law, University of Virginia Law School, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," Fordham Law Review, vol. 82, no. 2, 2013, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4941&context=flr

c. Presidential Energy

The observer effect may force the president (or cabinet members) to spend time understanding complex litigation. Not all triggering events will require presidential attention, of course. But to the extent that triggering events—or dialogic language from a court in a prior case—lead the executive to implement systemic, high-level policy changes, the president and his cabinet usually need to understand the context in which the policy arises, how the policy currently operates, and the judicial activity that has influenced the proposed policy changes. Given the president’s limited time and consistently overburdened agenda, requiring the president to absorb and decide any additional set of complicated issues flowing from litigation means that he will spend less time on other important topics. On the other hand, when the litigation in question implicates some of the most profound and contestable national security issues in decades, there is good reason to expect—and, for purposes of political accountability, demand—that the president and his cabinet make these types of decisions.

#### 7. Hasty policy overhaul causes wreckless policy design.

Ashley S. Deeks 13, Associate Professor of Law, University of Virginia Law School, "The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference," Fordham Law Review, vol. 82, no. 2, 2013, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4941&context=flr

a. Rushed Policymaking

Litigation-driven policymaking forces the executive to make decisions quickly, when taking more time might result in a more considered policy. If the executive decides to respond to the pendency of litigation by making a policy change, the timeline for developing and assessing policy options is finite. Filing deadlines drive policymaking timelines. Time pressure may mean that the executive fails to consider the full range of policy options. It also may lead the executive to craft a policy that is internally inconsistent, produces unintended consequences, or fails to resolve the perceived problem.