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The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference

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ARTICLE

THE OBSERVER EFFECT: NATIONAL SECURITY LITIGATION, EXECUTIVE POLICY CHANGES, AND JUDICIAL DEFERENCE

Ashley S. Deeks*

The national security deference debate has reached a stalemate. Those favoring extensive deference to executive branch national security decisions celebrate the limited role courts have played in reviewing those policies. The executive, they contend, is constitutionally charged with such decisions and structurally better suited than the judiciary to make them. Those who bemoan such deference fear for individual rights and an imbalance in the separation of powers. Yet both sides assume that the courts' role is minimal. Both sides are wrong.

This Article shows why. While courts rarely intervene in national security disputes, the Article demonstrates that they nevertheless play a significant role in shaping executive branch security policies. Call this the "observer effect." Physics teaches us that observing a particle alters how it behaves. Through psychology, we know that people act differently when they are aware that someone is watching them. In the national security context, the executive is highly sensitive to looming judicial oversight in the national security arena, and establishes or alters policies in an effort to avert direct judicial involvement. By identifying and analyzing the observer effect, this Article provides a more accurate positive account of national security deference, without which reasoned normative judgments cannot be made. This Article makes another contribution to the literature as well. By illustrating how the uncertain, but lurking, threat of judicial decisions spurs increasingly rights-protective policy decisions by the executive, it poses a rejoinder to those who are skeptical that law constrains the executive.

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INTRODUCTION

One of the core tenets of national security doctrine is that courts play a deeply modest role in shaping and adjudicating the executive's national security decisions. In most cases, courts use abstention doctrines and other tools to decline to hear such cases on the merits. When courts do hear these cases, they often issue decisions that are highly deferential to executive choices.¹ The courts' behavior in the wake of the September 11, 2001 attacks largely bears this out: courts have declined to reach the merits of almost all of the cases challenging executive policies on renditions, detainee treatment and transfers, lethal targeting, and warrantless wiretapping.² And even where the courts have stepped in, they have focused on the decisional processes that surround executive decisionmaking, rather than on the substance of those decisions themselves.³

1. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY* 135 (2007) (stating that *Hamdi v. Rumsfeld* and *Rasul v. Bush* were "little more than slaps on the wrist" because the Court "did not at that time require the President to alter many of his actions"); BENJAMIN WITES, *LAW AND THE LONG WAR* 104–05 (2008); Owen Fiss, *The Perils of Minimalism*, 9 *THEORETICAL INQUIRIES L.* 643, 647 (2008) (suggesting that the Supreme Court has resolved Guantánamo-related cases on "the narrowest ground" necessary); Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 *COLUM. L. REV. SIDEBAR* 122, 125 (2011) (arguing that courts have been "decidedly unwilling to engage the substance of counterterrorism policies").

2. See, e.g., *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (warrantless wiretapping); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (rendition); *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (detainee transfers); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (targeting).

3. See, e.g., Linda Greenhouse, *The Mystery of Guantánamo Bay*, 27 *BERKELEY J. INT'L L.* 1, 20 (2009) ("How is it that the Administration has lost, and lost, and lost again, and still has not been ordered against its will to release a single detainee?"); Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 *SUP. CT. REV.* 225, 238–39 ("Final judgments in habeas cases were thus directly and proximately linked to relief in less than two percent of actual releases from Guantánamo."); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *THEORETICAL INQUIRIES L.* 1 (2004) (arguing that in

Some national security scholars celebrate this state of affairs.⁴ In their view, courts are structurally ill equipped to assess the executive's intelligence and security calculations, which often must be made rapidly and which carry important foreign policy implications. These scholars also believe that the executive is far more accountable to the public than courts, such that its decisions will be guided and tempered by the public will.

Other scholars, in contrast, bemoan the absence of courts from the playing field.⁵ To them, the executive has undue incentives to emphasize security values over liberty values, and only a vigorous judicial role can counter that. More broadly, these scholars view robust judicial deference to the executive as weakening a critical tool by which to inhibit a single branch of government from accruing undue power. Both camps tend to assume, however, that the courts *do* play only a limited role in executive calculations about appropriate national security policies.

That assumption is flawed, and this Article demonstrates why. Against a backdrop of limited direct judicial involvement in its security policies, the executive is highly attuned to potential court action. When the executive faces a credible threat of litigation or the pendency of one or more specific cases, it often alters the affected national security policies in ways that render them more rights protective. These policy changes remain in place regardless of the outcomes of particular cases and affect a large number of individuals. This Article refers to this phenomenon as the "observer effect." In physics, the "observer effect" refers to the changes that an act of observation makes on the phenomenon being observed.⁶ In psychology, some experts believe that individuals alter their performance or behavior when they know that someone else is observing them.⁷ In the context of

times of crisis courts focus on the institutional processes by which the political branches make decisions); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661 (2009); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008); Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 111 (2012) (noting that legal victories in the high-profile "war on terror" cases directly resulted in very little change in petitioners' lives). *But see* Trevor W. Morrison, *The Middle Ground in Judicial Review of Enemy Combatant Detentions*, 45 WILLAMETTE L. REV. 453, 470–71 (2009) (concluding that the Court has made substantive judicial decisions on national security statutes while leaving constitutional questions undecided). The habeas cases are an exception to the courts' reluctance to opine on the specific status of detainees, though (as discussed *infra*) the D.C. Circuit has proven very government friendly in these cases.

4. *See infra* Part III.C.1.

5. *See infra* Part III.C.2.

6. *Quantum Theory Demonstrated: Observation Affects Reality*, SCI. DAILY (Feb. 27, 1998), <http://www.sciencedaily.com/releases/1998/02/980227055013.htm>.

7. This is often called the Hawthorne effect. *See* L.N. JEWELL, CONTEMPORARY INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 4 (1998) (defining the Hawthorne effect as "changes in behavior that are brought about through special attention to the behavior"); DEBRA L. NELSON & JAMES CAMPBELL QUICK, UNDERSTANDING ORGANIZATIONAL BEHAVIOR, at A-4 (2003) (stating that people's knowledge that they are being studied leads them to modify their behavior). To the extent that the observer effect in psychology works even when the observer takes no action, it is not a perfect analogue to the effect I describe in this Article. This Article's observer effect requires courts to take some action, even if limited, to prompt executive policy alterations.

this Article, the observer effect refers to the effect on the executive⁸ when it becomes aware that a court soon may review on the merits a particular executive policy.

For example, in the context of looming litigation, the government repeatedly has amended its detention review procedures in Afghanistan, each time granting detainees increased levels of procedural protections—even though courts have never mandated that it do so. It has regulated its own invocation of the state secrets doctrine, introducing additional layers of process and a commitment to external oversight, even though the courts ultimately upheld the government’s use of that doctrine in several series of cases. It has revealed details about the long-classified process by which it determines when and under what conditions it would transfer security detainees to foreign governments. And it has established more rigorous procedural hurdles for itself before it will seek to use secret evidence in deportation cases—all as a result of the observer effect.

Legal scholarship lacks a sustained theoretical account of how and why this phenomenon works to influence executive policymaking.⁹ Courts are not the only audiences for executive policies, and as a result the observer effect is not the executive’s only source of incentives to alter those policies. However, because courts can strike down executive policies, force the executive to comply with specific policies crafted by the courts, and mandate the creation of new policies as a matter of law, courts are a key audience for the executive’s national security policies. As a result, it is important to understand when, how, and why the observer effect works.

The observer effect, however, does more than simply inform why and how the executive changes its national security policies. It also can (and should) inform ongoing descriptive and normative debates about national security deference. Some scholars claim that “in crises, the executive

8. As many have noted, the executive (like courts and Congress) is a “they,” not an “it.” Indeed, tensions among different agencies that have equities in a particular policy affect the strength of the observer effect in particular cases. *See infra* Part II.A.1.b. For ease of discussing the interbranch relationship between the executive and the courts, however, this Article generally refers to the “executive branch” or the “U.S. government” as a single entity.

9. *See* Keith E. Whittington, *Judicial Checks on the President*, in *THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY* 646, 661–62 (George C. Edwards III & William G. Howell eds., 2009) (“Even more intriguing, however, is the possibility of further work examining the executive and how it responds to the courts, or fails to do so. . . . [U]nderstanding how both institutions think about and react to one another will ultimately be essential to understanding the operation of the judicial check. Relatively little is known about how judicial signals are processed within the executive branch and how legal interpretations are made, permeated, and implemented through the executive branch. . . . In short, the judicial check will matter more if the executive branch anticipates it and adjusts its behavior accordingly. Further theoretical and empirical investigation is needed to flesh out whether and under what conditions the executive anticipates judicial action.”); *see also* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 *U. CHI. L. REV.* 653, 656 (1985) (“[I]t is important to keep in mind the fact, traditionally overlooked in discussions of judicial review of agency action, that the availability of review will often serve as an important constraint on regulators during the decisionmaking process long before review actually comes into play.”).

governs nearly alone, at least so far as law is concerned,”¹⁰ and that the courts’ monitoring function is broken.¹¹ Scholars are sharply divided about whether that is a good thing or a bad thing. The existence of the observer effect calls into question a key premise of the debate by revealing that the executive does not in fact govern “nearly alone,” at least when the executive reasonably can foresee that a court may step in to review particular security policies. Yet the way the observer effect operates allows the executive to preserve and utilize its functional advantages to craft pragmatic security policies, avoiding what critics see as the more problematic effects of judicial involvement in national security decisionmaking.

A word is in order about the normative desirability of the observer effect. The overriding goal of this Article is to explain the observer effect, rather than to justify it. It also is exceedingly complicated (if not impossible), as an empirical matter, to determine whether the policy shifts engendered by the effect advance or hinder an ideal balance between national security and individual liberty.¹² Nevertheless, in laying out the operation of the observer effect, this Article shows why the present system is better than we may think at preserving the respective strengths of courts and the executive, as long as courts periodically (and perhaps unpredictably) decline to defer to the executive.

This Article proceeds as follows. Part I introduces the idea of the observer effect and identifies a number of its real world manifestations. This Part also explores why the effect is highly relevant in the national security arena, without foreclosing the possibility that it operates in other areas of law. Part II further parses the phenomenon, considering the second-order effects that follow when the executive develops national security policies in the shadow of court observation, and the factors that make the observer effect most potent. This Part then argues that the explicit and implicit dialogue that transpires between the courts and the executive plays an important role as the executive, under the influence of the observer effect, considers where to establish the contours of its policy. Part II also addresses the extent to which the observer effect is a distinct cause of policy change. Part III identifies the observer effect’s implications for national security law. It describes the empirical and normative debates about national security deference and argues that the observer effect has been a missing element in those debates. After identifying the constitutional equities underlying these deference debates, it defends the conclusion that the observer effect allows courts and the executive to advance different

10. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4 (2010).

11. *Id.* at 18–19.

12. Jack Goldsmith, *A Reply to Professor Katyal*, 126 HARV. L. REV. F. 188, 193 (2013) (“The optimal level of presidential constraint—in national security and other contexts—is elusive because it depends on ever-changing and sometimes unknowable facts (about, for example, the nature of the threat or the efficacy of particular counterterrorism policies), as well as contested normative judgments (about, for example, what the Constitution permits or what morality requires).”).

separation of powers values at a lower cost than generally is recognized. With those constitutional values in mind, Part IV explores how and why courts, the executive, and Congress may wish to amplify (or minimize) the observer effect.

I. THE OBSERVER EFFECT AND EXECUTIVE POLICYMAKING

Political scientists and some legal scholars have long understood that the three branches of the federal government are strategic actors. Each branch recognizes the interdependence of its actions in relation to the other branches, and each takes into account the predicted reactions by the other branches when making its decisions.¹³ Much of the scholarly work exploring this interdependence focuses on the Congress-court and Congress-executive relationships, with less attention paid to the executive-court interplay.¹⁴

This Part explores the strategic (and interdependent) relationship between the executive branch and courts in the national security context, in an attempt to understand the executive's "anticipated response calculations,"¹⁵ and how those calculations should affect the way we evaluate national security deference. In the national security arena, the executive historically has claimed for itself (and the courts and Congress have given it) significant flexibility of action. In cases ranging from *Haig v. Agee*¹⁶ to *Al-Aulaqi v. Obama*,¹⁷ courts have acknowledged the need to rely on the executive's unique capacities to protect the country from national security threats. One naturally might think that the executive's response calculations would be muted at best: with little fear of oversight or overruling, the executive should have a reduced need to be strategic when setting security policies. This conception of the executive's response calculations, however, significantly oversimplifies the executive-court relationship in the national security arena.

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—

13. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 36 (1994) (claiming that interdependent decisionmakers "will behave strategically, choosing the course of action that best achieves their goals in light of how they anticipate other decisionmakers will respond to their own possible choices"); Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision-Making*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 34 (Gregory A. Caldeira et al. eds., 2008).

14. *See supra* note 9.

15. Eskridge & Frickey, *supra* note 13, at 36 (emphasis omitted). In Adrian Vermeule's phrasing, the article specifies one mechanism by which uncertainty in the legal system produces institutional caution. Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 180 (2008).

16. 453 U.S. 280, 295 (1981).

17. 727 F. Supp. 2d 1, 1 (D.D.C. 2010).

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

18. One might expect to see an intense form of the observer effect in a typical agency decision to issue a formal rule on a controversial topic, such as environmental regulation. In these cases, the executive will be keenly aware of the courts' past and future involvement (and jurisprudence) when setting policy. High-frequency, direct scrutiny of executive branch policies would pose a problem for national security policymaking, but a theme in this Article is that the courts (and the public) can reap at least some of the rewards of potential judicial oversight without such high-intensity judicial involvement.

19. For a few examples of situations in which an entity's awareness that it might be watched affects that entity's behavior, see IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 4–5 (1992) (arguing that when the government credibly asserts a willingness to regulate intrusively, it may prompt actors in the marketplace to produce regulations of their own), and JACK GOLDSMITH, *POWER AND CONSTRAINT* 205–06 (2012) (describing the effect on prisoners of their awareness that a guard may or may not be watching their misbehavior).

20. When the government does not know in advance what judge (or panel of judges) will hear the case, the government effectively will need to calculate the “average” views of the federal judiciary. That task becomes easier when many national security cases arise (or when Congress mandates that litigants bring particular types of cases) in the same circuit—as with detainee habeas cases in the D.C. Circuit. In the latter case, the government would contemplate whether a particular policy would survive a panel composed of three judges who often are least sympathetic to government positions.

21. POSNER & VERMEULE, *supra* note 10, at 4 (“[T]he legally constrained executive is now a historical curiosity.”).

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

Several scholars have expressed an intuition that legal uncertainty plays an important role in limiting the extent to which the political branches aggrandize their own powers.²⁴ However, legal scholarship offers no discussion of why and how uncertainty about judicial involvement affects executive policy choices, particularly in the national security area.²⁵ This section does so. The observer effect results from the confluence of at least three elements: (1) a triggering event; (2) robust jurisdictional or substantive uncertainty; and (3) the likelihood of recurring scenarios.

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

22. Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1398–1403 (2012); see also Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777 (2012); Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 974 (2012).

23. See Pildes, *supra* note 22, at 1401 (discussing the “undoubted tendency of presidents to make decisions, or avoid them, with an eye toward the anticipated responses of other relevant actors”).

24. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1042 (2004) (stating that courts during peacetime issue “remarkably astringent commentaries on the use of emergency powers,” which produces “a cloud of suspicion and restrains officials who might otherwise resort to emergency powers too lightly”); Prakash & Ramsey, *supra* note 22, at 992 (“Judicial review of executive action matters because the knowledge of such review affects what the Executive will do. Executives typically do not wish to be sued, meaning that they often will take measures designed to stave off such suits and avoid actions that raise the risk of litigation.”); Vermeule, *supra* note 15, at 180 (suggesting that a possible benefit of legal uncertainty is that it “creates a kind of caution, keeping all actors or institutions from pressing the limits of their authority”).

25. Political scientists have used game theory to explore the relationships between the different branches of government and the way in which constraints imposed by other institutions define the nature of a particular institution's power to act. See Rui J. P. de Figueiredo, Jr. et al., *The New Separation-of-Powers Approach to American Politics*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 199 (Barry R. Weingast & Donald A. Wittman eds., 2006); Matthew D. McCubbins & Daniel B. Rodriguez, *The Judiciary and the Role of Law*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY, *supra*, at 273, 274 (stating that the fundamental insight of positive political theory is that courts are constrained in their interpretive choices by the possibility that Congress may overturn their decisions). Even though the observer effect incorporates a comparable insight—that the executive is constrained in its policy choices by the possibility that the courts may overturn those policies—I have found no studies that apply game theory to the relationship between the executive and the courts outside the framework of the Administrative Procedure Act.

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

Consider a situation in which the executive branch long operated without judicial oversight. Military decisions about who to detain as enemy belligerents offer a paradigmatic case.²⁷ For decades, the military made independent decisions about which individuals to detain during armed conflict without considering that a court might oversee or revisit these decisions.²⁸ Along came Yaser Hamdi, an American citizen detained by U.S. forces on the battlefield in Afghanistan in 2001 and brought to the United States.²⁹ Hamdi's father filed a habeas petition in June 2002, contending that Hamdi's detention was unlawful.³⁰ The subsequent Supreme Court decision came as a surprise to many in the U.S. government.³¹ The decision accepted the government's legal theory that it may detain individuals associated with the Taliban as "enemy combatants."³² But the opinion gave little deference to the argument that the executive's constitutional authorities during wartime permitted the government to avoid giving Hamdi any opportunity to challenge his detention. Rather, the Court ordered the U.S. government to create a process whereby a citizen-detainee may challenge his classification as an enemy combatant and required that that process include notice of the factual basis for his classification and a fair opportunity to rebut those assertions before a neutral decisionmaker.³³ The Court thus effectively prevented the

26. There clearly are cases where the observer effect has not had as robust an impact as one might predict, and this Article offers some hypotheses for weaker and stronger manifestations of the effect.

27. GOLDSMITH, *supra* note 19, at 166 (noting that the Court almost always sided with the executive branch in cases involving its military powers during war); *id.* at 167 (stating that each of the Bush Administration's two primary legal arguments supporting detention at Guantánamo were backed by old legal precedents); *id.* at 179 (noting that on the surface, the Bush Administration's legal arguments in support of military commissions appeared sound because they relied on previous executive and Court precedents).

28. *Id.* at xi.

29. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

30. *See id.* at 511.

31. In 1946, a federal court addressed whether the executive could lawfully detain an American-born Italian soldier as a prisoner of war. That court concluded that the soldier could not secure his release through a habeas claim. *In re Territo*, 156 F.2d 142 (9th Cir. 1946). This and other World War II precedents prompted Bush Administration lawyers such as David Addington to predict that the Supreme Court would not countermand the Commander-in-Chief during wartime. GOLDSMITH, *supra* note 1, at 134.

32. *Hamdi*, 542 U.S. at 518.

33. *Id.* at 533.

executive from retaining sole discretion about whether, when, and how to review the status of its detainees. The filing of the litigation and, more importantly, the Court's holding serve as a triggering event in the detention area.³⁴

The existence of the observer effect leads to a prediction that U.S. national security policies will cycle between more aggressive and more cautious postures.³⁵ Where the executive is quite certain that courts will not review particular security policies, its policies will tend to be more aggressive. Then, one or more triggering events leads the executive to shift a variety of its national security policies in a more modest direction, partly to fend off further judicial encroachments. As executive policies "improve" over time, and as courts establish predictable jurisprudence on the issue and give increasing deference to those more rights-protective policies, the observer effect weakens until it falls away.³⁶ At that point, a new triggering case will be needed to start the cycle again.

34. Other recent triggering cases include *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008). In *Rasul*, the Court concluded that detainees at Guantánamo were entitled to statutory habeas corpus review of their detentions. In the government's view, there was very limited uncertainty up to that point about whether their decision not to provide habeas to detainees was lawful; the precedents—on their face—supported the government's arguments. See GOLDSMITH, *supra* note 19, at 189 (describing the administration's argument in *Rasul* as reflecting the best reading of the precedents, strictly construed); Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorneys Gen., U.S. Dep't of Justice, Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def., Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001). In *Hamdan*, the Court declined to defer to the executive's interpretation of the Geneva Conventions and the Uniform Code of Military Justice, though it did so without discussion. This presumably produced a relatively unfocused observer effect by fostering significant executive uncertainty about whether *Hamdan* represented a new era of reduced deference in national security cases. See Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1097 (2009) ("[T]he tension between *Hamdan* and court precedents requiring deference to the executive produces a regime of legal uncertainty that could dissuade the executive branch from pressing its expansive constitutional-avoidance and implied-repeal theories in other contexts whenever judicial review of the merits is possible, even if the courts ultimately decide to avoid ruling on the merits."). *Boumediene* served as a triggering case because it set off broad questions about the future jurisdictional reach of habeas corpus extraterritorially, including for people held as enemy belligerents in Afghanistan and elsewhere.

35. This is not to suggest that the executive branch fails to consider individual rights when setting national security policies. In some cases, those officials who set the policies are of two minds about the right approach to a given national security issue and presumably will express their ambivalence in interagency discussions. See, e.g., DANIEL KLAIDMAN, *KILL OR CAPTURE* 41–42 (2012) (describing President Barack Obama as being personally torn about policies such as the use of "signature strikes" to target individuals who bore terrorist characteristics but whom the U.S. government had not specifically identified). In other cases, different executive agencies simply bring different perspectives to the table about how rights-protective a given policy should be. That disparity of views prompts consideration of different ways in which policies under discussion could take into account (or preclude) specific individual rights or liberty values.

36. As of late 2013, the observer effect appears to be at a low point in the cycle. The D.C. Circuit has established quite predictable jurisprudence on detainee issues and the Supreme Court has declined to hear a detainee-related case since it issued its decision in *Boumediene v. Bush* in 2008.

2. Uncertainty

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.

Two interrelated forms of uncertainty are particularly relevant: jurisdictional uncertainty and substantive uncertainty. Jurisdictional uncertainty exists when it is unclear whether a court will conclude that it can or should exercise jurisdiction over a case—that is, whether a case is justiciable. This includes cases in which court-created doctrines that limit merits consideration may apply. Substantive uncertainty exists where it is not obvious what law will govern the dispute at issue, or where there is little precedent to guide the courts in resolving the dispute. We should expect the observer effect to be strong when either type of uncertainty is present.³⁹

37. See David A. Martin, *Offshore Detainees and the Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125, 156 (2005) (noting that uncertainty about which cases a court might review “provides an ongoing external incentive for the administrators to set up the administrative system in as professional and careful a manner as possible”). The fact that courts (and the law generally) may foster uncertainty in the mind of future litigants has academic roots in the well-known article by Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Mnookin and Kornhauser argue that when divorce law is unclear, negotiations will take place against a backdrop of uncertainty and affect each party's risk calculations. See generally *id.*

38. See *Kucinich v. Obama*, 821 F. Supp. 2d 110, 115–16 (D.D.C. 2011) (referring to a line of cases that has “all but foreclosed the idea” that members of Congress may assert legislative standing to sue the executive for a use of force abroad); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1728 n.11 (1996).

39. It is hard to predict whether the observer effect will be stronger when (a) both forms of uncertainty are present, or (b) when only substantive uncertainty is present. In the former case, where there is some chance that a court will exercise jurisdiction over a case, as well as a lack of clarity about where the court would come out on the merits, the executive will be attuned both to the possibility of court intervention and to the uncertainty about whether the court will uphold its policy. This also means that the executive has ample room to structure its policies to try to avoid judicial review entirely. In the latter case, the executive may have less room to craft its policies, but it faces the certainty of judicial review, which tends to focus the mind. One example might be wartime detentions conducted inside the United States: courts clearly have habeas jurisdiction but, at least in 2003, it was not clear what

In contrast, where there is neither jurisdictional uncertainty nor substantive uncertainty, the executive will be quite confident that it will win the case and will have little incentive to alter its policies in anticipation of litigation or its outcome.⁴⁰

Both jurisdictional and substantive uncertainty abound in national security cases. There are a variety of grounds on which courts have “condoned executive initiatives in foreign affairs by refusing to hear challenges to the president’s authority.”⁴¹ These include decisions that the case was not ripe, that it presented a political question, that it was moot, that the plaintiffs lacked standing, that the defendant was immune from suit, that the plaintiffs lacked a cause of action, or that the plaintiffs’ requested relief created grounds for dismissing the case.⁴² Harold Koh suggests that lower courts have dismissed so many challenges to executive conduct that “their opinions now seem to pick and choose almost randomly from among the available abstention rationales.”⁴³ Nevertheless, a line of cases exists in which courts *have* exercised jurisdiction over national security decisions, which is critical to sustaining jurisdictional uncertainty.⁴⁴

As for substantive uncertainty in the national security area, things have not changed much since Justice Robert Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.⁴⁵ There he wrote,

A judge, like an executive advisor, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.⁴⁶

In Jack Goldsmith’s view, “What the law required was uncertain at best in 2002, and if anything, it favored the government.”⁴⁷ Various international and domestic law questions arose in the wake of the September 11 attacks: Could nonstate actors commit armed attacks against a state that trigger the state’s right of self-defense? How do the Geneva Conventions apply to terrorist groups that operate from within different states? What review procedures must a state apply to detentions not covered by the

standards courts would apply to review the government’s determination that an individual was an enemy combatant. See John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 446 (2003).

40. This assumes that the executive’s policy is consistent with existing law. It is hard to imagine responsible governmental decisionmakers intentionally taking an approach known to be inconsistent with existing doctrine.

41. HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION* 146–47 (1990).

42. *Id.* at 147.

43. *Id.*

44. See Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 392 (2010).

45. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

46. *Id.* at 634–35.

47. GOLDSMITH, *supra* note 19, at 166.

Conventions?⁴⁸ What activities did the 2001 Authorization for Use of Military Force (AUMF) approve? Faced with questions such as these—and virtually no domestic precedent for how to handle them—there was considerable substantive uncertainty before and in the first several years after September 11, 2001.

3. Prospect of Future Litigation

The third factor that helps secure the observer effect's operation is the likelihood of future litigation on related issues. If a court declines to defer to the executive in a particular case, that decision is unlikely to create an observer effect if the executive is confident that the factual and legal questions at issue in that case will not arise again.⁴⁹ In contrast, when the executive perceives that a set of policies is likely to come under sustained litigation (and thus under the potential oversight of multiple judges over time), it is more likely to concertedly review those policies.

The iterative litigation on U.S. detention policies offers a paradigmatic example. Among the first set of cases that the courts took up after September 11 were cases involving detainees held at Guantánamo or in the United States. From this body of cases, it is easy to see (especially in retrospect) how litigation then followed from detainees held in other locations (Iraq and Afghanistan); from Guantánamo detainees challenging other aspects of their detention, including transfers to third countries; from individuals who alleged that the government had transferred them to third countries where they were mistreated; and from former detainees for alleged mistreatment while in U.S. detention. The first Guantánamo cases proved to be the tip of a very large iceberg of detention-and-transfer-related litigation. As this trend became clear to the executive, it would have secured the operation of the observer effect.

* * *

When these three elements are present, the observer effect is likely to come into play. How does the executive react? This Article assumes that the executive branch is, collectively, a rational actor that attempts to maximize the total value of two elements: a sufficiently security-focused policy and unilateral control over national security policymaking. To achieve this goal, the executive often is willing to cede some ground on the first element to retain the second element.

The executive branch therefore often responds to the presence of these three elements by shifting its policy to a position that gives it greater confidence that the courts would uphold it if presented with a challenge to

48. For a discussion of such questions, see John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201 (2011).

49. Of course, the observer effect may kick in during the pendency of the triggering case itself, causing the executive to modify its challenged policy in the middle of litigation.

that policy.⁵⁰ This does not mean, however, that it will establish or revise its policy to a point at which it has full confidence that a court will deem the policy acceptable. Instead, the executive has strong incentives to take a gamble: all the executive needs to do is establish a policy that is close enough to what a court would find acceptable that it alters the court's calculation about whether to engage on the merits.⁵¹ The executive thus will shift from a policy that would prompt nondeference to a policy that allows the court credibly to defer. On occasion, the executive may adopt policies that are more rights protective than what a court eventually requires. In at least one recent case, the executive adopted policies that proved more protective of detainee equities than the court of appeals ultimately demanded.⁵² With these shifts in policy, the executive narrows the "degree" of deference required to uphold the policy in question because the assertion of executive authority is more modest. The next section provides several real world examples of such policy shifts.

B. Examples of the Effect

The executive's response to the observer effect generally manifests itself in one of three ways: the executive creates a policy from whole cloth, amends an existing policy, or reveals new information about the internal procedures by which the executive implements a particular policy. Several real world examples illustrate how the observer effect impacts executive policymaking.

50. Embedded in this is an assumption that "abstention" doctrines give courts significant flexibility to credibly decline to adjudicate a range of cases. See Michael J. Gerhardt, *How a Judge Thinks*, 93 MINN. L. REV. 2185, 2189 (2009).

51. One could draw parallels to the idea of "enforced self-regulation," in which "[e]ach firm in an industry is required to propose its own regulatory standards if it is to avoid harsher (and less tailored) standards imposed by the state." AYRES & BRAITHWAITE, *supra* note 19, at 101; see also Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009). Posner and Vermeule describe ways in which the executive can signal his credibility to the public by *diminishing* presidential control over policymaking, through a mechanism they term "self-binding." Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 868 (2007). This self-binding allows the president to demonstrate that his chosen policies are benign and faithful to the public's desires, with the broader goal of accruing greater executive power in other areas. At a general level, the observer effect prompts a form of self-binding, as it leads the executive to limit its own scope of action in particular policy contexts. The executive's goal in the latter situation, however, is somewhat different from the goal of the "self-binding" described by Posner and Vermeule. The operation of the observer effect tends to allow the executive to *retain* control over policymaking in specific contexts by deterring direct judicial intervention.

52. The government accepted that it needed to prove by a preponderance of the evidence that a detainee met its detention standard. The D.C. Circuit suggested that it would be content with a lower standard—possibly a "some evidence" standard. *Al-Adahi v. Obama*, 613 F.3d 1102, 1104–05 (D.C. Cir. 2010). Additionally, the D.C. Circuit panel in *Al-Bihani v. Obama* concluded that the executive had unnecessarily tied its hands in finding itself bound by international law in interpreting the AUMF. *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010). The D.C. Circuit, sitting en banc, later deemed that conclusion dicta. *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (en banc). These appear to be examples of what John Calfee and Richard Craswell termed "overcompliance." John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 965 (1984).

1. Establishing Policy

The observer effect may pressure the executive to create new policies to fend off future litigation. In particular, a triggering event may suggest to the executive that the lack of a policy process to govern certain decisions will expose it to a new wave of lawsuits. In this case, the executive crafts a policy to signal to courts that it is monitoring its own actions responsibly.

The observer effect manifested itself in several ways in some of the earliest post-September 11 litigation. That it did so suggests that the effect plays a role even in presidential administrations that adhere to a particularly strong version of executive unilateralism. In 2003, the Court granted certiorari in *Rasul v. Bush*.⁵³ The petitioners in *Rasul* sought review of their detention under the federal habeas corpus statute.⁵⁴ To that point, the government had asserted that the laws of war allowed it to hold detainees at Guantánamo as combatants until the end of the conflict without according them a hearing.⁵⁵ The looming Court review prompted the government to establish a new policy toward detainee hearings.⁵⁶ On the day that the U.S. government's merits brief was due in the Court, the government promulgated Administrative Review Boards (ARBs). The ARBs constituted an annual threat-based review, intended to ensure that the executive did not hold detainees at Guantánamo longer than national security required.⁵⁷ The executive almost certainly concluded that it would be more likely to win *Rasul* in the Supreme Court if it had a better story to tell about its detention policies, particularly if the executive developed a predictable avenue by which to review each detainee's case and release or transfer some detainees. The fact that the executive described these new procedures in its brief to the Court supports this theory.⁵⁸

As is well known, the government lost its case in *Rasul*, with the Court holding that Guantánamo detainees were entitled to statutory habeas corpus.⁵⁹ On the same day, the Court in *Hamdi* held that the United States was required to provide a U.S. citizen detainee with "notice of the factual basis for his [enemy combatant] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."⁶⁰

53. 540 U.S. 1003 (2003) (mem.).

54. 28 U.S.C. § 2241 (2006).

55. John Mintz, *U.S. Outlines Plan for Detainee Review*, WASH. POST, Mar. 4, 2004, at A10.

56. Martinez, *supra* note 3, at 1050.

57. Memorandum from Deputy Sec'y of Def. to Sec'ys of the Military Dep'ts, Chairman of the Joint Chiefs of Staff, Under Sec'y of Def. for Policy, Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, ¶ 1(c) (July 14, 2006), available at <http://www.defense.gov/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

58. Brief for the Respondents at 5–6, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739, at *5–6.

59. *Rasul*, 542 U.S. at 484.

60. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

The Court's decision in *Rasul* created uncertainty for the executive: What processes should the government establish to address the forthcoming habeas challenges from Guantánamo detainees? And what level of review would the district courts exercise in assessing the legality of the detainees' custody? *Hamdi* provided somewhat greater guidance about what processes might pass constitutional muster, but the decision on its face only applied to American citizens. In what seems to have been an effort to create a substitute for statutory habeas review and to get out in front of possible future court decisions applying *Hamdi*-type reasoning to alien detainees, the executive established Combatant Status Review Tribunals (CSRTs), an executive-only process that assessed whether each detainee at Guantánamo was an unlawful enemy combatant.⁶¹ The government probably believed that the CSRTs would deter the courts from examining, in any level of detail, the executive's decision to hold detainees. Comments by then-Deputy Secretary of Defense Gordon England provide evidence that the observer effect operated here. Deputy Secretary England noted that *Hamdi* involved a U.S. citizen, but that the decision "raised concerns about potential implications for noncitizen detainees."⁶² He also described the decision to establish CSRTs, which applied to citizens and aliens alike, as an effort to "get ahead of the curve."⁶³

To the extent that the CSRTs created in 2004 reflected a policy judgment by the executive about where the courts would come out in future cases, the executive misjudged its hand significantly.⁶⁴ Yet the observer effect does not predict that, in every case, the executive will shift its policy to a location acceptable to courts. It only explains when and why the executive will be attuned to perceived judicial preferences as it draws policy lines.

61. The government continued to argue against judicial review of the outcomes of individual CSRT proceedings entirely, and posited that if judicial review were required, "it should go no further than to determine whether there is 'some evidence' supporting the findings of activity or status that the President . . . has determined to warrant removal of an alien from the field of battle." Response to Petitions for Writ of Habeas Corpus and Motion To Dismiss or for Judgment As a Matter of Law and Memorandum in Support at 50, *Hicks v. Bush*, 452 F. Supp. 2d 88 (D.D.C. 2006) (No. 04-CV-1254 (HHK)), 2004 WL 5378102.

62. STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE H. ARMED SERVS. COMM., 112th CONG., LEAVING GUANTANAMO 51 (Comm. Print 2012).

63. *Id.*; see also David A. Martin, *Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 AM. J. INT'L L. 344, 349 (2007) (noting that the government's changes to its detention policies evidently were intended "to reduce exposure to negative rulings in the predictably forthcoming Guantánamo habeas challenges").

64. The *Rasul* opinion might also have created uncertainty for the executive about whether future courts might conclude that detainees at Guantánamo had constitutional rights. See, e.g., *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory."). The observer effect occasioned by this uncertainty may have led the executive to argue in its post-*Rasul* briefs that CSRTs would satisfy Fifth Amendment due process requirements. Response to Petitions for Writ of Habeas Corpus and Motion To Dismiss or for Judgment As a Matter of Law and Memorandum in Support, *supra* note 61.

2. Amending Policy

More commonly, the observer effect creates pressure on the government to improve existing policies. This occurs when a triggering event prompts the executive to revisit existing policies through the lens of possible judicial review.

a. Detention

In several cases, the observer effect has manifested itself as pressure to modify existing detention policies to provide greater procedural protections to detainees. One example is the president's 2011 Executive Order, which reinstated, updated, and renamed the Administrative Review Boards, the system for conducting periodic threat-based reviews of detainees at Guantánamo.⁶⁵ There are several reasons that the executive may have chosen to do this, including to mitigate pressure from constituents who hoped that President Barack Obama would close Guantánamo. But the executive likely also took this step to try to stave off a second round of habeas litigation.⁶⁶ The executive presumably is (and should be) concerned that if it detains some of the individuals at Guantánamo for another several years without additional review, the courts may step back in to review the detainees' cases, even though federal courts rejected their habeas petitions once before.

*Hamdi v. Rumsfeld*⁶⁷ and *Boumediene v. Bush*⁶⁸ may have focused the government's mind on this risk. The majority in *Hamdi* stated:

If the Government does not consider this unconventional war won for two generations . . . then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life. . . . Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict If the practical circumstances of

65. Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

66. Two aspects of the Executive Order's Periodic Review Board (PRB) process may represent executive efforts to respond to concerns previously expressed by courts. First, the PRBs allow detainees to hire private counsel; the Court in *Boumediene v. Bush* was concerned about the detainees' lack of assistance of counsel during their Combatant Status Review Tribunals. See *Boumediene v. Bush*, 553 U.S. 723, 767 (2008); Exec. Order No. 13,567, *supra* note 65, § 3(a)(2). Second, the Executive Order provides that when the PRB designates a detainee for transfer, "the Secretaries of State and Defense shall be responsible for ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the United States and the commitment set forth in section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998." Exec. Order No. 13,567, *supra* note 65, § 4(a). A persistent strain of litigation has pressed courts to order the executive to transfer detainees after they have been identified as eligible for such transfers. Section 4(a) appears to constitute a strong signal to courts that the executive is committed to finding appropriate placements for those detainees.

67. 542 U.S. 507 (2004).

68. 553 U.S. at 723.

a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.⁶⁹

Justice Kennedy echoed this sentiment in *Boumediene v. Bush*, noting, “Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”⁷⁰

The Court thus has signaled its potential impatience for detention that begins to look indefinite. This may well have led the executive to announce a policy (updated from the Bush Administration’s version) that signaled its continued attention to those detentions, and that, once underway, may prompt the executive to release additional detainees from Guantánamo. Periodic detention reviews by the executive may give courts greater confidence that those detainees have not been “warehoused” for the rest of their lives, and that they face some prospect of release. In May 2012, the Department of Defense issued implementing guidelines for the Executive Order, though reviews under the Order have not yet begun.⁷¹

The government frequently announces its changed policies during the pendency of litigation in an effort to persuade the relevant court that it need not review on the merits the status of a particular set of detainees. For instance, the executive twice modified the policies by which it reviews the status of those in U.S. military custody in Afghanistan, likely in response to then-ongoing litigation (and pursuant to an additional observer effect radiating from the *Boumediene* decision, which held that Guantánamo detainees have a constitutional right to habeas corpus).

In *Al Maqaleh v. Gates*, a D.C. District Court had to decide, in the wake of *Boumediene*, whether certain detainees held by the Defense Department in Afghanistan were entitled to habeas corpus review.⁷² The *Boumediene* Court established several factors that are relevant to determining when constitutional habeas attaches extraterritorially.⁷³ One factor requires courts to assess the adequacy of the process by which the United States has

69. *Hamdi*, 542 U.S. at 520–21.

70. *Boumediene*, 553 U.S. at 797–98; *see also id.* at 801 (Souter, J., concurring) (“After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today’s decision is . . . an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.”).

71. Memorandum from U.S. Deputy Sec’y of Def. to Sec’ys of the Military Dep’ts et al., Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13,567 (May 9, 2012), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/DTM-12-005.pdf>. The observer effect thus may have provided the impetus to develop and announce the new policy, but the continued pro-government rulings in the D.C. Circuit, and the Supreme Court’s decisions not to grant certiorari in any new Guantánamo cases, suggest that the observer effect may have waned in this area. Without a looming threat of judicial involvement, the executive faces reduced incentives to initiate reviews under the 2011 Order.

72. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 207 (D.D.C. 2009).

73. *Boumediene*, 553 U.S. at 766.

determined a detainee's status.⁷⁴ In applying that factor in *Al Maqaleh*, the D.C. District Court criticized the executive's detention procedures at Bagram as falling short of even the much-maligned Guantánamo detention review procedures.⁷⁵ The court held for the detainees but allowed the government to take an interlocutory appeal.⁷⁶ In September 2009, just before filing its brief in the D.C. Circuit, the Obama Administration issued new guidelines for detention review in Afghanistan that gave the detainees a greater ability to challenge their custody.⁷⁷ In news reports, a Defense Department official acknowledged that the new policies would bolster the government's case, stating, "We want to be able to go into court and say we have good review procedures."⁷⁸ Although the D.C. Circuit formally based its decision on the old review procedures rather than the new ones,⁷⁹ this does not mean that the government's public issuance of the new procedures had no effect on the court's decision. Those new procedures may well have given the D.C. Circuit additional confidence in holding for the U.S. government. If so, the Defense Department's altered policies had their desired effect.

In 2010, the *Al Maqaleh* detainees refiled their case, claiming changed circumstances.⁸⁰ Just before the government's brief was due in district court, the process repeated itself, with the Obama Administration revealing another rule change that favored the petitioners.⁸¹ The change ensured that exchanges between detainees and their personal representatives would be considered confidential, establishing something akin to the attorney-client privilege.⁸² In the U.S. government's motion to dismiss the detainees' amended petitions for a writ of habeas corpus, the government discussed in detail the changes to the detainee review process, noting,

Whatever weight the Court of Appeals had placed on the [Unlawful Enemy Combatant Review Board] procedures then at issue before it, it is necessarily true that new [Detainee Review Board] procedures can only

74. *Id.*

75. *Al Maqaleh*, 604 F. Supp 2d at 219.

76. *Id.* at 235–36.

77. Eric Schmitt, *U.S. Will Expand Detainee Review in Afghan Prison*, N.Y. TIMES, Sept. 13, 2009, at A1 ("The changes have come as the administration is expected as early as Monday to file a formal written brief explaining its opposition to a ruling by a federal district judge, John D. Bates, in April.")

78. *Id.*

79. *Al Maqaleh v. Gates*, 605 F.3d 84, 96 n.4 (D.C. Cir. 2010).

80. *Al Maqaleh v. Gates*, 899 F. Supp. 2d 10 (D.D.C. 2012).

81. See Memorandum from Dep't of Def. to U.S. Military Forces Conducting Detention Operations in Afg., Detainee Review Board Policy Memorandum (July 11, 2010), available at http://www.politico.com/static/PPM205_bagrambrfb.html.

82. According to one report, "The memo was originally classified 'secret' but was apparently declassified before being filed in court Thursday in cases seeking court review of the detentions of several prisoners at Bagram." Josh Gerstein, *U.S. Officers Representing Afghan Prisoners Get More Lawyerly, Under the Radar*, POLITICO (May 20, 2011, 5:12 PM), http://www.politico.com/blogs/joshgerstein/0511/US_officers_representing_Afghanistan_prisoners_get_more_lawyerly.html. The decision to reveal this policy might also fit within the examples listed in Part I.B.3, *infra*.

further support the Court of Appeals' ultimate conclusion that the Suspension Clause does not apply to Bagram Airfield.⁸³

The district court recently held that habeas does not extend to the *Al Maqaleh* petitioners, taking note in its opinion of the "procedural improvements" that were "at least marginally better and more detainee-protective" than the prior procedures at Bagram.⁸⁴

The observer effect triggered by the holding in *Boumediene* and the mere existence of the *Al Maqaleh* litigation is unmistakable. Several military officers (writing in their nonofficial capacity) described *Boumediene's* effect on detention procedures in Afghanistan. For example, Lieutenant Colonel Jeff Bovarnick (then the Chair of the International and Operational Law Department at the Army Judge Advocate General School) compares *Boumediene* and *Al Maqaleh* and notes that "if the same litigation pattern emerges for the Afghanistan detainees, then it follows that the detention review procedures in Afghanistan will receive the same scrutiny as the [Guantánamo Combatant Status Review Tribunals]."⁸⁵ Similarly, Colonel Fred Ford writes, "*Boumediene*, and the potential extension of its holding, impacts U.S. detention operations not only at Guantanamo Bay but also at Bagram and other current or future detention facilities."⁸⁶ Ford bemoans the ambiguity that this decision occasions in the executive.⁸⁷ This Article, in contrast, identifies ways in which this type of uncertainty may advance separation of powers values.

Beyond the impact that *Boumediene* and *Al Maqaleh* may have had on the U.S. government's specific detention procedures in Afghanistan, those cases cast a more diffuse shadow over the direction of U.S. detention in Afghanistan. As the executive branch navigates its drawdown of troops in

83. Respondents' Motion To Dismiss Amended Petitions for Writ of Habeas Corpus at 24, *Al Maqaleh*, 899 F. Supp. 2d at 10 (No. 1:06-cv-01669-JDB).

84. *Al Maqaleh*, 899 F. Supp. 2d at 24, 25.

85. Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., June 2010, at 9, 14; see also GOLDSMITH, *supra* note 19, at 13 ("[M]otivated in part to fend off habeas corpus review in Afghanistan, the Obama administration had begun to raise the standards of the screening and detention procedures for suspects held in Afghanistan."); Bovarnick, *supra*, at 35 ("Until Congress enacts a law specifying the legal framework for battlefield detention review for terrorists—or, as the current trend has gone, until the Executive's current [Detainee Review Board] procedures are specifically commented on by the federal courts—the main question will remain: What procedural protections should be afforded to detainees captured on a foreign battlefield . . . ?").

86. Fred K. Ford, *Keeping Boumediene Off the Battlefield: Examining Potential Implications of the Boumediene v. Bush Decision to the Conduct of United States Military Operations*, 30 PACE L. REV. 396, 411 (2010); see also GOLDSMITH, *supra* note 19, at 193–94 (quoting senior lawyers in Afghanistan as worried about the prospect that the Supreme Court will overturn the D.C. Circuit's *Maqaleh* decision, and as saying that these military lawyers warn capturing units that law of war detention "must adhere the [sic] highest legal standards to avoid habeas litigation").

87. Ford, *supra* note 86, at 410 (arguing that the Department of Defense "is in the untenable position of having to conduct a war and plan for future engagements in an uncertain legal landscape"); see also Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 850–51 (2011) (explaining why uncertainty about who may be detained may be problematic).

Afghanistan and begins to transition detention responsibilities to the government of Afghanistan, it faces pressure from Congress not to release a number of detainees it now holds. At the same time, it faces a countervailing problem: it does not want to make affirmative declarations that it will not release particular individuals for fear that doing so will tempt the D.C. Circuit to revisit its holdings in *Al Maqaleh*.⁸⁸ The observer effect thus continues to shape U.S. detention policy more broadly.

b. State Secrets

Detention is not the only area in which the observer effect may have influenced the evolution of national security policy. The observer effect seems to have contributed to the executive's decision to alter—and render more restrained—its policy about invoking the state secrets privilege. The state secrets privilege is a common law privilege that the government may invoke when a case raises legal challenges that cannot be proven or defended without disclosing information that would jeopardize U.S. national security.⁸⁹ The privilege protects against the release of information that would impair the nation's defense capabilities, reveal intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments.⁹⁰ The privilege has many critics, who fear that the privilege allows the executive unfettered discretion and usurps judicial power.⁹¹

The executive has invoked the privilege with some regularity, including to prevent two types of lawsuits from proceeding: challenges to the National Security Agency's warrantless wiretapping and claims for damages resulting from alleged U.S. renditions of terrorist suspects from one country to another.⁹² Courts have not reacted uniformly to this litigation. In the rendition litigation, for instance, the Fourth Circuit upheld the government's invocation of the privilege.⁹³ In April 2009, however, a panel of the Ninth Circuit rejected the use of the privilege in *Mohamed v. Jeppesen Dataplan, Inc.*, concluding that it was not appropriate to stop the lawsuit at the outset.⁹⁴ The Ninth Circuit agreed to hear the case en banc and eventually reversed the panel holding, but not before the U.S. Attorney General announced a new state secrets policy.⁹⁵

88. See Charlie Savage & Graham Bowley, *U.S. To Retain Role As a Jailer in Afghanistan*, N.Y. TIMES, Sept. 6, 2012, at A1.

89. Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1931 (2007).

90. *Id.* at 1935–36.

91. *Id.* at 1932 & n.2.

92. *Id.* at 1941.

93. See *El-Masri v. United States*, 479 F.3d 296, 299–300 (4th Cir. 2007).

94. See *Mohamed v. Jeppesen Dataplan, Inc. (Jeppesen I)*, 579 F.3d 943, 949 (9th Cir. 2009).

95. *Mohamed v. Jeppesen Dataplan, Inc. (Jeppesen II)*, 614 F.3d 1070, 1076–77 (9th Cir. 2010) (en banc). The Justice Department announced its new policy on September 23, 2009. *Id.* at 1077. The Ninth Circuit issued its initial decision against the government on

In September 2009, the Attorney General instituted new Department of Justice (DOJ) policies and procedures governing when and how the government would assert the state secrets privilege in litigation.⁹⁶ The new policy was intended to promote “greater accountability” and ensure that the privilege “is invoked only when necessary and in the narrowest way possible.”⁹⁷ It highlighted three forms of independent oversight over the privilege’s use: judicial oversight over classified evidence that supports the use of the privilege, referrals to relevant Inspectors General when there are credible allegations of government wrongdoing but a possibility to successfully claim the state secrets privilege, and a DOJ commitment to provide periodic reports to congressional oversight committees on cases in which the government has asserted the privilege.⁹⁸

To be clear, pending and future litigation was not the only impetus for the Obama Administration’s decision to alter its state secrets policy. Several members of Congress pressured the Administration to decrease its use of the privilege. Even before the Ninth Circuit panel rejected the Administration’s invocation of the privilege, the Administration had established a task force to review the executive’s use of the privilege. Nevertheless, the Ninth Circuit panel decision, which firmly rejected the privilege in that case, very likely increased the pressure on the government to rework the procedures it would employ before invoking the privilege. Even the district judge who heard the *Jeppesen* case at the trial level and who upheld the government’s use of the privilege reflected concern during oral argument about the use of the state secrets privilege to suppress a case involving civil liberties.⁹⁹

As a result, the executive had multiple audiences for this policy shift, including Congress and some of the president’s constituents. Another audience was the courts: the executive surely intended this policy shift to affect judicial reactions to future executive assertions of the privilege. And it has had this effect. In a decision issued after the September 2009 policy change, then-Chief Judge Royce Lamberth articulated misgivings about approving a settlement in a long-running CIA-related case because he believed that the government originally acted inappropriately in invoking the privilege.¹⁰⁰ He also was concerned that no U.S. officials would be held

April 28, 2009, *see Jeppesen I*, 579 F.3d at 943, and its en banc decision on September 8, 2010, *see Jeppesen II*, 614 F.3d at 1070.

96. Memorandum from the Attorney Gen. to the Heads of Exec. Dep’ts & Agencies & the Heads of Dep’t Components, Policies and Procedures Governing Invocation of the State Secrets Privilege 1 (Sept. 23, 2009), *available at* <http://www.justice.gov/opa/documents/state-secret-privileges.pdf> [hereinafter State Secrets Memorandum].

97. Press Release, Dep’t of Justice, Attorney General Establishes New State Secrets Policies and Procedures (Sept. 23, 2009), *available at* <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html>.

98. State Secrets Memorandum, *supra* note 96, at 2–4.

99. Howard Mintz, *Judge Considers Suit Over San Jose Company’s Alleged CIA Torture Flights*, SAN JOSE MERCURY NEWS (Feb. 5, 2008), http://origin.mercurynews.com/breakingnews/ci_8176582.

100. *Horn v. Huddle*, 699 F. Supp. 2d 236 (D.D.C. 2010).

responsible for the underlying wrongdoing.¹⁰¹ He nevertheless found it “encouraging” that the Attorney General had issued new guidelines for the proper use of the privilege, which the court “applaud[ed].”¹⁰² The court attached the Attorney General’s policy as an appendix to its decision.¹⁰³

Likewise, in *Jeppesen*, the Ninth Circuit cited the new procedures in reaching its conclusion that the government had not invoked the privilege to “avoid embarrassment or to escape scrutiny.”¹⁰⁴ The new policy thus clearly played a role in subsequent court decisions, though it is impossible to determine that the policy change directly caused the outcome. The executive branch has cited the policy itself in litigation: the DOJ attached the Attorney General’s guidelines as an exhibit to its motion for summary judgment in the *Al-Aulaqi* case, in which it invoked the state secrets privilege.¹⁰⁵ Doing so reflects an interest in ensuring that the court is aware of the government’s self-imposed restraints on the policy’s use.

c. Secret Evidence in Immigration Proceedings

The observer effect is not limited to the post–September 11 world. For example, since the 1950s the Immigration and Naturalization Service (INS) has sought to use secret evidence to support its decisions to deport aliens and legal permanent residents or to deny asylum to noncitizens.¹⁰⁶ In 1999 and 2000, several administrative and court rulings rejected the agency’s use of such evidence. In at least one such case, the DOJ declined to pursue deportation, even though the government had a reasonable chance of winning its case on appeal.¹⁰⁷ Indeed, the government altered its practices and procedures in response to these judicial critiques of its use of secret evidence.¹⁰⁸ The FBI General Counsel testified that the DOJ instituted internal procedures to ensure that the government only used classified evidence when it was “necessary to adequately serve the national interest.”¹⁰⁹ He stated that the DOJ was establishing guidelines and regulations to regularize and improve the process of using classified

101. *Id.* at 238–39.

102. *Id.* at 239.

103. *Id.* at 239–43. It may have done so both to give itself cover for the pro-government decision it reached and to signal to the executive that the court had relied on the executive’s policy commitments to reach its holding.

104. *Mohamed v. Jeppesen Dataplan, Inc. (Jeppesen II)*, 614 F.3d 1070, 1090 (9th Cir. 2010) (en banc).

105. Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendants’ Motion to Dismiss at 6, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469-JDB), 2010 WL 3863135 (arguing that the “military and states [sic] secrets privilege, invoked only after substantial deliberation and consistent with the Department of Justice’s new Guidelines would also bar disclosure of the evidence” (citation omitted)).

106. *Shaughnessy v. Mezei*, 345 U.S. 206, 208–09 (1953); *House Holds Hearings on Use of Secret Evidence*, 77 INTERPRETER RELEASES 301, 302–03 (2000).

107. *Martin*, *supra* note 37, at 157.

108. *See id.*

109. *Secret Evidence Repeal Act of 1999: Hearing on H.R. 2121 Before the H. Comm. on the Judiciary*, 106th Cong. 14 (2000) (statement of Larry R. Parkinson, Gen. Counsel, FBI).

information in court, and that the Attorney General and Deputy Attorney General were personally involved in the efforts.¹¹⁰ The more rigorous internal review continued even after the courts of appeals vacated the critical district court rulings on appeal or criticized those rulings in ancillary proceedings.¹¹¹

3. Publicizing Policy

A third type of pressure imposed by the observer effect prompts the executive to reveal nonpublic executive policies and, in doing so, try to attest to its own responsible behavior. Once the policies are widely available, foreign governments, NGOs, and legal scholars can assess and debate them.¹¹² The disclosure provides a baseline against which courts and the public may evaluate future executive behavior and challenge that behavior when it appears to countermand the stated policy.¹¹³ Of course, these disclosures are self-serving; they reflect an executive calculation that these policy revelations are likely to benefit the executive's case at a manageable cost. And not all litigation leads to disclosure: in some cases, being sued causes government officials to be more cautious than usual about making public statements on issues implicated by the litigation. Nevertheless, the executive has revealed a number of policies under the influence of the observer effect.

The government's decision to reveal publicly the process by which it determines when and how to transfer military detainees to other countries serves as an example.¹¹⁴ Initially, the government transferred people from Guantánamo to other countries without publicly explaining the standards and process by which it conducted those transfers. The government had not revealed when it sought diplomatic assurances that receiving countries would not mistreat the detainees; when it sought security assurances (by which a receiving country agreed to take measures to ensure that a transferred detainee would not undertake dangerous activities); and which government officials were involved in the process.¹¹⁵

110. *Id.*

111. Martin, *supra* note 37, at 158.

112. Magill, *supra* note 51, at 888 (stating that formalizing a policy calls attention to the policy and illustrates a greater commitment by the agency to the stability of the policy); Kent Roach, *Judicial Review of the State's Anti-terrorism Activities: The Post 9/11 Experience and Normative Justifications for Judicial Review*, 3 INDIAN J. CONST. L. 138, 162 (2009) (noting that judicial decisions on national security help "publicize the often secret security activities of the state").

113. See Posner & Vermeule, *supra* note 51, at 903.

114. An earlier example can be found in extradition cases. The U.S. government only clarified when and how it sought diplomatic assurances from a state seeking the person's extradition after a person facing extradition to Mexico sued, claiming that he would be tortured there. Declaration of Samuel M. Witten at 4–5, *Cornejo-Barreto v. Seifert*, No. 01-cv-662-AHS (C.D. Cal. Oct. 2001), available at www.state.gov/documents/organization/16513.pdf.

115. See NAUREEN SHAH, COLUM. LAW SCH. HUMAN RIGHTS INST., PROMISES TO KEEP: DIPLOMATIC ASSURANCES AGAINST TORTURE IN US TERRORISM TRANSFERS 27–28 (Peter

When detainees facing transfers from Guantánamo sued the government to block those transfers, this lack of transparency hurt the government's ability to defend its policies in court.¹¹⁶ Therefore, the government decided to file several affidavits from Defense and State Department officials that described the process.¹¹⁷ These affidavits explained the consultations and internal deliberations that take place within the government and with foreign governments when assessing whether an individual is more likely than not to face torture if transferred to a particular country.¹¹⁸ The affidavits also identified which states had accepted detainees from U.S. custody.¹¹⁹

Through this disclosure, the government presumably hoped to persuade the courts that it had in place a thorough process to ensure that the United States did not expose detainees to likely mistreatment in the receiving country. The government ultimately convinced the D.C. Circuit that the thirty-day stays imposed by several district courts were improper, based in part on its representations to the court about its internal procedures.¹²⁰ In any case, the government's disclosures about its internal policies remain in place and allow the public to evaluate a process of which it previously was aware in only very general terms.

In addition, several cases have prompted the government to identify which set of individuals it deems detainable in particular armed conflicts, even though no court specifically ordered the government to do so. Litigation in March 2009¹²¹ directly led the government to clarify its claimed scope of detention at Guantánamo, but the observer effect seems to have led the government to extend that definition to those detainable in Afghanistan as well.¹²² Notwithstanding the D.C. Circuit's conclusion in *Al Maqaleh* that four detainees held by the United States in Afghanistan lacked constitutional habeas rights, some modest ambiguity remains about the court's reach over U.S. detainees in Afghanistan. By providing clarity about who the government claimed it could detain in Afghanistan, it foreclosed one potential avenue of litigation by detainees held in Afghanistan. The government may have concluded that issuing a clear and public policy about its scope of claimed detention authority would give

Rosenblum ed., 2010) (describing the United States's reluctance to disclose information about use of assurances).

116. See, e.g., *Al-Joudi v. Bush*, No. Civ.A. 05-301(GK), 2005 WL 774847 (D.D.C. Apr. 4, 2005); *Abdah v. Bush*, No. Civ.A. 04-1254(HHK), 2005 WL 711814 (D.D.C. Mar. 29, 2005).

117. See *Al-Joudi*, 2005 WL 774847, at *4; *Abdah*, 2005 WL 711814, at *3.

118. See *Al-Joudi*, 2005 WL 774847, at *4; *Abdah*, 2005 WL 711814, at *3.

119. Declaration of Matthew C. Waxman at 4, *Al-Joudi*, No. Civ.A. 05-301(GK), available at www.state.gov/documents/organization/55820.pdf.

120. *Kiyemba v. Obama*, 561 F.3d 509, 514–16 (D.C. Cir. 2009).

121. See generally Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, Nos. 08-0442 (TFH), 05-0763 (JDB), 05-1646 (JDB), 05-2378 (JDB) (D.D.C. Mar. 13, 2009), available at <http://www.scotusblog.com/wp-content/uploads/2009/03/doj-detain-authority-3-13-09.pdf>.

122. See GOLDSMITH, *supra* note 19, at 193.

courts comfort that the claimed authority was cabined—and cabined in ways that the courts blessed in the Guantánamo context.

Similarly, the government decided to discuss publicly certain details about the legal standards it employs to determine when it may target a U.S. citizen overseas using lethal force. In *Al-Aulaqi v. Obama*, Anwar Al-Aulaqi's father sought an injunction prohibiting the government from intentionally killing his son unless the son presented a concrete, imminent threat and there were no other means to suppress the threat.¹²³ Even though Judge John Bates held for the government, he expressed significant discomfort with the idea that the government was required to obtain court authorization to wiretap an American's phone conversations overseas, but need not do so before using lethal force against him.¹²⁴ Although the government won, the executive disregards at its peril a careful opinion by a well-respected judge that expresses grave concerns about a government policy. As discussed *infra*, Attorney General Eric Holder later gave a speech detailing the legal arguments and basic processes by which the United States determined when it was lawful to target members of al Qaeda, including those who are American citizens.¹²⁵ Of course, a public speech such as Holder's has multiple intended audiences, of which the courts are just one. This disclosure of internal procedures, however, like the disclosure of internal transfer policies, may represent an effort to assure courts of the level of attention such targeting decisions receive within the executive branch.¹²⁶ This effort may be calculated to affect the outcome of additional, future litigation on targeting questions, litigation that seems quite likely.

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.

C. The National Security Distinction

If the observer effect shapes the way in which the executive branch develops or modifies many of its national security policies, why doesn't it impact U.S. policymaking in other areas of law? In fact, it probably does.¹²⁷ This Article focuses on one area of the law in which the observer

123. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

124. *Id.* at 8–9.

125. See *infra* Part II.C.1.

126. See GOLDSMITH, *supra* note 19, at 198 (noting that the ACLU and Center for Constitutional Rights brought the *Al-Aulaqi* suit to force the government to disclose more information about its practices, among other reasons).

127. For example, the premise behind the “ossification” theory in administrative law is that “hard look” judicial review deters agencies from implementing policies rashly or without factual basis. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992). This implies that the agencies are

effect often obtains significant traction, without discounting the observer effect's potential role elsewhere. There are at least two reasons to think that the observer effect may be felt keenly in the national security area. In addition, as Part III illustrates, the observer effect's operation in this area is of particular interest because it plays an important checking function in the national security arena, where the executive often is seen as unfettered.

1. History of Deference

Where the executive is used to receiving deference from the courts in a particular area of law, the executive grows accustomed to its freedom of operation. The executive perceives judicial "intrusions" into this area as particularly unwelcome, and has strong incentives to preserve the status quo. Ironically, this may cause the executive to act with particular flexibility in setting and amending policy, in response to perceived looming court participation in this area of decisionmaking. If the executive alters its policy in a manner that persuades courts to continue to defer to it (jurisdictionally or on the merits), the executive is able to preserve that area of operations as relatively untouched by courts. Although intuition might suggest that the executive would be disinclined to amend its policies in an area in which courts traditionally have limited their involvement, the opposite is true: the executive is particularly prone to the observer effect in this area.

National security and wartime activities are areas in which courts' involvement historically has been limited.¹²⁸ In earlier wars,

the President determined when, how, and where to surveil, target, detain, transfer, and interrogate enemy soldiers, often without public knowledge, and almost entirely without unwanted legal interference from within the executive branch itself or from the other branches of government. . . . [N]ever before has the Commander in Chief been so influenced, and constrained, by law.¹²⁹

Others concur that the courts' approach to national security cases after September 11 differed dramatically from their pre-September 11 approach.¹³⁰ This history of deference to the executive in national security cases means that there are more likely to be triggering events that shock the system. It also means that the executive is particularly sensitive—because it is not acclimated—to judicial review in this area.

Relatedly, conventional wisdom and the holdings in several high-profile, historical cases suggest that the executive tends to receive a broad *degree* of deference when the courts choose to review national security policies on the

keenly aware of the impending (and near-certain) judicial review and set their policies accordingly. See Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 499–502 (1997).

128. See Morrison, *supra* note 3, at 469.

129. GOLDSMITH, *supra* note 19, at 207–08.

130. Deborah Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 800 (2011); Scheppele, *supra* note 3, at 92.

merits.¹³¹ Where the executive generally receives a broad degree of deference, courts will be willing to uphold a wider range of executive policy choices. This, in turn, suggests that where an executive is otherwise in a position to respond to the observer effect,¹³² the executive has a greater variety of alternative policy options available to it if it seeks to adjust its policies to fend off court involvement. In contrast, where the executive receives only limited deference from the courts, it generally will have to choose among a narrower range of policy options that might satisfy the court. It therefore has less flexibility to shift its policy to a position that persuades the court to defer or uphold the policy on the merits. In the national security realm, in contrast, there may be several different policy amendments that the executive could effect to respond to the observer effect, in an attempt to avoid a loss on the merits. This is another reason the observer effect operates robustly in the national security area.

2. Ease of Policy Change

An important aspect of the observer effect is the executive branch's ability to establish and amend policies relatively quickly. This is not to say that the levers of government operate with great alacrity in the national security area (though on occasion they can). Rather, the claim is that the executive functions with *relatively* greater freedom in setting and changing national security policies than it does in other policy areas, such as those that implicate environmental or workplace safety issues.

First, in the national security arena the executive is not hindered by the Administrative Procedure Act (APA), an important statutory restriction on executive policymaking and policy alteration.¹³³ Requiring agencies to work through extensive procedures before enacting new rules has led to "ossification," preventing agencies from regulating effectively and efficiently.¹³⁴ The APA, however, contains several carve-outs in the national security area.¹³⁵ These include a provision exempting from APA procedures "courts martial and military commissions" and "military authority exercised in the field in time of war or in occupied territory."¹³⁶ APA sections 553 and 554 exempt "military or foreign affairs functions" from rulemaking and adjudication procedures.¹³⁷ As a result, most national security policies are not subject to the APA's time-consuming strictures and do not directly invite judicial review.

131. *See infra* Part III.A (discussing "degrees" of deference).

132. *See infra* Part II.B.

133. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

134. *See, e.g.*, Paul R. Verkuil, *Comment: Rule-Making Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453 (1997).

135. Aziz Z. Huq, *Structural Constitutionalism As Counterterrorism*, 100 CALIF. L. REV. 887, 925 (2012) ("[T]he generally applicable law of administrative procedure is unavailable or weakly constraining as applied to security agencies.").

136. 5 U.S.C. § 551(1)(F)–(G) (2006).

137. *Id.* §§ 553(a)(1), 554(a)(4).

Second, although in theory Congress may insert itself into the policymaking process—including by legislating directly or by conducting oversight hearings—it faces a number of hurdles to doing so. As Aziz Huq notes, “Terrorism is a subject matter that is especially prone to legislative delegation because it often entails hard trade-offs. Post-9/11 legislation generally leaves large discretion in executive hands. For example, when fashioning substitutes for habeas corpus, Congress left open both substantive and procedural rules.”¹³⁸ In addition to this delegation, congressional oversight mechanisms have not proven particularly robust.¹³⁹ The president may limit executive reporting to Congress by interpreting particular statutory terms narrowly, as he seems to have done with the term “hostilities” in the War Powers Resolution.¹⁴⁰ Congressional reports on national security issues tend to emerge years after the fact and thus have limited impact on policy setting that must take place quickly.

As a result, even where Congress has enacted a framework statute such as the 2001 Authorization for Use of Military Force¹⁴¹ or the Military Commissions Act of 2009,¹⁴² many specific policies in the national security area are made with limited input from Congress or affected nongovernmental entities. The speed with which these policies are crafted and publicized is limited by internal bureaucratic requirements and political will, which are non-negligible factors. But on a relative basis the executive remains more nimble in setting and changing national security policy than in other substantive areas and so may be particularly responsive to the observer effect in this context.

II. DISSECTING THE OBSERVER EFFECT

Part I identified the observer effect and introduced real-world evidence of its operation. This Part explores how the observer effect operates, including how it affects both policy processes and policy content. It also describes factors that maximize the observer effect. In dissecting the effect’s mechanics, this part draws from scholarship on the dialogic relationship between different branches of government to explore how courts and the executive engage in a dialogue with each other about their views on acceptable—and “off-limits”—national security policies. This dialogue plays an important role when the executive shapes those policies under the influence of the observer effect.

138. Huq, *supra* note 135, at 923.

139. *Id.* at 926 (“The history of sua sponte congressional oversight of national security affairs indeed suggests that congressional attention to counterterrorism will be weaker than in other domains.”).

140. Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT’L SEC. L. & POL’Y 539, 612 (2012).

141. Pub. L. No. 107-40, 115 Stat. 224 (2001).

142. 10 U.S.C. §§ 948a–950t (2006).

A. *Second-Order Effects*

The operation of the observer effect affects both the processes by which the executive arrives at those altered policies and the substance of the resulting policies. Many of these second-order effects are double edged. Those who favor relatively greater judicial deference and executive independence in the national security arena will object to many of these effects. Those who view courts' involvement in these cases as critical to curtailing the executive's infringement of individual rights will tend to see these second-order effects as positive.

1. Policy Processes

When the observer effect is in play, executive officials find themselves forced to consider whether to establish particular policies (some of which may have been contemplated but not resolved for years), or to revisit policies that already are in place. The external pressure brought to bear by the observer effect therefore sets in motion various internal processes within the executive branch machinery.

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.

On the other hand, indefinite time does not always produce the best policy. In some cases, too much time leads to bureaucratic gridlock or excessively complicated policies. In other cases, litigation pressures may prompt the executive to finalize a policy that has long been under consideration among agencies or to focus on an issue that has languished due to the press of other business. Only when the executive responds to the observer effect during the pendency of litigation will it face filing deadlines. From the perspective of litigants, court deadlines may be just the thing to light a fire under the executive's decisionmaking process and to prompt the executive to craft a more rights-protective policy.

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

143. Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359 (2013).

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.

Others may find this shift appealing. Ultimately, the observer effect works to shift executive policies closer to the courts’ comfort zone. The DOJ is best suited institutionally to predict where that zone is and how courts (and specific judges) may respond to a given policy.¹⁴⁴ In the national security context, where the executive has strong incentives to adopt security-driven policies, it is unreasonable to expect the executive often to produce policies that exceed—from an individual rights perspective—what the courts will require. Thus, from this perspective, it is only natural that the DOJ will play a powerful role in national security policy setting by virtue of its litigation expertise.¹⁴⁵

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.

144. As the *Rasul* example suggests, the DOJ sometimes may become overly wed to a particular view of presidential powers that hinders its ability to forecast properly where courts are likely to come out on particular issues. See *Rasul v. Bush*, 542 U.S. 466 (2004); *supra* note 34.

145. The DOJ has independent, substantive national security equities as well, by virtue of its role in prosecuting national security-related cases.

2. Policy Content

Just as the observer effect alters policy processes within the executive branch, the effect impacts the substance of the policies that emerge from these internal executive branch processes. In general, the observer effect will lead the executive to pay somewhat greater attention to the implications for individual rights of a particular policy, while potentially allowing the government to leave unresolved the outer boundaries of its claimed authorities.

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.

b. Minimizing Adverse Precedent

Litigants who challenge an executive national security policy may see the observer effect as leading to two undesirable outcomes. First, if the executive shifts a policy mid-litigation, the shift may moot the case or prompt the court to hold for the government on the merits. Either outcome is desirable from the executive's perspective but undesirable for litigants,

146. See Huq, *supra* note 135, at 929–31 (describing systematic incentives of both the executive and Congress to favor aggressive security policies).

because each reduces the likelihood that the courts will establish precedent adverse to the government. Second, even if the litigants find the new executive policy more tolerable than the prior policy, the litigants may believe that, absent the policy change, the courts would have forced the executive to establish an even more favorable policy (in the litigants' view) on the merits. Thus, the policy shifts engendered by the observer effect may leave litigants dissatisfied, notwithstanding the overall "improvement" to the policy.

There may be a broader reason to be concerned about this type of policy resolution as well. To the extent that the observer effect stimulates the government to alter policies before a final court resolution of the case, this may lead to less overall transparency about the content of those policies. For example, in *Padilla v. Hanft*, the Court granted certiorari to consider whether the executive lawfully could detain as an enemy combatant a U.S. citizen picked up on U.S. soil.¹⁴⁷ The Court later dismissed the case on jurisdictional grounds, but signaled discomfort with Padilla's detention.¹⁴⁸ When the case threatened to come back before the Court after Padilla refiled his case in the proper venue, the executive unsealed a criminal indictment against him and transferred him to civilian custody.¹⁴⁹ In short, the observer effect and judicial messaging prompted the executive to moot the case and leave unresolved questions about the propriety of such detentions.¹⁵⁰ While this approach produces fewer direct clashes between the executive and the courts, it may allow the government to turn the (legal, if not public) spotlight away from some of its most controversial policies.

For the same reasons that litigants see disadvantages in reducing the amount of precedent, the executive will favor this result. The executive will have avoided having to alter a policy to the court's specifications, limited the reputational costs that flow from having a policy struck down, and reduced the amount of time its agencies must devote to managing the litigation. It also will reduce the executive's long-term concerns about

147. *Padilla v. Hanft*, 540 U.S. 1173 (2004).

148. *Padilla v. Hanft*, 547 U.S. 1062 (2006); see Steve Vladeck, *Online Alexander Bickel Symposium: The Passive Virtues As Means, Not Ends*, SCOTUSBLOG (Aug. 21, 2012, 12:32 PM), <http://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-the-passive-virtues-as-means-not-ends/>.

149. See Vladeck, *supra* note 148.

150. The case of Ali Saleh Kahlal al-Marri provides a comparable example. In 2001, the FBI arrested al-Marri in Illinois and charged him with various criminal offenses. See *Al-Marri v. Wright*, 487 F.3d 160, 164 (4th Cir. 2007). The Bush Administration decided to classify him as an unlawful enemy combatant and place him in military detention. See *id.* at 164–65. His habeas corpus case made its way through the federal courts, with the Supreme Court granting certiorari in late 2008. See *Al-Marri v. Pucciarelli*, 555 U.S. 1066 (2008). On coming into office, President Obama ordered a review of al-Marri's case. Press Release, The White House Office of the Press Sec'y, Review of the Detention of Ali Saleh Kahlal al-Marri (Jan. 22, 2009). The DOJ charged him in federal court and he pled guilty, mooting the case before the Supreme Court. See Press Release, Brennan Ctr. for Justice, *Al-Marri Detention Case Vacated* (Mar. 6, 2009), available at http://www.brennancenter.org/content/resource/al_marri_detention_case_vacated/. Though happy with the outcome, some civil liberties groups bemoaned the fact that the Court did not clarify the limits of the executive's detention power. See *id.*

having restraining precedent on the books, the language of which litigants undoubtedly will employ in similar (and even unrelated) future cases against the government.

c. Reducing the Security Focus

The observer effect provides an important counterweight to the executive's instinct to prioritize national security equities at the expense of individual rights because the executive knows that the courts may be a future audience for its policies. A primary reason to be concerned about allowing the executive to completely dominate national security decisionmaking is the fear that the executive will conduct skewed risk assessments, overstate the threat that the country faces, and establish excessively draconian policies as a result.¹⁵¹ As Cass Sunstein suggests, "[T]he President has a strong incentive to take precautions even if they are excessive and even unconstitutional."¹⁵²

Ensuring some level of ambiguity about whether a court will step in to review a particular policy helps counteract that bias. Christina Wells notes that the "lack of predictability regarding a court's approach . . . should force the executive to consider that the possibility of rigorous judicial review is very real."¹⁵³ In her view, advance knowledge of the existence of judicial review can force the executive to assume some "pre-decisional awareness of accountability."¹⁵⁴ That is, when the executive understands that it likely will be forced to explain its reasoning after the fact for particular security policies it adopts, it will think more carefully *ex ante* about what those policies should be and weigh a greater number of alternatives.¹⁵⁵ While this element has procedural aspects to it—forcing a more careful and considered process of adopting policy—it also has important substantive effects. Assuming that courts as a rule will favor policies that are more rights protective than those favored by the executive, this perception of future judicial oversight will shift the substantive policy in a more rights-sensitive direction.¹⁵⁶

151. See David Cole, *No Reason To Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1335 (2008) ("Precisely because we rely so heavily on the executive to maintain our security, we should be skeptical of its ability to give sufficient weight to the liberty side of the balance."); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 929 (2004). *But see* ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 30 (2007) ("There is no reason to think that the government will systematically undervalue civil liberties or overvalue security during emergencies nor that it will systematically overestimate the magnitude of a threat.").

152. Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 53.

153. Wells, *supra* note 151, at 942.

154. *Id.* at 940.

155. *Id.* at 944.

156. The current habeas corpus jurisprudence in the D.C. Circuit stands as an important exception to this point. In the Guantánamo detainee habeas cases, the D.C. Circuit has upheld virtually all of the executive branch's policy and factual decisions about detention. Indeed, some judges on that court have been willing to require less of the executive branch than it has required of itself. See *Esmail v. Obama*, 639 F.3d 1075, 1077–78 (D.C. Cir.

B. Maximizing the Observer Effect

Part I described various manifestations of the observer effect in the national security arena. Each of those examples, however, emerges from a complicated political and bureaucratic ecosystem. Various factors in that ecosystem influence how robustly the observer effect reveals itself in any particular case. This section identifies factors that strengthen or weaken the effect.

1. Public Attention

It is a truism that issues attracting public attention and debate draw the attention of executive policymakers as well, especially where the executive's current approach to those issues has produced negative congressional and media reactions. The observer effect amplifies the reasons that the executive will be inclined to alter its policies. The premise of the observer effect is that the executive responds to certain or probable judicial attention to its national security policies by attempting to ensure that those policies will survive (or deter) judicial scrutiny. As the executive knows, courts are attuned to popular discourse.¹⁵⁷ Thus, when entities such as Congress, nongovernmental organizations (NGOs), journalists, human rights groups, or national security "hawks" already have begun to scrutinize and criticize those policies, the executive reasonably surmises that the courts are aware of this public criticism. As a result, the executive is more likely to perceive that a court may intervene, especially when the courts sense a shift in the public's (and, importantly, the elite's) views on an issue.¹⁵⁸ Because the executive is aware that courts can mandate specific policy changes in a way that the public cannot, the executive may be just as conscious of the elite's influence on court preferences as it is of the direct influence of the elite on its own decisionmaking. Where public criticism appears pervasive enough to alter judicial preferences, the executive is prone to feel the observer effect more keenly.

2. Interagency Disputes

The executive is more likely to heed the observer effect and alter an existing policy if one or more entities within the executive branch are dissatisfied with that policy. If members of an interested executive agency

2011) (Silberman, J., concurring) (stating that the "preponderance of the evidence" standard that the government had supported was too constraining); *Al-Adahi v. Obama*, 613 F.3d 1102, 1104–05 (D.C. Cir. 2010) (same); *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (contesting executive's view that international law constrained its interpretation of the 2001 Authorization for Use of Military Force).

157. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009) (viewing the justices and the public as in a marriage that bypasses Congress and the executive); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 643 (1993) ("What courts do is similar to the task performed by other governmental bodies—they give voice to constituencies under certain circumstances.").

158. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010).

believe that the government has struck the wrong policy balance (because, for example, the policy preserves excessive flexibility for the government), the shadow of a judicial presence gives those agency officials who favor a more modest balancing an additional arrow in their quiver as they argue their position.¹⁵⁹ That is, during interagency policy discussions, those members are likely to invoke the idea that the government either must adjust the policy balance or face a greater chance of having the policy overturned. Those officials will argue that it is in the executive's interest to retain control of the policy's contours, rather than face a less satisfying policy imposed unilaterally by a court.

In contrast, if all officials within the government believe that the executive has struck the appropriate liberty-security balance in a national security policy, there are likely to be few advocates for a policy readjustment, notwithstanding the presence of the observer effect. In these cases, the executive may prefer to live with the risk that a court may strike down or modify its policy rather than to alter its policy in advance.

3. Modest Transaction, Financial, and Political Costs

Changing an existing executive policy usually requires the affected agencies to hold extended discussions, draft background papers, prepare multiple iterations of the new policy, and obtain approval from agency heads.¹⁶⁰ These are some of the "bureaucratic costs" of enacting or changing a policy. In addition, policy changes may incur financial costs, as where the policy change requires additional personnel or new physical structures. Stark changes in policy may also reopen litigation on settled issues or prompt a loud congressional or public outcry. Where the bureaucratic, financial, and political costs of making a particular policy change are manageable, the observer effect will be relatively robust. In contrast, where the costs of altering the policy are extremely high—even where there is a triggering case and an interagency dispute about a particular policy—the observer effect is unlikely to shift that policy.

Consider an example of countervailing political incentives that operate to minimize executive policy shifts: the high costs of releasing detainees. To release a detainee from Guantánamo is politically costly because of the chance, however remote, that the detainee will undertake future terrorist activities. The political cost exists even where the executive branch has determined that the individual poses a relatively limited threat to the United States and its allies. Even where the observer effect might compel the executive not to contest some of the stronger detainee habeas petitions, the executive has competing incentives to try to shift the cost of release onto

159. See Martin, *supra* note 37, at 155 (“[T]he mere prospect of court review greatly enhances the bargaining position of those within the agency who wish to adopt tighter standards, closer supervision, or more protective procedures.”).

160. See Ingber, *supra* note 143, at 369–72 (describing various executive branch decisionmaking processes).

the courts.¹⁶¹ Where such political costs are present, it is difficult to predict the extent to which the observer effect will manifest itself, if at all.

C. Interbranch Dialogue

As previously discussed, the observer effect can prompt the executive to change a policy without a court saying a word about that policy, particularly when the factors in Part II.B are present.¹⁶² But in other situations, courts *can* say a word (or several) about a particular policy. When courts hear cases on the merits or when justices issue statements related to denials of certiorari, they have the opportunity to initiate a dialogue with the executive—whether or not the courts ultimately defer to the executive’s position. That dialogue allows the courts to gesture at acceptable and unacceptable policy choices, while the executive gauges which policies to adopt and how large of a “cushion” to build into those policies to avoid future adverse decisions.¹⁶³

Some scholars and judges have critiqued the practice by which a court provides advice or guidance on issues that are not directly related to the case before it.¹⁶⁴ Other scholars promote the virtues of judicial advice giving. Neal Katyal argues for a “proactive theory of judging under which the Justices may recommend courses of action to provide advice, clarify constitutional issues, or shine light on particular matters.”¹⁶⁵ It is easy to envision reasons to be skeptical of a robust use of judicial advice giving in all contexts. In situations in which courts are likely to defer systematically to the executive, however, their use of opinions and related tools as vehicles

161. *See Esmail*, 639 F.3d at 1077–78 (Silberman, J., concurring) (describing high cost of releasing detainee who is likely to return to terrorism).

162. *See supra* Part II.B.1 (public attention); Part II.B.2 (interagency disputes); Part II.B.3 (modest transaction, financial, and political costs).

163. *See* Eskridge & Frickey, *supra* note 13, at 40–41 (stating that interbranch signals “contribute to the efficient operation of an institutional system” and that over time such “signals and actions consistent with those signals can be a way that interdependent institutions create implicit bargains”); Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709, 1712 (1998) (arguing that justices often provide advice to political branches in their published opinions, and depicting the Court “as guiding the political branches not only through its coarse mechanism of judicial review, but also through its more subtle power of nonbinding counseling”); Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1735 (2011) (describing how courts may signal to agencies how deeply they intend to probe in future cases); Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. RICH. L. REV. 893, 897 (2009) (reviewing WITTES, *supra* note 1) (noting that the Supreme Court’s decisions in this area contain “implicit guidance to the political branches on how to avoid more serious confrontations”).

164. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1253 (2006) (urging caution about undue uses of dicta, but also noting that dicta “can help lawyers and society to predict the future course of the court’s rulings”); Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998). For a broader discussion of minimalism, see Cass R. Sunstein, *The Supreme Court 1995 Term Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 6–8 (1996).

165. Katyal, *supra* note 163, at 1711.

to provide guidance—including notes of caution—to the executive is an important way to influence and cabin national security policies.

Between 2004 and 2008, the Supreme Court was relatively active in patrolling Guantánamo cases, perhaps “because of its awareness that it was engaged in a dialogue with the elected branches of government and that its decisions would not be the final word in the dialogue.”¹⁶⁶ What exactly is the purpose of this “dialogue”? Does it run only from the courts to the executive, or is the executive also in “dialogue” with the courts? And how does this dialogue relate to the observer effect?

1. Court Messaging

In an area such as national security, where deference is the norm, one might expect courts to say little about the underlying executive policy in question. In fact, they regularly have offered warnings and guidance, both explicit and implicit, even as they defer. In many recent cases, the courts have laid down markers indicating that the executive should consider certain policy choices to be off limits.¹⁶⁷ For instance, in a case in which two American citizens held by U.S. forces in Iraq challenged their impending transfer to the Iraqi government, the Court was willing to let the transfer proceed because the executive assured the Court that it was U.S. policy not to transfer an individual where torture is likely to result.¹⁶⁸ The Court distinguished that case from a “more extreme case in which the executive has determined that a detainee is likely to be tortured but decides to transfer him anyway.”¹⁶⁹ In his concurrence, Justice David Souter put a finer point on it, stating:

[N]othing in today’s opinion should be read as foreclosing relief for a citizen of the United States who resists transfer, say, from the American military to a foreign government for prosecution in a case of that sort, and I would extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it. . . . [I]f the political branches did favor transfer it would be in order to ask whether substantive due process bars the Government from consigning its own people to torture.¹⁷⁰

Similarly, the Court in *Hamdi v. Rumsfeld*¹⁷¹ ruled out indefinite detention for the purposes of interrogation, even though that fact pattern was not before the Court.¹⁷² The D.C. Circuit in *Al Maqaleh* held for the government in declining to extend constitutional habeas rights to detainees

166. Roach, *supra* note 112, at 144–45.

167. For court signaling to have an effect, the executive must perceive a credible likelihood of future litigation over a policy directly or loosely linked to that signaling language.

168. *Munaf v. Geren*, 553 U.S. 674, 702 (2008).

169. *Id.* at 702.

170. *Id.* at 706 (Souter, J., concurring); *see also* *Kiyemba v. Obama*, 561 F.3d 509, 514 n.5 (D.C. Cir. 2009) (reiterating *Munaf*’s caution about the “more extreme case”).

171. 542 U.S. 507 (2004).

172. *Id.* at 521. The Solicitor General, however, had defended this type of detention in the U.S. government’s brief. *See id.* at 520.

in Afghanistan, but indicated that it would be concerned if the government brought detainees into active combat zones for the purpose of evading judicial review.¹⁷³ This language left executive officials unsure about whether a court would exercise habeas jurisdiction in such a case.

Even denials of certiorari may provide a forum for judicial messaging. In his concurrence to the denial of certiorari in *Padilla v. Hanft*,¹⁷⁴ Justice Anthony Kennedy, writing for himself, Chief Justice John Roberts, and Justice John Paul Stevens, implied that the Court would step in to hear the case if the executive, which had shifted Padilla from military custody to civilian custody, redetained Padilla as an enemy combatant.¹⁷⁵ When the Court denied certiorari in *Boumediene v. Bush*¹⁷⁶ in 2007, Justices Stevens and Kennedy made clear that they were attuned to the possibility that the Detainee Treatment Act's remedies might prove inadequate or that the government might unreasonably delay the proceedings or otherwise prejudice the petitioners' position.¹⁷⁷ In such a case, they stated, "alternative means exist for us to consider our jurisdiction over the allegations made by petitioners before the Court of Appeals."¹⁷⁸

Courts may signal the executive in both nondeference and deference cases, and they may do so explicitly or implicitly. In *Rasul v. Bush*, for instance, the Court issued a nondeferential procedural opinion, concluding that federal courts had jurisdiction under the habeas statute to hear petitions from Guantánamo detainees.¹⁷⁹ Some interpreted that decision as providing an additional, though subtle, indication about the Court's views on the merits.¹⁸⁰

In *Al-Aulaqi v. Obama*, Judge Bates issued a deferential opinion, concluding that standing problems and the political question doctrine precluded him from assessing whether the U.S. government lawfully could target an American citizen in Yemen.¹⁸¹ But Judge Bates made explicit his discomfort with the implications of his decision.¹⁸² It is hard to imagine that the executive failed to receive that signal, particularly because the

173. *Al Maqaleh v. Gates*, 605 F.3d 84, 98–99 (D.C. Cir. 2010).

174. 547 U.S. 1062 (2006).

175. *Id.* (Kennedy, J., concurring). Particularly given that three justices would have granted certiorari, this certiorari denial sent a particularly strong signal to the executive about the costs of shifting Padilla out of federal court and back into military custody.

176. 549 U.S. 1328 (2007).

177. *Id.* at 1329 (Stevens & Kennedy, JJ., respecting denial of cert.) (citing Detainee Treatment Act of 2005, tit. X, 119 Stat. 2739).

178. *Id.*

179. *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

180. See Martinez, *supra* note 3, at 1049 (treating *Rasul* as a procedural decision that "intentionally signals something about the Court's view of the merits in a difficult case, while intentionally leaving those merits substantively unresolved").

181. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

182. See *id.* at 8 ("Stark, and perplexing, questions readily come to mind, including the following: How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?").

media, foreign governments, and NGOs already had begun to critique U.S. targeting decisions and the use of drones overseas.

Indeed, Judge Bates's decision likely helped spark internal executive discussions about whether to say more publicly about the process by which the executive decides when and how to target an American citizen.¹⁸³ On March 5, 2012, Attorney General Holder outlined in general terms the process by which the executive makes this decision and the legal standards that govern U.S. actions.¹⁸⁴ It is unclear whether the Attorney General's disclosure will mitigate the impact of future litigation by persuading courts that they need not intervene when a future targeting case arises before them because the executive is following sufficient procedures. In fact, the disclosure might inspire additional litigation by individuals who believe that they may be targeted or who seek access to underlying executive policy documents. Either way, such a disclosure allows more informed public debate about an important national security policy.

Some court messaging may be relatively specific and may appear in opinions, but courts have additional ways to signal general displeasure with government policies. *Mohamed v. Jeppesen Dataplan, Inc. (Jeppesen I)*¹⁸⁵ offers an example of both direct and "penumbral" signaling. In *Jeppesen I*, the Ninth Circuit upheld the U.S. government's invocation of the state secrets privilege to block a suit by a former Guantánamo detainee who claimed the government tortured him.¹⁸⁶ The court's decision contained explicit language reflecting the difficulty of the case and stating that the use of the state secrets privilege to dismiss a case at the outset should be "rare."¹⁸⁷ In addition, the court ordered the government to pay the *Jeppesen I* plaintiffs' legal costs, even though the plaintiffs had not requested that relief.¹⁸⁸ Few could interpret this signal as anything but further evidence of the court's displeasure about the executive's underlying rendition policy—and its decision to invoke the state secrets privilege in the case.

2. Executive Messaging

The executive tries to achieve at least four things when it undertakes the types of policy changes described in Part I. First, by establishing procedures that look increasingly judicial in nature, it is trying to persuade the courts that it is not necessary for them to review these cases on the merits. Second, if a court decides to hear a case on the merits, the executive wants to win that case by persuading the court of the legal soundness of the

183. See *supra* Part I.B.3.

184. Eric Holder, U.S. Attorney Gen., Speech at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

185. 614 F.3d 1070 (9th Cir. 2010).

186. *Id.* at 1092–93.

187. *Id.* at 1092.

188. *Id.* at 1093; see also Charlie Savage, *Court Dismisses a Case Asserting Torture by C.I.A.*, N.Y. TIMES, Sept. 9, 2010, at A1.

executive policy. If a court accepts the executive's arguments, the court preserves the realm of national security policymaking as a relatively "court-free" zone. Third, the executive is trying to give courts a credible public justification for leaving the issue in the hands of a more politically responsive branch.¹⁸⁹ Fourth, given that national security doctrine is relatively undeveloped, the executive attempts to influence the standards of deference and related sets of rules that accompany and guide national security decisions on the merits.

To achieve these goals, the executive needs to establish a policy that makes the courts comfortable enough that they are persuaded to defer to the executive. At the same time, the executive is aware that judicial activism has costs for the judiciary.¹⁹⁰ The executive, therefore, has flexibility on the margins to establish a policy that would be somewhat less rights protective than a court itself might require if considering the statute or treaty in a vacuum. This is, in some ways, a game of chicken.¹⁹¹

In considering the executive's "signal" to it, a court is likely to take into account the formality and timing of the process through which the executive established the policy at issue. As Matthew Stephenson has noted, courts may give an agency greater substantive latitude in its statutory interpretation when it adopts that interpretation using formal procedures.¹⁹²

189. Jon D. Michaels, *The Willingly Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 830 (2011) ("Political accountability no doubt helps legitimate executive primacy in military and foreign affairs and justifies in large part the judiciary's deference to agency action.").

190. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (examining when judges withdraw from conflicts to protect the integrity and legitimacy of their institution).

191. This discussion loosely draws from game theory. Some game theory literature models and studies interbranch interactions, including how the president anticipates the response of other actors. See de Figueiredo et al., *supra* note 25, at 208 ("[C]ourts also constrain the other players in separation-of-powers games. Because judicial action shapes policy outcomes, Congress, the president, and agencies will anticipate court decisions, and the potential for judicial review will be taken into account during the law-making process."); see also Eskridge & Frickey, *supra* note 13, at 41 (noting that if institutions are in a competitive rather than a cooperative posture, "signals might be a way for one institution to gain strategic advantages over its competitors, by suggesting a state of affairs that would discourage the other institutions from aggressively pursuing those interests"); Richard McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 224 (2009) (describing the game of "chicken").

192. See Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 530 (2006) (observing that courts often give an agency more substantive latitude when the agency promulgates an interpretive decision via an elaborate formal proceeding than when it announces its interpretation in a more informal context); see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 675 (2000) (noting that litigation positions unsupported by regulations, rulings, or administrative practice are not entitled to *Chevron* deference); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1773 (2007) ("Deference should not be given where the interpretation is unsupported by any formal legal opinion generated by a relevant department or agency (but instead constitutes nothing more than an argument made by the Justice Department in the course of litigation) In contrast, deference should be robust (though not binding) where the interpretation (1) reflects the considered legal opinion of the department or agency responsible for the treaty's implementation and (2) there is no conflicting opinion from other

Courts may view quite differently an Executive Order issued by the president well in advance of a particular round of litigation and a Defense Department policy change announced during the pendency of litigation about that particular policy.¹⁹³ The format in which the executive issues the policy can range from formal mechanisms such as Executive Orders, to legally binding but less visible measures such as affidavits in litigation, or to informal means such as speeches. The public nature of the announcement can vary as well. A policy announced by the president in a televised speech garners far more attention than a policy announced via court filing. The format, timing, and nature of the policy are bound to affect the level of deference a court is willing to confer. When the policy is in writing, signed by a senior executive official, and easily accessible to the public, those formal attributes suggest that the costs of altering that policy in the future will be higher, and thus an alteration is less likely to occur. These kinds of situations—where the executive has signaled to the courts a genuine commitment to the new policy—are more likely to receive deference from courts.

D. Alternative Explanations for Policy Shifts?

The observer effect obviously is not the sole impetus for changes to executive policy. As scholars long have recognized, multiple entities influence the executive, including Congress, the courts, bureaucratic experts, the press, and interest groups.¹⁹⁴ To that list, one could add U.S. allies. Proving what causes the executive to select or modify a particular policy is notoriously difficult, not the least because many factors and influences usually coalesce to produce a policy. Jon Michaels has explained that “one can never be certain about policymakers’ true motivations and intentions, or whether there is anything approaching a singular purpose.”¹⁹⁵ The same is true for many of the examples presented in Part I, and this Article argues that the observer effect has an important influence over policy development and changes, but it does not (and cannot, without additional evidence about internal government decisionmaking)

departments or agencies also having a significant stake in the issue.”); Magill, *supra* note 51, at 888 (explaining that formalizing a policy illustrates more commitment by the agency to the stability of the policy and calls attention to it); Deborah N. Pearlstein, *A Measure of Deference: Justice Stevens from Chevron to Hamdan*, 43 U.C. DAVIS L. REV. 1063 (2010) (arguing that Justice Stevens was unwilling to accord the executive deference in *Hamdan* because the executive had not “shown its work” and had cut uniformed military out of the drafting of the Military Commissions Act).

193. See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1214–15 (2007) (“[U]nder current law, it is true that the executive sometimes will not receive deference when no formal procedure has preceded its decision. In the domain of foreign affairs, as elsewhere, it is certainly worth considering the possibility that a mere litigation position is not entitled to judicial deference or that the executive must state its views in some public place in advance of a particular controversy.”).

194. See, e.g., GOLDSMITH, *supra* note 19 (describing the role of courts, Congress, human rights activists, journalists, and lawyers in regulating executive action); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2254 (2001).

195. Michaels, *supra* note 189, at 805 n.4.

claim that the effect alone causes those developments. Nevertheless, by explicating one important influence on the executive as it sets its policy preferences, this Article lays the groundwork for additional, systematic research on executive policy development.

To strengthen the causal claims in this Article, this section considers three other possible explanations for the policy changes discussed in Part I.B. It argues that these other explanations do not account persuasively for those policy changes.

1. Congressional Pressure

As political scientists have demonstrated, a strategic executive will be attuned not just to the judiciary as a potential audience for its policymaking, but also to Congress. The executive accordingly will take into account potential congressional reactions to its policy decisions when finalizing those policies. Perhaps, then, Congress is a key source of pressure on executive policymaking, leading the executive to alter or reveal various national security policies and procedures.

Two facts indicate that Congress has played a modest role in shaping the national security policies discussed here. First, the timing of the policy changes seems closely aligned with activity in courts, and seems unrelated to salient activity in Congress. In many cases, Congress only became involved in cementing policy changes well after the executive already had made them on its own. For instance, the 2005 Detainee Treatment Act effectively codified (with modest amendments) the Bush Administration's 2004 Combatant Status Review Tribunals.¹⁹⁶ Congress has not legislated (or even threatened to legislate) to mandate particular review procedures for detainees in Afghanistan, the use of secret evidence in immigration proceedings, or the use of lethal force overseas against American citizens. In most of the examples considered in Part I, Congress has come late to the game, if it shows up on the field at all.

Second, where Congress has chosen to legislate in the post-September 11 era, it frequently has been more aggressively security focused and less rights focused than the executive.¹⁹⁷ For instance, in 2007, the Senate passed a "Sense of the Senate," by a 94-3 vote, opposing efforts to bring Guantánamo detainees to the United States, notwithstanding President George W. Bush's interest in doing so.¹⁹⁸ In the National Defense Authorization Act for Fiscal Year 2012, Congress sought to require the executive to detain members of al Qaeda within a military detention paradigm rather than an Article III criminal paradigm.¹⁹⁹ President Obama's signing statement opposed that policy and triggered relevant

196. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified in part at 42 U.S.C. §§ 2000dd to 2000dd-1 (2006)).

197. There are exceptions to this. For example, certain members of Congress hoped to cabin the executive's use of the state secrets doctrine. *See infra* note 308.

198. 153 CONG. REC. 19,719 (2007).

199. National Defense Authorization Act for the Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021-22, 125 Stat. 1298 (2011).

waivers built into the legislation.²⁰⁰ It is hard to reconcile Congress's security-driven preferences with policy shifts by the executive in more rights-protective directions. It is possible that private consultations between some members of Congress and the executive have affected executive decisions to alter executive policy, but records of those discussions are not publicly available. There even is evidence of situations in which members of Congress objected to rights-protective shifts in executive security policies shortly after the executive issued those policies.²⁰¹ In short, it is hard to see, based on available direct and circumstantial evidence, that Congress has exercised a potent "observer effect" of its own over the executive in the national security arena.

2. International Pressure

Many U.S. allies were highly critical (at least publicly) of the Bush Administration's "war on terror" policies. Lord Johan Steyn, one of the United Kingdom's top Law Lords, famously described Guantánamo as a "legal black hole" in a public speech in November 2003.²⁰² Several reports sponsored by the Council of Europe criticized the U.S. use of harsh interrogation techniques, renditions to third countries, and the use of the Guantánamo Bay facility to conduct long-term military detention.²⁰³ The United States unquestionably had to expend significant diplomatic energy responding to concerns and questions from allies about the legality and wisdom of its policies.

There is little evidence, however, that the United States altered its approach to its conflict with al Qaeda or its use of renditions and the Guantánamo Bay facility as a result of allied interest or criticism. It may be that those NATO member states that have forces in Afghanistan have had some influence on what U.S. detention procedures look like at Bagram Air Base, but few of those states conduct any detention operations of their own. This suggests that any influence they have over changes to detention procedure is relatively limited. Furthermore, several of the policies that the executive altered in the past eight years were policies with very strong domestic aspects but limited international aspects, such as the use of the

200. Press Release, President Barack Obama, The White House, Office of the Press Sec'y, Statement by the President on H.R. 1540 (Dec. 31, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

201. See, e.g., *Law of War Detention and the President's Executive Order Establishing Periodic Review Boards for Guantanamo Detainees: Hearing Before the H. Comm. on Armed Servs.*, 112th Cong. 1 (2011) (statement of Hon. Howard P. "Buck" McKeon, Chairman, Comm. on Armed Servs.) (stating that he had "significant concerns about the review process established pursuant to the President's Executive Order" providing amended periodic review processes to Guantánamo detainees).

202. Johan Steyn, Lord of Appeal in Ordinary, *Guantanamo Bay: The Legal Black Hole* (Nov. 25, 2003).

203. See, e.g., Eur. Comm. for Democracy Through Law, Venice Comm., *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, 66th Plenary Sess., Op. No. 363/2005 (2006); Eur. Parl. Ass., *Alleged Secret Detentions and Unlawful Transfers Involving Europe Member States*, Doc. No. 16 (2006).

state secrets doctrine.²⁰⁴ Finally, on several issues on which European states have been most vocal, little has changed since 2001. The United States has not committed to stop using renditions, ceased to use an armed conflict paradigm as a basis for its struggle against al Qaeda, or foregone the use of security detentions. In short, pressure from U.S. allies may have an atmospheric effect, and it may influence the views of the American elite, but there is little evidence to suggest that U.S. allies have had a significant effect on most U.S. national security policies.

3. Public Attitudes

It is worth considering whether the executive undertook the policy changes discussed herein as a result of an overall shift in public attitudes toward those policies. After all, the president must answer to the American public, at least at the polls. Yet two factors suggest that general public opinion was not a notable source of pressure to alter these national security policies. First, at least some of the policies discussed in Part I almost certainly were unknown to most of the American public—including DOJ policies about the use of secret evidence in immigration proceedings, and the detention review policies in Afghanistan. Second, even for those national security policies that receive extensive coverage in the media, there is good reason to think that pressure from the general public cannot account for policy shifts in a rights-protective direction. The American public tends to favor aggressive security policies. For example, in a recent Pew survey on drone use, 56 percent of those surveyed approved the United States's use of drones to target extremists in Pakistan, Yemen, and Somalia, with 18 percent unsure and only 26 percent disapproving.²⁰⁵ In a survey from 2010, nearly half of those surveyed thought that the government's antiterrorism policies had not gone far enough to protect the country, while slightly less than one-third of survey respondents thought those policies had gone too far in restricting civil liberties.²⁰⁶ While these surveys do not specifically address the policies considered here, one could extrapolate from these results to conclude that a healthy majority of Americans would favor robust national security policies, especially when those policies are directed at non-U.S. nationals.

In contrast, elite public opinion likely has a much stronger effect on executive policymaking. As discussed above, elite views may affect court decisions, and thus we should expect the observer effect to become stronger in situations in which the media and other elites are focused on a particular

204. See Frost, *supra* note 89, at 1933 (describing state secrets privilege as implicating U.S. separation-of-powers concerns because of the potential to leave the executive unchecked by the other branches).

205. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, CONTINUED SUPPORT FOR U.S. DRONE STRIKES 1 (2013).

206. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, CONTINUED POSITIVE MARKS FOR GOVERNMENT ANTI-TERROR EFFORTS 2 (2010); see also Mark Landler & Dalia Sussman, *Poll Finds Strong Acceptance for Public Surveillance*, N.Y. TIMES, Apr. 30, 2013, at A16 (stating that 78 percent of Americans favor surveillance cameras in public places).

policy.²⁰⁷ But those views also surely impact executive decisionmaking directly, and elite views slant to the left today.²⁰⁸ Executive officials may be sensitive to elite opinion for the same reasons that Supreme Court justices are: people want to be liked and respected by those to whom they are close and with those whom they identify.²⁰⁹ For many senior and midlevel executive officials, this includes political elites, journalists, and academics. Executive officials may be affected by reputational concerns here: when the media shines a spotlight on a policy that—seen in the harsh light of day—appears to have struck an overly security-driven balance, that exposure provides an additional impetus to alter the policy.²¹⁰

This Article does not and cannot rule out an important role for elite views in prompting the executive to modify its policies, particularly once they come to light as a result of litigation. But the existence of this influence does not erase the important pressures brought to bear by an increased awareness of possible court intervention, especially because courts have the power specifically to rewrite national security policies in a way that members of the public do not.

III. IMPLICATIONS FOR NATIONAL SECURITY DEFERENCE

In the post–September 11 world, the U.S. government has been involved in an unprecedented amount of national security litigation, in which plaintiffs have contested many executive policies. Part I identified a subset of this litigation. This national security litigation has involved individuals who have: challenged detention policies and individual detention determinations within the United States, at Guantánamo, and in Afghanistan;²¹¹ sought to block their transfers from U.S. military custody to the custody of various foreign governments;²¹² claimed damages resulting from alleged U.S. renditions and mistreatment of detainees;²¹³ demanded information about how the government decides to place individuals on the

207. *See supra* text accompanying note 158.

208. Baum & Devins, *supra* note 158, at 1545 & n.156 (discussing political orientations of legal scholars and journalists).

209. *Id.* at 1537. *See generally* David G. Winter, *Measuring the Motives of Political Actors at a Distance*, in *THE PSYCHOLOGICAL ASSESSMENT OF POLITICAL LEADERS: WITH PROFILES OF SADDAM HUSSEIN AND BILL CLINTON* 156 (Jerrold M. Post ed., 2003) (describing concern for close relations with others and prestige-seeking as important motivators for some leaders).

210. Fear of personal exposure in litigation may also play a role. When a triggering event raises questions about the legality of a given policy, executive officials of the agency implementing that policy have strong reputational reasons for wanting to avoid being named as a defendant in a *Bivens* action, even if a court ultimately concludes that the policy was constitutional.

211. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (United States); *Rasul v. Bush*, 542 U.S. 466 (2004) (Guantánamo); *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (Afghanistan); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (United States).

212. *Munaf v. Geren*, 553 U.S. 674 (2008); *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

213. *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012) (mistreatment); *Mohamed v. Jeppesen Dataplan, Inc. (Jeppesen II)*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (rendition); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (same).

U.S. “no-fly list”;²¹⁴ asserted that military commissions in general and specific commission prosecutions in particular are legally flawed;²¹⁵ and attempted to block alleged targeting decisions.²¹⁶ As a result, scholars recently have devoted significant attention to the relationship between the executive and the judiciary in the area of national security. A key focus of this work has been on the proper role for courts in reviewing executive decisions. The work parses empirical questions (i.e., to what extent *have* courts deferred to executive legal and factual assertions?) and normative questions (i.e., to what extent *should* courts defer in this area?).

This Part summarizes the empirical and normative debates and concludes that they have reached a stalemate. Scholars disagree empirically about the extent to which courts defer to executive positions in foreign affairs and national security cases, though the dominant view is that courts frequently defer. They also disagree normatively about when courts should defer. This Part then illustrates that the observer effect is a relevant phenomenon that has been absent from these discussions. In the national security area, the effect made itself especially apparent between 2004 and 2009, as courts began to challenge the historical breadth of deference that the executive received.²¹⁷ Factoring the observer effect into the deference equation produces two unexpected insights. First, by virtue of the observer effect, occasional judicial decisions not to defer to the executive branch have a greater impact on policy than is generally recognized, even in an area of law where many perceive the executive to have a free hand. Second, because the observer effect exerts a restraining influence *ex ante* on executive decisions about where to draw policy lines, court decisions to defer often reflect (and require) a more modest degree of deference to executive judgment than is commonly realized.

A. Terminology

Before introducing the debates, it is important to clarify what this Article means by “deference.” Deference occurs when a decision maker follows a determination made by another entity to reach a decision different than that which the decision maker might have reached if deciding the question independently.²¹⁸ This definition of “deference” is relevant to situations in

214. *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012).

215. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (challenging military commission jurisdiction over charges of conspiracy, solicitation, and material support for terrorism).

216. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

217. The observer effect is cyclical. We now appear to be in a period in which the courts have resumed a highly deferential posture toward the executive, in part because the robust observer effect in the 2004–2009 period prompted notable shifts in executive policies. *See supra* text accompanying note 36.

218. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1073 (2008); *see also* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983) (treating deference as displacing the interpretation that a court would have reached otherwise); *cf.* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) (“A naked argument from precedent thus urges that a decisionmaker give weight to a particular

which a court hears a national security case on the merits and substitutes the executive's determination (in whole or in part) for its own. But this Article embraces a broader idea of deference as well, one that includes situations in which courts use abstention-like doctrines to decline to hear such cases on their merits. The use of the political question doctrine, for instance, is a form of judicial deference to executive positions.²¹⁹ Other manifestations of deference include denials of certiorari by the Supreme Court,²²⁰ the use of standing and ripeness doctrines to decline to hear claims challenging the introduction of U.S. troops into hostilities abroad,²²¹ and the dismissal of a case based on the government's invocation of the state secrets privilege.²²²

Deference is not binary. This Article also considers the relevance of the "degree" of deference, which describes the extent to which the decisionmaker will defer: Will it defer absolutely?²²³ Substantially but not entirely?²²⁴ In assessing the degree of deference given by a decisionmaker, one must ask about the nature of the claim for which the party at issue seeks deference. The more aggressively an executive policy seeks to interfere with individual rights, the greater the degree of deference a court would need to give to uphold that policy.²²⁵

The executive seeks judicial deference for different types of decisions or assertions. At least five types of deference may arise in the foreign affairs context.²²⁶ Although foreign affairs deference cases do not overlap entirely

result regardless of whether that decisionmaker believes it to be correct and regardless of whether that decisionmaker believes it valuable in any way to rely on that previous result.").

219. See, e.g., Bradley, *supra* note 192, at 659–60 (treating the political question doctrine as equivalent to absolute deference). Judge Bates's decision in *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), in which the court declined to adjudicate the legality of an alleged U.S. decision to target an American citizen in Yemen based on standing problems and the political question doctrine, stands as a good example of a decision this Article treats as "deferential."

220. It also includes grants of certiorari that limit the question presented. For example, the Court granted certiorari in *Rasul v. Bush*, 540 U.S. 1003 (2003), on only one of the questions presented in the certiorari petition. Jenny Martinez interprets this, reasonably, as a signal that the Court was not anxious to reach the merits of the case, including questions about whether Guantánamo detainees had constitutional rights. Martinez, *supra* note 3, at 1050.

221. See, e.g., *Doe I v. Bush*, 323 F.3d 133 (1st Cir. 2003) (dismissing, on ripeness grounds, a suit by military personnel and members of Congress claiming that an invasion of Iraq would be unconstitutional); *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011) (granting motion to dismiss Representative Dennis Kucinich's claim that the president exceeded his constitutional authority to launch military operations in Libya without congressional authorization).

222. See *supra* notes 92–103 and accompanying text.

223. Horwitz, *supra* note 218, at 1073. In *Hamdan v. Rumsfeld*, the Court assumed that it owed "complete deference" to the president's determination that it was impractical to apply civilian criminal trial rules to Hamdan's military commission. *Hamdan v. Rumsfeld*, 548 U.S. at 623.

224. See *United States v. Lindh*, 212 F. Supp. 2d 541, 556–57 (E.D. Va. 2002) (granting "substantial or great weight" to the executive's interpretation and application of the Geneva Conventions, but rejecting "[c]onclusive deference, which amounts to judicial abstention").

225. This assumes that the policy does not fall squarely within established constitutional doctrine or plain statutory language.

226. Bradley, *supra* note 192, at 659–64.

with national security deference cases, many forms of deference in the foreign affairs taxonomy appear in national security cases as well. The most robust form of deference is “political question” deference, which equates to absolute judicial deference to the political branches. Other forms of deference include: deference to the executive’s assessment of “international facts”; “persuasiveness” deference based on the executive’s role as a knowledgeable representative of U.S. interests; and *Chevron* deference, where courts defer to reasonable executive interpretations of treaties and foreign affairs statutes.²²⁷ The cases considered in Part I include each of these types of executive deference claims.

Because deference implicates core constitutional values, it is easy to understand why scholars and judges extensively debate its applications, virtues, and vices. The following sections discuss two ongoing debates about national security deference, one empirical and one normative.

B. The Empirical Debate

The question seems simple: to what extent do courts actually defer to challenged executive policies in the national security area? The answer, however, is not. It implicates complicated determinations about which cases constitute “national security” cases, questions about how to measure a “win” or “loss” for the government, an examination of whether deference manifests itself more strongly in particular categories of cases, and decisions of what the types of assertions (factual or legal) are for which the government seeks deference.

The Supreme Court’s language in several high-profile cases offers fodder for the conclusion that courts defer extensively to the executive when U.S. national security or foreign affairs interests are at stake. In *United States v. Curtiss-Wright Export Corp.*, the Court cited the president’s “very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations” and recognized that the president required “a degree of discretion and freedom from statutory restriction” when international affairs are at issue.²²⁸ The Court stated in *Department of the Navy v. Egan* that “unless Congress specifically has provided otherwise, courts traditionally [should be] . . . reluctant to intrude upon the authority of the Executive in military and national security affairs.”²²⁹ Most recently, *Holder v. Humanitarian Law Project* gave strong deference

227. *Id.* at 661–63; see also Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009) (offering examples of cases in which the government seeks deference for its factual assessments in national security contexts). The executive also (unsuccessfully) has sought deference to its constitutional judgments in some cases, including *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

228. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

229. *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988). Other prominent pro-deference cases include *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (asserting that executive decisions about foreign policy “belong in the domain of political power not subject to judicial intrusion or inquiry”), and *Korematsu v. United States*, 323 U.S. 214 (1944).

to executive factfinding in a case that implicated “sensitive and weighty interests of national security and foreign affairs.”²³⁰

Yet other high-profile cases offer a different view of the Court’s role in times of emergency. Many cite *Ex parte Milligan* as a paradigmatic case in which the Court staked out a distinctly nondeferential role for itself: “[I]f society is disturbed by civil commotion . . . these safeguards [of liberty] need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws.”²³¹ *Youngstown Sheet & Tube Co. v. Sawyer* famously rejected President Harry Truman’s effort during the Korean War to seize control of the steel industry, notwithstanding executive claims that the seizure was necessary “to avert a national catastrophe.”²³² And since September 11, 2001, scholars point to *Hamdi v. Rumsfeld*,²³³ *Hamdan v. Rumsfeld*,²³⁴ and *Boumediene v. Bush*²³⁵ as examples of nondeferential decisions in this area.

Much of the empirical scholarship that synthesizes national security cases adheres to a “crisis thesis,” a claim that the Supreme Court consistently has proven willing to suppress rights and liberties when the United States is under threat.²³⁶ At least some scholarship in this camp, based on a small sample of high-profile cases or on conventional understandings, claims that courts pervasively demonstrate deference.²³⁷ Other writers believe that

230. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (“One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.”); *see also* *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 283 (E.D.N.Y. 2006) (“[T]he task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our foreign affairs and national security.”).

231. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123–24 (1866).

232. *Youngstown*, 343 U.S. at 582.

233. 542 U.S. 507, 536 (2004) (rejecting the executive’s claim that Hamdi’s detention should be free of judicial oversight and stating, “Whatever power the United States Constitution envisions for the executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake”).

234. 548 U.S. 557 (2006) (rejecting executive interpretation of the 2006 Military Commissions Act).

235. 553 U.S. 723 (2008).

236. Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-war Cases*, 80 N.Y.U. L. REV. 1, 4–6 (2005) (describing the “crisis thesis”).

237. POSNER & VERMEULE, *supra* note 151, at 16 (“Conventional wisdom among constitutional lawyers . . . holds that courts defer heavily to government in times of emergency, either by upholding government’s action on the merits, or by ducking hard cases that might require ruling against the government.”); POSNER & VERMEULE, *supra* note 10, at 53 (“At the level of constitutional law, the overall record is that courts tend to defer heavily to the executive in times of crisis, only reasserting themselves once the public sense of imminent threat has passed.”); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 702 (2004) (“[I]n both the international and the domestic spheres, courts have generally been reluctant to declare conduct to be unlawful when there is any plausible claim of military or national security necessity.”); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2321 (2006) (“[T]he executive branch has gained power from deference doctrines that induce courts to leave

foreign affairs deference ebbs and flows in different historical periods.²³⁸ Yet others see a shift away from deference to the executive since September 11.²³⁹ A prominent fourth camp asserts that courts are most likely to defer in the national security context to actions taken jointly by Congress and the executive, and are least likely to defer to executive assertions of inherent, unilateral power.²⁴⁰

Several scholars, dissatisfied with the current, fragmented understandings of national security deference, have undertaken extensive empirical studies to measure the deference that courts grant the executive's national security decisions. The most extensive of these studies concludes that Supreme Court justices are significantly more likely to curtail rights and liberties during times of war and crisis.²⁴¹ Notably, though, the study finds that the existence of war does not affect the subset of cases related directly to the war.²⁴² This suggests that claims about extensive deference by courts (or at least the Supreme Court) on national security issues during wartime may be somewhat overstated.

This conclusion stands in some tension with other studies. William Eskridge and Lauren Baer examined more than 1,000 cases in which the Supreme Court reviewed an agency's statutory interpretation.²⁴³ They

much conduct untouched—particularly in foreign affairs.”). Others conclude, either generally or in specific cases, that courts give the executive limited deference. *See* Martin S. Flaherty, *Judicial Foreign Relations Authority After 9/11*, 56 N.Y.L. SCH. L. REV. 119, 130 (2011) (claiming that the Supreme Court's deference doctrine “appears as little more than a passing reference to conclusions that have already been reached” on the basis of other interpretive techniques); Pearlstein, *supra* note 192, at 1064–65 (asserting that the Court in *Hamdi* and *Hamdan* showed no deference to the executive's arguments); Roach, *supra* note 112, at 140 (arguing that courts in the United States, Canada, and the United Kingdom have been surprisingly active in reviewing their executives' national security actions). Aziz Huq argues that courts give the executive no greater or lesser deference in national security cases than they do in other types of cases. Huq, *supra* note 3, at 226 (arguing that there is nothing unique about the ways courts respond to national security situations).

238. David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 497–99 (2007) (noting that the Court gave the executive no deference in treaty interpretation in the late eighteenth and early nineteenth centuries, extensive deference in the Rehnquist Court, and more limited deference in *Hamdan*); *cf.* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1016 (1994) (viewing deference to executive treaty interpretations as near-absolute, no matter what the justices claim); Chesney, *supra* note 192, at 1732 (noting courts' “considerable confusion with respect to the obligation to give at least some deference to executive treaty interpretations”).

239. Pearlstein, *supra* note 130, at 785; *see also* KOH, *supra* note 41, at 148 (arguing that the trend in the 1980s toward executive insulation from judicial review in foreign affairs was a relatively recent development); Scheppele, *supra* note 3, at 94 (arguing that the “face of judicial deference has radically changed” since September 11).

240. Issacharoff & Pildes, *supra* note 3; Trevor Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1703–06 (2011).

241. LEE EPSTEIN ET AL., *THE SUPREME SILENCE DURING WAR* 71 (2003) (“[W]e found no effect of war on cases to which the [U.S.] government is an express party.”); *see also* Epstein, *supra* note 236.

242. Epstein, *supra* note 236, at 9.

243. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1094 (2008).

found that the executive branch wins 78.5 percent of the time when the statutory framework at issue implicates foreign affairs or national security, and wins 100 percent of the time when the Court specifically invokes *Curtiss-Wright* deference.²⁴⁴ To be sure, Eskridge and Baer review cases without regard to whether they arose during wartime and focus only on cases of statutory interpretation. Their conclusion is supported by a study by Cass Sunstein, who examined national security–related decisions in the courts of appeals between September 11, 2001, and September 10, 2008.²⁴⁵ He found that these courts invalidated executive policies only 15 percent of the time, a rate lower than almost all other areas of law.²⁴⁶ Sunstein assesses that appellate courts have shown a high rate of deference to the executive in national security cases, but have stopped short of adopting an irrebuttable presumption in favor of the government.²⁴⁷

Taken together, these studies do not allow us to say with certainty what levels of deference courts apply to executive national security policies. And while efforts to study what courts actually *do* in this area clearly are useful, these measurements have not attempted to detect relationships between particular clusters of national security cases, or to analyze the *degree* of deference that executive branch seeks in any particular case, something that would require an assessment of how aggressive a particular national security policy is. These omissions create an important gap in understanding national security deference.

C. The Normative Debate

If the empirical deference debate produces a divide among scholars, the normative debate reveals an even greater multitude of views, among both scholars and judges. At its core, the normative debate implicates key separation of powers questions: How squarely do national security issues fall exclusively to the executive as a matter of constitutional text? To what extent is judicial review necessary to check curtailments of individual rights specifically and undue accretions of power by the executive more generally? And how should the functional competencies of each branch—derived in part from their respective constitutionally created structures—affect our views on the propriety of national security deference?

This section discusses the views of scholars, courts, and the executive branch, and describes the constitutional norms underlying each position. There is a vast literature on separation of powers issues, including in the national security context, and there is rough consensus on the underlying goals of separating the powers of government.²⁴⁸ For the purposes of this

244. *Id.* at 1098 (describing agency interpretations involving foreign affairs and national security as receiving “super-deference”).

245. Cass R. Sunstein, *Judging National Security Post-9/11*, 2008 SUP. CT. REV. 269, 270.

246. *Id.* at 276–77.

247. *Id.* at 281–82.

248. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (describing goals as protecting fundamental rights, advancing democracy, and enhancing

Article, I rely on the following trinity of goals: protecting individual liberty, preserving democratic accountability, and promoting effectiveness by allowing branches to develop different specializations and competencies.²⁴⁹ Deference proponents generally focus on effectiveness and democratic accountability. Deference skeptics focus on protecting individual liberty and on broader institutional concerns about the inter-branch balance of power.

1. Deference Proponents

On one end of the spectrum are those who believe that judicial involvement in national security issues damages U.S. security and should be minimized. Eric Posner and Adrian Vermeule, for instance, see courts as more likely than the political branches to strike the wrong balance between liberty and security. They therefore argue that “judicial review of the security-liberty tradeoffs that government makes during emergencies is affirmatively harmful.”²⁵⁰ This view seems consistent with Justice Clarence Thomas’s highly deferential approach to executive decisions that implicate military or foreign affairs.²⁵¹

Others take a more modest approach. Cass Sunstein would retain some role for the courts on national security issues, albeit a deferential one. He argues that courts should give the president *Chevron* deference for “all exercises of presidential power when Congress has authorized the President to protect the nation’s security.”²⁵² Sunstein urges courts to apply such deference even when the executive interprets statutes that do not expressly delegate decisionmaking to the president.²⁵³ Writing with Eric Posner,

professional competence); Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516, 1531 (1991) (arguing that the primary separation of powers goal is to protect individual rights against encroachment by a tyrannical majority); Flaherty, *supra* note 38, at 1729–30 (describing separation-of-powers goals as balance, accountability, and government energy); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1148 n.80 (2000) (arguing that formalists and functionalists agree on an intermediate goal of separation of powers: to prevent a single branch of government from possessing and using too much power).

249. See Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009).

250. POSNER & VERMEULE, *supra* note 151, at 20 (denying that executive decisionmaking during emergencies reflects panic and that judges as an institutional matter can improve on such decisionmaking); see also Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 180 (2006) (claiming that the *Hamdan* Court’s refusal to defer to the executive will raise transaction costs for policymakers without serious benefits).

251. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 678–80 (Thomas, J., dissenting) (“The plurality’s evident belief that *it* is qualified to pass on the ‘military necessity’ of the Commander in Chief’s decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. . . . [T]he President’s decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference.” (citations omitted)).

252. Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2664 (2005).

253. *Id.* at 2671 (“Insofar as the AUMF is applied in a context that involves the constitutional powers of the President, it should be interpreted generously. In this domain,

Sunstein then goes further, arguing that where there is “no interpretation of a statutory term but simply a policy judgment by the executive, the courts should defer as well, using *Chevron* as an analogy.”²⁵⁴ In sum, courts should give *Chevron* deference to all executive national security policymaking decisions, whether or not the executive develops those policies pursuant to statutory authorization. Joseph Landau takes a more constrained approach to deference, arguing that courts should “scale” *Chevron* deference by giving the executive greater deference when it operates pursuant to a delegation from Congress and less deference when the executive acts pursuant to its own authority only.²⁵⁵

Unsurprisingly, the executive branch tends to seek deference aggressively in national security cases, based in part on claims about its superior effectiveness in making national security decisions.²⁵⁶ In its brief in *Hamdi v. Rumsfeld*, for example, the government argued:

As this Court has observed, “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” The customary deference that courts afford the Executive in matters of military affairs is especially warranted in this context.

A commander’s wartime determination that an individual is an enemy combatant is a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority Especially in the course of hostilities, the military through its operations and intelligence-gathering has an unmatched vantage point from which to learn about the enemy and make judgments as to whether those seized during a conflict are friend or foe.²⁵⁷

the President receives the kind of super-strong deference that derives from the combination of *Chevron* with what are plausibly taken to be his constitutional responsibilities.”); see also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2084 n.150 (2005) (“Executive Branch interpretations of the AUMF might be entitled to deference under, or by analogy to, the *Chevron* doctrine in administrative law. . . . Such interpretive deference may be particularly appropriate in the context of the AUMF because it is a statute regulating foreign affairs.”).

254. Posner & Sunstein, *supra* note 193, at 1198–99.

255. Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U.L. REV. 1917, 1976–77 (2012).

256. The Bush Administration also made “formalist” separation-of-power claims to the effect that particular military and national security decisions were constitutionally allocated to the executive and could not be infringed by either of the other branches. See, e.g., Respondents’ Reply Memorandum in Support of Motion To Dismiss or for Judgment As a Matter of Law at 10, *In re Guantanamo Detainee Cases*, No. 1:04-cv-01166-RJL (D.D.C. Nov. 16, 2004), 2004 WL 5225831 (“[U]nder our constitutional system, decisions about how to provide for the national defense and whether to recognize a state of war and/or employ military force abroad are placed singularly in the Executive Branch. . . . For this Court to proclaim . . . that the President’s prosecution of a war against al Qaeda and its co-belligerents is nothing more than a ‘rhetorical declaration’ would present a separation of powers problem of the most dire sort.”).

257. Brief for the Respondents at 25–26, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020, at *25–26 (citations omitted); Brief for the Respondents, *supra*, at 46 (arguing that an additional court-imposed process would be “constitutionally intolerable”).

The government's language in this brief is typical of the positions that Bush Administration lawyers took in other litigation, and is not dramatically different from positions taken by other administrations.²⁵⁸

Those who support deference to executive authority in the national security context primarily invoke two separation of powers values: effectiveness and democratic accountability.²⁵⁹ Some deference proponents focus on the affirmative competence of the executive to make national security decisions. These proponents claim that: (1) the executive must remain unfettered when protecting the country against dire threats,²⁶⁰ (2) the executive has unparalleled policy expertise,²⁶¹ and (3) the executive holds a unique ability to act with speed and secrecy.²⁶² Other arguments focus, inversely, on the judiciary's lack of institutional competence in this area—particularly on claims that the judiciary lacks access to the information it needs to evaluate the import of the facts at issue and that it is ill suited to assess the consequences of its judgments.²⁶³ In both cases,

258. Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 239 n.33 (2006); see, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541, 555 (E.D. Va. 2002) (noting government contention that “the President’s determination that Taliban members are unlawful combatants was made pursuant to his constitutional Commander-in-Chief and foreign affairs powers and is therefore not subject to judicial review or second guessing because it involves a quintessentially nonjusticiable political question”); Brief for the Petitioner at 20–21, *Dep’t of Navy v. Egan*, 484 U.S. 518 (1988) (No. 86-1552), 1987 WL 880362, at *20–21 (“National security matters, as this Court has recognized, are ‘the province and responsibility of the executive. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.’” (citations omitted)); Supplemental Brief for Appellees/Cross-Appellants at 10–11, *Rasul v. Rumsfeld*, Nos. 06-5209, 06-5222 (2009), 2009 WL 700175 (opposing a *Bivens* action against U.S. military officials for actions taken toward aliens detained during wartime because it “would enmesh the courts in military, national security, and foreign affairs matters that are the exclusive province of the political branches”).

259. See *supra* text accompanying note 249.

260. POSNER & VERMEULE, *supra* note 151, at 16 (“Constitutional rights should be relaxed so that the executive can move forcefully against the threat.”).

261. Posner & Sunstein, *supra* note 193, at 1176; Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263, 1301 (2002) (“On delicate matters of international diplomacy and national defense, the structural advantages and resultant expertise of the executive may support substantial deference on treaty interpretation matters.”).

262. THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that during times of war, “[d]ecision, activity, secrecy, and dispatch” are at a premium); POSNER & VERMEULE, *supra* note 151, at 16 (“The real cause of deference to government in times of emergency is institutional: both Congress and the judiciary defer to the executive during emergencies because of the executive’s institutional advantages in speed, secrecy, and decisiveness.”); *id.* at 17 (normatively supporting “high deference”); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 821 (2004) (describing the executive’s ability to act with secrecy and expedition). Attorney General Holder recently argued, “The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments—all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time.” Holder, *supra* note 184.

263. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (finding that the president “has the better opportunity of knowing the conditions which prevail in foreign

deference proponents conclude that the executive has an “efficiency” advantage over courts in crafting workable security policies.

The other argument in favor of deference involves political accountability. It is relatively clear that the executive bears greater political accountability than courts do.²⁶⁴ That political accountability serves as an important check on executive decisionmaking, whereby the electorate can punish or reward the executive for making various policy decisions. Some in this camp presumably would favor deference to the executive only when it acts pursuant to legislatively delegated authority, because political accountability is at its height.²⁶⁵ Others rest on the fact that the executive is more politically accountable than the courts, regardless of whether executive action is buttressed by a statutory delegation.

In the views of the U.S. government and these scholars (and often of courts themselves), the political branches are in a better position to balance liberty and security than the courts, and the executive’s structural attributes in particular render it best suited to make critical national security decisions.

2. Deference Skeptics

At the other end of the spectrum are those who deem it imperative that courts play a role in evaluating national security decisions by the executive (and Congress).²⁶⁶ The core separation of powers goal of protecting individual rights frequently undergirds this normative skepticism about judicial deference. A related, more systemic institutional concern also appears: the basic need to preserve a balance of power among the three branches.²⁶⁷ The Madisonian notion of separation of powers presumes that

countries, and especially is this true in time of war”); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (“[I]t is often difficult for a court to review the classification of national security information.”); POSNER & VERMEULE, *supra* note 151, at 129 (“The judges lack the information needed to evaluate [the] government’s claims, and know that they lack it.”); Daniel Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1006 (1999) (“[T]he Court often contrasts the expertise of the officials under review to its own generalist and uninformed nature.”); Sunstein, *supra* note 152, at 53 (“[C]ourts have institutional weaknesses of their own. Worst of all, they lack relevant information and hence they may not know whether an interference with liberty is actually justified.”).

264. *Hamdi v. Rumsfeld*, 542 U.S. 507, 582–83 (2004) (Thomas, J., dissenting) (arguing that military and foreign policy judgments “are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.” (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))); POSNER & VERMEULE, *supra* note 10, at 52–54.

265. Issacharoff & Pildes, *supra* note 3; Landau, *supra* note 3.

266. See, e.g., Cole, *supra* note 151, at 1334 (“[T]here are strong reasons not to defer to executive power, especially in emergencies.”); Flaherty, *supra* note 237, at 164 (arguing that courts should give no deference to the executive’s interpretations of the Constitution, treaties, or statutes, particularly in the area of foreign relations).

267. See Flaherty, *supra* note 38, at 1730, 1741 (“Most often opposing accountability and energy is balance among the branches, especially balance designed to prevent tyrannical accretions of power.”). The protection of individual rights and the importance of interbranch balance are directly related. The reason to divide roles among different branches of

each branch of government will seek to jealously guard its powers, ensuring that no particular branch accrues too much power to itself. Founders such as John Jay and Alexander Hamilton believed that the judiciary should be a full player in the separation of powers framework, including in foreign relations.²⁶⁸ Sunstein describes the motivations behind this approach:

In “perilous times,” it might be thought, [the political] branches are especially prone to a serious form of lawlessness . . . and it becomes all the more important for courts to insist on compliance with the rule of law. On this view, the system of checks and balances, including an independent judiciary, is no less dispensable when the stakes are high and damaging intrusions on liberty are likely.²⁶⁹

In various post-September 11 cases, several justices have laid out arguments against strong deference to the executive. In *Hamdi v. Rumsfeld*, Justice Sandra Day O’Connor focused on a rights-protecting separation of powers rationale when she wrote:

[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.²⁷⁰

Boumediene is more explicitly focused on the goal of balance among the branches, though embedded in that concern is an awareness that habeas corpus implicates individual rights. Justice Kennedy noted that the government’s “formal sovereignty-based test” for when judicial review may extend to non-U.S. territory “raises troubling separation-of-powers concerns . . . [that] have particular bearing on the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”²⁷¹ Several Supreme Court opinions thus recently have deemed it important for courts to evaluate executive national security policies, both to prevent the executive from accreting too much power to itself, and to ensure that executive policies do not infringe unlawfully on individual rights.

Finally, a few scholars have argued that the pro-deference camp is insufficiently skeptical about the institutional efficiency claims. Deborah Pearlstein, for example, rejects the idea that the unitary executive is the

government is to limit the power of any one branch of government and, in so doing, protect individual liberties against governmental overreach.

268. See THE FEDERALIST NO. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961); *id.* NO. 80, at 476–77 (Alexander Hamilton); see also Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1311 (1988) (describing “Youngstown’s vision of institutional and constitutional balance”).

269. Sunstein, *supra* note 245, at 269–70; see also Pearlstein, *supra* note 249, at 1573 (“It should be . . . beyond question that a core goal of dividing roles among different branches is to limit power and thereby to protect individual liberty.”).

270. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004).

271. *Boumediene v. Bush*, 553 U.S. 723, 764–65 (2008).

ideal structure through which to make national security decisions.²⁷² Indeed, she believes that the functional advantages usually attributed to the executive are overstated,²⁷³ and insists that any deference given by a court to executive positions must limit “excessive delegations of power and disfavor interpretations that disable any one branch from continued participation in a deliberative dialogue.”²⁷⁴

Like the empirical debate, the normative debate continues without resolution. While this Article does not purport to put these difficult issues to bed, it aims to shed light on both debates by prompting a reconsideration of the judicial-executive dynamics in this arena.

D. Advancing Separation of Powers Values

Both of these debates—about how extensively courts do defer to the executive on national security issues and about how much they should defer—fail to take into account an important dynamic that should inform our views about national security deference: the observer effect. Understanding the way the observer effect operates should lower the temperature of the debate. The observer effect ultimately advances all three core separation-of-powers values just discussed: protecting individual liberty (and sustaining a more systemic balance of power), preserving democratic accountability, and promoting efficiency and effectiveness. This is not to argue that the observer effect allows accountability and effectiveness goals to manifest themselves as vigorously as complete judicial deference would. Nor is it to argue that reliance on the observer effect advances the protection of individual rights as robustly as a total absence of judicial deference would. It is to suggest, however, that the observer effect potentially promotes all three values at once in a way that the alternatives do not.

As a result, the current normative deference debate—which either favors the executive’s functional advantages by allowing the executive broad discretion to navigate national security issues, or urges judicial involvement to protect individual rights and preserve structural balance—needlessly frames the discussion as an either/or proposition. Instead, ample judicial deference to executive security policies—interspersed with occasional non-deferential decisions—can promote both sets of values simultaneously.

272. Pearlstein, *supra* note 249, at 1598; see also Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 J. NAT’L SECURITY L. & POL’Y 507, 508 (2012) (“Part of the impetus toward concentrating power in the executive branch is the belief, which I consider false, that the President is better able and more likely to operate in the ‘national interest’ under presidentialist, rather than pluralist arrangements.”).

273. Pearlstein, *supra* note 249, at 1582 n.119 (citing *Hamdi*’s assertion that it is “unlikely that this basic [review] process will have the dire impact on the central functions of warmaking that the Government forecasts”); see also Cole, *supra* note 151, at 1357 (“It is not clear that any branch of government has more or less expertise dealing with emergencies; they simply have different roles to play in those emergencies.”).

274. Pearlstein, *supra* note 130, at 791.

1. Effectiveness

Hamilton famously remarked that housing powers in a unitary executive provides the advantages of “[d]ecision, activity, secrecy, and dispatch.”²⁷⁵ Executive unilateralists have pointed to the particular salience of these characteristics when the United States is faced with an imminent or actual threat to its own national security.²⁷⁶ Assuming that the executive (by virtue of its expertise, access to classified information, and ability to act expeditiously in response to real-world events) tends to be better suited than courts to make difficult legal policy judgments, the observer effect allows the executive to retain control over the bulk of those judgments. It often results in executive control over policy corrections as well, even as the possibility of court review prompts the executive to make those corrections. The effect, when functioning well, helps the executive avoid most direct court intercessions by focusing the executive’s attention more keenly on those equities the courts would evaluate if forced to review those policies. If one believes, as many do, that the executive branch holds particular advantages in responding to questions that implicate national security and the conduct of military or intelligence operations, this is a positive result.

Those who adopt strong executive unilateralist positions will not be fully satisfied by the observer effect phenomenon because, in order for the effect to operate, the judiciary must retain some role in evaluating the legality of the executive’s national security policies. Courts may do so on the merits, or they may choose to do so more indirectly, through dialogue and signaling. Either way, courts retain a hand in developing national security policies by serving as a specter in the executive conference rooms in which policies are made. At the same time, the fact that the observer effect moderates executive policies means that the courts often are able to avoid wading into areas that fall outside their core spheres of competence. The executive branch continues to shape the details—the procedures, scope, and substance—of national security policy, but the observer effect ensures that the executive does not govern “nearly alone.”²⁷⁷

Some commentators may view as unseemly the courts’ role in fostering the observer effect. On this view, the observer effect allows courts to interfere with national security policies without having to decide hard issues publicly and, in so doing, to avoid having to put their reputations on the line. This concern is not without merit, particularly if one believes that courts are adequately positioned as a structural matter to assess national security issues. In contrast, if one believes that the executive bears significant structural advantages over courts in this area, one is likely to view the courts’ light touch as a satisfactory way to navigate this shoal.

275. THE FEDERALIST NO. 70, at 403 (Alexander Hamilton) (Isaac Kramnick, ed., 1987).

276. *See, e.g.*, POSNER & VERMEULE, *supra* note 151, at 55 (“[D]uring emergencies, the public will often favor increased executive power, and this may be fully sensible, given the executive’s relative decisiveness, secrecy, centralization, and other advantages over Congress and other institutions.”).

277. POSNER & VERMEULE, *supra* note 10, at 4–5.

2. Individual Rights Protection and Interbranch Balancing

Those courts and scholars who tend to be skeptical about the propriety of extensive national security deference worry most about the effect that deference has on individual rights. The Supreme Court itself articulated this concern in *Hamdi*, rejecting the executive's argument that the courts have only a "circumscribed role" to play in evaluating the review processes to which a detained enemy combatant was entitled.²⁷⁸ In times of emergency, the executive often has undue incentives to focus on security equities and reduced incentives to weigh individual rights properly against those equities. Courts, in contrast, are thought to have the independence to defend the rights of minorities.²⁷⁹ If courts defer in these cases, those rights will go unprotected against government power.

The observer effect offers some—though not perfect—protection against this concern. For the observer effect to operate, courts periodically must assume jurisdiction over national security cases. Given the breadth of deference "tools" the judiciary has, it has significant flexibility to determine the cases in which it wishes to intervene. There are competing stories to be told about the courts' role in protecting individual rights in the wake of September 11, much as one can tell competing stories about the courts' rights-protective role more generally.²⁸⁰ Yet evidence from the past eight years offers some reason to think that the courts will intervene in cases in which the executive national security policies intrude particularly strongly on individual rights.²⁸¹ More systemically, the observer effect reminds the executive of the courts' presence, and so has a subtle rights-protective influence on a number of executive policies in the wake of a triggering event.

The observer effect tends to work without regard to the subject matter of the specific case or cases on which a court is focused. But that fact might leave categories of individual plaintiffs out in the cold in case after case. Assume the courts are aware of and seek to foster the observer effect in the executive. If the courts decide not to defer only in cases that do not implicate individual rights, and decide to defer in national security cases

278. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004).

279. LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 20 (1985) ("Even when the Congress and the President can be counted upon to defend most of us from the infringement of fundamental liberties, because the political majorities to which those departments of government answer demand such protection, the Supreme Court often stands alone as the guardian of minority groups. . . . True, the Supreme Court's record in championing the cause of oppressed minorities is hardly unstained.").

280. *See, e.g.*, Stephen M. Griffin, *Has the Hour of Democracy Come Round at Last? The New Critique of Judicial Review*, 17 *CONST. COMMENT.* 683, 685 (2000) (reviewing CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999), and MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000)) ("[The Supreme] Court appears to be retreating from its role as stalwart defender of constitutional rights."); *see also, e.g.*, Vladeck, *supra* note 1 (describing courts' general passivity in the face of controversial governmental policies affecting individual rights).

281. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2005); *Hamdi*, 542 U.S. at 507; *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

that do implicate individual rights, the courts might preserve the observer effect while failing to serve their function as individual rights protectors. We might conclude that the observer effect will have some influence in shifting national security policies that *do* implicate individual rights, but those changes might be more modest and less satisfying from a rights-protective approach than they would be if the cases on which the courts did not defer were individual rights cases. In short, the observer effect produces a better “second-best” world when the cases in which the courts show less deference are those that implicate individual rights.

A more abstract and systemic separation-of-powers goal is to avoid an excessive concentration of power in any particular institution of government. Scholars such as Posner and Vermeule are untroubled by the quantum of power that today’s executive branch has accrued to itself. They see it as inevitable that the executive will dominate today’s government, and they perceive the executive as being restrained primarily by political rather than, say, judicial forces. Others decry deference precisely because it facilitates this accretion of power in the executive.²⁸²

Yet the implications of deferential and nondeferential judicial decisions in the national security context are not completely intuitive. A nondeferential court decision achieves more separation of powers “balance” than may be apparent at first glance. That is because, as Part I showed, the court’s involvement casts a shadow longer than the individual court decision that struck down or modified an executive policy. Conversely, the observer effect allows courts in many cases to take more modest approaches to executive national security policies because the executive has reduced—under its own steam—its claims of authority. The executive has, in other words, voluntarily surrendered some of its accreted power, a fact that contributes to the structural balance among branches.

3. Democratic Accountability

Another goal in separating powers—and in placing all of the power to execute the laws in a single entity—is to promote the accountability of the decisionmakers to the people they represent.²⁸³ Those who favor national security deference emphasize that the president (and Congress, when it chooses to get involved in national security decisions) are far more politically accountable to the people than the courts. The executive in particular is best positioned to make the difficult decisions that protect individuals from or expose individuals to danger during times of crises. At

282. Cole, *supra* note 151, at 1332–33 (“Democracies are good for many things, but they are not good at distributing costs fairly when there are easy ways to concentrate them on minorities. If the Constitution is designed to forestall such responses, and if such responses are more likely in emergencies, then it is critical that the judiciary, the least democratic branch, maintain an active role in enforcing our constitutional commitments during emergency periods.”).

283. Flaherty, *supra* note 38, at 1740, 1767 (noting that separation of powers helped cabin unfettered populism by recasting accountability to render it “more truly representative, or at least representative of the people’s better, more deliberative selves”).

the same time, the public may and will hold the president accountable for those decisions. Courts are less directly accountable to the people, and, according to this argument, should therefore tread carefully when invalidating executive policies established to protect the citizenry.

Courts are sensitive to the reputational costs of deciding controversial cases—and cases involving wartime or emergency policies are particularly likely to be controversial. Many scholars have highlighted the institutional costs of deciding such cases.²⁸⁴ Judicial decisions on the merits force courts to bear certain reputational costs. The operation of the observer effect means that courts need to decide fewer such cases (or decide them in a more modest manner) than they may think in order to preserve separation-of-powers values. This approach allows courts largely (though not entirely) to avoid making politically controversial decisions that might cast questions on their institutional competence, while allowing the courts on limited occasions to stake out their more popular role as defender of rights.²⁸⁵ At the same time, there are ways in which courts can distance themselves from the policies in question, thus ensuring that political accountability for the policy falls squarely on the executive.

IV. REVISITING NATIONAL SECURITY DEFERENCE

The fundamental requirements of the observer effect—occasional threatened or actual judicial interventions in national security cases and ongoing uncertainty about jurisdiction and substantive rules—already exist today. However, it is not clear that the executive, Congress, the courts, or litigants are conscious of the effect or attempt to use it in a tailored, deliberate way.²⁸⁶ Yet Part III shows how the observer effect, when fully operational, allows the executive and the courts to maintain a healthy constitutional balance. This Part offers some lessons for the relevant institutions as they seek to achieve and preserve (or pressure the other branches to preserve) that balance.

A. Lessons for Courts

One purpose of identifying and specifying the observer effect is to enable courts to better understand the effect that their deferential and nondeferential decisions have on executive branch policymaking. This

284. BICKEL, *supra* note 190; Katyal, *supra* note 163; *see also* *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting) (arguing that it would have been better for the court to decline to review such actions than to have the judiciary review and approve them).

285. *See* EPSTEIN ET AL., *supra* note 241, at 19 (arguing that a court can protect itself as an institution by upholding largely popular policies but not foregoing the right to say what the law is); Eskridge & Baer, *supra* note 243, at 1144 (“In the area of foreign affairs and national security, where interpretations are often based upon sensitive political calculations, the Justices usually see themselves at an institutional disadvantage in comparison to the executive branch.”).

286. For reasons of space, Part IV does not discuss ways in which litigants may employ (and feel the impact of) the observer effect. Nevertheless, understanding the observer effect clearly will be to litigants’ advantage.

section summarizes ways in which courts may employ the observer effect to achieve particular ends.

1. Preserving Uncertainty

Perhaps the most important lesson for courts is that, for the observer effect to function, their decisions and communications must create uncertainty in the executive branch about when and how the courts might intervene to review future policies. This proposition is in some tension with frequent calls in favor of predictability in the legal system.²⁸⁷ It also is in tension with the idea that a decisionmaker (in this case, the executive branch) tends to make better decisions when armed with more (relevant) information. As Adrian Vermeule has written,

Minimalist decisions leave things undecided, which itself imposes a cost on all actors in the legal system [T]he option value of leaving things undecided, and the reduced error costs that arise from postponing high-stakes decisions until more information is available, might indeed be good *for courts* during emergencies, but what is good for courts might be bad for the system overall.²⁸⁸

As Parts I and II illustrated, the type of uncertainty that arises in the wake of triggering events can benefit not only the courts but our separation-of-powers system generally during times of crisis.

Conversely, if a series of court decisions harmonizes the law and does so in favor of executive authority, the observer effect will wane. The uncertainty that is critical for retaining the observer effect dissipates, diminishing the impetus for the executive to keep adjusting its policies. The D.C. Circuit's habeas jurisprudence serves as an example. Other than the 2011 Executive Order establishing periodic high-level reviews of Guantánamo detentions, the executive does not appear to have made any fine-grained policy shifts on Guantánamo detention processes since the D.C. Circuit began systematically to uphold the executive's policies. But if there are important advantages to be gained when the executive consistently revisits its security policies and, in doing so, challenges itself about whether it has struck the correct balance between security and liberty, then courts may wish to foster strategic uncertainty in the executive.

This proposal raises two difficult questions. First, is it appropriate for a court to adopt views on executive security policies (either individually or in the aggregate) before a particular case or controversy about those policies comes before it? This is a legitimate concern; after all, it is first and foremost the role of the electorate to decide whether the government has struck an appealing overall balance in its security policies. Yet empirical

287. See Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–83 (1989) (describing the virtues of clear, predictable rules); David Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1405 n.120 (2011) (noting that arguments in favor of rule-based decisionmaking traditionally focus on a rule's ability "to foster the interrelated virtues of reliance, predictability, and certainty").

288. Vermeule, *supra* note 15, at 14.

scholarship has shown that judges have policy preferences, and manipulate judicial review to accommodate those preferences.²⁸⁹ Additionally, the Supreme Court recently has evidenced a willingness to intervene in cases to “assert and preserve the institutional role of the federal courts,”²⁹⁰ which implicitly reflects an interest in ensuring that another branch—here, the executive—cannot accrete too much unchecked power. If courts understand the operation of the observer effect to mean that sustaining some uncertainty in the executive branch serves as a check on aggressive power grabs, they have incentives to foster that uncertainty, whether or not it is wholly appropriate for them to do so.

Second, is it possible, particularly in the long term, for courts to maintain such uncertainty while upholding their judicial obligations? The Guantánamo habeas corpus litigation in the D.C. Circuit illustrates how, over two years, serial cases evinced new principles of law—as to admissible evidence, standards of proof, and substantive detainability—that became established precedent as they reappeared in different district courts and, eventually, in the court of appeals. In situations such as this, it is hard to see how the relevant courts could both follow this precedent and sustain executive uncertainty. This further highlights the temporal ebb-and-flow nature of the observer effect. But serial cases such as these are the exception, not the norm, and in the ordinary course there are likely to be multiple opportunities for courts to introduce uncertainty into the executive’s assessment of its own policy positions.

2. Framing Deference

A second key lesson is that not all deference is created equal. Courts therefore should be attuned to the form in which they manifest deference to the executive. An unambiguous decision on the merits that upholds a U.S. national security policy on the basis of deference to the executive is the purest form of deference. A decision like this likely will lead the executive to consider its policy in that area secure from challenge for at least several years. Deference that takes the form of a denial of certiorari or hesitant reliance on the political question doctrine is deference, to be sure, but it comes in a form that leaves the executive far less confident about the security of its policies. The latter is much more likely to lead to moderating shifts in executive policy than the former unambiguous decision. In addition, when courts defer, they often have opportunities to clarify that their deference does not represent an endorsement of the executive’s position on the merits.²⁹¹ Courts also may defer in fact but choose to say

289. Tracey E. George & Albert E. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 4 (2008) (“Attitudinal theory proffers that judges are political actors who make decisions that will maximize their policy preferences.”).

290. Vladeck, *supra* note 1, at 125.

291. Katyal, *supra* note 163, at 1712 (noting that courts can make clear that a decision not to hear a case because of a procedural bar is not an endorsement of the constitutionality of the executive’s act).

little or nothing about deference in their opinions. These kinds of approaches can further amplify the observer effect.

3. Acknowledging Executive Modifications

Courts are not obligated to defer to revised executive policies crafted pursuant to the observer effect beyond what precedent may require. Indeed, in some cases they may not know that the policy at issue has evolved from an earlier, more aggressive form. But if courts never acknowledge that the executive has made beneficial policy changes in these circumstances, the executive may conclude that the incentives to respond to the observer effect are low and thus may decide more often to gamble in court with their more aggressive, unaltered policies. Courts therefore may wish to be attuned to executive policy shifts when evaluating close cases, at least where those courts are persuaded that the original policy was adopted as a good faith interpretation of what the law allowed.²⁹²

4. Selecting Triggering Cases

A judicial decision on a particular national security question has ripple effects that extend well beyond the specific policy at issue. But the observer effect operates as a relatively blunt instrument: having decided to adjudicate a particular national security case on the merits, the court will have little ability to forecast (and limited means to control) how its decision will affect other executive policies.²⁹³ At the same time, in the national security context, courts have a fair measure of discretion to decide which particular cases to adjudicate on the merits. So how should a court decide which cases to take up on the merits?²⁹⁴

If a court wishes to magnify the observer effect, it should consider the presence of the factors described in Part II.B. Those factors include the likelihood of multiple related cases in the foreseeable future, a high level of public attention to the executive policies being challenged, the existence of interagency disputes about the propriety of the existing policy, and

292. The court in *Mohamed v. Jeppesen Dataplan, Inc. (Jeppesen II)*, 614 F.3d 1070, 1090 (9th Cir. 2010) (en banc), seems to have taken this approach.

293. The part of the *Hamdan* decision that held that Common Article 3 applied to the U.S. conflict with al Qaeda is a good example. That holding had implications beyond military commissions: it altered the law applicable to all U.S. detainees in the conflict with al Qaeda, and it led the Department of Defense to modify the rules governing interrogations. See DEP'T OF ARMY, FIELD MANUAL NO. 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006).

294. In advancing their theory that law represents an equilibrium among competing branches of government, Eskridge and Frickey note that the most difficult question their theory confronts is when the Court should disrupt a national equilibrium. They conclude, as a descriptive matter, "Only when the national political branches have failed to deliberate on the relevant constitutional values has the Court exercised its authority to disrupt the equilibrium." Eskridge & Frickey, *supra* note 13, at 90. While Congress's support for the executive policies at issue—particularly as evidenced by statutory authorization—is relevant to how a court disposes of a national security case, this section suggests additional factors a court may wish to consider.

manageable transaction costs. All things being equal, the presence of one or more of these factors associated with a particular executive policy suggests that a court intervention on that policy likely will have a tangible impact on other associated policies (and on the challenged policy itself during the pendency of litigation).

Conversely, courts should be attuned to the total absence of an observer effect on the policy being litigated. In an area of the law rife with deference, courts obviously retain a clear way to protect individual rights: hearing a case on the merits and striking down a government policy. Where there is little external evidence that the executive intends to modify, on its own, a policy that imposes particularly strong restrictions on individual liberty, courts may wish to adopt a nondeferential posture in the case challenging that policy.

B. Lessons for the Executive

The executive might take two lessons from a clearer understanding of the observer effect, one about how it presents its policies and one about how it signals a sensitivity to judicial concerns.

First, as discussed in Part II, the process by, and format in, which the executive develops and announces its policies is likely to affect the extent to which courts will defer to those positions. Therefore, in cases in which the executive is most anxious to avoid judicial review, it should consider carefully how it develops its processes, publicizes its reliance on experts, formalizes its policies, and announces those policies. Further, the timing of the policy shift matters. The executive is more likely to obtain deference if it announces its policy (or policy change) at a time that avoids implying that the policy shift is tied to pending cases.²⁹⁵

As a related matter, the executive should ensure that its pre-observer effect policy reflects a legitimate interpretation of the law. If the executive is a strategic actor (as this Article argues), one might be concerned that the executive—suspecting that it may come under pressure in the future to “soften” a national security policy—will select initial policies that are more aggressive than the executive ultimately believes it needs. This would build in a “cushion” for the executive to shift its policies in a more rights-protective direction, while still resulting in a policy with which it is very comfortable. And if the courts are strategic actors (as this Article also argues), courts will be attuned to this possibility and be less inclined to defer to executive policies, even after policy shifts. There are good reasons to think that the executive faces other (nonjudicial) pressures to craft sincere initial policies. For instance, public outcry would be substantial if it became publicly known that the executive had selected an initial policy position that it internally believed was unlawful. In any case, selecting

295. See GOLDSMITH, *supra* note 19, at 41 (noting that many modest self-imposed restrictions were particularly significant because the Obama Administration seemed to embrace them on its own initiative rather than under apparent threat of judicial scrutiny).

initial policies that are insincere (if detected) will significantly diminish courts' willingness to defer to amended policies.

Second, it may behoove the executive to signal to the courts that it is sensitive to judicial concerns as it sets or amends its policies. The executive may benefit, for instance, by providing courts with greater details about the way in which concerns previously expressed by courts influenced the way it settled on particular policies. This might include identifying various triggering cases that influenced the shape of subsequent policies.²⁹⁶ In this way, the executive could signal to the courts that it developed a particular policy under the influence of the observer effect, which may affect the courts' willingness to defer, at least in hard cases. And when seen in this light, aggressive executive claims that "extraordinary deference" is warranted and that the courts' role is "extremely circumscribed" seem counterproductive, because they virtually dare the courts to intervene, rather than signaling that they are sensitive to the institutional balance that undergirds the separation of powers.²⁹⁷

C. Lessons for Congress

Congress can affect how the observer effect operates between the executive and the courts.²⁹⁸ Specifically, a congressional requirement that certain types of cases be filed in a particular circuit affects how the observer effect functions. The direction in which the requirement pushes the observer effect is unpredictable, though, and depends on the substantive inclinations of the designated circuit.²⁹⁹

On one hand, designating a circuit to handle a particular type of national security case eventually may diminish the observer effect. The observer effect operates most effectively when courts generally uphold executive policies but occasionally decline to defer. When a circuit hears a large volume of comparable cases, the rough edges of the case law become smoothed out as those courts resolve ambiguities. In these circumstances, the executive is better able to anticipate outcomes. In the short term, as the courts are moving toward an equilibrium, the executive has incentives to (or is forced by courts to) change its policies. In the longer term, however, the settled nature of the case law creates few incentives for the executive to

296. A possible analogy here is to the "statement of reasons" given by agencies in the context of rulemaking. See Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 398–99 (2012) (noting that providing reasoned analysis is the way that an agency "pays for (and warrants) deference" from courts).

297. Consider the U.S. government's Response to Petitions for Writ of Habeas Corpus and Motion To Dismiss or for Judgment As a Matter of Law and Memorandum in Support at 7–8, *In re Guantanamo Bay Detainee Litigation*, No. 1:04-cv-01166-RJL (D.D.C. Oct. 4, 2004), 2004 WL 5378102 (arguing that any role the courts have in reviewing the Commander-in-Chief's exercise of his authority to determine the combatant status of detainees is "extremely circumscribed" and that the courts' role in resolving detainee claims about status must be "extraordinarily deferential" and would, in some cases, "be proscribed altogether").

298. Congress obviously has a role in that relationship if congressional authorization of executive acts causes courts to defer more. See Issacharoff & Pildes, *supra* note 3.

299. Thanks to Kate Andrias for useful suggestions on this point.

make those changes. This is particularly true where the circuit's "equilibrium" is highly deferential to the government, as the D.C. Circuit's has been in the detainee habeas cases.³⁰⁰ That said, settled case law and limited change to executive policies is not always a bad thing. In the Foreign Intelligence Surveillance Court (FISC), for instance, both courts and Congress have concluded that the low number of cases in which the FISC rejects government warrant applications results not from excessive deference from the FISC but from "a practice of careful compliance with the statutory requirements on the part of the government."³⁰¹ The observer effect supports this conclusion, particularly where the FISC remains willing on occasion to reject or amend a government warrant application.

Forcing similar cases into a predetermined circuit with substantive proclivities different from the D.C. Circuit may enhance the observer effect to the breaking point. Congress chooses to enact these types of jurisdictional statutes to let courts develop expertise in complicated but similar types of cases. 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.

There are other ways in which Congress can weaken the observer effect as well. When it enacts legislation that strips jurisdiction from courts, as it did in the Military Commissions Act of 2006,³⁰³ it effectively ensures that the observer effect will not operate (unless courts conclude that the statutory provision is unconstitutional). Statutory bars to raising certain claims will produce the same effect.³⁰⁴ Likewise, if the Senate provides

300. Patrick Campbell, *U.S. Supreme Court Denies Certiorari in Khadr v. Obama, Guantánamo and Beyond: A Blog on Executive Detention, National Security and Due Process*, N.Y. STATE BAR ASS'N (May 27, 2011, 3:30 PM), http://nysbar.com/blogs/ExecutiveDetention/2011/05/the_supreme_court_denies_certi.html ("In connection with the D.C. Circuit's rulings in favor of the Government, the D.C. Circuit, without any substantive Supreme Court decision since *Boumediene*, is developing burdens of proof and procedural and remedial rules applicable to detainee habeas petitions that frustrate and narrow the fundamental Constitutional [sic] rights *Boumediene* afforded detainees.").

301. *United States v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987).

302. See generally Chesney, *supra* note 227.

303. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

304. See, e.g., 10 U.S.C. § 948b(g) (2006) (limiting the ability of military commission defendants to raise the Geneva Conventions as a source of rights); 28 U.S.C. § 2241 note (Treating Obligations Not Establishing Grounds for Certain Claims) (noting that individuals

advice and consent to ratification of a treaty subject to a declaration that the treaty is non-self-executing, that also will suppress the observer effect. In short, foreclosing judicial review—by whatever mechanism—will diminish the likelihood that the observer effect will manifest itself and concomitantly reduce executive policy adjustments.

CONCLUSION

In her article on the substantive and procedural decisions taken by U.S. courts since September 11, Jenny Martinez recounts a question that Jose Padilla asked her: “Why is it that litigation concerning the alleged enemy combatants detained at Guantanamo and elsewhere has been going on for more than six years and almost nothing seems to have actually been decided?”³⁰⁵ In one sense, the underlying premise of Padilla’s question remains true: courts have decided only a limited number of substantive issues in the national security arena, notwithstanding the continuing proliferation of litigation.³⁰⁶

In another sense, though, much of substance *has* been decided since 2002—by the executive branch rather than the courts. This Article illustrated an important reason why the executive’s national security policies have changed significantly since 2001. Many of these changes are due not to the direct sunlight of court orders, but to the shadow cast by the threat or reality of court decisions on executive policymaking in related areas of activity. Court decisions, particularly in the national security realm, have a wider ripple effect than many recognize because the executive has robust incentives to try to preserve security issues as its sole domain. In areas where the observer effect shifts executive policies closer to where courts likely would uphold them, demands for deference by the executive turn out to be more modest than they might seem if considered from the isolated vantage of a single case at a fixed point in time. It remains critical for courts to police the outer bounds of executive national security policies, but they need not engage systematically to have a powerful effect on the shape of those policies and, consequently, the constitutional national security order.

A more detailed understanding of the observer effect has implications for national security developments on the horizon. In particular, the observer effect should have salience for those in Congress and the executive branch who are considering whether to create a new national security court that would review targeted killings.³⁰⁷ In this type of situation, the executive

are precluded from invoking the Geneva Conventions in habeas or other civil actions as a source of rights).

305. Martinez, *supra* note 3, at 1014–15.

306. Scheppelle, *supra* note 3, at 94 (“[T]he solutions that judges have crafted—often bold, ambitious, and brave solutions—nonetheless fail to address the plights of the specific individuals who brought the cases.”).

307. See, e.g., Editorial, *A Court for Targeted Killings*, N.Y. TIMES, Feb. 14, 2013, at A26; Jeh Johnson, Pentagon Gen. Counsel, A “Drone Court”: Some Pros and Cons, Mar. 18, 2013, available at <http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons/>.

would have no jurisdictional uncertainty but ample substantive uncertainty, at least initially. This suggests that the observer effect might have a significant up-front effect on executive decisionmaking regarding targeted killings, shifting those decisions in a more rights-focused direction. As long as the court periodically challenged executive petitions, whether by rejecting a given petition or requiring additional information before approving it, we could predict that the executive would continue to make modest adjustments to its policies. Over time, as the court established baseline doctrine, that effect would flatten out, prompting fewer and fewer changes in executive policy, as with the Guantánamo habeas cases in the D.C. Circuit.

This Article focused on the role of the observer effect in cases and policies related to national security. But this is not the only area of law or legal relationship in which the phenomenon appears. Instead, this Article analyzed the observer effect in the national security context both because the effect manifests itself prominently in this area and because it has important implications for the related national security deference debate. However, the hope is to provide insights about a phenomenon that appears in other areas of the law³⁰⁸ and to begin to shed light on how the phenomenon operates on a transsubstantive and transinstitutional level.³⁰⁹

308. A modified version of the observer effect may appear when Congress threatens legislation that would alter a particular executive policy. This may prompt the executive to temper that policy itself, particularly where Congress may have sufficient votes to enact the legislation. For example, Congress periodically has contemplated passing a law regulating the use of the state secrets privilege. Attorney General Holder's 2009 state secrets policy seems to have gone far enough to take the wind out of Congress's sails. Charlie Savage, *Justice Dept. Planning To Limit Government's Use of State Secrets Privilege*, N.Y. TIMES, Sept. 23, 2009, at A16 ("Leading Democratic lawmakers in both the House and the Senate have filed bills that would restrict how the privilege could be used. . . . [T]he new policy, which is intended to rein in use of the privilege by erecting greater internal checks and balances against abuse, could blunt momentum in Congress to pass legislation. . . . Generally, the administration's proposed policy echoes those review requirements [proposed by Congress]."). Similarly, in 1975 the Church Committee began to investigate the CIA's use of assassinations. Even before the Committee issued its recommendations, President Gerald Ford promulgated an Executive Order prohibiting the assassination of foreign officials. L. BRITT SNYDER, *THE AGENCY AND THE HILL: CIA'S RELATIONSHIP WITH CONGRESS 277* (2008); Chesney, *supra* note 140, at 590 (noting that in the wake of the Church Committee recommendations Presidents Ford and Jimmy Carter "moved via executive order to impose voluntary substantive and procedural constraints on covert action, thereby deflating momentum in Congress for more permanent (and potentially more drastic) intervention"). Another example arises in the use of secret evidence in immigration proceedings. In the wake of several troubling, high-profile cases in which INS sought to deport individuals on the basis of secret evidence, several members of Congress introduced the Secret Evidence Repeal Act of 1999, H.R. 2121, 106th Cong. § 6. The executive invoked changes to its internal policies as one reason to oppose the bill. *See Secret Evidence Repeal Act of 1999: Hearing of H.R. 2121 Before the H. Comm. on the Judiciary*, *supra* note 109.

309. Other cases in which interbranch interactions may reflect a modified observer effect are threats of presidential vetoes, which affect the content of legislation notwithstanding Congress's pure preferences; and threats of congressional overrides, which impact the decisions courts produce. *See* Charles M. Cameron, *The Presidential Veto*, in *THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY*, *supra* note 9, at 362 (presidential veto); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE

The observer effect sheds light on an even broader debate about the role of the executive in our separation-of-powers system. There is a growing body of literature exploring the extent to which the executive today faces legal constraints on its actions, and an increasing interest in how nonlegal constraints on the executive function.³¹⁰ One can view the observer effect either as a legal constraint (derived from a future prediction about where a court will decide the “law” should be) or as a quasi-legal constraint that nevertheless has a direct and real impact on executive national security decisions.³¹¹ In either case, the executive responds to the observer effect to maintain control over the content of its security policies, and to preempt judicial decisions with which it would feel pressure to comply. By virtue of the observer effect, it is not true that the courts “come too late” to national security issues or that the executive governs “nearly alone.”³¹² Rather, the observer effect reveals one way courts exert a subtle, ongoing influence on the executive to constrain its own actions, even in national security, an area of law in which the executive usually is seen as most unbound.

L.J. 331, 390–403 (1991) (congressional override of court decisions); Pablo T. Spiller & Emerson Tiller, *Invitations To Override: Congressional Reversals of Supreme Court Decisions*, 16 INT’L REV. L. & ECON. 503 (1996) (same).

310. See generally GOLDSMITH, *supra* note 19; POSNER & VERMEULE, *supra* note 10 (claiming that the primary constraints on the executive are political, not legal); Huq, *supra* note 22 (arguing that the executive faces a combination of legal and political restraints); Pildes, *supra* note 22; Prakash & Ramsey, *supra* note 22.

311. Oliver Wendell Holmes famously viewed law as prediction, often a prediction about what the courts would say the common law is. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

312. POSNER & VERMEULE, *supra* note 10, at 19 (quoting Carl Schmitt, *Die Rechtswissenschaft im Führerstaat*, 7 ZEITSCHRIFT DER AKADEMI FÜR DEUTSCHES RECHT 438–39 (1935)) (arguing that during times of crises the rate of policy change is so fast that Congress and the courts are forced to hand the reins to the executive).