Checks and Balances from Abroad

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Judicial and scholarly discussions about checks and balances almost always focus on actions and reactions by domestic actors. At least in the intelligence area, however, foreign actors can have direct and indirect influences on US checks and balances. New national-security challenges require increased cooperation with foreign intelligence partners. Leaks and voluntary transparency mean that far more information is publicly available about intelligence missions. And robust legal rules now bind the United States and other Western intelligence services.

These changes create opportunities for foreign leaders, citizens, corporations, and peer intelligence services to affect the quantum of power within the executive or the allocation of power among the three branches of the US government. First, some of these foreign influences can trigger the traditional operation of checks and balances in the US system. Second, these foreign actions simulate some of the effects produced by US checks and balances, even if they do not stimulate the US system to act endogenously. Whether one views these foreign constraints as positive or detrimental, understanding them is critical to an informed conversation about the extent to which the executive is truly unfettered in the national-security arena.

INTRODUCTION

It is a truism that the executive has accrued the lion's share of power and control in the US national-security arena. One key reason is Congress's inability to conduct appropriate levels of intelligence oversight.[1] The executive possesses significant informational and operational advantages, members of Congress face limited incentives to conduct oversight that does not advance constituent interests, and congressional staffing and technical expertise are insufficient to the task.[2] As a result, the checks

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1 See Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 Cal L Rev 301, 331 (2009) ("[C]hecks and balances can make a positive contribution to national security by compelling the executive to submit to congressional scrutiny."). The executive has also accrued power in the national-security area because the judiciary has historically been reluctant to decide issues that it sees as assigned to the political branches or as beyond its competence to assess. See, for example, Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 Colum L Rev Sidebar 122, 122–27 (2011).

2 See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64

and balances that are a critical aspect of our democracy are particularly fragile in areas such as cyberoperations, electronic surveillance, and covert operations.

In the face of this weakened system of checks and balances, scholars have examined potential substitutes for vigorous interbranch competition. One strand of scholarship argues that executive intrabranch competition can produce policies that take into account a broader balance of interests.[3] Another strand asserts that, during periods of divided government, competition between political parties serves a function comparable to interbranch separation of powers.[4] Other work argues that participation by private actors in the administrative process can enhance accountability.[5]

Almost no scholarship has explored the potential or actual impact of foreign actors on US checks and balances.[6] At first glance, this is unsurprising: checks and balances are a domestic constitutional concept, and the rules regulating interstate interactions—international law—are disinterested in how states organize themselves internally.[7] It turns out, however, that a

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Stan L Rev 289, 299 (2012) ("[M]eaningfully monitoring intelligence activities requires sophisticated expertise among the overseers that is difficult to acquire."). The recent Senate Select Committee on Intelligence report on interrogation and detention was notable in large part because of its uniqueness. See generally *Report of the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program Together with Foreword by Chairman Feinstein and Additional and Minority Views*, S Rep No 113-288, 113th Cong, 2d Sess (2014).

3 See, for example, Gillian E. Metzger, *The Interdependent Relationship between Internal and External Separation of Powers*, 59 Emory L J 423, 439–40 (2009); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L J 2314, 2316 (2006) (describing "executive v. executive" as a second-best method of checks and balances).

4 See generally, for example, Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2312 (2006).

5 See Jody Freeman, *The Private Role in Public Governance*, 75 NYU L Rev 543, 549 (2000). But see Jon D. Michaels, *Privatization's Pretensions*, 77 U Chi L Rev 717, 719 (2010) (describing various privatization practices as "executive aggrandizing").

6 See generally Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11* (Norton 2012) (describing a set of domestic actors outside the federal government that amplify the existing system of checks and balances). See also Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 Stan J Intl L 1, 17–19 (2013) ("The gap in the literature is the failure to appreciate that a systematic understanding of the [external constraints] might shed light on the appropriate level of [internal constraints] on the President.").

7 See Vienna Convention on the Law of Treaties, Art 27, TIAS No 18232, 1155 UNTS 331, 339 (May 23, 1969, entered into force Jan 27, 1980). See also Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 Am J Intl L 805, 806 (1989) ("The checks and balances built into the system were designed principally to protect the direct interests of the states and their citizens, not foreign states or aliens.").

variety of foreign actors—including leaders, courts, citizens, and corporations—have the capacity to affect either the quantum of power within a single branch or the allocation of power among the three branches of the US government, particularly in the area of intelligence activity.[8]

This Essay makes two related arguments about foreign influences on US checks and balances. First, these foreign influences can stimulate the traditional operation of checks and balances in the US system. That is, the foreign action prompts one or more of the branches to act in ways that are consistent with the conventional understanding of how checks and balances operate. This Essay terms these actions "external prompts." Second, and more controversially, these foreign actions replicate some of the effects produced by the US system of checks and balances, even if they do not stimulate the US system to act endogenously. The Essay terms these "external checks." The Framers envisioned that checks and balances among the branches would serve several functions: ensuring that no branch unduly expands its constitutionally assigned role,[9] fostering deliberation to produce better policies,[10] and precluding one branch from consolidating excessive power.[11] Part II explores how four types of foreign actions serve as external prompts, external checks, or both.

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8 This Essay assumes that checks and balances are not a zero-sum game; one can restrict the flexibility of the executive without directly empowering Congress or the courts. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U Pa L Rev 603, 637 (2001) (critiquing the idea that the power of the three branches is a zero-sum game).

9 See *Buckley v Valeo*, 424 US 1, 122 (1976) ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."); Federalist 51 (Madison), in *The Federalist* 347, 347–48 (Wesleyan 1961) (Jacob E. Cooke, ed) (advocating that "the interior structure of the government . . . be the means of keeping [the constituent parts] in their proper places").

10 See Holmes, 97 Cal L Rev at 328 (cited in note 1) ("[W]e need to look beneath formal compliance with checks and balances to the arrangement's underlying rationale—namely the idea that the duty of the president to report to Congress will prevent at least some ill-conceived policies from being adopted. This is a hope or expectation shared by the Framers.").

11 See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 Colum L Rev 515, 518 (2015) ("For those troubled by relatively unencumbered, concentrated power . . . the Framers' commitment to checks and balances provided, and still provides, an answer."); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 Ga L Rev 117, 120 (2011) ("[T]he Framers sought to prevent any single branch from accumulating unchecked power to enact arbitrary laws.").

The persuasiveness of this account depends on one's view of how much the executive needs assistance from foreign actors. If one believes that the United States is a Gulliver that has no need for—and therefore cannot be constrained by—Lilliputian foreign states whose cooperation may advance US national-security goals, one will be skeptical of this account. Further, there undoubtedly are cases in which cooperation with foreign states bolsters executive branch authority instead of constraining it. If, however, one recognizes that US national security increasingly relies on relationships with foreign partners, then the idea that the executive responds to foreign critiques and concerns to enable ongoing partnerships has bite.

Part I briefly describes the reasons for Congress's weakness in conducting intelligence oversight and the executive's dominance over US intelligence policy. It then considers how a changing intelligence landscape provides fodder for foreign actors to alter this traditional story: new missions require more intelligence partners, leaks and voluntary transparency provide far more information about those missions, and the volume of legal rules that now bind the US and peer intelligence services makes the United States more susceptible to foreign constraints in its operations. Part II explores four sources of foreign influence on the executive's national-security policies and Congress's informational access: foreign courts, leaders, corporations, and intelligence services. This Part demonstrates how each influence serves as an external prompt or external check by prompting the executive to self-regulate, improving Congress's understanding of complicated executive cyber and surveillance activities, or weakening the executive directly. Part III evaluates foreign actors' impact on the allocation of power between the political branches.[12]

I. CHECKS AND BALANCES IN A CHANGING LANDSCAPE

It is well understood that the executive dominates US national-security decisionmaking.[13] Congress and the courts may

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[12] For reasons of space, this Essay largely does not analyze whether the US political branches should privilege the acts of certain foreign actors over others. A future line of inquiry could consider, for instance, whether foreign Westphalian actors play a more important or positive role in this checks and balances story than nonstate actors do. Nor does this Essay explore the likely possibility that some executive checks (such as foreign litigation) redound to the benefit of foreign citizens rather than US citizens.

[13] See, for example, Eric A. Posner and Adrian Vermeule, *The Executive Unbound:*

provide specific, limited constraints on the executive, but these actors generally leave the executive with broad flexibility to conduct military and intelligence operations. Recently, however, changes to the context in which the US intelligence community operates have created an opening for certain foreign actors to influence US intelligence operations. This Part briefly describes the traditional power dynamics between Congress and the executive in the intelligence arena and then identifies and analyzes new forces that are challenging the executive's operational freedom.

A. Congress's Challenges

The structural and political hurdles to robust congressional oversight of the executive's national-security activities are well-known.[14] One important problem is Congress's heavy reliance on the executive for information about intelligence programs, because Congress has few other ways to learn what the executive is doing. Members of the intelligence committees express frustration about the difficulty of extracting information from the executive. As Representative Justin Amash once said: "You don't have any idea what kind of things are going on. So you have to start just spitting off random questions: Does the government have a moon base? . . . Does the government have a cyborg army?"[15] Speaking about the NSA's phone-records program, Senate Select Committee on Intelligence (SSCI) member Senator Ron Wyden stated: "*The New York Times* story and the *USA Today* [article revealing the extent of that program] were both real wakeup calls."[16] These reactions reveal that the intelligence community's obligation to keep Congress "fully and currently

After the Madisonian Republic 4, 18–19 (Oxford 2010) (describing the limited role for Congress and courts in national security).

[14] See generally Amy B. Zegart, *The Roots of Weak Congressional Intelligence Oversight* (Hoover Institution, 2011), archived at http://perma.cc/9NYT-THEE.

[15] Zoë Carpenter, *Can Congress Oversee the NSA?* (The Nation, Jan 30, 2014), archived at http://perma.cc/BW3E-PGUK. See also Serge Grossman and Michael Simon, *And Congress Shall Know the Truth: The Pressing Need for Restructuring Congressional Oversight of Intelligence*, 2 Harv L & Pol Rev 435, 439 (2008) (describing "a culture of passive resistance within intelligence agencies, where they answer your questions, but you have to ask the right questions") (quotation marks and brackets omitted).

[16] Kim Zetter, *Pro-Privacy Senator Wyden on Fighting the NSA from Inside the System* (Wired, Oct 23, 2014), archived at http://perma.cc/UMZ8-8N65 ("[T]here are things that even [Wyden] remains ignorant about—such as the ways in which the government is using Executive Order 12333 to conduct overseas data collection without court oversight.").

informed" about its activities, including new program initiatives and actions with major foreign policy implications, is not producing the desired results.[17]

The mismatch between the size of the intelligence communities and the congressional oversight committees poses another problem. For fiscal year 2013, the US intelligence budget was approximately $52 billion.[18] As House Permanent Select Committee on Intelligence member Representative Adam Schiff noted: "The intelligence committees are small, the staff is small, the agencies themselves are behemoth."[19] This partly explains the limited expertise that constitutes an additional hurdle with which congressional committees must grapple.[20] The executive's extensive use of complicated technology—especially in the cyber and surveillance areas—only exacerbates this problem, because it significantly increases the amount of time required for those in Congress to understand the technology well enough to ask probing questions. This combination of informational reliance on the executive and Congress's lack of technological expertise makes it very difficult for Congress to adequately oversee the executive's cyber and surveillance programs.

B. The Executive's Advantages

The executive's ability to obtain and classify foreign intelligence information gives it the upper hand over Congress and others who attempt to conduct oversight.[21] The increasing use of technology to conduct intelligence operations allows the executive to collect more and more information at a time when Congress's capacity to oversee the executive remains unchanged, thus increasing the information asymmetry between the executive and Congress. The executive has collected large amounts of telephony metadata under § 215 of the USA PATRIOT Act,[22] as

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17 50 USC § 3091(a)(1) ("The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States.").

18 Wilson Andrews and Todd Lindeman, *$52.6 Billion: The Black Budget* (Wash Post, Aug 29, 2013), archived at http://perma.cc/8GJ2-NLHU.

19 Carpenter, *Can Congress Oversee the NSA?* (cited in note 15).

20 See Zegart, *The Roots of Weak Congressional Intelligence Oversight* at *10–11 (cited in note 14).

21 See James A. Baker, *Intelligence Oversight*, 45 Harv J Legis 199, 204 (2008).

22 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") § 215, Pub L No 107-56, 115 Stat 272, 287–88, codified as amended at 50 USC §§ 1861–62.

well as certain e-mail content pursuant to the FISA Amendments Act of 2008.[23] To store these data, which include "gargantuan quantities of data from emails, phone calls, Google searches and other sources," the NSA has constructed a massive data center in Utah.[24]

The executive's high technology intelligence tools pose a new hurdle to not only congressional oversight but also executive self-constraint. An executive with the ability to collect billions of communications every day might find it highly tempting to do just that.[25] As President Barack Obama himself has recognized, "there is an inevitable bias . . . to collect more information about the world, not less. So in the absence of institutional requirements for regular debate—and oversight that is public, as well as private or classified—the danger of government overreach becomes more acute."[26] After all, the executive pays the highest price among the three branches of government if a terrorist attack occurs, and so it has the most robust incentives to employ all tools at its disposal to protect national security.[27]

Notwithstanding the executive's technological superiority to Congress, even the executive occasionally does not fully understand its own surveillance capabilities. The general counsel of the Office of the Director of National Intelligence has noted that "[t]hese are some incredibly complicated systems that NSA was not able to fully and accurately articulate to the [Foreign Intelligence Surveillance Court], in large part because no one at NSA had a full understanding of how the program was operating at the time."[28] This further illustrates how difficult it is to check the executive's cyber and surveillance operations.

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23 Pub L No 110-261, 122 Stat 2436, codified as amended in various sections of Titles 8, 18, and 50. See also generally *U.S. Intelligence Community Surveillance One Year after President Obama's Address* (Brookings Institution, Feb 4, 2015), archived at http://perma.cc/DD8T-4SQB (describing various collection programs).

24 Rory Carroll, *Welcome to Utah, the NSA's Desert Home for Eavesdropping on America* (The Guardian, June 14, 2013), archived at http://perma.cc/SNV6-YBHX.

25 See *Liberty and Security in a Changing World: Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies* *46–48 (Dec 12, 2013), archived at http://perma.cc/H76R-SZAS.

26 *Remarks by the President on Review of Signals Intelligence* (DOJ, Jan 17, 2014) ("NSA Speech"), archived at http://perma.cc/CP7W-8F4N.

27 See Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 Fordham L Rev 827, 887 (2013) ("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.").

28 Cyrus Farivar, *NSA: No One "Had a Full Understanding" of 2009 Call-Checking Program* (Ars Technica, Sept 10, 2013), archived at http://perma.cc/53M2-JLXT.

C. A Changing Intelligence Landscape

The backdrop against which intelligence agencies operate is changing in a way that affects executive power. These changes make it harder for the executive to keep its intelligence activities secret, force the executive to rely more heavily on other states for intelligence and related assistance, and render the executive more sensitive to the relevance of law to its intelligence activities. Thus, while the executive continues to accrue and exercise vast technological powers to conduct national-security activities, many of which occur outside the United States, it faces more avenues by which foreign actors can seek to curtail those activities.

1. New missions.

First, the missions that the United States now asks its intelligence agencies to undertake require greater cooperation with other states.[29] Further, because the missions increasingly affect nonstate actors, they expose US intelligence agencies to greater criticism and litigation.[30] In espionage's long history, the majority of state intelligence activities were directed almost exclusively against other states. But since the 1990s, the United States has faced far more serious threats from nonstate actors who are committed to terrorism, the proliferation of weapons of mass destruction, and transnational crime.[31] Serious threats to a state's security can now emanate from nonstate actors who are located in geographically remote locales.

As a result, the United States can no longer operate independently to achieve its security goals.[32] No single intelligence

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[29] See Richard J. Aldrich, *International Intelligence Cooperation in Practice*, in Hans Born, Ian Leigh, and Aidan Wills, eds, *International Intelligence Cooperation and Accountability* 18, 32 (Routledge 2011).

[30] See, for example, Jonathan Masters, *Targeted Killings* (Council on Foreign Relations, May 23, 2013), archived at http://perma.cc/D65M-9SKA ("[A]nti-Americanism in Pakistan is fueled by the domestic media's portrayal of the U.S. drone campaign as a 'scourge targeting innocent civilians.'"); Mark D. Young, *National Insecurity: The Impacts of Illegal Disclosures of Classified Information*, 10 I/S: J L & Pol Info Socy 367, 403 (2014) ("According to a Pew Research poll conducted shortly after the first [disclosures by Edward Snowden], 'for the first time since 9/11, Americans are now more worried about civil liberties abuses than terrorism.'").

[31] See, for example, John D. Negroponte, *Annual Threat Assessment of the Director of National Intelligence for the Senate Select Committee on Intelligence* *4 (Office of the Director of National Intelligence, Feb 2, 2006), archived at http://perma.cc/V2V6-GFRA.

[32] See Ashley Deeks, *Intelligence Communities, Peer Constraints, and the Law*, in Samuel Rascoff and Zachary Goldman, eds, *Global Intelligence Oversight: Governing*

community can obtain all the coverage it desires on its own or suppress external threats without working with foreign intelligence services.[33] By cooperating with peer intelligence services, the United States can take advantage of other services' better linguists, more nuanced cultural understandings of geopolitics, and relative geographic advantages in intercepting third-party states' communications. For example, the "Five Eyes" arrangement among the United States, United Kingdom, Australia, New Zealand, and Canada allocates electronic surveillance collection geographically among its members.[34] In sum, notwithstanding the executive's increased technological capabilities, it depends on foreign intelligence services to help it manage today's threats.

The targets of US intelligence have changed, too. US intelligence missions today include far more contact with individual nonstate actors, whether in the form of targeted killings, renditions, detention, interrogation, or electronic surveillance. Because electronic surveillance allows states to detect and suppress terrorist acts, surveillance agencies now collect bulk data, which implicates the communications of millions of private actors. As Obama has noted, "the same technological advances that allow U.S. intelligence agencies to pinpoint an al Qaeda cell in Yemen or an email between two terrorists in the Sahel also mean that many routine communications around the world are within our reach."[35] Each of these missions increases interactions between intelligence agencies and private individuals. This creates a group of "victims" who have publicly attempted to cabin US intelligence activities, whether by engaging the media or their leaders, suing US officials who participated in the activities, or suing their own governments for cooperating with US intelligence services.[36]

Security in the Twenty-First Century *5–6 (forthcoming 2016) (on file with author).

[33] See Aldrich, *International Intelligence Cooperation in Practice* at 32 (cited in note 29).

[34] Conor Friedersdorf, *Is 'the Five Eyes Alliance' Conspiring to Spy on You?* (The Atlantic, June 25, 2013), archived at http://perma.cc/F22S-TMPK.

[35] *NSA Speech* (cited in note 26).

[36] See, for example, Scott Shane, *N.S.A. Phone Data Collection Is Illegal, A.C.L.U. Says* (NY Times, Aug 26, 2013), archived at http://perma.cc/43NH-S4EW; Ravi Somaiya, *Drone Strike Prompts Suit, Raising Fears for U.S. Allies* (NY Times, Jan 30, 2013), archived at http://perma.cc/RGM7-QT27.

2. New transparency.

Second, public access to information about intelligence activities has skyrocketed in the past ten years. More of the executive's intelligence activities are being revealed to a panoply of foreign actors, including states, victims, journalists, and corporations. This has resulted from both leaks and voluntary transparency by intelligence agencies. For example, Edward Snowden's 2013 leaks about the activities of the NSA and the UK Government Communications Headquarters (GCHQ) exposed the fact that the NSA and the GCHQ collect massive amounts of telecommunications and Internet information from average citizens, both US and foreign. The executive branch, under pressure from foreign and domestic sources to clarify the legal basis for its targeted killing program, gave a series of speeches justifying those uses of force.[37] The government has also voluntarily declassified various documents, including Foreign Intelligence Surveillance Court opinions.[38] In sum, we know much more today about the intelligence activities that the executive undertakes.[39]

Another source of increased transparency is the nature of the missions themselves. These new missions allow outsiders to more easily detect the physical outcomes of the operations. Journalists and nongovernmental organizations have investigated the aftermaths of large numbers of targeted killings in Somalia, Pakistan, and Yemen.[40] Learning about the location, timing, and targets of these killings is simplified by the fact that drone strikes—unlike, say, efforts to recruit a foreign asset—leave visible physical damage. Further, those who are directly

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[37] See, for example, *The Efficacy and Ethics of U.S. Counterterrorism Strategy* (Wilson Center, Apr 30, 2012), archived at http://perma.cc/Z6MC-T8WL.

[38] See, for example, *ODNI and DOJ Release Additional Declassified FISC Filings and Orders Related to Section 215 of the USA Patriot Act* (Office of the Director of National Intelligence, May 14, 2014), archived at http://perma.cc/9GPC-DGZ4.

[39] It is possible that we know quantitatively more about intelligence operations than we used to but proportionately less (or the same amount), given an overall increase in intelligence operations and collection. However, writings by individuals who worked inside the US intelligence community and the expansion of litigation against intelligence actors suggest that we now know proportionately more. See, for example, David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J Natl Sec L & Pol 209, 280–81 (2014) (describing the Obama administration's commitment to increase the transparency of intelligence collection, apparently measured against the current baseline).

[40] See, for example, *US: Reassess Targeted Killings in Yemen* (Human Rights Watch, Oct 21, 2013), archived at http://perma.cc/ZAD6-XRQE; Karen McVeigh, *Drone Strikes: Activists Seek to Lift Lid on Open Secret of Targeted Killings* (The Guardian, June 19, 2012), archived at http://perma.cc/A8S7-LJQL.

affected by US intelligence activities have incentives to reveal those activities in ways that state victims do not. State targets often are loath to reveal intelligence activities that other states have taken against them because they fear revealing weakness.[41] Nonstate victims, in contrast, have many reasons to reveal US intelligence activities and few reasons not to. As a result, these nonstate-actor-focused activities intrinsically create more avenues by which they may come to light.

3. New legalism.

Finally, various states' intelligence communities confront newly legalistic cultures. More so than fifteen years ago, many intelligence communities today are bound by detailed statutes. Professor Margo Schlanger identified this phenomenon within the NSA as "intelligence legalism," but the NSA is not unique.[42] Then–CIA General Counsel Stephen Preston stated that "the rule of law is integral to Agency operations."[43] Various foreign intelligence services, including those of the United Kingdom, Canada, and Australia, have become subject to detailed statutes since 2000.[44]

As intelligence services face more regulation, they have increased their legal staffs to help comply with those regulations. The CIA had fewer than 20 lawyers in the mid-1970s and approximately 150 in 2010.[45] These lawyers are increasingly embedded in operations. For example, in the United Kingdom, operators receive legal briefings on domestic and international law to ensure that UK intelligence does not facilitate torture or mistreatment by other intelligence services.[46]

In the past decade, individuals have begun to challenge the legality of different forms of intelligence activity in court.[47] This

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41 See, for example, Devlin Barrett and Damian Paletta, *Officials Masked Severity of Hack* (Wall St J, June 24, 2015), archived at http://perma.cc/ZL27-GRFY.

42 Margo Schlanger, *Intelligence Legalism and the National Security Agency's Civil Liberties Gap*, 6 Harv Natl Sec J 112, 113 (2015).

43 *Remarks of CIA General Counsel Stephen W. Preston at Harvard Law School* (CIA, Apr 10, 2012), archived at http://perma.cc/X28R-VM9P.

44 See Deeks, *Intelligence Communities* at *5 (cited in note 32).

45 See Goldsmith, *Power and Constraint* at 87 (cited in note 6).

46 See Intelligence and Security Committee, *Rendition* *53 (Crown, July 2007), archived at http://perma.cc/EA6Y-Y3SY.

47 See, for example, James Risen, *Setback for Suit against N.S.A. on Phone Data* (NY Times, Aug 28, 2015), archived at http://perma.cc/8YZQ-WRDW; Charlie Savage, *Suit over Targeted Killings Is Thrown Out* (NY Times, Dec 7, 2010), archived at http://perma.cc/VT6R-SHWC.

naturally focuses the minds of intelligence officials on legal compliance. And as the work of these communities becomes more public, litigation will increase. Leaks such as Snowden's reveal secret programs of which potential plaintiffs may not have been aware. Disclosures about intelligence activities also increase the likelihood of plaintiffs' success in litigation, because the disclosures may alter courts' assessments of jurisdictional issues such as standing and privileges such as the state-secrets privilege.[48] Indeed, some plaintiffs have made headway in court: The European Court of Human Rights (ECHR) has held that Poland and Macedonia acted unlawfully in assisting the CIA in hosting secret detention facilities and rendering a person to Afghanistan.[49] A UK court has allowed an individual to proceed with his claim that UK and US intelligence services transferred him to the Libyan government, which he alleges tortured him.[50]

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These changes to the intelligence landscape render the executive more responsive to foreign influences. This directly affects how the executive exercises its intelligence powers. The new transparency gives leverage to a wide range of actors to prompt changes to US policy in different forums. The new types of intelligence missions produce foreign victims with strong incentives to object to the intelligence activities, sometimes by claiming that the United States violated foreign or international law. And the new legalism confronting various intelligence communities means that foreign partners with whom the United States must cooperate may impose constraints on the United States in joint operations.

II. FOREIGN INFLUENCES ON CHECKS AND BALANCES

Part I shows why the United States often needs the cooperation of foreign states in the national-security arena. The stakes are high when cooperation falls apart—perhaps more so

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48 See Deeks, *Intelligence Communities* at *10 (cited in note 32).

49 See *Al Nashiri v Poland*, App No 28761/11, *216–17 (Eur Ct Hum Rts 2014); *Husayn (Abu Zubaydah) v Poland*, App No 7511/13, *212–13 (Eur Ct Hum Rts 2014); *El-Masri v The Former Yugoslav Republic of Macedonia*, App No 39630/09, *79–80 (Eur Ct Hum Rts 2012).

50 Owen Bowcott, *Abdel Hakim Belhaj Wins Right to Sue UK Government over His Kidnap* (The Guardian, Oct 30, 2014), archived at http://perma.cc/DV54-J5NX; *Belhaj v The Rt. Hon. Jack Straw MP*, 2014 EWCA Civ 1394.

in national security than in areas such as trade and the environment. Unduly aggressive intelligence policies can make it difficult for Western allies to maintain cooperation with the United States, as a legal and political matter.[51] As a result, foreign states that wish to continue to cooperate with the US intelligence apparatus (because it advances their own security goals) pay keen attention to how the US executive conducts its national-security policies. In turn, the United States pays attention to their views, to the extent that those views preview reduced cooperation or impose legal limits that the United States must embrace to conduct joint operations.

The influence of foreign states on executive power is an outgrowth of a phenomenon identified by Professor Jack Goldsmith.[52] Goldsmith has focused on how actors outside the government, such as the US media and nongovernmental organizations, helped hold the executive accountable in the face of its massive accumulation of power post-9/11.[53] But few scholars have spent time considering non-US pressures that affect the quantum and use of that executive power. Although foreign actors may share some motivations in common with domestic actors, they have additional motivations because of the ways in which US and foreign national-security apparatuses are intertwined. Domestic actors contest executive action when they disagree with substantive policies or when they fear, in a more inchoate sense, an unbridled accrual of executive power. Foreign actors may share some of those motivations, but they also seek to preserve their ability to cooperate with the United States on law-enforcement, military, and intelligence matters—which, paradoxically, can become harder when the US executive is unfettered.

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[51] See Adam D.M. Svendsen, *Intelligence Cooperation and the War on Terror: Anglo-American Security Relations after 9/11* 4 (Routledge 2010) (noting that US use of renditions altered the way that the United Kingdom shared intelligence with the United States); Alison Smale, *Germany Limits Cooperation with U.S. over Data Gathering* (NY Times, May 7, 2015), archived at http://perma.cc/9T3L-UYVP.

[52] See Goldsmith, *Power and Constraint* at xi (cited in note 6) (describing the post-9/11 efforts of Congress and the Supreme Court to limit executive authority as a pushback "harder . . . than in any other war in American history").

[53] See generally id. In *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952), Justice Robert Jackson's concurrence recognized that external factors such as public perceptions of the president could alter the strength of the executive. Jackson stated that the president's "prestige as head of state and his influence upon public opinion [ ] exert[ ] a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness." Id at 653–54 (Jackson concurring).

This Part explores four contexts in which foreign actions have influenced—directly or indirectly—the operation of checks and balances within the US government. All four sets of foreign actors (courts, leaders, corporations, and intelligence services) have reduced executive power in certain circumstances (an external check). The foreign court cases, naming and shaming, and constraints by peer intelligence services potentially stimulate inter- and intrabranch dialogues about the US policies under fire (an external prompt). Those same activities have attempted to rein in what the actors view as executive violations of international law (an external check and prompt). Finally, the naming and shaming as well as foreign technology company reports enhance Congress's capacity to evaluate and critique executive programs, the former by providing (sometimes persuasive) alternative views on the wisdom and legality of executive actions and the latter by enhancing Congress's sophistication about technology and threats (an external prompt).

A. Litigation Abroad Implicating US Policies

Historically, intelligence cases rarely found their way into court, presumably because the victims were foreign states or because the victims could not attribute the activity to a particular perpetrator. Since September 11, 2001, however, both US and foreign courts have seen a proliferation of intelligence-related litigation. This litigation has garnered more traction abroad than domestically; a number of foreign cases directly or indirectly implicate US intelligence activities.

For example, in the United Kingdom, a former Guantánamo detainee challenged the legality of UK intelligence activities, claiming that the United Kingdom had provided information to the United States, which the CIA employed to question him using harsh interrogation techniques.[54] The UK Court of Appeal ordered the UK government to publicly reveal evidence describing what the United Kingdom knew about the individual's treatment while he was in CIA custody.[55] As another example,

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[54] See *Mohamed v Secretary of State for Foreign and Commonwealth Affairs*, 2010 EWCA Civ 65, ¶¶ 60–64. The United Kingdom settled the case for millions of pounds. *Government to Compensate Ex-Guantanamo Bay Detainees* (BBC, Nov 16, 2010), archived at http://perma.cc/DGD4-R9SF.

[55] See Richard Norton-Taylor, *Binyam Mohamed Torture Evidence Must Be Revealed, Judges Rule* (The Guardian, Feb 10, 2010), archived at http://perma.cc/J3MG-CSNG; *Mohamed*, 2010 EWCA Civ 65 at ¶ 2.

the son of a man allegedly killed by a US drone in Pakistan sued the GCHQ, claiming that GCHQ employees had abetted murder by providing locational intelligence to the CIA so that it could target the individual.[56] Further, the ECHR recently held that Poland had violated the rights of two detainees whom the CIA allegedly held and mistreated in secret detention facilities in Poland.[57]

Some attempts to challenge US intelligence practices take the form of criminal prosecutions. Several states are conducting criminal investigations or prosecutions of individuals who are associated with US intelligence activities. Italy prosecuted and convicted in absentia a number of US intelligence and military officials for allegedly rendering a radical sheikh from Milan to Egypt.[58] A Lithuanian prosecutor recently reopened an investigation of reports that Lithuania hosted a secret CIA detention facility; the focus is likely to be on senior Lithuanian intelligence officials.[59] A Pakistani judge recently ordered the state to file criminal charges against two former CIA officials who were involved with the drone program.[60] And it seems likely that more cases against US officials might follow in the wake of the SSCI's interrogation report.

When the results of foreign litigation produce judicial decisions revealing and restricting the intelligence activities of the United States or its partners, this alters the legal landscape within which both intelligence communities operate. This litigation and its outcomes serve as external checks by limiting the ability of particular US officials to travel.[61] Far more significantly, these

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[56] See Somaiya, *Drone Strike Prompts Suit* (cited in note 36) (noting that the case raised the prospect of legal liability for European officials by linking them to the US drone campaign, which is widely seen as illegal in their home states). The UK Court of Appeal ultimately ruled against the claimant. *Khan v Secretary of State for Foreign and Commonwealth Affairs*, 2014 EWCA Civ 24, ¶ 53.

[57] See Adam Goldman, *European Court Finds Poland Complicit in CIA 'Torture,' Orders Detainee Compensation* (Wash Post, July 24, 2014), archived at http://perma.cc/6L8E-MK75 (describing the cases of *Al Nashiri v Poland*, App No 28761/11 (Eur Ct Hum Rts 2014), and *Husayn (Abu Zubaydah) v Poland*, App No 7511/13 (Eur Ct Hum Rts 2014)).

[58] See Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions* (NY Times, Nov 4, 2009), archived at http://perma.cc/VJ86-75WL; Craig Whitlock, *Testimony Helps Detail CIA's Post-9/11 Reach* (Wash Post, Dec 16, 2006), archived at http://perma.cc/C54W-U7LH.

[59] Andrius Sytas and Christian Lowe, *Exclusive: Lithuanian Prosecutors Restart Investigation into CIA Jail* (Reuters, Apr 2, 2015), archived at http://perma.cc/U9W8-899P.

[60] *Pakistan Judge Orders Charges against Ex-CIA Officials over Drone Deaths* (Al Jazeera America, Apr 7, 2015), archived at http://perma.cc/FT6C-EABC.

[61] See, for example, Greg Miller and Karen DeYoung, *Panama Releases Former CIA Operative Wanted by Italy* (Wash Post, July 19, 2013), archived at

cases constrain the executive indirectly by limiting the ways in which its intelligence partners can cooperate with it. Additionally, it creates what I have elsewhere referred to as an "observer effect."[62] Due to this observer effect, the threat of having a court adjudicate and reject a national-security policy gives both US and foreign executives incentives to render those policies more rights-protective even before the court weighs in.[63] The litigation described above creates an observer effect for US intelligence partners who have suffered losses in court and who are more likely to be more cautious in shaping future, related policies. This in turn further narrows the scope of cooperation that the US executive can obtain from its partners. These cases thus serve as external checks that diminish the power of the executive.

These cases largely reflect efforts by foreign plaintiffs to enforce domestic laws against their own governments. But both these cases and the naming/shaming and peer constraints discussed in Part II.B rely on international law as part of their legal argumentation. In some cases, the United States shares the international law obligations at issue. As a result, these actors are directly imposing their interpretations of international law on the executive and blocking its perceived violations.[64] These foreign actions may also force the executive to reconsider its existing interpretation of international law—and they could stimulate Congress to question whether executive policies are compliant with the law. This forcing of dialogue, whether it occurs between branches or entirely within the executive, emerges from an external prompt.

B. Naming and Shaming by Foreign Leaders

Another way in which foreign actors narrow the range of executive national-security activity is by directly criticizing the executive's intelligence policies, accusing the executive of violating international law, and demanding change. One direct result of Snowden's leaks was a slew of complaints from foreign leaders about US extraterritorial surveillance. German Chancellor Angela Merkel chastised President Obama for allowing the NSA to

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http://perma.cc/BSC5-7HCS (stating that a former CIA agent convicted by an Italian court faced potential deportation from Panama).

62 Deeks, 82 Fordham L Rev at 830–31 (cited in note 27).

63 See id.

64 See Goldsmith, *Power and Constraint* at 225 (cited in note 6) (describing foreign states as negotiating "favored understandings of the law").

monitor her phone calls.[65] Brazilian President Dilma Rousseff canceled her state visit to the United States, sending an unmistakable signal that Brazil was displeased with this spying.[66] Regardless of the sincerity or hypocrisy of these accusations, the political pressure resulted in US policy changes.[67]

In January 2014, Obama announced: "[U]nless there is a compelling national security purpose, we will not monitor the communications of heads of state and government of our close friends and allies."[68] The accompanying presidential policy directive "suggests that the United States will limit its existing surveillance of certain states' leadership" and will be more cautious before engaging in surveillance against "the leadership of a significant number of states."[69] The press later reported that the CIA had stopped spying on "friendly governments in Western Europe in response to the furor over a German caught selling secrets to the United States and the Edward Snowden revelations of classified information held by the National Security Agency."[70] If true, the US policy decision to suspend collection is an example of self-constraint flowing—in notable part—from public naming and shaming by allies. These decisions did not necessarily empower Congress at the expense of the executive, but they did subtract power from the executive's side of the ledger.

Because these foreign actions are highly public, they also serve to educate all executive actors about highly classified US intelligence policies. By bringing into the conversation executive actors (such as the State Department) that presumably did not participate in the initial policy setting, the subsequent policy decisions reevaluating US activity may incorporate the equities of

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65 See Geir Moulson and John-Thor Dahlburg, *German Chancellor Confronts Obama over Reported Spying* (Atlanta Journal-Constitution, Oct 23, 2013), archived at http://perma.cc/57R4-GWZZ.

66 *Brazil's Rousseff Cancels State Visit to U.S. over Spying - Report* (Reuters, Sept 17, 2013), archived at http://perma.cc/9HF6-UL6F.

67 See Ashley Deeks, *An International Legal Framework for Surveillance*, 55 Va J Intl L 291, 330 (2015).

68 *NSA Speech* (cited in note 26).

69 Deeks, 55 Va J Intl L at 330 (cited in note 67). See also *Presidential Policy Directive—Signals Intelligence Activities* (The White House, Jan 17, 2014), archived at http://perma.cc/TCB7-HCEJ (stating that it is "essential that national security policymakers consider carefully the value of signals intelligence activities in light of the risks entailed in conducting these activities").

70 Ken Dilanian, *CIA Halts Spying in Europe* (AP, Sept 20, 2014), archived at http://perma.cc/8REC-U9RE.

a wider set of actors.[71] These external prompts therefore may contribute to the "second-best," intrabranch form of checks and balances envisioned by Professor Neal Katyal.[72] When a foreign actor seeks to impose a constraint on the executive, the executive often has a choice: accept the constraint and continue interstate cooperation, or reject the constraint and evaluate alternatives that do not require the cooperation of another state. In making that choice, the executive branch must internally assess the costs and benefits of both approaches. Those conversations require the executive to evaluate the importance of the operations at issue and the validity of foreign concerns. The foreign acts thus force intrabranch deliberations that may produce more carefully considered policies.

C. High Technology Cyberfirms

One theory about how Congress conducts oversight is the "fire alarm" theory, which holds that Congress relies on outside influences, including whistleblowers and the press, to alert it to situations in which agencies violate congressional mandates.[73] This oversight trigger helps compensate for Congress's inferior knowledge about executive activities and allows members of Congress to target oversight toward activities that interest their constituents. Although the fire alarm approach is less common in the national-security area because of the clandestine nature of intelligence,[74] the Snowden leaks serve as a paradigmatic recent example. Far less remarked on, however, is a different external source of information about US cyberactivity: foreign cyberfirms.[75] These firms, which are extremely technologically

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71 See, for example, Holmes, 97 Cal L Rev at 330 (cited in note 1) ("Excessive compartmentalization within the executive prevents knowledgeable experts ensconced in one executive agency from pointing out the flaws in the evidence being used by another executive agency to set national policy.").

72 Katyal, 115 Yale L J at 2316 (cited in note 3).

73 Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am J Polit Sci 165, 166 (1984) (describing the police-patrol and the fire alarm models of congressional oversight).

74 See Grossman and Simon, 2 Harv L & Pol Rev at 438 (cited in note 15).

75 To be fair, foreign technology firms are not the only firms producing these reports. Several American firms, such as FireEye/Mandiant and CrowdStrike, have done so as well, though their reports tend to identify foreign authors of espionage and hacking, including Russia and China, and generally have not attributed cyberespionage to the United States. See generally *APT1: Exposing One of China's Cyber Espionage Units* (Mandiant), archived at http://perma.cc/W2H5-PLKP; *CrowdStrike Global Threat Report: 2013 Year in Review* (CrowdStrike), archived at http://perma.cc/89VS-ZE3H.

capable and which often work on behalf of corporate clients, investigate sophisticated cyberespionage, hacking, and other attacks on their clients' computer systems. They defend their clients against these cyberoperations and produce credible reports describing the operations and the likely attacker—which is often a state actor, and often the United States.

One of the most prominent foreign cyberfirms is Kaspersky Lab, a Moscow-based company that helps clients combat cyberthreats, including malware, hackers, and cyberespionage.[76] Kaspersky helped identify the Stuxnet worm in 2010—a computer attack directed at Iran's nuclear program and reportedly created by the United States and Israel.[77] Kaspersky later discovered and reported on Flame, an espionage tool kit that sabotages infrastructure and that has infected systems in Iran, Lebanon, Syria, and Sudan, among others.[78] The firm also recently reported that it discovered on customer machines NSA tools directly related to Stuxnet. The report disclosed in detail how the platforms work, including by giving the attackers complete, persistent control of infected systems for years without detection.[79]

Assume that Kaspersky correctly attributed these operations to the United States. It is not known whether the executive had already informed Congress of these operations. But even if the executive had informed the congressional intelligence committees, these projects would be so highly classified that the executive likely would have told only the committees' leadership. In contrast, these foreign reports allow all members of Congress to better understand cyberthreats generally and (possible) US capabilities in particular.

These high technology reports are particularly relevant because they provide information about an area of operations in which intrabranch checks and balances may not be effective. Cyberoperations are often highly classified, so actors inside agencies such as the State and Treasury Departments may not have access to or input regarding the operations. Further, the operations are so technical that many people in other agencies, even if given access, are ill equipped to question the operations

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76 See *About Kaspersky Lab* (Kaspersky Lab), archived at http://perma.cc/U5RL-SLCE.

77 See Deirdre Fernandes, *Kaspersky Lab Cites Growing Cyber Threats* (Boston Globe, Mar 10, 2015), archived at http://perma.cc/ST72-ZPEX.

78 See Kim Zetter, *Meet 'Flame,' the Massive Spy Malware Infiltrating Iranian Computers* (Wired, May 28, 2012), archived at http://perma.cc/QYP4-SFKP.

79 See Kim Zetter, *Suite of Sophisticated Nation-State Attack Tools Found with Connection to Stuxnet* (Wired, Feb 16, 2015), archived at http://perma.cc/54HC-X6Z2.

or their potential unforeseen consequences.[80] Ironically, these technology firms are more likely than most bureaucratic actors within the executive branch to have the technological sophistication to match the NSA and the CIA.

The activities of these firms thus amplify US checks and balances in three ways. First, reports on US cyberoperations directly constrain the executive by limiting the breadth of tools in its cyberarsenal.[81] Now that cyberexperts around the world understand Stuxnet and Flame, the United States can no longer employ those types of cyberweapons in future actions. Second, at times these firms act as the executive's competitors. They defend their clients from possible NSA and foreign cyberactivities and provide protection to corporations that some think the executive branch itself should provide.[82] When technology firms rather than the executive provide corporate defense, the executive obtains less threat information and accordingly is less empowered. Third, these technology firms help Congress overcome its informational disadvantages on technology and information about US intelligence-community operations.[83] It is hardly a perfect fix, of course; these reports provide a window into a narrow part of US cyberoperations rather than a systematic education to those tasked with overseeing the executive's cyberactivity. But if Congress feels that it is underinformed and ill equipped to understand the impact of cybertools used by and against the United States, these reports help counter those problems and may prompt Congress more generally to assert a role in setting US cyberstrategy.[84] These reports thus serve as external prompts, stimulating domestic checks and balances.

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80 See Zegart, *The Roots of Weak Congressional Intelligence Oversight* at *10–11 (cited in note 14).

81 For those who favor strong national-security policies, these reports are highly problematic and costly for the United States, even though the companies obtained their information using lawful cybertools (*vice* leaks).

82 See, for example, *About Kaspersky Lab* (cited in note 76).

83 See Zegart, *The Roots of Weak Congressional Intelligence Oversight* at *18 (cited in note 14) ("Meaningful oversight requires good questions, and good questions require expertise. Unless Congress fosters institutional mechanisms to develop greater expertise, more executive branch information will only go so far.").

84 See Stephen Dycus, *Congress's Role in Cyber Warfare*, 4 J Natl Sec L & Pol 155, 159–60 (2010).

D. Peer Constraints

The three phenomena discussed in the previous sections serve to publicly limit executive intelligence operations, stimulate inter- or intrabranch dialogue, or enforce international law against the executive. But foreign influence takes more subtle forms as well. The legal limitations that govern one intelligence service can constrain not just that service but also the peer services with which the first one interacts.[85] For example, one intelligence service may wish to transfer an individual to another state's custody but may fear that the receiving state will mistreat him.[86] The transferring state may require assurances that the receiving state will not engage in certain actions against the transferred individual and may also require the receiving state to allow continued access to the individual posttransfer.[87] Post-9/11, the United Kingdom imposed these types of formal constraints on the US executive.[88]

Constraints on US intelligence activity take other forms as well. The United Kingdom refused to allow the United States to use UK airbases or airspace for US renditions because it did not support US rendition policy.[89] Germany instructed its domestic intelligence service not to provide US intelligence officials with information that would enable them to locate German citizens and use force against them.[90] And states that initially permitted the United States to establish secret detention facilities on their territory post-9/11 ultimately withdrew that consent as they became increasingly uncomfortable with how unfettered the US executive was. As a result, the CIA had to terminate its secret detention and interrogation program.[91]

Some have lamented the limited nature of oversight and accountability that surrounds bilateral intelligence liaison

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85 See generally Deeks, *Intelligence Communities* (cited in note 32).

86 See Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo Wash L Rev 1333, 1379–94 (2007).

87 See Ashley S. Deeks, *Avoiding Transfers to Torture* 10 (Council on Foreign Relations 2008).

88 See ISC, *Rendition* at *43 (cited in note 46) (noting that caveats have been placed on intelligence and honored by the United States over the past twenty years).

89 See *Straw Denies 'Torture' Cover-Up* (BBC, Jan 20, 2006), archived at http://perma.cc/XK7S-NKK4. But see Cori Crider, *7 Things You Should Know about Diego Garcia and Renditions* (The Guardian, July 11, 2014), archived at http://perma.cc/VC6S-LAEU.

90 Smale, *Germany Limits Cooperation* (cited in note 51).

91 See S Rep No 113-288 at xxiv (cited in note 2).

relationships.[92] These relationships, however, may in some cases constrain US intelligence operations, even when those limitations flow not from US statutes but transitively from the domestic and international law obligations of states with which the United States must cooperate. In some cases, these constraints operate before the executive can act; in contrast, many of the domestic constraints in the intelligence area operate ex post and so may be less effective.[93] Further, these foreign intelligence services serve as watchers over executive activity that no other actor within the US system can observe, and to that extent they provide legal oversight that is otherwise difficult to conduct.[94]

III. EVALUATING FOREIGN INFLUENCES

If one hopes to analyze with greater accuracy how unfettered the executive has truly become in the post-9/11 era, it is important to look beyond the formalism of a closed system of checks and balances. Whether one conceives of the foreign actors described in Part II as external prompts (exogenous stimulants to traditional actors in the US system of checks and balances) or as external checks (foreign players whose actions simulate some of the effects on the executive that our system of checks and balances produces), these foreign actors help suppress or amplify the powers of each of the three branches.

At the same time, treating certain external influences as affecting US checks and balances poses line-drawing problems. After all, not all interactions between the United States and foreign actors should be treated as implicating domestic checks and balances. This problem is not unique to foreign influences on checks and balances, of course. Scholars who study checks and balances that are internal to the US system and who believe that actors such as corporations and the media influence the balance of power between the branches must draw lines as well, to articulate what types of interactions do and do not yield that result.[95]

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92 See, for example, Elizabeth Sepper, *Democracy, Human Rights, and Intelligence Sharing*, 46 Tex Intl L J 151, 168–69 (2010); Martin Scheinin and Mathias Vermeulen, *International Law: Human Rights Law and State Responsibility*, in Born, Leigh, and Wills, eds, *International Intelligence Cooperation and Accountability* 252, 252 (cited in note 29).

93 See Neal Kumar Katyal, Book Review, *Stochastic Constraint*, 126 Harv L Rev 990, 994–95 (2013) (favoring ex ante constraints on the executive).

94 See Deeks, 82 Fordham L Rev at 833–34 (cited in note 27).

95 See generally Goldsmith, *Power and Constraint* (cited in note 6) (describing a host of nongovernment actors as participants in checks and balances).

This Essay does not attempt to draw crisp lines between foreign influences that should count as contributing to US checks and balances and those that should not. Its primary contribution is to illuminate the existence, nature, and impact of some forms of foreign influence on that system. The constraints described herein are definable and, to some extent, quantifiable. They are also largely legal in nature, and they are therefore easier to identify than diplomatic or foreign policy pressures that at a broader level also constrain the executive or stimulate inter- or intrabranch dialogue. And these constraints tend to diminish or increase the power of one branch of government rather than affect the power of the United States as a whole. The more directly one can trace the impact of foreign action on an executive decision to undertake less than is fully authorized under US law, the more clearly the foreign act should be treated as implicating checks and balances.

Second, the extent to which foreign actors can and will constrain the executive depends on the size of the delta between the laws and policies of the United States and those of its allies. As long as the states from which the United States requires cooperation—particularly Western democracies such as EU member states, Canada, and Australia—have laws and policies in place that are more protective of certain rights than those of the United States, foreign actors will continue to place power-reducing pressures on the executive. If, however, foreign actors face new security threats and expand their own intelligence authorities, then pressures on the US executive might diminish, further affecting the power balance within the United States.[96] Likewise, if US laws and policies shift in a rights-protective direction, the quantum of foreign constraints on the executive will shrink.

Third, although these foreign pressures may enhance US checks and balances directly (as when foreign companies produce useful information for Congress) or indirectly (by producing comparable effects), they are not necessarily democracy enhancing overall. Many of these foreign constraints reflect a direct or transitive imposition of foreign values on executive branch actions. There is nothing unlawful about this imposition: it results from foreign actors properly implementing their own laws and policies. But the constraints on the executive do not flow from a US

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[96] France, for example, recently enacted legislation that considerably enhances the executive's surveillance authorities. Joanna Gill, *France MPs Approve Vast New Surveillance Rules in 'French Patriot Act'* (Euronews, May 5, 2015), archived at http://perma.cc/CQ9P-N383.

democratic (or even countermajoritarian) decision to rein in executive intelligence activities. Thus, the *effect* on the executive that external checks produce may be very similar to that produced by internal checks: an executive constrained in its ability to engage in a particular intelligence activity. But the reasons and values behind the external checks, such as a desire to promote another government's foreign policy goals or publicize a controversial covert CIA or NSA activity, may not be values that the US demos would support.

Nevertheless, these foreign pressures may bear certain virtues when compared to pressures from within the US demos, as from human rights NGOs and other interest groups outside the government that contest US intelligence policies. These domestic groups are not national-security experts, and they often cannot accurately balance the full range of equities at stake when assessing the propriety of a particular executive policy.[97] In contrast, at least some of the actors discussed in Part II are educated about national-security issues, either because they face comparable issues within their own governments or because they have a sophisticated technological understanding of the ways in which certain intelligence activities operate. Though they are not part of the US democracy, their pressures may in some cases be more sensibly directed than pressures by those within the United States who lack substantive national-security experience.

CONCLUSION

Congress and the courts face significant hurdles in conducting traditional interbranch checks and balances in the national-security arena, and there is little reason to think that this dynamic will change soon. But there are other sources of pressure on our heavily dominant executive, particularly from beyond our borders. In the intelligence arena, in which the United States relies in significant ways on foreign partners and advanced technology to address potent nonstate threats, a variety of foreign actors have demonstrated their abilities to diminish the executive's national-security dominance—by either stimulating the functioning of US checks and balances or directly limiting the executive's freedom of operation. In a world in which spying becomes increasingly publicized, contentious, and regulated, foreign actors undoubtedly will continue to check the US executive in subtle but powerful ways.

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[97] See Katyal, Book Review, 126 Harv L Rev at 1002 (cited in note 93).