

ASHLEY S. DEEKS

Secret Reason-Giving

ABSTRACT. Reason-giving plays an important role in our system of governance. Agencies provide public reasons when making rules so that individuals affected by the rules can assess them. Judges give public reasons when issuing opinions, which allows the public and higher courts to evaluate the caliber of the judges' decisions. Public reason-giving can improve the quality of decisions, deter abuses of authority, and enhance fidelity to legal standards. In these contexts, reason-giving and the publicity principle go hand in hand.

But what happens when the government cannot publicly reveal the reasons for its decisions? Many classified national security decisions are made entirely inside the executive branch. Does the government still provide reasons for those decisions, and, if so, who is the intended audience? Does secret reason-giving have the same beneficial effects as public reason-giving? Can the audience for secret reason-giving serve as a proxy for the public?

This Article tackles these questions. It first shows that the Executive often undertakes secret reason-giving and does so with a variety of audiences in mind, including the officials executing policy decisions, future administrations, foreign allies, and a notional public. The Article then argues that secret reason-giving confers a number of benefits, which manifest themselves in a different way than in the public context. Recognizing that secret reason-giving imposes constraints on legal and policy decision-making informs the continuing debate about the breadth of executive power in the national security space. If secret reason-giving offers a modest yet achievable way to impose systemic checks on national security decision-making while improving the quality of decisions, it is in our collective interest for reason-giving to become a regular part of the Executive's classified decision-making process.

AUTHOR. E. James Kelly, Jr. — Class of 1965 Research Professor of Law, University of Virginia Law School. Many thanks to Mathilde Cohen, Mike Flowers, Chimène Keitner, Robert Litt, Mitt Regan, Alan Rozenshtein, Daphna Renan, Rich Schragger, Paul Stephan, Jed Stiglitz, and participants in the 2018 Yale-Duke Foreign Relations Law Roundtable and a Vanderbilt Law School Faculty Workshop for very helpful comments. Rachel Brown and the other editors of the *Yale Law Journal* provided excellent substantive suggestions and editorial assistance. Thanks also to Ben Doherty and Kristin Glover of the University of Virginia Law Library for reference assistance and to Scott Harman-Heath for research assistance.



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INTRODUCTION

Reason-giving—the process of offering justifications for a decision—is essential to our system of governance. When issuing rules, for example, agencies give and publish their reasoning in the Federal Register so that the public, particularly those affected by the proposed or final rules, can see it. Such public reason-giving may improve the quality of decisions, deter abuses of authority, and enhance fidelity to legal standards.¹ Further, this public reason-giving allows judges to evaluate whether the agency’s reasons are legally sufficient. Public reason-giving is also important in the context of court opinions: judges usually supply reasons justifying the holdings in their decisions. These reasons allow both higher courts and the public to evaluate the quality of the decision. In these contexts, reason-giving goes hand in hand with the publicity principle—the Kantian idea that political decisions must be able to withstand public debate.

But what happens when the government cannot make public the reasons for its decisions? In the national security context, the government frequently makes decisions that affect individuals, such as whether to freeze someone’s assets, block a foreign corporate acquisition, or authorize a particular covert action. But virtually all of those debates and decisions happen entirely inside the executive branch, often at a high level of classification. Does the government still provide reasons for its decisions in these settings, and, if so, who is the audience? Can secret reason-giving have the same beneficial effects as public reason-giving? In other words, how fundamental to reason-giving’s virtues is the publicity principle? To what extent, if at all, does the audience for secret reason-giving serve as a proxy for the public?

This Article examines these questions, which have so far gone unexplored in legal scholarship. The Article first shows that secret reason-giving occurs frequently. All three branches of government engage in secret reason-giving, but this Article emphasizes secret reason-giving within the executive branch because the Executive has the widest range of authority and ability to act in the national security space.² The Executive sometimes provides secret reasons to Congress and the courts to justify a variety of national security programs. More surprisingly, the Executive also engages in secret reason-giving that remains entirely within the executive branch. Even though intraexecutive reasoning rarely reaches the courts, Congress, or the public, it is nonetheless directed at a variety of other

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1. See Edward H. Stiglitz, *Bureaucratic Reasoning* 5, <https://extranet.sioe.org/uploads/sioe2019/stiglitz.pdf> [<https://perma.cc/EZ7F-BQAC>] (unpublished manuscript).
 2. See, e.g., Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1292-97 (1988).

audiences, including the officials executing policy decisions, future administrations, foreign allies, and a notional public that would judge the reasoning if it became known.

The Article then argues that secret reason-giving confers a variety of benefits, even if those benefits manifest themselves in a somewhat different way than in the public context. Unlike public reason-giving, the primary goal of secret reason-giving is not to facilitate effective review by outsiders. Nor is it intended to promote the transparency of government operations. Instead, secret reason-giving improves the overall quality and effectiveness of government decision-making and operations, constrains the decision-maker, and strengthens the decision-maker's legitimacy.

Secret reason-giving is an underexplored constraint in the debate about the breadth of executive power in the national security space.³ It may occur when Congress imposes reason-giving requirements by statute (which it frequently does) or demands secret reason-giving during briefings by national security agencies. It may also occur when the Executive imposes reason-giving requirements on itself for principled or instrumental reasons. If secret reason-giving can both check national security decision-making and improve the quality of the resulting decisions, all three branches of government should choose to expand and entrench its use.

Promoting secret reason-giving is consistent with the idea that it is possible to further the rule of law within the executive branch, even in the relatively unregulated national security context.⁴ Neal Katyal, for example, has argued for institutional mechanisms that create checks internal to the Executive as a partial

3. For an analysis of the way in which the Executive faces constraints through other nonjudicial mechanisms—including norm internalization by executive lawyers and the expectation that executive officials will have to explain their actions publicly—see Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1132-45 (2013).

4. See, e.g., DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 218 (2006) (discussing the role of law in responding to national security crises); Evan J. Cridle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. L. REV. COLLOQUY 309, 311, 315 (2010) (arguing that public officials hold a fiduciary role toward citizens and must be ready to provide reasons for action that are consistent with that fiduciary role, but also suggesting that “such measures” do not currently exist—something this Article disputes); Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 903-14 (2014) (considering how the national security administrative state became so insulated from review); Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 32 (1994) (arguing for a “culture of justification” where the public expects officials to justify every exercise of power); Etienne Mureinik, *Emerging from Emergency: Human Rights in South Africa*, 92 MICH. L. REV. 1977, 1986 (1994) (describing law in South Africa in the early 1990s as “a struggle between a culture of authority and a culture of justification”).

substitute for robust congressional oversight.⁵ This Article identifies a new avenue by which to bring that possibility to fruition. As this Article shows, secret reason-giving occurs inside the Executive today, but it may not occur systematically. It may also occur more often in some agencies than others, depending on the agency's culture. It is in our collective interest for reason-giving to become a regular part of the secret decision-making process. Increased reason-giving – in both the policy and legal contexts – brings with it the kinds of virtues we seek in our government: coherence, regularity, predictability, and increased analytical rigor. Further, even though not all secret reason-giving necessarily implicates legal doctrine, it implicates rule-of-law values and – to the extent that it creates a check on the Executive – constitutional norms.

This Article has three goals. First, it seeks to bring to light the phenomenon of secret reason-giving and to sketch its parameters. Second, it analyzes secret reason-giving in view of what we know about public reason-giving. To that end, the Article examines how public and secret reason-giving differ in terms of audience, benefits, costs, and potency. Its third goal is normative: to argue that secret reason-giving offers a modest yet achievable way to impose systemic and salutary constraints on executive decision-making.

Part I evaluates the literature on public reason-giving, identifying the primary contexts in which government actors engage in public reason-giving and assessing the core virtues of such processes. Part II highlights the fact that a range of governmental reason-giving, especially related to national security decisions, happens in a classified setting. It examines the types of actors who give secret reasons, the nature of their reasons, and the audiences for those reasons. Drawing from the virtues of public reason-giving identified in Part I and armed with an understanding of the secret reason-giving ecosystem from Part II, Part III assesses the extent to which secret reason-giving shares some of the same virtues as public reason-giving. It concludes that providing secret reasons can advance many of those virtues, albeit in slightly altered and less robust ways. Part IV argues that, in light of the important benefits that secret reason-giving confers and the particular pathologies of national security decision-making, Congress, the Executive, and the courts should embrace the need for the Executive to give reasons in classified or privileged settings. It offers several ways to achieve that end.

To begin, it is worth defining what this Article means by executive “decision-making” and “reason-giving,” particularly in the context of classified national security activities. “Decision-making” here refers to relatively formal decisions, generally memorialized in writing, on which some set of other government ac-

5. Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322-42 (2006).

tors will rely to execute a program or take a position in litigation. “Reason-giving” refers to justifications offered in support of and accompanying a legal or policy decision, whether those justifications are required by statute, formal executive guidance, or informal executive practice.

When this Article uses the term “secret,” it refers to information within the executive branch that is either formally classified or protected from release by executive privilege. Although the breadth of the Executive’s use of secrecy has been the subject of extensive debate,⁶ that is not this Article’s focus. Instead, the Article assumes that some level of secrecy is necessary even in a democracy and does not address the persistent and important question of whether the U.S. government classifies too much information. Many legitimate, arguably critical, national security actions rely on reasons that cannot be publicized without defeating their purpose and execution. Such actions might include conducting a covert action to undercut an enemy state’s nuclear program, electronic surveillance of a suspected foreign agent inside the United States, or a military operation to rescue hostages. Further, there are contexts in which we want executive officials to be able to negotiate, debate, and persuade freely and frankly, which often requires a certain level of secrecy.

That said, secret reason-giving is only a small part of the Executive’s overall efforts to give reasons to other branches of government and the public. This Article accepts the Rawlsian proposition that a democratic government generally owes its citizens public reasons for its actions and that secrecy is a narrow but necessary exception to that rule.⁷ Public reason-giving will thus almost always be preferable to secret reason-giving. When the Article argues in favor of secret reason-giving, it does so in comparison not to public reason-giving but to no reason-giving at all.

One final caveat: it may seem strange and arguably anachronistic to write about the norm of executive reason-giving at a time when the current administration has chosen to deviate from a range of long-standing norms governing executive behavior. This Article, however, takes an optimistic view and assumes that many of those norms will either persist unseen or reemerge in years to come. That is, it focuses on the institution of the executive branch generally, rather than

6. See, e.g., *Examining the Costs of Overclassification on Transparency and Security: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (2016); Elizabeth Goitein & David M. Shapiro, *Reducing Overclassification Through Accountability*, BRENNAN CTR. FOR JUST. (Oct. 5, 2011), http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf [<https://perma.cc/9NXH-7QY3>].

7. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

on any particular president.⁸ All administrations should embrace the norm of secret reason-giving. To the extent that they do not, Congress and the courts can take measures to ensure that reason-giving remains an important part of the executive machinery.

I. THE PARAMETERS OF PUBLIC REASON-GIVING

Legal scholarship generally identifies two contexts in which public reason-giving occurs: in judicial opinions and in agency rulemaking.⁹ Judges write opinions that contain their decisions on the legal questions presented, generally accompanied by reasons justifying those decisions. In the notice-and-comment rulemaking process, federal agencies produce proposed and final rules supported by justifications for their decisions. This Part identifies the most common arenas in which official, public reason-giving occurs; considers who the audience is for this reason-giving; and catalogs why public reason-giving is generally (though not universally) celebrated.

A. *The Contexts for Public Reason-Giving*

Courts and agencies are the two bodies to give public reasons most frequently, but they make decisions in different realms, and they give different types of reasons, in pursuit of different ends. Courts tend to give legal reasons for their decisions, whereas agencies provide a combination of social, economic, policy, and legal reasons for their regulations.¹⁰

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8. See Daphna Renan, *When the President Is at War with the Presidency: Implications for Presidential Authority from Trump v. Hawaii*, JUST SECURITY (July 20, 2018), <https://www.justsecurity.org/59592/president-war-presidency-implications-presidential-authority-trump-v-hawaii> [<https://perma.cc/B89P-FVJA>] (considering the role of the “institutional presidency” in addition to the President’s role in any given specific administration).
 9. There also is a small body of literature about reason-giving in the international law and foreign-policy realm. See, e.g., Chimène I. Keitner, *International Law: Explaining International Acts*, 3 THE JUDGES’ BOOK 87 (2019); Harold Hongju Koh, *The Legal Adviser’s Duty to Explain*, 41 YALE J. INT’L L. 189 (2016). Members of Congress are another prominent set of public officials who sometimes give reasons. Committee reports, for example, often “explain and justify policy that stems from the text.” James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 35 (1994). However, unlike the courts and agencies, which face very strong expectations that they will give reasons, Congress is not *required* to give reasons for its actions. Further, because the value and proper uses of public congressional reason-giving are broadly contested, this Article does not focus on Congress.
 10. See Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 22 (2001).

1. *Judicial Reason-Giving*

Liberal democratic ideals suggest that because citizens may disagree about values, public officials “act legitimately only if they have reasons that those subject to them can, in principle, understand and accept.”¹¹ Judges, as public officials who wield state power, should “show that their decisions are justified according to the law.”¹² Reason-giving is a way to secure the consent of the public by lending legitimacy both to the specific decision and to the process more broadly.¹³ All three levels of the federal judiciary thus generally give reasons for their judgments. More pragmatically, when a judge decides a case, the parties want to know why the judge reached the conclusion she did.¹⁴ Knowing the judge’s reasons may inform a litigant’s judgment about whether to appeal the decision. Reason-giving also enables hierarchical judicial review. As a result, there is an expectation that courts will issue decisions explaining the rationales for their judgments.¹⁵ These rationales are heavily legal, although judicial reason-giving may also include justifications based on facts and legal policy.¹⁶

2. *Agency Reason-Giving*

The Administrative Procedure Act (APA) is the primary statutory source of agencies’ obligations to give public reasons. APA Section 553 requires an agency issuing rules to give a “concise general statement of their basis and purpose.”¹⁷ Supreme Court and lower court decisions have established the expectation that agencies must provide reasoned explanations to support their policy choices. In *State Farm*, the Supreme Court required an agency to “examine the relevant data

11. Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1004 (2008).

12. *Id.* at 1026.

13. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 10 (2009).

14. Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 221 (1985) (“A judgment expressing no reasons presents the appearance of arbitrariness The parties to an appeal, particularly the losers, want to know the reason why.”).

15. JOHN RAWLS, *POLITICAL LIBERALISM* 231-40 (1993) (stating that judges give legal reasons because they know that the public expects it); Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1143 (2010) (“Reason-giving is an efficient tool for supervision within the judicial hierarchy.”).

16. See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 486 (2015).

17. 5 U.S.C. § 553(c) (2018).

and articulate a satisfactory explanation of its actions, including a ‘rational connection between the facts found and the choices made.’”¹⁸ More recently, the Court confirmed that its task on review involves “examining the reasons for agency decisions – or, as the case may be, the absence of such reasons.”¹⁹ As part of this required reason-giving, an agency must also address contrary evidence.²⁰ Ideally, these responses entail “accurate fact-finding and sound policy analysis.”²¹ Indeed, in administrative law, the decision and the reason for that decision are so intertwined that a decision that lacks an acceptable reason will be struck down.²²

What counts as a permissible reason is subject to judicial and academic debate.²³ Jerry Mashaw notes that adoption and rescission of rules “must be rationalized in terms of relevant statutory criteria and social, economic, or scientific facts spread upon the rulemaking record.”²⁴ Agencies have policy and subject-matter expertise that courts do not, and they should draw from this expertise to evaluate the evidence and articulate justifications for rules based on that evidence.

B. *The Audiences for Public Reason-Giving*

Inherent in reason-giving is the idea that the decision-maker directs her reasons to another person or group of people.²⁵ Indeed, the relationship between the reason-giver and her audience may shape the reasons she develops *ex ante*, the choice from among several possible reasons she offers *ex post*, or the form in

18. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

19. *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

20. See Note, *Judicial Review of Informal Administrative Rulemaking*, 1984 DUKE L.J. 347, 353.

21. Mashaw, *supra* note 10, at 22.

22. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (holding that agency findings justifying an order are essential to the validity of that order).

23. See Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 713 (2014).

24. Mashaw, *supra* note 10, at 22.

25. In addition, we might consider the judge herself to be an audience for her own reason-giving, as the act of developing reasons serves as a check on the quality and content of the underlying decision. See Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187, 1199 (1992) (“Judges sometimes say ‘it won’t write,’ meaning that there are some reasons that will not stand the test of public explanation.”).

which she outlines the reason.²⁶ A member of Congress, for example, might offer her colleague one reason why she supported a decision in private, but offer the public a different reason in a press conference. When giving a reason publicly, it can, of course, be difficult to tailor the message to any one particular audience. But the quality of the reason can still affect the relationship. An unpersuasive or cursory reason might undercut trust between a reason-giver and her audience, while a robust, thoughtful reason might increase that trust.²⁷

1. *Audiences for Judicial Reason-Giving*

The audiences for judicial reason-giving are straightforward. When a court produces a decision and supports it with reasons in a written opinion, it presumably has five audiences in mind. The first audience is the parties to the case and their lawyers, who are most directly affected by the outcome and will be highly attuned to the specific reasons given.²⁸ The second audience is the higher court that may review the decision. The reasons that the lower court gives may affect the higher court's assessment of the propriety of the decision itself. The third audience consists of peer judges, including not only those in the same circuit and (for multijudge panels) those on the same panel, but also those on the bench more broadly. By giving reasons for their decisions, judges provide guidance (or at least counterarguments) to peer judges who confront related issues, even if those reasons are not binding.²⁹ Judges who consistently produce well-reasoned decisions also improve their professional reputations.³⁰ A fourth audience is Congress, which can enact laws to override judicial decisions.³¹ Congress may be more likely to override a poorly reasoned decision than a well-reasoned one. The

26. See, e.g., Jacob Gersen & Adrian Vermule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016) (discussing why agencies may give different reasons than those they had originally relied on).

27. See *infra* Section II.C.

28. See Schwartzman, *supra* note 11, at 1006 (stating that “the relevant audience ought to include at least those whose interests are implicated by the application of” the reason).

29. See Cohen, *supra* note 16, at 510.

30. See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994) (mentioning the judicial desire for “reputation within the legal community”); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 38 (1994) (describing judges’ desires for a positive reputation among peers).

31. See, e.g., Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (responding to *Emp’t Div. v. Smith*, 494 U.S. 872 (1990)).

final audience is the general public. As Jeremy Waldron has written, “[I]ntelligible justifications in social and political life must be available in principle for everyone. . . . [T]he basis of social obligation must be made out to each individual, for once the mantle of mystery has been lifted, *everybody* is going to want an answer.”³²

Each of these audiences is in a position to review, evaluate, and critique the decision-maker’s reasons, although different audience members have stronger or weaker incentives to do so. Some audience members (higher courts and Congress) have mandates to review the reasons and assess whether they are sufficiently persuasive to uphold the decision, while others have no authority to reverse the decision but have clear incentives to critique the reasons.

At times, the judiciary may also share secret reasons with some of these same audiences, as Part II discusses. For instance, the executive branch, as a party to judicial proceedings, is generally the primary audience for secret judicial reasons, as when a judge on the Foreign Intelligence Surveillance Court (FISC) issues a decision in a Foreign Intelligence Surveillance Act (FISA) case.³³ Likewise, a small group of judges on the Foreign Intelligence Surveillance Court of Review (FISC-R) can review the FISC judge’s reasons. Certain congressional committees are also audiences for secret judicial reason-giving, as the Attorney General must provide them with any FISC decision, order, or opinion that includes a significant construction or interpretation of FISA.³⁴ However, many groups almost never receive secret reasons from judges, including the private actors directly affected by executive national security decisions, the full range of federal judges, and the general public.

32. Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 135 (1987), reprinted in JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS*, 1981-1991, at 35, 44 (1993).

33. FISA regulates how the executive branch may conduct electronic surveillance and physical searches of foreign powers or agents thereof inside the United States. FISA established the FISC, which is staffed with a rotating group of eleven Article III judges who review government applications to undertake this foreign-intelligence collection. Foreign Intelligence Surveillance Act of 1978 § 103(a)(1), 50 U.S.C. § 1803(a)(1) (2018). To obtain an order from the FISC, the government must show probable cause to believe that the target is a foreign power or agent thereof and is using the facility the government wishes to surveil or search. *Id.* § 105(a)(2). FISA also created the Foreign Intelligence Surveillance Court of Review (FISC-R), a three-judge court that serves as a court of review for FISC decisions. *Id.* § 103(b). The Supreme Court can grant certiorari to review FISC-R decisions. *Id.*

34. *Id.* § 601(c)(1).

2. Audiences for Agency Reason-Giving

The audiences for agency reason-giving are similar, although not identical, to those for judicial reason-giving. One set of audiences is governmental: the Executive, Congress, and the courts. Another set of audiences lies outside the government.

The first governmental audience is internal to the Executive: the Office of Information and Regulatory Affairs (OIRA). Executive Order 12,866 requires agencies to provide OIRA with a large volume of information, including a description of why a given proposed rule is necessary and why the planned rule is preferable to potential alternatives.³⁵ OIRA thus serves as a first-line check on the adequacy of an agency's reasoning.³⁶ Other agencies may serve as a second, "peer" audience for one agency's reason-giving.³⁷ In some cases, several agencies may even undertake proposed rulemaking together, and the agencies joining in the rulemaking will then directly evaluate their peers' proposed reasons in support of a rule.³⁸ Congress serves as a third audience as it can invalidate agencies'

35. Exec. Order No. 12,866 § 6, 3 C.F.R. 638, 644-46 (1993), *reprinted in* 5 U.S.C. § 601 (2018).
36. See MAEVE P. CAREY, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 27 (2013), <https://fas.org/sgp/crs/misc/RL32240.pdf> [<https://perma.cc/Y7UK-DZ5B>] (describing a shift in OIRA's role from one of agency "counselor" to one of "gatekeeper"); U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 44-45 (Sept. 22, 2003) [hereinafter OMB'S ROLE], <https://www.gao.gov/new.items/do3929.pdf> [<https://perma.cc/TZ2K-R9J3>] (reporting agency officials' claims that OIRA looks for "more justification and breakdown of marginal benefits" for every item in the agency's rules); OMB'S ROLE, *supra*, at 141 (describing a case in which OMB suggested preambular changes that added additional justifications for the rule). OIRA itself undertakes reason-giving when it returns a rule to an agency for reconsideration. Executive Order 12,866 § 6(b)(3) requires the OIRA Administrator to provide the issuing agency with a written explanation about the section of the executive order on which OIRA is relying in returning the rule. Exec. Order No. 12,866, *supra* note 35.
37. See Exec. Order No. 12,866, *supra* note 35, § 4 (assigning OIRA the task of coordinating that interagency review); Cass R. Sunstein, *Deliberative Democracy in the Trenches*, 146 DAEDALUS 129, 134 (2017) (noting that a variety of offices within the White House, as well as the Department of State and the Office of the U.S. Trade Representative, would scrutinize an EPA ozone regulation); Darryl Fears, *A Judge Ripped This Federal Agency's Justification for Killing Thousands of Wild Animals*, WASH. POST (June 25, 2018, 5:15 PM), <https://www.washingtonpost.com/news/Animalia/wp/2018/06/25/a-judge-ripped-this-federal-agencys-reasons-for-killing-thousands-of-wild-animals> [<https://perma.cc/9YWH-JHW7>] (describing how the Fish and Wildlife Service, Forest Service, and Bureau of Land Management critiqued the rationale of the Department of Agriculture's Wildlife Services).
38. See, e.g., Interagency Advance Notice of Proposed Rulemaking: Guidelines for Furnishers of Information to Consumer Reporting Agencies, 41 Fed. Reg. 14,419 (Mar. 22, 2006) (including the Treasury Department, the Federal Reserve Board, National Credit Union Administration,

rules under the Congressional Review Act.³⁹ Even if such a statute did not exist, agencies would need to treat Congress as an audience because it is the source of agencies' delegated authority to produce those rules in the first place. Federal courts, which have the power of judicial review over agency rules, are a fourth governmental audience.⁴⁰ As the Supreme Court stated in *Skidmore v. Swift*, the weight accorded to an agency head's judgment "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."⁴¹ Agencies therefore attempt to conform their reason-giving to this standard.

Agency reason-giving also has critical audiences outside the three branches of government. One audience of particular importance is those most directly affected by the agency's decision: corporations, nongovernmental organizations, and individuals engaged in the regulated activity. Such parties will be focused on the quality of the reason-giving and, if dissatisfied, may choose to challenge the reasons in litigation. A final audience is the general public. Though few people spend time perusing the Federal Register, the agency's reasons for acting are nevertheless there for all to see, and third-party interest groups may bring those reasons to the public's attention.

Some of these audiences—namely Congress, the courts, and in some cases OIRA—can reverse the agency's decision. Others lack the ability to do so, but can nonetheless offer powerful critiques of what they perceive to be flawed reasons. Different audiences do not work in isolation from one another. For example, a corporate audience that strongly and vocally objects to an agency's decision and reasons might affect the way that congressional or judicial audiences then view the reasons given.

As with public reason-giving, at least some types of secret reason-giving by executive agencies have a variety of governmental audiences. As Part II describes, secret executive reason-giving has a narrower set of audiences in the courts and Congress than public reason-giving does because so much information is classified—but it still has audiences in those bodies.⁴² Inside the executive branch, audiences for secret reason-giving abound up and down the decisional chain, including within a single agency, across agencies, and into and out of the White House. Even though the general public lacks access to secret executive reason-

and Federal Trade Commission as issuing agencies); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201.

39. 5 U.S.C. §§ 801-808 (2018); CAREY, *supra* note 36, at 15.

40. 5 U.S.C. §§ 702, 704 (2018).

41. 323 U.S. 134, 140 (1944).

42. See *infra* Sections II.B. and II.C.

giving in real time, there are also other underappreciated external audiences for executive secret reason-giving. As Part II details, the Executive sometimes provides secret reasons to third parties such as foreign allies and also considers the views of future public audiences.

C. *The Virtues of Public Reason-Giving*

Implicit in the discussion of reason-giving is that those who give the reasons benefit just as much from the process as those who receive them. Courts and scholars sing the praises of reason-giving as advancing important democratic and “good governance” goals, while Jerry Mashaw has written that the administrative state “is the institutional embodiment of the enlightenment project to substitute reason for the dark forces of culture, tradition, and myth.”⁴³ Judge Leventhal famously noted, “Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice.”⁴⁴ Describing the role of reason-giving in court opinions, Justice Kennedy wrote, “To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings.”⁴⁵

Although public reason-giving receives generalized acclaim, we must tease apart the different virtues that it advances if we are to understand the work that secret reason-giving can do. Only once we understand public reason-giving’s virtues can we assess whether and to what extent secret reason-giving provides similar value. Different scholars emphasize distinct virtues of reason-giving.⁴⁶

43. Mashaw, *supra* note 10, at 26.

44. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971).

45. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009).

46. See, e.g., Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 56–60 (2015) (stating that reason-giving improves decisional quality, constrains the exercise of discretion, facilitates further judicial review, enhances the legitimacy of the decision, and fosters the development of workable standards); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657–58 (1995) (“[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies . . . [T]he very time required to give reasons may reduce excess haste and thus produce better decisions. A reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.”); Schwartzman, *supra* note 11, at 989 (“[P]roponents of greater candor in the courts have argued that transparent decision making constrains the exercise of judicial power, makes judges more accountable to the law, provides better guidance to lower courts and litigants, promotes trust and reduces public cynicism, and strengthens the institutional legitimacy of the courts.”); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J.

This Section draws from that scholarship to argue that reason-giving furthers five main virtues.

1. *Improving Decisional Quality*

Perhaps the highest virtue of reason-giving lies in its ability to improve the overall quality of the decision being made. Requiring an official to explain the rationales underlying her choice generally means that the resulting decision will be more considered and measured. When a decision-maker must articulate and compile her reasons, she is likely to spend more time deliberating, pay more attention to the choice's parameters, and seek out expert input.⁴⁷ She will also likely gauge the justifiability of her choice by imagining conversations in which she must defend it.⁴⁸ Even simply anticipating the need to give reasons can enhance deliberative rigor.⁴⁹

In addition, reason-giving improves decisions by forcing individuals to consider others' interests. Requiring an other-regarding reason precludes decisions that are based entirely on self-interest, ensures that the decision-maker heeds her fiduciary or statutory responsibilities, and deters her from abusing her authority.⁵⁰ Relatedly, reason-giving conveys respect for one's audience – which, in this case, is the public on whose behalf the government actor serves. Mathilde Cohen

1811, 1861-78 (2012) (describing a sociological account of reason-giving); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278 (2009) (noting that reason-giving promotes accountability, facilitates transparency, and fosters democratic legitimacy); Stiglitz, *supra* note 1, at 11-12 (identifying that reason-giving imposes constraint, allows effective review by other entities, and promotes transparency and trust in government operations).

47. Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 180 (“A decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat.”); Stiglitz, *supra* note 1, at 8.

48. JOHN RAWLS, *A THEORY OF JUSTICE* 580 (1971) (“[J]ustification is argument addressed to those who disagree with us, or to ourselves when we are of two minds.”).

49. See Mary B. DeRosa & Mitt Regan, *Deliberative Constitutionalism in the National Security Setting*, in *THE CAMBRIDGE HANDBOOK OF DELIBERATIVE CONSTITUTIONALISM* 28, 29 (Jeff King et al. eds., 2018) (explaining that “anticipating the need for [reason-giving] also can enhance deliberative rigor”).

50. See Stiglitz, *supra* note 1, at 8 (finding that a reason-giving requirement “deters abuse of authority”); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17 (1993) (arguing that central to government actions and constitutional law is that the government has public-regarding reasons for its acts); Shapiro, *supra* note 47, at 184 (“[A]ny decisionmaker under an obligation to give reasons may be less prone to arbitrary, capricious, self-interested, or otherwise unfair judgment than one under no such obligation.”).

notes, “If public institutions do not give reasons, their decisions are akin to orders or, at best, unintelligible preferences that they seek to impose on others.”⁵¹ In contrast, reasons empower the audience by “giving [them] grounds for reflection and eventually, criticism” of the decision.⁵² When citizens can evaluate and critique public officials’ reasons, they are better poised to ensure that the government acts in their best interests.

2. *Promoting Government Efficiency*

Reason-giving can also promote efficiency. Understanding the reasons behind a decision helps government officials execute it in a manner consistent with the decision-maker’s goals. Consider a presidential decision to deploy U.S. military forces to Mali to fight the Islamic State. If the President decides to do so because she seeks to persuade the Malian people that they should accept Western values and reject radical Islam, that reasoning will infuse the more specific decisions made by U.S. military leaders about where, how, and in what posture to deploy troops. The reason-giving that accompanies the decision thus enhances its execution — as long as the decision-maker adequately conveys her thinking to those implementing the policy on the ground.

3. *Constraining Decision-Makers*

A third virtue of reason-giving lies in constraining the decision-maker. Making a general assertion (in the form of a reason) creates a kind of promise about future behavior, which itself serves as a constraint. As Frederick Schauer notes, “[E]ven in ordinary conversation we make *prima facie* commitments to future decisions when we give reasons more general than the particular decisions or statements that they are given as reasons for.”⁵³ Assume, for example, that the President decides not to instruct the Department of Defense to target a member of al-Shabaab because she believes that the 2001 Authorization for Use of Military Force does not authorize the targeting of al-Shabaab and does not wish to act solely under her Article II authorities. The reason-giving attached to this decision constrains the Executive in its future actions related to al-Shabaab (and similarly situated terrorist groups), at least in the short term and so long as there

51. Mathilde Cohen, *Reasons for Reasons*, in APPROACHES TO LEGAL RATIONALITY 119, 122 (Dov M. Gabbay et al. eds., 2010).

52. *Id.* at 126.

53. Schauer, *supra* note 46, at 645.

are not major shifts in the geopolitical or threat landscapes. Although the Executive could later attempt to alter its stance, it might be politically costly to deviate from past reasoning. In the national security context, procedures that bind executive officials are in relatively short supply⁵⁴ and thus sought after by those who seek to limit excessive executive authority.

This sort of constraint also makes things more predictable for those operating within the executive branch. A government that approaches similar situations in dramatically different ways may be erratic, disorganized, or even corrupt.⁵⁵ Requiring executive actors to give reasons offers some bulwark against such a government because it evidences a commitment to certain underlying principles and suggests that those principles would apply again in a similar case.⁵⁶ Predictability benefits not only the broader public, but also executive-branch officials themselves, who can better anticipate which kinds of proposals their leadership will likely embrace or reject. In the example above, those within the executive branch with access to the relevant reasoning—including intelligence officers, military officers, and litigators—will likely assume that a future decision about a different al-Shabaab member, at least in the near term, would come out the same way.

4. *Strengthening Decision-Makers' Legitimacy*

Reason-giving also can enhance a decision-maker's legitimacy. There is an inverse relationship between popular authority and reason-giving: the greater the popular authority and democratic legitimacy an actor has, the less she needs to give reasons.⁵⁷ The reverse is also true: institutions with weak electoral foundations, such as the federal judiciary, tend to have highly developed norms and

54. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 10 (2011).

55. See Schauer, *supra* note 46, at 653 (noting that a desire for reason-giving “might . . . stem from a preference for stability, but it might also be a corrective against the potential for the bias built into excess particularity”).

56. Cf. POSNER & VERMEULE, *supra* note 54, at 137-38 (terming this “executive self-binding”); Cohen, *supra* note 51, at 138 (“Once offered publicly, reasons may be applied to future cases that the governmental organ cannot possibly have before it while justifying a particular decision. This is why reason giving promotes planning.”).

57. Cf. Schauer, *supra* note 46, at 637 (“When the voice of authority fails, the voice of reason emerges.”).

practices of reason-giving.⁵⁸ Although the reasons for this relationship are unclear, it seems likely that decision-makers and audiences see reason-giving as a partial substitute for other sources of legitimacy.⁵⁹ This type of substitution may be particularly important for the Executive in the national security space, where democratic accountability is already limited.⁶⁰

Reason-giving bolsters the legitimacy of decision-makers in at least three ways. First, assuming the reason is credible, it makes the decision more palatable both to those who argued in favor of the outcome *ex ante* and to those who opposed it.⁶¹ More palatable decisions are, in turn, more likely to be implemented. This can create a virtuous circle: when the bureaucracy effectually executes an

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58. See, e.g., JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 142-46 (2012) (discussing sources of authority). This might explain why Congress feels little need to give reasons when enacting statutes, but courts, which lack the legitimacy of elected officials, feel the need.
59. For a discussion of different facets of democratic legitimacy, see J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2469 (1991), which notes that “[s]ocial legitimacy . . . connotes a ‘broad, empirically determined societal acceptance of the system’” and “occurs when the government process displays a commitment to, and actively guarantees, values that are part of the general political culture, such as justice, freedom, and general welfare.” See also Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 *EMORY L.J.* 115, 116 (2007) (“Popular sovereignty provides the primary source of legitimacy for contemporary liberal democracies, such as the United States.”).
60. See DeRosa & Regan, *supra* note 49, at 28 (arguing that “deliberative rigour and transparency seem especially important in light of the potentially momentous decisions that need to be made in the national security setting”). The same point may hold true for international reason-giving, which can enhance the legitimacy of the state giving the reasons. See Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 *INT’L L. STUD.* 235, 247 (2016) (“Even if other governments or populations do not agree with our precise legal theories or conclusions, we must be able to demonstrate to others that our most consequential national security and foreign policy decisions are guided by a principled understanding and application of international law.”).
61. See DeRosa & Regan, *supra* note 49, at 28 (noting that transparency “requires that officials publicly explain the reasons for their decisions in terms that citizens can endorse as acceptable grounds for acting in the name of the political community – even if some citizens disagree with the outcomes of the decision making process”); Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 *LA. L. REV.* 831, 846 (2004) (“It is easier for one to tolerate even an imperfect law if she is satisfied that her views were at least heard and seriously considered in its making, whether or not they were accepted.”); Nahal Toosi et al., *Cabinet Chiefs Feel Shut Out of Bolton’s ‘Efficient’ Policy Process*, *POLITICO* (July 25, 2018, 8:24 PM), <https://www.politico.com/story/2018/07/25/bolton-cabinet-meetings-mattis-pompeo-trump-740429> [<https://perma.cc/8ANS-RMB8>] (quoting a former White House official as stating, “If the leadership of the agencies believe they’ve been given a chance to have their say and contribute to the decision, in theory you’ll have less griping, leaking or efforts to re-litigate decisions”).

official's decision, others in the executive branch will view that individual as effective, which then empowers and legitimates her going forward.⁶²

Second, because reason-giving signals respect for the audience, it can help build personal trust between the reason-giver and the reason's recipient.⁶³ When the audience for an official's decision feels greater trust toward the decision-maker because they respect her reasons, the decision-maker benefits in both the immediate and the longer term. Not only will the specific decision at issue receive a warmer reception and less criticism, but the trust accorded to the decision-maker may also be of benefit in future decisions, whether or not the decision-maker provides reasons in those subsequent cases.⁶⁴

Third, when a reason-giver makes credible legal arguments, it can increase her legitimacy by reinforcing her adherence to applicable legal principles. Because legal compliance generally enhances an official's legitimacy, reasoning that invokes the law legitimizes at the same time that it constrains. As Abram Chayes has written, "[T]he requirement of justification provides an important substantive check on the legality of action."⁶⁵ Schauer argues that if someone justifies her decision on the grounds that it is required "because it is the law," that commits her to following the law in the future. Thus, when an executive official defends a decision on the basis that it is required by (or precluded by) the law, she shows that the law holds an important place in the hierarchy of justifications for executive action while at the same time bolstering her own credibility.⁶⁶

Conversely, a decision-maker who fails to offer reasons may undercut her own legitimacy and render her decision less stable. Some actors have called for

62. Cf. DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 15-18 (2001) (describing historical examples of executive agencies that developed reputations based on their achievements and were able to influence the policy preferences of elected officials).

63. See Cohen, *supra* note 51, at 131-33 (discussing how reason-giving can generate personal, as well as impersonal, trust).

64. Presumably, at some point, the trust erodes if the decision-maker repeatedly declines to give reasons after giving reasons for the initial decision.

65. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 42 (1974); see also Jack Goldsmith, *UK Legal Position on Humanitarian Intervention in Syria*, *LAWFARE* (Aug. 29, 2013, 9:28 AM), <https://www.lawfareblog.com/uk-legal-position-humanitarian-intervention-syria> [<https://perma.cc/5YH4-KTUE>] (opining that it "is always better for nations to offer a poor or weak legal justification than no justification at all" because others might interpret the absence of a legal justification as indicating "indifference to international law").

66. Frederick Schauer, *Being a Reason, Having a Reason, Giving a Reason* 109 (2017) (unpublished manuscript) (on file with author); see also Cohen, *supra* note 51, at 142 (noting that if reason-giving cites legal reasons or legal authority, it can "reinforce the authority of the legal system").

courts to provide less deference to executive decisions that are offered without reasons, since such a lack of reasoning raises questions about the legitimacy of the decision—and possibly also of the decision-maker. During the Trump Administration’s travel-ban litigation, for example, a former White House lawyer wrote:

President Trump issued Presidential Proclamation 9645 (EO-3), adding two non-Muslim countries to the list of banned countries, and failed to explain how the eight countries whose citizens it banned were selected. As a group of former national security officials note in their amicus brief, the Administration has taken the unusual step of not offering even a single sworn declaration explaining the motivation or national security reasons underpinning the policy.⁶⁷

In cases such as this, evidence that the President has flouted executive-branch norms may result in reduced judicial deference to the Executive’s position.⁶⁸ Likewise, in the context of foreign-policy decisions, a state’s failure to explain to other states and to its public why it took a particular action may delegitimize that action.⁶⁹ For instance, the Executive faced sharp criticism from Congress for refusing to provide a legal rationale for its April 2018 strikes on facilities in Syria associated with chemical weapons.⁷⁰ More recently, European and Asian officials criticized the United States for asking them to ban Huawei, a

67. Brief of Amici Curiae Former National Security Officials in Support of Respondents at 2-3, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965) (arguing that President Trump’s travel ban “did not emerge from meaningful Executive Branch judgment and deliberation” and that the Executive was unable to articulate a credible reason for the ban); see also W. Neil Eggleston & Amanda Elbogen, *The Supreme Court Should Rethink Deference to the Executive in the Travel Ban Case*, JUST SECURITY (Apr. 19, 2018), <https://www.justsecurity.org/55059/supreme-court-rethink-deference-executive-travel-ban-case> [<https://perma.cc/62KU-68KD>].

68. Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 183 (2018).

69. Keitner, *supra* note 9, at 15, 20-21 (suggesting that weak international-law justifications for state acts generate condemnation both by other states and by the acting state’s domestic public and discussing the example of the UK’s failure to justify its invasion of Iraq).

70. Tim Mak, *Critics Want Legal Rationale for Strikes on Syria. The White House Says It’s Secret*, NAT’L PUB. RADIO (Apr. 12, 2018, 5:00 AM ET), <https://www.npr.org/2018/04/12/601674175/critics-want-legal-rationale-for-strikes-on-syria-the-white-house-says-its-secre> [<https://perma.cc/U5PT-DXKP>].

Chinese telecommunications company, from building their 5G networks but failing to explain why the United States believes that Huawei poses a national security threat.⁷¹

5. *Fostering Accountability*

Finally, reason-giving can foster accountability when the Executive makes its rationales public.⁷² To be held accountable, a decision-maker must first articulate and record a reason that an audience can assess. The audience can then determine whether the reasons articulated are in fact of sufficient quality to warrant public support or at least tolerance.

When the Executive makes clear why it has pursued a particular course of action, a wide range of actors gains the opportunity to evaluate those reasons.⁷³ If the reasons are found wanting, some of those actors will be in a position to sanction the reason-giver, whether by overruling the decision, voting the decision-maker out of office, or, more mildly, offering public criticism of the decision or reason. Those sanctions can, in turn, force the Executive to alter the underlying policy for which its reasons proved insufficient.

In cases of agency decision-making, the requirement to give reasons facilitates judicial review, which is the most significant way to hold agencies accountable.⁷⁴ Consider the Freedom of Information Act (FOIA). Courts require agencies to give reasons in support of their decisions to withhold certain information from release and can assess those reasons publicly. For example, in *ACLU v. Department of Defense*, the court required the Department of Defense to explain why it was unable to release documents containing the citizenship, length of detention, and dates, locations, and circumstances of capture of the detainees held at Bagram Air Base in Afghanistan.⁷⁵ The court forced the Department to articulate with some precision why and how each type of information would directly damage national security, rather than allowing the Department to rely on a conclusory statement that the releases would cause harm.

71. Julian E. Barnes & Adam Satariano, *U.S. Campaign to Ban Huawei Overseas Stumbles as Allies Resist*, N.Y. TIMES (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/us/politics/huawei-ban.html> [<https://perma.cc/HNP3-72F8>].

72. Staszewski, *supra* note 46, at 1278 (arguing that a requirement of reason-giving helps hold officials in a democracy publicly accountable).

73. Schwartzman, *supra* note 11, at 1008 (noting that, by giving reasons, others are able to test the validity and soundness of the claims).

74. Shapiro, *supra* note 47, at 182 (“A giving reasons requirement generates a record. And once a judge has a record, anything is possible.”).

75. *ACLU v. Dep’t of Def.*, 723 F. Supp. 2d 621, 624-25 (S.D.N.Y. 2010).

Glen Staszewski takes a somewhat different approach to reason-giving and accountability. In his view, it is practically impossible to hold governmental decision-makers *politically* accountable for their substantive decisions because doing so requires the electorate to know about the government's decision, to identify who was responsible for that decision, and to vote on the basis of that information in the next election.⁷⁶ Instead, Staszewski argues that we should hold public officials *deliberatively* accountable by imposing an expectation that they give reasons for their decisions that are public-regarding and "could reasonably be accepted by free and equal citizens with fundamentally different interests and perspectives."⁷⁷ Deliberative accountability may hold particular promise in the national security realm given the difficulty of holding executive officials politically accountable for classified decisions that never come to light.

D. Reason-Giving's Skeptics

Not everyone is sanguine about reason-giving. Legal realists deem it "window-dressing" or an "*ex post* legitimation"⁷⁸ of a decision driven almost entirely by politics.⁷⁹ Other critics emphasize the difficulty of ascertaining whether a decision-maker has given genuine reasons.⁸⁰ Recent literature in psychology also raises questions about the extent to which reason-giving meaningfully constrains people's actions.⁸¹ One concern might be that when people reason about their own opinions, they focus only on justifications that support their decision and ignore negative arguments unless they anticipate needing to rebut them.⁸² This approach might not necessarily produce the best objective decision. Yet others suggest that the quality of reason-giving depends on the audience. When a decision-maker expects to be held accountable by an audience whose views she does not know, she undertakes "preemptive self-criticism," but when she knows the audience's views, she is likely to shift her reasons toward their viewpoint.⁸³

76. Staszewski, *supra* note 46, at 1266.

77. *Id.* at 1255.

78. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 192 (1991).

79. For a discussion of realist critiques of reason-giving, see Stiglitz, *supra* note 1, at 5-6.

80. Cf. Schwartzman, *supra* note 11, at 990-91 (arguing that judges should adhere to a principle of sincerity in their reason-giving).

81. See, e.g., HUGO MERCIER & DAN SPERBER, THE ENIGMA OF REASON (2017).

82. Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 BEHAV. & BRAIN SCI. 57, 63 (2011).

83. Philip E. Tetlock, *Social Functionalist Frameworks for Judgment and Choice: Intuitive Politicians, Theologians, and Prosecutors*, 109 PSYCHOL. REV. 451, 455 (2002).

Because it takes time, reason-giving may also be inefficient.⁸⁴ This can cause problems in certain contexts such as court cases and, as discussed below, national security. Some scholars argue that using intuition and “fast and frugal” heuristics produce more satisfactory answers in less time than deliberation and reason-giving do.⁸⁵ But national security questions, with their complicated legal and policy elements, seem unlikely to be the types of questions for which people readily develop intuitions about the correct answer⁸⁶ or for which they can rely on “probabilistic mental models.”⁸⁷ Gerd Gigerenzer and Daniel Goldstein, for instance, suggest that people rely on mental models in situations in which they must draw inferences with limited time and knowledge, such as when driving, conducting triage in emergency rooms, and trading stocks in the trading pit.⁸⁸ Other than in emergencies, however, national security decision-making is generally a slower and more deliberate process, one that gives senior decision-makers the opportunity to seek additional facts and analysis if the information at their disposal is incomplete or insufficient.

Another critique of reason-giving is that it can signal weakness and thus might decrease, rather than increase, an actor’s legitimacy. Political scientist William Howell has argued, for instance, that modern presidential power lies in the

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84. See Alessandro Melcarne, Giovanni B. Ramello & Paige Marta Skiba, *The Role of Legal Justification in Judicial Performance: Quasi-Experimental Evidence* (Vanderbilt Law Sch. Legal Studies Research Paper Series, Working Paper No. 18-45, 2018), <http://dx.doi.org/10.2139/ssrn.3195922> [<https://perma.cc/BS7D-NHP8>].
85. See GERD GIGERENZER, *GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS* 173 (2007) (arguing that intuition often produces better decisions than reflection and reason); John McMackin & Paul Slovic, *When Does Explicit Justification Impair Decision Making?*, 14 *APPLIED COGNITIVE PSYCHOL.* 527, 538 (2000) (finding that subjects performed worse on intuitive tasks but better on analytical tasks when asked to give reasons); see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 *CORNELL L. REV.* 1, 43 (2007) (explaining that judges use both a combination of intuition and deliberation to reach their decisions, but should seek to be “predominately deliberative”).
86. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20-21 (2011) (describing system 1 and system 2 reasoning). Giving reasons for a national security policy would seem to demand “system 2 reasoning,” which is more deliberative and logical than “system 1 reasoning,” which is faster and more instinctive. Confirming the hypothesis that national security questions require more deliberate decision-making would require empirical work.
87. Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 *PSYCHOL. REV.* 650, 652 (1996).
88. *Id.* at 651.

ability to act unilaterally, without needing to rely on persuasion.⁸⁹ In such circumstances, providing a reason might thus imply that the official believes that her decision lacks legitimacy on its own.

We should not discard these objections too lightly. Reason-giving cannot serve as a panacea for flaws in human judgment or for improper motivations. There are undoubtedly situations in which government actors, particularly those whose decisions will not be reviewed by a court or Congress, offer hasty, ill-conceived reasons for particular decisions, depriving the exercise of reason-giving of many of its virtues. And phenomena such as “groupthink” can hijack even a robust deliberative process. Nevertheless, recent empirical work has found that requiring a person with fiduciary duties to give reasons for the allocation of particular goods influences the way in which that person undertakes her duties.⁹⁰

There are good reasons to believe that reason-giving offers a variety of benefits, particularly in a democracy. Making one’s reasons publicly available generally enhances those benefits by widening the audience that can evaluate them and increasing scrutiny and challenge from diverse audiences.⁹¹ But there are many circumstances in which government officials reach decisions that are not made public, often because the subject matter is classified.⁹² Other branches receive some subset of those classified decisions, but many are never shared beyond the executive branch. Yet in both cases, the decision-maker may produce reasons to accompany her decision. The next Part explores the circumstances in which such secret reason-giving occurs.

II. SECRET REASON-GIVING’S MANIFESTATIONS

Part I charted where public reason-giving occurs in government and identified some of its virtues. This Part reveals that the government also engages in secret reason-giving, a process that serves purposes similar, although not identical, to those of public reason-giving. Little scholarship has previously considered this phenomenon, perhaps because commentators often see reason-giving as inextricably intertwined with the values of transparency and accountability.

89. WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 8-14 (2003).

90. Stiglitz, *supra* note 1, at 33.

91. Shapiro, *supra* note 47, at 180 (“[G]iving reasons is a device for enhancing democratic influences on administration by making government more transparent.”).

92. Another reason that the Executive keeps deliberations surrounding executive decisions private is because it believes that doing so will produce sounder decisions. See, e.g., SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 175 (1989) (discussing the government’s need at times for secrecy in deliberations).

Jerry Mashaw's approach is typical: he argues that administrators must give complete, authentic, and transparent reasons, but he does not consider what happens when those administrators cannot do so because the underlying information or programs are classified.⁹³ Likewise, scholars of deliberative democracy insist that even if deliberations occur privately, the decisions themselves must be publicized, as must the reasons that underlie those decisions.⁹⁴ Thus, much reason-giving scholarship envisions that decision-makers must ultimately share their reasons broadly.

In contrast, scholars who do contemplate reason-giving in the national security context generally assume that it cannot—or should not—be done. Cohen notes that “reason-giving is discouraged or even prohibited in a number of decision-making contexts, such as . . . national security affairs.”⁹⁵ Likewise, Robert Knowles argues, “The same values that were praised by proponents of administrative law reform that undergird the APA—transparency, legitimacy, deliberation, and accessibility, among others—were regarded as dangerous in the national security context.”⁹⁶ Perhaps these writers mean that reason-giving cannot take place *publicly* in the national security space. But reason-giving can and does take place in this space; it merely happens behind closed doors.

The goal of this Part is to reorient the discussion of official reason-giving to illustrate the importance of providing reasons even when the process is not publicized beyond the government's walls. This Part explores the ways in which secret reason-giving looks different from and similar to public reason-giving. For the sake of completeness, this Part first identifies categories of secret reason-giving that happen within courts and Congress. These forms of reason-giving, though underexamined, look quite similar to their public reason-giving counterparts. A second category of secret reason-giving occurs when the Executive

93. Mashaw, *supra* note 10, at 26. For one account of the Executive's commitment to reason-giving within the executive branch, see Sunstein, *supra* note 37. Sunstein describes ways in which deliberation happens inside the executive branch among different agency experts, though he does not focus on reason-giving in particular or the existence of secret reason-giving.

94. ZSUZANNA CHAPPELL, *DELIBERATIVE DEMOCRACY: A CRITICAL INTRODUCTION* 116 (2012).

95. Cohen, *supra* note 16, at 488; *see also id.* at 488-89 n.32 (“There is no affirmative requirement for the Executive to provide reasons for its actions, although it is generally expected to do so. When it comes to sensitive issues involving diplomacy, the secret services, or national security, it is generally thought that some level of secrecy is desirable to conceal information that, if disclosed, would endanger the national interest.”).

96. Knowles, *supra* note 4, at 929 (stating that influential members of the Roosevelt and Truman Administrations adhered to a “view of government policymaking that treated national security matters as uniquely requiring a closed, militarized, and centralized process—just the opposite of the principles of transparency, public participation, and judicial oversight animating the APA”).

gives secret reasons to the courts and Congress. This category, too, bears similarities to executive public reason-giving to the other branches. The third category of secret reason-giving is perhaps the most important and counterintuitive: reason-giving by the executive branch to the executive branch.⁹⁷ This Part emphasizes this final category, given both its unusual features and important role in checking executive overreach in national security.

Before turning to different categories of secret reason-giving, it is worth noting that such reasoning can take more or less structured forms. Some secret reason-giving occurs in writing, as when the Executive responds to Congress with reasons to fulfill a statutory requirement or submits a classified affidavit in a court proceeding. Other secret reason-giving occurs orally but is not memorialized in writing. This Part focuses on secret reason-giving that is written down, partly because its existence is easier to identify based on declassified documents and partly because written reason-giving offers a possible level of accountability that oral reason-giving does not. It also seems probable that written reason-giving is more considered than oral reason-giving because the actors providing reasons in writing have taken the time to memorialize their arguments and know that others will more easily be able to review their reasoning in the future.

A. Secret Judicial and Congressional Reason-Giving

The Executive is not the only body that engages in secret reason-giving. Federal courts commonly provide secret reasons. Sometimes they do so pursuant to statute. For instance, if a judge on the FISC denies the government's application for a warrant to conduct surveillance on an agent of a foreign power, FISA requires the judge to provide a "written statement of each reason" for her decision.⁹⁸ That statement of reasons serves as a record for the FISC-R to evaluate on appeal. In other cases, federal courts engage in secret reason-giving when particular issues within a case are classified. In a number of habeas cases brought

97. See DeRosa & Regan, *supra* note 49, at 28 (noting that national security officials sometimes deem it "imprudent to provide complete details" of their decisions and the underlying rationales, even to Congress and the courts).

98. 50 U.S.C. § 1803(a)(1) (2018); see also *id.* § 1803(b) (stating that the FISC-R must provide a written statement of each reason for its decision and that a record of this shall be transmitted to the Supreme Court on petition for a writ of certiorari); FISC R.P. 18(b)(1) ("If a Judge denies the government's application, the Judge must immediately provide a written statement of each reason for the decision and cause a copy of the statement to be served on the government.").

by Guantánamo detainees, for instance, the district courts and D.C. Circuit produced redacted opinions. Only the government, defense counsel, and higher courts could view the courts' reasoning beneath the redactions.⁹⁹

Courts may also engage in secret reason-giving in more informal contexts. The Supreme Court Justices' conferences, for example, offer a forum in which secret judicial reason-giving transpires; Justices will offer reasons for favoring a particular legal conclusion, even though those particular reasons may never become public (for instance, because a Justice changes her view and the Court's final opinion does not reflect her initial reasons).¹⁰⁰

One important difference between public and secret reason-giving by courts is the size of the audience. The only audiences for secret reason-giving by FISC judges, for example, are the executive branch, a narrow set of reviewing judges who sit on the FISC-R, the Supreme Court (in the unlikely case of a grant of certiorari), and a small number of congressional committees. In most situations, the wider set of judges on the federal bench will never view the reasoning of a FISC opinion, nor will the general public. There is a possible exception, however. There has been a new push to declassify these opinions in the wake of the Edward Snowden leaks and the USA FREEDOM Act of 2015. Under the Act, the Director of National Intelligence (DNI) must now conduct a declassification review of each FISC or FISC-R opinion that includes a significant interpretation of law and make any such opinion public to the extent practicable.¹⁰¹ As discussed in Section C below, the knowledge that a particular secret reason might become public effectively turns the "future public" into an audience to whom the secret reason-giver addresses her reasons.

Members of Congress, too, undoubtedly find themselves needing to provide secret reasons while conducting their daily business. For instance, if members of the Senate Select Committee on Intelligence prepare a classified oversight report (as they did on the Central Intelligence Agency's (CIA) rendition, detention, and

99. See Michael A. Sall, *Classified Opinions: Habeas at Guantánamo and the Creation of Secret Law*, 101 GEO. L.J. 1147, 1161 (2013) ("In district courts, classified opinions are made available to detainee attorneys and may be cited in subsequent cases.")

100. See *Supreme Court Procedures*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/8PZA-2LHP>] (describing the conference process). Of course, each Justice ultimately produces some type of public reason-giving by adhering to the majority, concurring, or dissenting opinion in a case.

101. See USA FREEDOM Act of 2015, Pub. L. No. 114-23, §§ 402, 602, 129 Stat. 268, 281, 292.

interrogation program), that report surely includes reasons that support its conclusions.¹⁰² Less formal secret congressional reason-giving includes nonpublic efforts by one member to persuade other members to vote a particular way or accept certain language in a bill.¹⁰³ Like secret judicial reason-giving at conference, these congressional interactions constitute a form of procedural rather than substantive secrecy because both the end product (a statute) and the votes on it are public. As a result, this type of secret reason-giving tends to raise fewer questions about transparency and accountability.

B. Secret Executive Reason-Giving to Courts and Congress

The Executive gives nonpublic reasons to the other two branches of government in an effort to justify, legitimize, or seek permission to conduct certain actions. The Executive typically gives classified legal and factual reasons to courts in the form of affidavits or briefs. In the FISA context, for example, the Department of Justice provides secret reasons to the FISC to obtain a court order authorizing foreign intelligence surveillance.¹⁰⁴ This allows the FISC to probe the government's request, facts, and justifications to ensure that the request meets the statutory requirements. The government also must apply to the FISC when the Federal Bureau of Intelligence (FBI) seeks to review for non-national security purposes the contents of certain foreign intelligence information collected under Section 702 of the FISA Amendments Act.¹⁰⁵ That application (which the Attorney General approves) must include an affidavit "containing a statement of the facts and circumstances relied upon by the applicant *to justify the belief* of the

102. See, e.g., SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288 (2014). For another example, see PERMANENT SUBCOMM. ON INVESTIGATIONS, SENATE COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, UNITED NATIONS DEVELOPMENT PROGRAM: A CASE STUDY OF NORTH KOREA 42 n.117 (2008), <https://www.hsgac.senate.gov/imo/media/doc/UNDPREPORTFINAL.pdf> [<https://perma.cc/KRZ7-RZH4>], which refers to a classified annex explaining why the subcommittee believed that the United Nations was unaware of the nature of a North Korean entity.

103. See *Senate Legislative Process*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm [<https://perma.cc/U4D5-574P>] ("Informal negotiations among senators interested in a given measure are commonplace.").

104. For a recent example of a redacted and released FISA application, see Verified Application, *In re Page* (FISA Ct. Oct. 2016), as well as the documents linked in this article by Charlie Savage, *Carter Page FISA Documents Are Released by Justice Department*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/us/politics/carter-page-fisa.html> [<https://perma.cc/5GV2-HU57>].

105. 50 U.S.C. § 1881a(f) (2018).

applicant that the contents” of the communications sought would provide evidence of criminal activity or contraband.¹⁰⁶ Finally, the FISC’s own rules of procedure state, “If an application or other request for action raises an issue of law not previously considered by the Court, the government must file a memorandum of law in support of its position on each new issue.”¹⁰⁷ That memorandum of law undoubtedly provides reasons in support of the legal arguments the government makes. There are thus various stages in the Executive’s interaction with the FISC at which the Executive must provide classified reasons in support of its requests.

Beyond its interactions with the FISC, the Executive gives secret reasons to federal courts when it invokes the state-secrets privilege or the Classified Information Procedures Act (CIPA), which seeks to limit unnecessary disclosures of classified information during criminal trials.¹⁰⁸ When the executive branch wishes to employ the state-secrets privilege, it tries to persuade a court hearing a particular case that it should either excise certain evidence or decline to allow the entire case to proceed because the litigation will reveal information that will harm national security.¹⁰⁹ The head of the relevant executive department must submit a formal declaration in court to trigger the privilege, and she sometimes submits a classified supplemental affidavit explaining why the privilege is necessary to avoid serious damage to national security.¹¹⁰ Similarly, CIPA applies in criminal cases in which the government intends to use classified information to make its case or the defendant seeks to use classified information in her defense. In this situation, the statute anticipates that the government will provide reasons to courts *ex parte* and *in camera* to demonstrate why the court should authorize the government to delete certain classified information from documents made available to the defendant through discovery or to provide her with an unclassified summary of or substitution for classified evidence.¹¹¹

106. *Id.* § 1881a(f)(2)(C)(ii) (2018) (emphasis added).

107. FISC R.P. 11(d).

108. 18 U.S.C. app. III §§ 1-16 (2018).

109. See TODD GARVEY & EDWARD C. LIU, CONG. RESEARCH SERV., R41741, THE STATE SECRETS PRIVILEGE: PREVENTING THE DISCLOSURE OF SENSITIVE NATIONAL SECURITY INFORMATION DURING CIVIL LITIGATION 3-4 (2011); see also *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (affirming the district court’s dismissal of the plaintiff’s complaint based on the state-secrets privilege); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (same).

110. See *Jeppesen Dataplan, Inc.*, 614 F.3d at 1076.

111. Classified Information Procedures Act, 18 U.S.C. app. III § 4 (2018).

The Executive may also defend asset freezes to courts using classified information.¹¹² The International Emergency Economic Powers Act provides that, “[i]n any judicial review of a determination” to block someone’s property, “if the determination was based on classified information . . . such information may be submitted to the reviewing court *ex parte* and *in camera*.”¹¹³ That submission presumably includes the Executive’s reasons why it blocked the property of the person challenging the freeze.¹¹⁴ Finally, the Executive sometimes provides secret reasons to courts when litigating FOIA issues.¹¹⁵ Courts have held that agencies may satisfy their burden of demonstrating that a given FOIA exemption applies by filing an affidavit that “describes the justifications for withholding the information with specific detail [and] demonstrates that the information withheld logically falls within the claimed exemption.”¹¹⁶ That affidavit—a form of executive reason-giving to the court—may be classified.¹¹⁷

The Executive also gives secret reasons to Congress. A range of statutes mandate this provision of reasons or justifications, while also anticipating that the Executive will do so using a classified format. For example, the covert-action statute requires the President to notify Congress of any covert action she approves “as soon as possible after such approval.”¹¹⁸ If she decides to notify only certain members of Congress, the statute requires that she provide “a written

112. See, e.g., *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (holding that the government’s notice to a designated entity “need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute”); *Kadi v. Geithner*, 42 F. Supp. 3d 1, 22 (D.D.C. 2012) (discussing the government’s evidence in classified and unclassified records as supporting the designation of the plaintiff as a specially designated global terrorist); see also 8 U.S.C. § 1189(a)(4)(B)(iv)(II) (2018) (providing that the government may submit classified information to the reviewing court *ex parte* and *in camera* in support of a decision to revoke an entity under the Act); 8 U.S.C. § 1189(c)(2) (same, but for designation instead of revocation); 21 U.S.C. § 1903(i) (2018) (same); *O’Connor v. U.S. Dep’t of Treasury*, 570 F. Supp. 2d 749, 786–89 (E.D. Pa. 2008) (discussing the Treasury Department’s classified affidavit explaining why the Treasury sought to make a *Glomar* response about terrorist financing investigations).

113. 50 U.S.C. § 1702(c) (2018).

114. See, e.g., *Kadi*, 42 F. Supp. 3d at 23 (reviewing the classified record and concluding that the Executive had substantial reasons to believe that the plaintiff was providing financial support to designated terrorists).

115. See 5 U.S.C. § 552 (2018).

116. *ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011).

117. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 151 & n.42 (2009) (noting in the FOIA context that “courts have permitted or sometimes required agencies to submit explanatory *in camera* affidavits in order to protect the national security information that could not be discussed in a public affidavit” and citing numerous cases upholding that principle).

118. 50 U.S.C. § 3093(c)(1) (2018).

statement of the reasons for limiting such access.”¹¹⁹ If the delay in notification exceeds 180 days and the President does not provide access to all members of the congressional intelligence committees, the President “shall ensure that . . . a statement of reasons that it is essential to continue to limit access to such finding or such notification to meet extraordinary circumstances affecting vital interests of the United States is submitted” to the Gang of Eight, a select group of congressional leaders including the leaders of the intelligence committees.¹²⁰ The covert-action statute also requires the Executive to furnish to the intelligence committees the legal basis under which it is conducting any covert action.¹²¹ Likewise, in the 2018 National Defense Authorization Act (NDAA), Congress required the Executive to provide to the appropriate committees “a report on the legal and policy frameworks for the United States’s use of military force and related national security operations,” which must include the “legal, factual, and policy justifications for any changes” made during the prior year.¹²² The statute anticipates that the report will contain a classified annex and the Executive’s 2018 report included such an annex, which discussed targeting and detention policies.¹²³ There are a host of comparable statutes in which Congress demands reasons, while tolerating the fact that the reasons may be classified.¹²⁴

119. *Id.* § 3093(c)(5)(A).

120. *Id.* § 3093(c)(5)(B).

121. *Id.* § 3093(b)(2); *see also id.* § 3092(a)(2) (requiring the Executive to furnish to the intelligence committees the legal basis for intelligence activities other than covert actions).

122. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1264, 131 Stat. 1283, 1689-90 (2017) (to be codified in scattered sections of 50 U.S.C.).

123. *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, WHITE HOUSE, <https://assets.documentcloud.org/documents/4411804/3-18-War-Powers-Transparency-Report.pdf> [<https://perma.cc/PDU3-CN3Y>] (describing U.S. international and domestic legal justifications for use of force in Afghanistan, Iraq, Syria, Yemen, Somalia, Libya, and Niger, and stating that the classified annex contains additional information on U.S. targeting and detention policies).

124. *See* 22 U.S.C. § 2708(g)(3) (2018) (requiring the Secretary of State to provide justification before publicly announcing international criminal tribunal rewards); Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(d), 123 Stat. 1859, 1920 (allowing the Executive to submit in classified form its plans for the transfer of certain detainees); Public Interest Declassification Act of 2000, Pub. L. No. 106-567 § 706(e)(2), 114 Stat. 2856, 2862 (codified as amended at 50 U.S.C. § 3161 note) (requiring executive agencies to justify to congressional committees their decisions to deny the Public Interest Declassification Board access to classified records); Iran Nonproliferation Act of 2000, Pub. L. No. 106-178, 114 Stat. 38 (codified as amended at 50 U.S.C. § 1701 note) (authorizing the President to impose certain measures on individuals proliferating missile-related technology to Iran, North Korea, and Syria; requiring him to provide a written justification for declining to do so; and authorizing him to submit his justification in classified form).

The Executive may also give secret reasons to Congress in the course of classified briefings or closed congressional hearings.¹²⁵ In April 2018, for example, the Trump Administration provided a classified briefing to senators about its legal justification for launching airstrikes against Syria in response to President Bashar al-Assad's use of chemical weapons against Syrian citizens.¹²⁶ From 2009 to 2013, the Obama Administration's intelligence officials held more than a dozen classified briefings for members of Congress to explain why the Executive believed it had the authority to collect electronic records for national security purposes.¹²⁷ Even earlier, the Clinton Administration held classified briefings for the Senate on why it was sending U.S. troops to Bosnia. Such reason-giving can prove effective; these briefings reversed at least one senator's opposition.¹²⁸

These two types of secret reason-giving – to courts and to Congress – appear comparable to the public reason-giving that takes place in similar settings. Whether done publicly or secretly, the Executive gives reasons to courts to influence the judges' decisions and reason-giving. Similarly, both publicly and secretly, the Executive provides reasons to Congress both in response to congressional demands in the oversight process and to persuade Congress that particular executive policies are substantively sound and nonarbitrary (thus averting congressional overrides of those policies).

Most significantly, secret reason-giving offers an important way to check executive decision-making in the national security setting, where broad swaths of information are classified. For example, in the judicial contexts discussed above – FISA, asset freezes, state secrets, CIPA, and FOIA – the requirement that

125. For a general discussion of Central Intelligence Agency (CIA) briefings to congressional committees, see L. BRITT SNIDER, *SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE* 23-28 (1997); and Stephen Preston, Gen. Counsel, Cent. Intelligence Agency, Remarks at Harvard Law School: CIA and the Rule of Law (Apr. 10, 2012), <https://www.lawfareblog.com/remarks-cia-general-counsel-stephen-preston-harvard-law-school> [<https://perma.cc/JY4M-Q4X7>], which states that the CIA made, on average, more than two written submissions and two live appearances per day before the intelligence oversight committees.

126. See Nicole Gaouette, Ted Barrett & Richard Roth, *Senators Leave Classified Briefing on Trump's Syria Policy "Very Unnerved,"* CNN (Apr. 18, 2018, 1:13 PM), <https://www.cnn.com/2018/04/17/politics/us-syria-briefing-trump/index.html> [<https://perma.cc/AFN7-FGY2>] (describing executive efforts to articulate a legal justification for the strike but noting senators' concern about the lack of an overall military strategy in Syria).

127. See Jonathan Weisman & David E. Sanger, *White House Plays Down Data Program,* N.Y. TIMES (June 8, 2013), <https://www.nytimes.com/2013/06/09/us/politics/officials-say-congress-was-fully-briefed-on-surveillance.html> [<https://perma.cc/M5ZB-RQHW>].

128. See Katharine Q. Seelye, *Anguished, Senators Vote to Support Bosnia Mission; Clinton Off to Paris Signing,* N.Y. TIMES (Dec. 14, 1995), <https://www.nytimes.com/1995/12/14/world/balkan-accord-congress-anguished-senators-vote-support-bosnia-mission-clinton.html> [<https://perma.cc/T2SU-WKLE>].

the Executive provide secret reasons allows the court to avoid having to take the Executive's claims of harm at face value and to have a wider range of information before it when evaluating whether to allow the Executive to proceed in the way it has requested. Secret reason-giving by the Executive to the other branches—or to a limited subset of actors in those other branches—thus strikes a balance between two unappealing alternatives: allowing the Executive to act unilaterally and decline to share its decision-making with any other branch, or requiring the Executive to publicly share all of its decisions and justifications.

The mechanism of secret reason-giving, however, alters the justificatory relationship between the Executive and the public. Just as the public reviews the Executive's justifications in the public reason-giving setting, the courts review the Executive's justifications for taking certain steps that affect individual rights in secret reason-giving settings, such as in cases involving FISA, state secrets, CIPA, FOIA, and asset freezes. When another branch of government (in this example, the courts) reviews secret executive reason-giving, a situation of “transitive trust” arises. Because the individual most directly affected by the Executive's decision (the person whose assets were frozen, for example, or the subject of foreign intelligence surveillance) cannot access the reasons, the court becomes the stand-in audience for the Executive. For the litigant to perceive the Executive's decision as legitimate, she must trust the court to correctly evaluate the quality and validity of the reason on her behalf. Likewise, when the Executive gives secret reasons to Congress, individuals place “transitive trust” in Congress to fairly evaluate the validity of those reasons in their stead.¹²⁹ In assessing the Executive's secret reasons, Congress thus serves as a surrogate for the broader public.¹³⁰

In both cases, however, the surrogates might favor or be persuaded by types of reasons that the public finds less than persuasive. Courts, for instance, may find reasons that emphasize an action's legality more persuasive, whereas the public might favor reasons that focus on the action's moral desirability. Therefore, even when the public generally trusts their surrogates, the surrogates may

129. We might even think of secret reason-giving to Congress, especially by agencies whose activities are generally exempt from the Administrative Procedure Act (APA), as a quasisubstitute for APA review.

130. See JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* 238 (1982) (discussing Congress as a “surrogate of the public”); Scott Simon, *The Role of Intelligence Committees*, NAT'L PUB. RADIO (Feb. 3, 2018, 8:07 AM), <https://www.npr.org/2018/02/03/582968678/the-role-of-intelligence-committees> [<https://perma.cc/8PNR-PGEZ>] (interviewing a former CIA analyst who states that the U.S. intelligence committees “serve as surrogates for the American public since most of those activities, by their very nature, cannot be made public”).

not be ideal substitutes because their interests and approaches align imperfectly with those of the public.

C. *Secret Intraexecutive Reason-Giving*

The most interesting and least examined examples of secret reason-giving are those that occur entirely within the executive branch. There are a range of nonobvious forms of constraint on the Executive when it makes classified national security decisions. The Executive has intentionally built some of these constraints into its decision-making process, such as the system of executive-branch lawyers who oversee the process of concluding secret agreements.¹³¹ Other constraints are externally imposed, for example as a result of legal obligations to allies, including foreign intelligence services and militaries.¹³² Intraexecutive secret reason-giving provides yet another way in which the executive branch faces constraints on its national security decision-making process. This Section offers a basic taxonomy of the types of secret reason-giving that occur within the executive branch. As Rebecca Ingber has noted, “Evidence of internal decision-making, let alone dissent, is particularly elusive in the context of the national security state, where so much executive branch deliberation takes place in secret.”¹³³ Nevertheless, it is possible to identify or extrapolate various practices from declassified documents, leaks, and reports by former government officials, as well as from the political science literature.

Mapping secret executive reason-giving produces a complicated matrix. There are different types of reason-givers (the President, other policymakers, and lawyers); different contexts in which actors give secret reasons (in support of policy, legal, or intelligence decisions); different directionalities for reason-giving (up, down, or horizontal); different lengths of time for which reasons will remain secret; and different audiences.

Consider first the *types* of reason-givers inside the Executive. The most prominent secret reason-giver is the President. The President issues a variety of presidential memoranda and directives.¹³⁴ Some of those documents, which re-

131. See Ashley S. Deeks, *A (Qualified) Defense of Secret Agreements*, 49 ARIZ. ST. L.J. 713, 779 (2017).

132. See Ashley Deeks, *Checks and Balances from Abroad*, 83 U. CHI. L. REV. 65 (2016).

133. Ingber, *supra* note 68, at 155-56.

134. See William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 417 (2005) (noting alternatives of “executive orders, executive agreements, proclamations, national security directives, or memoranda”); Gregory Korte, *The Executive Action Toolbox: How Presidents Use Proclamations, Executive Orders and Memoranda*, USA TODAY (Oct. 12, 2017, 9:18 AM), <https://www.usatoday.com/story/news/politics/2017/10/12/how-presidents>

late to topics such as nuclear weapons, space policy, cyber operations, and continuity of government, are classified.¹³⁵ Nevertheless, it seems reasonable to extrapolate that they contain reasons for the announced policies, based on the fact that public presidential memoranda and executive orders often do.¹³⁶ Other secret policy reason-givers include those in the decision-making chain inside national security-related agencies such as the CIA and the Departments of Justice, Defense, as well as in bodies such as the National Security Council (NSC). Executive-branch lawyers often also serve as secret reason-givers, offering reasons to their agency clients. Additionally, lawyers in the Office of Legal Counsel (OLC) offer reasons both to other agencies and to the White House about why they reached particular legal conclusions about a proposed course of action.

Some agencies' officials may be more accustomed to giving reasons, such as those in the Justice Department, where legal reasoning is the coin of the realm,

-use-proclamations-executive-orders-and-presidential-memoranda/702751001 [https://perma.cc/JB6F-5GTR]. For a detailed discussion of the President's use of classified and unclassified directives to affect policy and commit federal government resources in the foreign and military policy areas, see U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-89-31, NATIONAL SECURITY: THE USE OF PRESIDENTIAL DIRECTIVES TO MAKE AND IMPLEMENT U.S. POLICY (Dec. 1988).

135. See, e.g., Gregory Korte, *Obama Has Issued 19 Secret Directives*, USA TODAY (June 24, 2015, 6:52 PM), <https://www.usatoday.com/story/news/politics/2015/06/24/presidential-policy-directives-form-secret-law/29235675> [https://perma.cc/P4FT-DXA4] (reporting that President Obama issued nineteen secret presidential directives); see also HOWELL, *supra* note 89, at 18 (“A sample of recently declassified national security directives includes orders to the CIA to support and recruit Nicaraguan Contras; the funding of covert operations to prevent nations from replicating the ‘Cuban model’; the authorization to execute preemptive and retaliatory strikes against confirmed and suspected terrorists; the establishment of new classified information rules for the National Security Agency; [and] the approval of the invasion of Grenada in 1983.”).
136. See, e.g., Exec. Order No. 13,224, 3 C.F.R. 786 (2001) (explaining why the President believed that he needed to declare a national emergency after September 11 and why it was appropriate to impose financial sanctions on foreign terrorists); Exec. Order No. 10,340, 17 Fed. Reg. 3139 (1952) (articulating various reasons why the Commerce Secretary needed to seize certain steel mills); Memorandum from the White House to the Vice President et al. on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) (listing reasons why the United States would not apply the Third Geneva Convention to certain detainees but why it would treat them “in a manner consistent with the principles of Geneva”); Presidential Policy Directive – Signals Intelligence Activities, WHITE HOUSE (Jan. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> [https://perma.cc/ZU5Y-JUH3] (explaining why the United States engages in signals intelligence collection and how it assesses the risks of that collection). For another example of presidential public reason-giving, see Letter from Barack Obama, President, to Speaker of the House of Representatives and President of the Senate (Oct. 7, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/10/07/letter-termination-emergency-respect-actions-and-policies-government> [https://perma.cc/3VUD-62NM].

and those in the State Department, which often must explain U.S. policies to domestic and foreign audiences. Indeed, one reason why secret reason-giving already occurs in some executive decision-making is that certain actors within the Executive may be in the habit of giving reasons in public settings. Justice Department lawyers, for instance, give reasons in all of their publicly filed briefs. On the other hand, officials at agencies with a strong culture of secrecy, such as the CIA, may be less used to giving reasons, at least to groups that extend beyond their particular agency. Military officials may also be unaccustomed to giving reasons for certain decisions because military culture does not typically expect inferior officers to demand reasons from their superiors before obeying commands. In short, reason-givers will be influenced both by their agency culture and their role and place in the organization.

Closely related to the identities of intraexecutive reason-givers are the *contexts* in which the decision-makers give reasons: secret reason-giving transpires in policy, legal, and intelligence settings. In each context, reason-giving achieves slightly different goals and includes different categories of information. Those making secret policy decisions will generally give policy-related reasons for their decisions, although on occasion a policymaker might proffer a reason for a policy that is largely driven by the law. Policy-focused secret reason-giving may embrace a wide range of legitimate justifications, including political, economic, or diplomatic ones.

The expectation for agency lawyers, on the other hand, is that they will give legal reasons for their decisions, though they may occasionally include policy judgments in their secret reason-giving.¹³⁷ The legal context is particularly suited for reason-giving because careful reasoning is the custom among lawyers. At the same time, the set of permissible reasons will be narrower than in the policy context and usually will exclude political justifications. A general expecta-

137. See *Nomination of Robert S. Litt to Be General Counsel, Office of the Director of National Intelligence and Nomination of Stephen W. Preston to Be General Counsel, Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 111th Cong. 56-57 (2009) (Prehearing Questions for the Record and Responses of Mr. Litt, Q.2) (stating that the Director of National Intelligence (DNI) expected Litt “promptly to bring to his attention any legal or policy issues that concern[ed]” Litt); Richard B. Bilder, *On Being an International Lawyer*, 3 *LOY. U. CHI. INT’L L. REV.* 135, 141-42 (2006) (describing lawyers’ role in advising on policy decisions); Michael K. Young, *The Role of the Attorney-Adviser in the U.S. Department of State: Institutional Arrangements and Structural Imperatives*, 61 *LAW & CONTEMP. PROBS.* 133, 145 (1998) (“[W]hile State Department lawyers may not have quite the same ability as their counterparts in other agencies to derail completely a particular policy, they generally stay involved in the policy formation process much longer and have a deeper, more pervasive, influence on the option finally chosen.”).

tion that the executive branch will not shift its legal positions lightly further narrows the range of acceptable reasons.¹³⁸ As a result, legal secret reason-giving often serves as a more lasting constraint on future executive action than its policy counterpart.

Another context for intraexecutive secret reason-giving arises when intelligence officials articulate the rationales behind their judgments.¹³⁹ Here, the expectation is that objective facts, not political or policy implications, will drive the reasoning. Sharing this reasoning can strengthen the credibility of the intelligence officials in the eyes of policymakers, ensure that the reasons behind a judgment are not self-serving, and allow others to identify potential flaws in the reasoning—and thus possibly in the judgments themselves.

Another dimension of the reason-giving matrix arises from the expected *length of time* that an official expects her reasons to remain secret. As discussed in Section II.C.3, FOIA and mandatory declassification review requirements provide certain opportunities for the public to access previously classified material.¹⁴⁰ Likewise, leaks of classified government information, including of decisions made only weeks or months before, now proliferate. Secret reason-givers who anticipate that their reasons are likely to soon become public—perhaps because the underlying decision is controversial and would be of intense public interest—presumably make particular efforts to provide careful, defensible reasons. Conversely, secret reason-givers who are confident that their reasons will remain hidden for years may be more casual in their reasoning.

Finally, by virtue of the way in which executive actors develop national security policies, reason-giving manifests itself in different *directions*, including up and down the hierarchical decision-making chain and horizontally among peer officials or agencies. The following Sections explore reason-giving in each of these directions.

1. Vertical Secret Reason-Giving

Much secret reason-giving happens vertically as a result of the way the Executive forms national security policies. A decision to pursue a given policy may start at the top—as a presidential initiative—and flow down to lower-level officials for execution, or it may arise from the bottom when lower-level officials

138. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010).

139. See, e.g., Jack Davis, *Tensions in Analyst-Policymaker Relations: Opinions, Facts, and Evidence*, CENT. INTELLIGENCE AGENCY (Jan. 2003), <https://www.cia.gov/library/kent-center-occasional-papers/vol2no2.htm> [<https://perma.cc/LN2V-XU4Y>] (noting that policymakers often gain insights from well-argued predictive judgments from intelligence analysts).

140. See *infra* Section II.C.3.

compile relevant facts and reasons in support of a particular policy and recommend it to their superiors. Most top-down reason-giving happens in the policy setting, not the legal setting. Senior officials can make policy decisions based on their political instincts or their existing understanding of foreign affairs, but senior lawyers rarely make important legal decisions before they have reviewed detailed legal research and analysis by their subordinates.

Top-down reason-giving can begin at a variety of levels and take different forms. The President might decide to establish a particular classified military or intelligence policy and then issue a classified directive that articulates that policy and her reasons for adopting it. Cabinet members also make classified decisions that affect their agencies and may issue formal policies accompanied by explanatory reasoning to the various offices within their agencies. Other top-down secret reason-giving may be less formal. For example, the 9/11 Commission Report notes that cabinet-level officials instructed CIA operatives to cease pursuing a covert operation to exfiltrate Osama Bin Laden from Afghanistan because they “thought that the risk of civilian casualties – ‘collateral damage’ – was too high” and were concerned about the safety of the tribal members who would have assisted the CIA in the operation.¹⁴¹ In another historical example, in 1948, President Harry Truman rejected the military’s formal request for custody over nuclear weapons, which were then under the control of the civilian Atomic Energy Commission. While the military argued that the actor using the weapons should keep custody of them and that the decision would concentrate authority in the unified military command, the President maintained that nuclear weapons were unlike other weapons, and that his ultimate responsibility for their use meant that he and the civilian commission should retain custody.¹⁴²

Reason-giving also occurs from the bottom up in both the legal and policy spheres. For example, bureaus in agencies such as the Department of Justice and the Department of State frequently engage in bottom-up policy reason-giving when they prepare classified decision memoranda for senior decision-makers that recommend particular policy choices.¹⁴³ Those memoranda usually identify the decision to be made and provide argumentative support. Some bottom-up

141. NAT’L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 114 (2004).

142. See *Meeting at the White House, Atom Bomb Custody*, NAT’L SECURITY ARCHIVE (July 21, 1948), <https://nsarchive2.gwu.edu//dc.html?doc=4316138-Document-01A-Meeting-at-the-White-House-Atomic> [<https://perma.cc/Y3BP-69X7>].

143. For an example of unclassified bottom-up reason-giving, see MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? 91-92 (2000), which discusses attempts by Department of Justice lawyers to persuade their political leadership using written memos and persuasive arguments.

reason-giving occurs not just within a single agency but also across multiple different agencies and is then fed to the NSC for a decision.¹⁴⁴

Consider a recent example related to targeted killings. President Obama produced secret presidential policy guidance governing the use of direct military action against terrorist targets. The government originally classified the document as top secret but declassified and released it after the American Civil Liberties Union (ACLU) filed a FOIA request. The document states in part:

When considering a proposed operational plan, Principals and Deputies shall evaluate the following issues, along with any others they deem appropriate:

- 1) The implications for the broader regional and international political interests of the United States; and
- 2) For an operational plan that includes the option of legal force against targets other than identified HVTs [high value targets], *an explanation of why authorizing direct action against targets other than identified HVTs is necessary* to achieve U.S. policy objectives.¹⁴⁵

This document reflects an expectation that the lower-level officials who prepare targeting decisions will include the reasons why they believe that the United States should, in a particular case, target a terrorist who is not a senior member of the terrorist group. The President thus envisions that his senior-most agency heads will assess the classified rationales that subordinate officials provide.

Law-enforcement procedures also often contain requirements for classified bottom-up policy reason-giving. FBI guidelines, for example, require agents to engage in reason-giving before they may issue national security letters (NSLs) and impose nondisclosure requirements on the recipients. NSLs are a form of administrative subpoena under which record holders such as banks and telephone companies must disclose certain information. The guidelines state:

144. Bottom-up secret reason-giving may also flow from the National Security Council (NSC) to the President. Executive Order 12,333 provides that the NSC shall submit to the President policy recommendations on covert actions, “including all dissents.” Exec. Order No. 12,333, 3 C.F.R. § 200 (1981), *reprinted in* 50 U.S.C. § 401 app. at 44-51 (1982). This indicates that the President receives from NSC secret reasons for and against undertaking a particular covert action.

145. *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, EXECUTIVE OFF. PRESIDENT 4 (May 22, 2013), https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf [<https://perma.cc/9MAZ-TXQR>] (emphasis added) [hereinafter *Presidential Policy Guidance*].

An NSL may issue, and a nondisclosure requirement may be imposed, only after rigorous review and approval at a high level. With respect to the NSL itself, *an agent must justify in writing why the NSL is needed*, i.e., the agent must provide a detailed explanation of the predication for the investigation as well as the relevance of the information sought.¹⁴⁶

Similarly, the *Attorney General's Guidelines on General Crimes and Domestic Terrorism Investigations* require inquiries to be completed within ninety days after initiation of the first investigative step.¹⁴⁷ The policy further states, "An extension of time in an inquiry for succeeding 30-day periods may be granted by FBI Headquarters upon receipt of a written request and statement of reasons why further investigative steps are warranted when there is no 'reasonable indication' of criminal activity."¹⁴⁸ These requirements reflect efforts by the Executive to force lower-level officials to systematically provide reasons to their superiors, who will assess the sufficiency of those reasons before the government undertakes an action that affects individuals' privacy or physical integrity.¹⁴⁹

Not all bottom-up secret reason-giving occurs in the policy sphere. When different agencies disagree about a particular legal interpretation, for example, each agency may present its legal views to the President and Cabinet (frequently

146. *Termination Procedures for National Security Letter Nondisclosure Requirement*, FED. BUREAU INVESTIGATION 1 (Nov. 24, 2015), <https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf/view> [<https://perma.cc/V265-8VUA>] (emphasis added).

147. Office of Attorney Gen., *Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations*, DEP'T JUST. pt. II.B.(3) (Mar. 21, 1989), <https://www.justice.gov/archives/ag/attorney-generals-guidelines-general-crimes-racketeering-enterprise-and-domestic#general> [<https://perma.cc/X33T-V63W>] (emphasis added).

148. *Id.* (emphasis added). For a comparable rule in the intelligence context, see *Central Intelligence Agency Intelligence Activities: Procedures Approved by the Attorney General Pursuant to Executive Order 12333*, CENT. INTELLIGENCE AGENCY §§ 5.1, 5.2 (Jan. 2017), <https://www.cia.gov/about-cia/privacy-and-civil-liberties/CIA-AG-Guidelines-Signed.pdf> [<https://perma.cc/YM7Q-57CU>], which states that CIA employees must complete documentation for any bulk collection activity. This documentation "shall include . . . [t]he purpose of the collection activity, including a description of why the data is reasonably believed to be relevant to a CIA authority and responsibility." *Id.* (emphasis omitted).

149. The Department of Justice's recommendations to the President about whether to grant clemency or a pardon serve as another example of policy-based bottom-up secret reason-giving. The Office of the Pardon Attorney prepares a report for the White House that contains reasons to grant clemency or a pardon. Neither those reasons nor the President's reasons for granting or denying clemency are made public. *Audit of the Department of Justice Processing of Clemency Proceedings, Audit Report 11-45*, OFF. INSPECTOR GEN., 5 (Sept. 2011), <https://oig.justice.gov/reports/2011/a1145.pdf> [<https://perma.cc/DAX2-TY8L>].

in the form of an NSC-drafted decision memorandum articulating those competing legal views).¹⁵⁰ One of the most prominent recent cases of classified bottom-up legal reason-giving occurred in the debate over the use of force in Libya in 2011, albeit without the traditional decision memorandum. The legal question was whether the War Powers Resolution required the President to cease employing U.S. military force in Libya after sixty days, absent congressional authorization. Although no written products containing secret reason-giving have been made public, news reports reflect that the Departments of Defense, State, and Justice, as well as the White House Counsel's Office, all offered the President legal reasons why the United States did or did not need to cease military force after sixty days.¹⁵¹ The President ultimately sided with the White House Counsel's Office and the State Department, and appears to have adopted the reasoning behind those arguments as well; the State Department Legal Adviser, Harold Koh, was authorized to testify to Congress in support of that decision using the reasons the State Department presumably originally proffered to the President.¹⁵²

Another common example of bottom-up legal reason-giving involves OLC's provision of classified opinions to the White House. Those opinions articulate OLC's view about whether a given course of action would be lawful, and, like judicial opinions, provide legal reasons for OLC's conclusions.¹⁵³ Indeed, an OLC memorandum from 2010 articulating the office's "best practices" reflects OLC's commitment to providing reasons when giving advice.¹⁵⁴ It states, "OLC helps the President fulfill his or her constitutional duties to preserve, protect,

150. See, e.g., *Protect Democracy Project v. Dep't of Def.*, No. 17-cv-00842 (CRC), at 10-13 (D.D.C. Aug. 21, 2018), <https://assets.documentcloud.org/documents/4779072/Memorandum-and-Opinion-Protect-Democracy-Syria.pdf> [<https://perma.cc/9HFX-KZWY>] (describing the process within the NSC and the White House for presenting the President with legal advice); Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 *CARDOZO L. REV.* 45, 71 (2009) (quoting former State Department legal advisers describing how, when agencies disagreed on a legal issue, the NSC would present those divergent legal opinions to the President).

151. See Daphna Renan, *The Law Presidents Make*, 103 *VA. L. REV.* 805, 839-41 (2017).

152. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7-40 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep't of State), https://fas.org/irp/congress/2011_hr/libya.pdf [<https://perma.cc/DY96-N4XC>].

153. See Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 *HARV. L. REV. F.* 62, 69-70 (2011). OLC legal opinions are often classified or kept secret but may be published in certain instances.

154. Memorandum from David J. Barron, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to Attorneys of the Office of Legal Counsel 1 (July 16, 2010) [hereinafter Barron OLC Memo], <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/B79B-ZK9V>].

and defend the Constitution, and to ‘take Care that the Laws be faithfully executed.’ It is thus imperative that the Office’s advice be clear, accurate, thoroughly researched, and *soundly reasoned*.¹⁵⁵ OLC officials have acted to uphold the quality of the reasoning in their opinions. In 2004, when then-head of OLC Jack Goldsmith decided to rescind the “torture memos” his predecessor had signed authorizing enhanced interrogation techniques as part of the War on Terror, he noted that the memos had displayed an “unusual lack of care and sobriety in their legal analysis.”¹⁵⁶

Some bottom-up reason-giving combines both legal and policy justifications. In 1994, for example, four bureaus in the State Department prepared a classified memorandum asking the Secretary of State to authorize Department officials to state publicly that acts of genocide had occurred in Rwanda and to allow U.S. delegations in international fora to agree to resolutions stating that fact.¹⁵⁷ The memorandum reasoned that some of the acts committed against the Tutsis, as described by the Department’s intelligence bureau, met the legal standard contained in the Genocide Convention.

In each of these cases, the underlying U.S. policy ultimately became public even though the initial reasoning took place in a classified setting. But decision-makers often will not know *ex ante* if or when their secret reason-giving will be released. There is good reason to assume, in other words, that the kinds of reasons supplied in a Rwandan-genocide-type memorandum (which ultimately became public) are similar to those in memoranda relating to covert and clandestine activities that are less likely to ultimately become public. One might think that because the Libya and interrogation decisions were controversial, the officials involved might have assumed their arguments were more likely to leak, and

155. *Id.* (emphasis added). For another example of secret bottom-up legal reasoning, see Memorandum from David J. Barron, Acting Assistant Attorney Gen., to the Attorney Gen. (July 16, 2010), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf [<https://perma.cc/J98A-QJ2U>]. The first paragraph of Part II states, “We first *explain*, in this part, the scope of section 1119 and *why* it must be construed to incorporate the public authority justification, which can render lethal action carried out by a government official lawful in some circumstances. We next *explain* in part III-A *why* that public authority justification would apply to the contemplated DoD operation. Finally, we *explain* in part III-B *why* that justification would apply to the contemplated CIA operation.” *Id.* at 12 (emphases added).

156. JACK GOLDSMITH, THE TERROR PRESIDENCY 148 (2007); see also DeRosa & Regan, *supra* note 49, at 42 (“Failure to include all knowledgeable agencies in deliberations about the torture statute thus resulted in what is regarded as a remarkably poorly reasoned and unpersuasive example of legal analysis.”).

157. Action Memorandum from George E. Moose et al. to the Sec’y of State (May 20, 1993), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB53/rwo52194.pdf> [<https://perma.cc/Y38U-297L>].

so their reason-giving efforts would not have reflected typical classified decision-making. Even if there is a higher risk that some controversial policies will leak, however, decision-makers know that many others never come to light, and it may not always be obvious to them at the time which decisions will later become controversial. It thus seems reasonable to conclude that these examples are fairly representative of secret reason-giving as a whole.

Sometimes a secret reason-giving exercise reflects *both* bottom-up reason-giving and top-down reason-giving.¹⁵⁸ For example, offices within agencies often obtain decisions from a senior agency official by drafting a decision memorandum recommending adoption of a particular policy. The decision memorandum to the senior official usually contains the reasons why the drafting offices believe that this is the most desirable policy outcome. The senior official then selects one of the options from the memorandum and sometimes even handwrites notes or reasons in the margins.¹⁵⁹ Once the decision is made, the top-down reasoning provided in those comments may then inform the policy's subsequent implementation. Agencies sometimes also produce "split memos" in situations in which some set of offices favors a particular policy choice and another set favors a different one. A split memorandum contains reasons why the different offices support a given policy, and the senior official making the choice will explicitly or implicitly adopt the reasons in support of the option she chooses — or even identify a different reason for her choice.¹⁶⁰ Another example arises with respect to classified OLC opinions to the President: the OLC opinions offer legal

158. These examples depict a sequence of reason-giving that begins with bottom-up reason-giving and later results in top-down reason-giving. It is theoretically possible for that sequence to occur in reverse, but it would be unusual for it to do so. By the time a senior decision-maker gives a reason, it is usually because she has reached a final decision, not because she is initiating a decision-making process inside her agency.

159. See, e.g., Memorandum from Zbigniew Brzezinski, Nat'l Sec. Advisor, to President Carter (Sept. 21, 1978), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB231/doc22.pdf> [<https://perma.cc/D9G6-PHW7>] (including President Carter's margin notes on the decision memo). For an example of a Secretary of Defense who provided extensive marginalia on the memos he received, see EDWARD C. KEEFER, *HAROLD BROWN: OFFSETTING THE SOVIET MILITARY CHALLENGE* 1977-1981, at 135, 422 (2017).

160. See DEMOCRATIC STAFF COMM. ON OVERSIGHT & GOV'T REFORM, U.S. HOUSE OF REPRESENTATIVES, STATUS UPDATE ON INVESTIGATION OF ATTACKS ON U.S. PERSONNEL AND FACILITIES IN BENGHAZI 43 (Sept. 2013), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Democratic%20Staff%20Report%20to%20Ranking%20Member%20Cummings.pdf> [<https://perma.cc/AQ55-XR2F>] (referring to a "split memo"); ANGELA E. STENT, *THE LIMITS OF PARTNERSHIP: U.S.-RUSSIAN RELATIONS IN THE TWENTY-FIRST CENTURY* 119 (2014) (same); Ori Nir, *Senate Probes Bolton's Pro-Israel Efforts*, FORWARD (May 6, 2005), <https://forward.com/news/3421/senate-probes-bolton-e2-80-99s-pro-israel-efforts> [<https://perma.cc/L9H6-E4N2>] (same).

rationales and analysis, and if the President chooses to disregard OLC advice, there is an expectation that she will provide a reason for doing so.¹⁶¹

2. *Horizontal Secret Reason-Giving*

Not all secret reason-giving within the Executive is hierarchical, however. Some secret reason-giving happens horizontally.¹⁶² For example, agencies provide secret reasons to OLC when they want to persuade that office to adopt a particular legal interpretation.¹⁶³ Another example of horizontal reason-giving happens between agencies and the NSC when one or more agencies provide a memorandum containing reasons that NSC should favor a particular policy approach. In 2002, the Secretary of State famously provided analysis to the NSC about the President's options for applying the Geneva Conventions to members of the Taliban.¹⁶⁴ Secretary Colin Powell's memorandum offered a variety of legal and policy reasons to treat the Taliban in a manner consistent with the Third Geneva Convention and urged the National Security Advisor to present those reasons to the President as he made his policy decision.¹⁶⁵ In this case, horizontal secret reason-giving occurred first, in the hope that there would later be vertical reason-giving to the President.

Another important example of horizontal secret reason-giving between agencies can be found in the U.S. government's state-secrets policy. The Department of Justice issued the policy in 2009 in the wake of public criticism that the U.S. government had repeatedly invoked the state-secrets privilege to prevent illegal or misguided decisions from coming to light.¹⁶⁶ Members of Congress

161. See Morrison, *supra* note 153, at 69-70 (“[H]ow does the President justify departing from OLC’s views? What legal rationale can he provide? Is it credible? If not, what does that say about his administration’s commitment to legal principle?”).

162. See Ingber, *supra* note 68, at 164-65 (describing “the daily activities of executive branch officials . . . seeking to persuade others, either their colleagues in other offices or agencies, or the political leadership, of the advantages of particular decisions, or of the risks of others”).

163. Barron OLC Memo, *supra* note 154, at 3 (describing how OLC solicits the views of interested agencies before it issues an opinion).

164. Memorandum from Colin L. Powell, Sec’y of State, U.S. Dep’t of State, to Counsel to the President, Assistant to the President for Nat’l Sec. Affairs (Jan. 25, 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.01.26.pdf> [<https://perma.cc/ZGL6-Q2W3>].

165. See *id.* at 3-4.

166. See GARVEY & LIU, *supra* note 109, at 1; Editorial, *Shady Secrets*, N.Y. TIMES (Sept. 29, 2010), <https://www.nytimes.com/2010/09/30/opinion/30thu1.html> [<https://perma.cc/WVP5-S966>]. See generally GARVEY & LIU, *supra* note 109 (discussing the use of the privilege in rendition, surveillance, and targeted killing cases).

also had introduced several bills that would have regulated and effectively limited the Executive's use of the privilege.¹⁶⁷ The Department announced that it was "adopting these policies and procedures to strengthen public confidence that the U.S. Government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests."¹⁶⁸

The policy states that the government agency seeking to invoke the privilege

must submit to the Division in the Department with responsibility for the litigation in question a detailed declaration based on personal knowledge that specifies in detail: (i) the nature of the information that must be protected from unauthorized disclosure; (ii) the significant harm to national security that disclosure can reasonably be expected to cause; [and] (iii) *the reason why unauthorized disclosure is reasonably likely to cause such harm.*¹⁶⁹

The Executive apparently sought to achieve at least three goals with the policy: to address legitimacy concerns that had sprung up around the privilege; to establish accountability by specifying how senior agency officials must request the privilege and which senior officials at the Department of Justice could authorize its use; and to avoid legislation that would institute what the Executive saw as overly inflexible rules on the use of the privilege.

Such a decision to require reason-giving implicates many of the values discussed in Section I.C above. Christina Wells noted that the policy might have imposed "explanatory accountability" on the Executive because it "involve[d] the expectation that officials might *actually* be asked to justify their particular policy decisions to others or face negative consequences."¹⁷⁰ Wells ultimately concluded that the policy would be unlikely to deliver much accountability, however, because it did not require explanations outside the executive branch.¹⁷¹ However, as discussed in the next Part, even reason-giving that happens entirely

167. See, e.g., State Secrets Protection Act, S. 2533, 110th Cong. (2008); State Secret Protection Act of 2008, H.R. 5607, 110th Cong.

168. Memorandum from the Attorney Gen., U.S. Dep't of Justice, to the Heads of Executive Departments and Agencies and Department Components (Sept. 23, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf> [<https://perma.cc/LJ2H-2TN8>] (setting forth policies and procedures governing invocation of the state-secrets privilege).

169. *Id.* at 2 (emphasis added) (footnote omitted).

170. Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 629 (2010).

171. *Id.* at 630.

within the executive branch promotes a variety of virtues and some level of accountability. And now that the policy is on the books, it will be more difficult politically for future administrations to unwind this requirement.

One notable example of secret *legal* horizontal reason-giving involves the Lawyers Group, a set of agency lawyers convened by the NSC legal advisor.¹⁷² The George H.W. Bush Administration created the NSC Lawyers Group to review covert-action proposals.¹⁷³ Though the directive establishing the group remains classified, President Bush presumably created it because covert action involves highly sensitive operations that can implicate difficult questions of domestic and international law. The group, which draws lawyers from the Departments of Defense, State, and Justice, as well as the CIA, DNI, and NSC, met throughout the Clinton, George W. Bush, and Obama Administrations to discuss legal issues related to intelligence operations and counterterrorism matters.¹⁷⁴

In these meetings, agency lawyers attempt to persuade one another of the correct legal analysis – which entails presenting legal reasons for a particular interpretation. As discussed in Part III below, sometimes the process of reason-giving fails to produce consensus about *why* a particular course of action would be lawful, even if all agree that it is.¹⁷⁵ In that case, the lawyers may convey to policy-makers that an action is legal without agreeing on the reasoning. In any event, agency lawyers provide reasons among themselves in an effort to achieve consensus on both legality and legal rationale.¹⁷⁶ If the Group reaches agreement, the members may shift from horizontal legal reason-giving among themselves to vertical, bottom-up reason-giving to the policy clients – usually principals within their respective agencies – who asked the initial legal question. One important reason for the Group’s enduring existence is that it demands a form

172. See DeRosa & Regan, *supra* note 49, at 29; Renan, *supra* note 151, at 837; see also Exec. Order No. 12,333, *supra* note 144 (requiring the Attorney General to provide a statement of reasons to an intelligence community head for not approving proposed procedures for intelligence operations).

173. See DeRosa & Regan, *supra* note 49, at 33; John Bellinger, *Charlie Savage and the NSC Lawyers Group*, LAWFARE (Nov. 8, 2015, 11:25 AM), <https://www.lawfareblog.com/charlie-savage-and-nsc-lawyers-group> [<https://perma.cc/CNA3-KGZC>].

174. See DeRosa & Regan, *supra* note 49, at 33-34; Bellinger, *supra* note 173. It is unclear whether the Lawyers Group continues to meet during the Trump Administration.

175. See *infra* Section III.B (discussing the costs of reason-giving).

176. See Ingber, *supra* note 68, at 168 (noting that actors within the executive branch “clash regularly over their different interpretations of legal obligations and authorities – between agencies, between offices within agencies, between individuals”).

of deliberation that helps ensure the legality of U.S. national security decisions.¹⁷⁷ Because legality and legitimacy are intimately intertwined, a public understanding of the existence and basic working procedures of the Group therefore can enhance public perceptions of the legitimacy of even secret national security decisions.

In a few cases, the direct audience for the Executive's secret reason-giving is not clear. For instance, when the CIA prepares a covert-action finding for the President's signature, it also prepares a detailed supporting document.¹⁷⁸ That document contains four sections, including a "policy objective(s)" section that describes "precisely the foreign policy objective(s) to be achieved" by that covert action, which is akin to articulating the reason why the U.S. government is undertaking the action.¹⁷⁹ It is unclear whether the Executive transmits this document to Congress, as it does with the formal finding, or whether it relies on this supporting document to simply clarify the mission and lines of operation for those executive officials who are involved in its execution.

These examples highlight that there are two distinct types of horizontal secret reason-giving: unidirectional and iterative. In the state-secrets setting, the reason-giving runs one way: the agency seeking to invoke the privilege tries to persuade the Department of Justice to do so, with the Attorney General acting as the final authority. In the Lawyers Group setting, the reason-giving is more iterative, as each agency lawyer attempts to persuade her counterparts of the correctness of her approach. As discussed in Part III.B, this latter type of reason-giving might impose somewhat higher costs on the government than the former because it may delay final decisions.

In sum, secret reasons are given in all directions. They are given from subordinates to their superiors and from superiors to their subordinates. Lawyers give secret reasons to peer lawyers, as well as to policy-makers to guide their actions. Secret reason-giving is multidirectional and plays a significant role in the daily business of national security and foreign-policy decision-making.

177. See DeRosa & Regan, *supra* note 49, at 31; see also CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY* 64-67 (2015) (noting that the Obama Administration's Lawyers Group "thought through all the reasons *not* to take a proposed action before acting").

178. William J. Daugherty, *Approval and Review of Covert Action Programs Since Reagan*, 17 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 62, 74-75 (2004).

179. *Id.* at 75 (describing the contents of the detailed supporting document).

3. *The Audiences for Intraexecutive Reason-Giving*

Understanding the types of intraexecutive secret reason-giving helps us identify the audiences for secret reason-giving, which in turn allows us to evaluate its effectiveness. As discussed in Part I, reason-giving is intimately linked to the audiences to whom the reason-giver provides her reasons. Public and secret reason-giving diverge most starkly with respect to the nature of the audiences being addressed. The audience for secret reason-giving is never the public—at least not directly. So who is it? There are at least four categories of audiences for secret reason-giving. Two of these audiences—executive officials and foreign officials—are real. Two others—future administrations and a notional general public—are imagined, but nevertheless powerful.

a. *Executive Actors*

The prior Sections examined both vertical and horizontal secret reason-giving.¹⁸⁰ In those settings, three types of executive actors serve as the audiences for secret reason-giving: superiors, subordinates, and peers. In the first case, the audience for secret reason-giving will be a senior executive official such as the President, a cabinet member, or an assistant secretary of an agency. Here, reason-givers generally have both instrumental and substantive interests in providing persuasive and accurate reasons, because they want their superiors to think well of them and their work. Cases undoubtedly arise in which subordinates will shape their reasons to curry favor with their superiors. When a range of inter-agency actors are party to the proposed decision and accompanying reasons, however, it will be harder for any one actor to proffer reasons based on self-interest.¹⁸¹

In the second case, the audience for secret reason-giving is the decision-maker's subordinates. This might include two different sets of individuals: those who advised and participated in the lead-up to the actual policy decision, and those who are tasked with executing the policy. When a decision-maker offers reasons for choosing a given way forward and explains why she did not choose another course of action, she addresses the first set and signals to those involved in the lead-up (who may have had a variety of views on the best course of action) that she considered all of the information before her. The second set, which may overlap with the first, consists of those officials who will help implement the decision. The reasons accompanying the decision may help inform or provide a

180. See *supra* Sections II.C.1 & II.C.2.

181. Katyal, *supra* note 5, at 2317 (noting that when the State and Defense Departments must persuade each other why their view is correct, “better decision-making results”).

“gloss” on the decision and how the decision-maker wishes her subordinates to implement it.

Finally, horizontal reason-givers seek to convince their peers. Here, too, reputational benefits attach to those who offer a persuasive basis for their choices, because those reason-givers show themselves to be logical and careful thinkers.¹⁸² Peers often are better situated than superiors to carefully interrogate the reasons given because they are closer to the facts and may have greater incentive to challenge them due to interagency rivalries or differing perspectives.¹⁸³ As a result, peers may be a more difficult audience to satisfy and a more reliable proxy for a public audience than superiors or subordinates. A peer may also push back with her own reasons, thus stimulating an iterative, dialogic process of reasoning.¹⁸⁴

Beyond these three concrete executive audiences inside the U.S. government lies yet another: future administrations.¹⁸⁵ Although by definition future administrations have not yet taken office, Presidents and other executive actors are often conscious of their legacies.¹⁸⁶ Although many national security decisions will never become public, future administrations can access secret historical archives and precedents, so a contemporary administration may wish to avoid leaving a trail of poorly reasoned or unreasoned decisions for a future administration to critique and possibly publicize. Conversely, administrations tend to want their policies to endure across administrations. Giving persuasive reasons that will remain in the archives helps build as strong a case as possible for that continuity.¹⁸⁷

182. See Ingber, *supra* note 68, at 190 (noting the importance to bureaucrats of their “institutional relationships”).

183. For an example of the CIA failing to persuade another executive agency of the wisdom of a particular covert action, see FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, at 56 (1976), which notes that the “policy arbiters have questioned CIA presentations, amended them, and, on occasion denied them outright” and that objections by the State Department “have resulted in amendment or rejection” of various CIA proposals (quoting CIA Memorandum of Feb. 25, 1967).

184. Cf. Renan, *supra* note 151, at 849 (describing an iterative and interactive process within the Executive of arriving at legal judgment).

185. See Cohen, *supra* note 51, at 129 (“By supplying reasons, decision-makers become more accountable to the public and lend themselves more easily to checks, in part because they leave records of their action.”).

186. Christian Fong et al., *Political Legacies: Understanding Their Significance to Contemporary Political Debates*, 52 PS: POL. SCI. & POL. 451 (2019).

187. I thank Chimène Keitner for bringing this point to my attention.

b. *Foreign Allies and International Officials*

Another audience for secret reason-giving is executive officials from foreign states, particularly those that are part of the North Atlantic Treaty Organization (NATO) and the Five Eyes intelligence-sharing arrangement.¹⁸⁸ U.S. diplomats frequently attempt to persuade their foreign counterparts to pursue (or not pursue) particular policies using classified reasons.¹⁸⁹ For example, immediately after the September 11 attacks, the United States provided secret reasons to NATO to justify the U.S. attribution of the attacks to al-Qaeda and to persuade NATO members to trigger the collective self-defense provision of the North Atlantic Treaty.¹⁹⁰ U.S. intelligence officials presumably undertake secret reason-giving when attempting to persuade their counterparts in other states to cooperate in intelligence sharing or covert activities.¹⁹¹ Members of the United Nations (UN) Security Council are also audiences for secret reason-giving.¹⁹² For example, the United States and other states must provide reasons—some of which they may ask to be kept private—to other members on the Council to persuade them to add individuals to sanctions lists.¹⁹³

188. The Five Eyes are the United States, United Kingdom, Canada, Australia, and New Zealand.

189. See, e.g., *U.S. Demarche on Pakistani Reprocessing Plant*, DEP'T OF STATE (1962) <https://nsarchive2.gwu.edu/nukevault/ebb352/doc12.pdf> [<https://perma.cc/TCA2-6VTD>] (providing classified justifications with which to persuade several other states to help stem Pakistan's efforts to acquire a nuclear reprocessing facility).

190. *Statement by NATO Secretary General Lord Robertson*, NATO (Oct. 2, 2001), <https://www.nato.int/docu/speech/2001/so11002a.htm> [<https://perma.cc/BA4F-W3L8>] (discussing classified briefing by U.S. government about who was responsible for the September 11 attacks).

191. See Statement of David A. Phillips, in *FINAL REPORT*, *supra* note 183, at 518 app. II.C (describing cases in which “cooperative friends are persuaded to influence a foreign government or some element of it” and noting that as a practitioner of covert action in seven countries, he found that “most of our mistakes occur when we attempt to persuade foreigners to do something which the United States wants more than they do”).

192. See Deeks, *supra* note 131, at 741-42 (describing the Five Eyes intelligence sharing arrangement); Joseph S. Gordon, *Intelligence Sharing in NATO*, https://www.atcom.nl/ap_archive/pdf/AP%202017%20nr.%206/Gordon.pdf [<https://perma.cc/PFL6-S447>]; *Access to Classified Information*, OFF. OF THE OMBUDSMAN OF THE SECURITY COUNCIL'S 1267 COMMITTEE, https://www.un.org/securitycouncil/ombudsperson/classified_information [<https://perma.cc/9H9A-H7BT>] (explaining the ombudsman's need for classified information and listing arrangements for classified information-sharing with various states, including the United States).

193. See S.C. Res. 1735, annex 1 (Dec. 22, 2006) (providing a cover sheet for submitting names to the sanctions committee, which requires states to provide a specific basis and a “statement of the case” for listing an individual or group and allows states to decide what portions of the statement the committee may release to the public or member states). See generally Simon

One might object that foreign states look more like the congressional and judicial audiences described in Section II.B because they operate at some remove from the U.S. executive branch, are better positioned to be objective and critical, and do not answer to the U.S. President. But unlike the courts and Congress, foreign and international officials cannot directly alter or overrule the Executive's decision on the basis that it was poorly reasoned. Yet they are nonetheless a relevant audience for intraexecutive reason-giving: the Executive often needs to give secret reasons to executive actors within foreign governments to motivate them to take actions that they might not naturally take, such as joining U.S. military operations or supporting U.S. policies in fora such as the UN Security Council.

c. *The Notional Public*

The final audience for secret reason-giving is less tangible: the general public. Although for secret reason-giving the public audience is an abstract concept, it nevertheless shapes the types of reasons that officials offer. There are two different notional publics that executive officials contemplate when providing secret reasons: a current public and a future public.

The current public will be most salient in the minds of secret reason-givers. It is increasingly difficult to keep secrets in real time, and leaks abound about covert-action programs, foreign intelligence surveillance, and military and cyber operations. Scholars now devote attention to the phenomenon of government leaks, including the ways in which senior government officials tolerate a certain level of leaking.¹⁹⁴ In light of the prevalence of leaking in the national security space, officials are keenly aware of the possibility that their decisions and operations may become public in the near term. A former CIA lawyer described his legal evaluations for covert-action programs as including “[t]he *Washington Post* test,” which asks how the American public would view the information if it were leaked.¹⁹⁵ Senior executive officials may also decide to release or declassify highly

Chesterman, *Shared Secrets: Intelligence and Collective Security*, LOWY INST. FOR INT'L POL'Y 47-54 (2006), <https://papers.ssrn.com/abstract=984821> [<https://perma.cc/LB55-F7JM>] (describing the UN's counterproliferation efforts).

194. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 530-31 (2013). For other literature on leaks, see RAHUL SAGAR, *SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY* (2013); and Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449 (2014).
195. Deeks, *supra* note 131, 781-82 (2017); see also *The Reauthorization of the Office of Government Ethics: Hearing Before the Subcomm. on the Fed. Workforce & Agency Org. of the Comm. Gov't Reform*, 109th Cong. 28 (2006) (statement of Marilyn Glynn, Acting Director, Off. of Gov't

classified documents to the public under pressure from Congress, journalists, or public interest groups.¹⁹⁶ In other words, the current public serves as an indirect audience for secret reason-giving. Even though members of the Executive do not intend for the public to learn about many national security decisions or the reasons given for them, they know that the public may discover the reasons nonetheless.¹⁹⁷

Executive officials also keep the future public in mind. One mechanism through which members of the public may seek the release of government information is the Freedom of Information Act.¹⁹⁸ In response to FOIA requests involving national security information, the Executive usually invokes one or more exemptions to avoid disclosure, and it often – although not always – succeeds in keeping the information secret.¹⁹⁹ However, the Executive may be more willing to authorize release in the more distant future. Across several administrations,

Ethics) (describing the “*Washington Post* test” as meaning “if it’s something that you wouldn’t want seen in the paper about you the next day, then you better think twice about doing it”).

196. See, e.g., *As Prepared for Delivery—Remarks of ODNI General Counsel Robert Litt at American University Washington College of Law Freedom of Information Day Celebration*, OFF. DIRECTOR NAT’L INTELLIGENCE (Mar. 17, 2014), <http://icontherecord.tumblr.com/post/79998577649/as-prepared-for-delivery-remarks-of-odni-general> [https://perma.cc/J2R7-9WNQ] (stating that Edward Snowden’s leaks prompted the U.S. intelligence community to declassify thousands of documents to show how it limits and oversees its intelligence collection); Karen DeYoung et al., *Congress Releases Long-Classified ‘28 Pages’ on Alleged Saudi Ties to 9/11*, WASH. POST (July 15, 2016), https://www.washingtonpost.com/world/national-security/congress-releases-long-classified-28-pages-on-alleged-saudi-ties-to-911/2016/07/15/e8671fde-4ab1-11e6-bdb9-701687974517_story.html [https://perma.cc/JMR7-3ZJU] (describing pressure on White House to declassify twenty-eight pages related to the possible Saudi role in September 11 for congressional release).
197. From an ethical perspective, government agents should not engage in any activities that the public would not approve of if it had full knowledge of the circumstances for the decision, whether or not the agents expect their activities to come to light.
198. 5 U.S.C. § 552 (2018).
199. 5 U.S.C. §§ 552(b)(1), (3), (5). For two recent exceptions in which a court forced the Executive to reveal sensitive executive legal reason-giving pursuant to a FOIA request, see *N.Y. Times v. Dep’t of Justice*, 756 F.3d 100 (2d Cir. 2014), which required the Executive to release OLC’s memo discussing the legality of targeting Anwar al-Aulaqi; and *ACLU v. Dep’t of Justice*, 15 Civ. 1954 (CM), 2016 WL 8259331 (S.D.N.Y. Aug. 8, 2016), which required the Executive to release presidential policy guidance on the process by which the United States targets individuals overseas. See also Karen DeYoung, *Newly Declassified Document Sheds Lights on How President Approves Drone Strikes*, WASH. POST (Aug. 6, 2016), https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html [https://perma.cc/JY7Q-R62W] (reporting on how the declassified document revealed the basis for the approval).

the executive orders governing classification have contemplated automatic declassification of classified information. E.O. 13,526, which President Obama issued, provides for automatic declassification of all classified records that are more than twenty-five years old.²⁰⁰ Although there are exceptions for specific categories of documents, government officials who handle classified information should be attuned to the fact that information can be declassified over time. Further, E.O. 13,526 precludes the Executive from continuing to keep documents classified to conceal violations of law or prevent embarrassment.²⁰¹ The future public can also access secret reasons through mandatory declassification review, a method by which individuals may seek to have specific classified documents declassified.²⁰² Therefore, officials who produce reasons contained in classified documents know those official records will remain in government archives and may come to the attention of the general public in future years.²⁰³ Like the current public, this abstract future public audience provides a weak but real reputational constraint on secret reason-givers.

In many of these secret reason-giving contexts, reasons are offered to audiences who do not exercise clear authority to change the outcome (as where senior executive officials give reasons to their subordinates, or to foreign governments). This is distinct from the paradigmatic public reason-giving case in which the Executive gives reasons to courts and Congress, both of which have the power to alter executive decisions based on the insufficiency of the reason. As discussed in the next Part, however, even when the recipient of secret reason-giving cannot directly alter the decision, she nonetheless usually has something to offer or withhold from the reason-giver: support in executing the decision, professional respect, or financial or military cooperation. The recipient of secret reasons may also be able to impose modest sanctions short of legal reversal, such as the ability to slow-roll the decision's implementation or to engage in semiprivate shaming. Perhaps most importantly, the act of giving a reason improves the quality of the decision being made, even in the absence of any audience at all. These softer

200. Exec. Order No. 13,526 § 3.3, 75 Fed. Reg. 707, 714 (Dec. 29, 2009).

201. *Id.* § 1.7(a).

202. *Id.* § 3.5 (describing the process of requesting mandatory declassification review).

203. See Orna Ben-Naftali & Roy Peled, *How Much Secrecy Does Warfare Need?*, in *TRANSPARENCY IN INTERNATIONAL LAW* 321, 339 (Andrea Bianchi & Anne Peters eds., 2013) (“[D]ecision-makers who have reason to believe that full disclosure of their decision-making processes before the war awaits them after it, are likely to act cautiously.”). Yet another way that secret or executive-privileged documents could come to light is in the confirmation process of the person who worked on those issues. See, e.g., Seung Min Kim, ‘Unprecedented Partisan Interference’: *Senate Escalates Bitter Fight over Kavanaugh’s Record*, WASH. POST (July 31, 2018), https://www.washingtonpost.com/politics/senate-democrats-ask-archives-for-all-of-kavanaughs-records-during-his-white-house-years/2018/07/31/065896a6-94cc-11e8-8ffb-5de6d5e49ada_story.html [<https://perma.cc/K9VC-TXNK>].

benefits and sanctions motivate the executive branch to engage in secret reason-giving, which directly affects and constrains its behavior.

III. THE VIRTUES (AND PROBLEMS) OF SECRET REASON-GIVING

Realists who are skeptical of the value of public reason-giving will undoubtedly be even more skeptical of the value of reasons shared in private. If they believe that public reason-giving is highly malleable, then they surely would conclude that secret reason-giving, which confronts a much narrower audience, is infinitely malleable. And yet this underestimates the power of secret reason-giving, which advances many of the same goals and values as public reason-giving, albeit in modified ways.

The primary goal of secret reason-giving is not to facilitate effective review by outsiders. Nor is it to promote transparency. Instead, secret reason-giving improves the overall quality of government operations. Indeed, even the Executive, who may oppose the constraints of certain public reason-giving requirements, must see virtue in secret reason-giving; after all, the executive branch has embraced self-imposed requirements to provide justifications in contexts such as the state-secrets privilege and targeted-killing policies.²⁰⁴ In these cases, secret reason-giving reflects the Executive's sense of self-responsibility and keen awareness of the limited outside review of its national security decisions.²⁰⁵

Theorists often closely link reason-giving and transparency. This Part teases them apart to identify the instrumental values of reason-giving in nontransparent settings. It argues that secret reason-giving improves the quality of national security decisions through many of the same mechanisms that operate in public reason-giving. Even when reasons are given in secret, the process still has the power to promote government efficiency, constrain decision-makers, and strengthen the legitimacy of officials who explain the basis for their choices. It

204. See *supra* text accompanying notes 109-110 (discussing state secrets); *supra* text accompanying note 145 (discussing targeted killing); see also Sunstein, *supra* note 37, at 137 (“[M]uch of the time, the executive branch itself combines both democracy and deliberation, not least because it places a high premium on reason-giving and the acquisition of information.”).

205. President Barack Obama, Remarks on Review of Signals Intelligence (Jan. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence> [<https://perma.cc/J8RH-BRLB>] (“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. . . . For all of these reasons, . . . I ordered that our programs be reviewed by my national security team and our lawyers, and in some cases I ordered changes in how we did business.”).

then considers the costs and imperfections of secret reason-giving, and determines that the benefits of executive reason-giving, even when undertaken in secret, far outweigh the costs. It concludes by arguing that giving reasons for classified decisions may be even more important than giving reasons to support public decisions because the likelihood is lower that the public will find out about – and be able to object to – the classified decision after the fact.²⁰⁶

A. *Comparing Public and Secret Reason-Giving*

Part I considered five primary virtues of public reason-giving, which include the ability to improve the quality of the decision being made, the decision-making process itself, and the relationship between the reason-giver and her audience. Although the audiences for secret reason-giving are narrower than for public reason-giving, many of the same incentives drive the process and produce similar, though admittedly more modest, results. This Section considers how each of the virtues of public reason-giving maps on to secret reason-giving.

1. *Improving Decisional Quality*

Just as the presence of an audience for public reason-giving improves the quality of the underlying decision, so too can the presence of an audience for secret reason-giving improve decisional quality. Consider, for instance, the role of Section 1264 of the 2018 National Defense Authorization Act.²⁰⁷ The provision requires the Executive to explain to Congress the legal, factual, and policy justifications for any changes to the U.S. frameworks for using military force. Such a requirement improves decisional quality by encouraging greater deliberation within the Executive and ensuring that it acts predictably and efficiently, rather than hastily making changes that the affected agencies have not carefully considered. Congress's inclusion of a secret reason-giving requirement in the covert-action statute similarly takes advantage of the fact that developing reasons requires deliberation. By mandating that the President give a reason for delaying notification to the intelligence committees, legislators ensure that the President and her staff must spend time developing a credible, other-regarding reason for the delay.

206. See Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 886 (2011) (arguing that it may be important for the Executive to craft “alternative fortifications” when legal and political constraints are disabled).

207. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1264, 131 Stat. 1283, 1296 (2017).

Even when the President or another senior official is making a decision that will remain entirely within the executive branch, she cannot simply snap her fingers and order a thing to be done when there is an expectation that she will give reasons for her decision. She must gather and sift through a variety of rationales for her proposed decision, expending cognitive energy and exposing her reasons to review and debate. For those operating in a dense bureaucracy, in which decision memoranda and supporting reasons pass through multiple layers of seniority within an agency and possibly through several different agencies, the proposed reasons will be subject to critique, rewriting, and argument—all of which produce sounder decisions. Indeed, to the extent that developing a reason for a decision forces an actor to slow down, increase the number of inputs considered, and pay more attention to the decision's parameters (including statutory limits), there is every reason to think that the effect on the quality of a secret decision would be the same as that on a public decision.²⁰⁸ This is so even when the quality of the reasons is “unchecked by norms, reputation, or other social and relational features.”²⁰⁹ The Executive presumably has internalized the idea that “public officials perform best, even during emergencies, when forced to give reasons for their actions.”²¹⁰

If secret reason-giving forces a decision that is at least somewhat other-regarding, that helps to ensure that the official's decision accounts for at least some citizens' interests. Secret reason-giving to a range of agencies (or even offices within a single agency) increases the likelihood that the decision will be in the interests of at least some significant group of citizens, because officials with a range of perspectives—including some that reflect those of their external constituents—can challenge and interrogate it.²¹¹ For example, when the Secretary of State offers a secret reason in support of a decision to channel foreign assistance away from Pakistan, the audience includes offices with expertise in South Asia, economics, migration, human rights, and political-military affairs. Those offices have extensive interactions with actors outside government, including nongovernmental organizations, corporations, international organizations, and think tanks. The Secretary of State will be aware of these diverse interactions.

208. See *supra* text accompanying note 47.

209. Stiglitz, *supra* note 1, at 8.

210. Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 354 (2009); see also *id.* at 333 (“An administration that is legally exempted from providing reasons for its actions also has a weak incentive to develop and implement a coherent overall policy.”).

211. DeRosa & Regan, *supra* note 49, at 36 (noting the decisions that are part of an interagency process such as the NSC Lawyers Group advance this goal because each organization brings a “broad base of knowledge into the discussions”).

The Secretary's reasons are thus likely to be attuned to a relatively wide range of citizen input, as channeled through the officials in charge of those offices, even if her foreign-assistance decision remains secret.

Indeed, as discussed in Section II.C.3 *supra*, decision-makers in the national security realm may have in mind not just the immediate audience of executive national security officials and their nongovernmental contacts, but also the current public envisioned by the "*Washington Post* test."²¹² This audience expands the scope of the "others" who the reason-giver considers when developing her reasons.²¹³ Likewise, any foreign allies who serve as an audience for secret reasons will critique reasons that do not grapple with certain other-regarding requirements enshrined in international law.²¹⁴

That said, secret reason-giving is admittedly less potent than public reason-giving in forcing officials to articulate other-regarding reasons because the set of "others" available to evaluate and check those reasons is both smaller and less diverse. A senior official making a national security decision may articulate a reason that is acceptable to the subordinate officials who must execute the policy, but that the broader public would consider insufficiently attentive to the interests of citizens or foreign nationals affected by the decision. Still, forcing a decision-maker to present an other-regarding reason precludes decisions that are entirely selfish; thus even a small executive audience offers benefits. For example, most executive officials would balk at a secret presidential decision to invade an oil-rich country based solely on the justification that it would personally enrich the President.

Indeed, there may be ways in which making sensitive decisions away from the public itself actually improves the quality of the decision and the accompanying reasons. Opening up deliberations to a broad audience can decrease the

212. See *supra* text accompanying note 195.

213. Cf. DeRosa & Regan, *supra* note 49, at 29 (noting that "anticipating the need" for reason-giving "can enhance deliberative rigour").

214. Various provisions in the law of armed conflict, for instance, require states to incorporate other-regarding rationales in their decisions—as with the proportionality principle, which requires that states consider the harm that an attack is likely to inflict on enemy civilians. Likewise, the requirement in international law that states undertake due diligence to prevent threats from emanating from their territory inherently includes an other-regarding aspect. So too does the Outer Space Treaty, which requires states to conduct all of their outer space activities "with due regard to the corresponding interests of all other States Parties to the Treaty." Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. IX, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 8843. For a discussion of the expectation that states will explain their international acts, see Keitner, *supra* note 9.

quality of those deliberations because the participants may focus more on pleasing the public than reaching the best decision.²¹⁵ Further, national security issues can trigger impassioned reactions, so conducting deliberations away from the public eye may improve their quality because experts will be less susceptible to deciding based on emotion.²¹⁶ Additionally, an expert audience is generally better informed than the general public and has access to risk and threat information that the public does not, so secret reasons may be more faithful to the facts, less driven by politics, and truer to the reason-giver's beliefs.

2. *Promoting Government Efficiency*

Like public reason-giving, secret reason-giving can enhance government officials' ability to execute the underlying decision. As William Howell has noted, "[W]hen it comes to the implementation of public policy (whether enacted as a federal statute or issued as a unilateral directive), the power modern presidents wield very much depends upon their ability to persuade."²¹⁷ Where the secret reason reflects an effort to take into account competing views, the decision's recipients are more likely to execute the decision willingly, regardless of whether the recipient "won" or "lost" in the decision-making process.²¹⁸ This is true for both vertical and horizontal reason-giving; an agency that argued that a statute meant *X* would be more likely to accept and comply with a secret OLC opinion concluding that the statute meant *Y* if the agency believed that OLC's reasons addressed the agency's arguments. Further, providing a secret rationale for a decision or policy helps the individuals who must implement it because they understand the impetus behind the decision.

Of course, when secret reasons flow from the top down, the audiences usually must obey the lawful mandates imposed by their superiors, even if they remain unpersuaded by the underlying reasons.²¹⁹ Further, in many cases, the President and other senior decision-makers could choose lawfully to order an action without giving a reason for it. In the military, in fact, reason-giving is not expected. A general need not give reasons to his majors to justify his orders. But civilian culture is different. Bureaucrats in civilian roles are more inclined to expect reasons and to demand (or at least believe that they are entitled to) them.

215. Simone Chambers, *Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation*, 12 J. POL. PHIL. 389, 394 (2004) (terming this "plebiscitory reason").

216. DeRosa & Regan, *supra* note 49, at 38-40.

217. HOWELL, *supra* note 89, at 22.

218. Raven-Hansen, *supra* note 61, at 846.

219. Jon Lee Anderson, *The Diplomat Who Quit the Trump Administration*, NEW YORKER, May 28, 2018 (describing the oath the former U.S. ambassador to Panama took).

Bureaucratic professionals are likely to believe that they will face professional costs if they implement policies that are supported by bad reasons, especially where they have some discretion in carrying out the decision. This suggests that the efforts to enhance secret reason-giving norms discussed in Part IV will be most fruitful if directed toward agencies or interagency groups that include civilians.

3. *Constraining Decision-Makers*

If giving a reason publicly constrains a decision-maker in future, comparable cases, giving secret reasons also imposes some similar constraints. Assume, for instance, that the Chairman of the Joint Chiefs of Staff has unfettered authority to decide when to release U.S. wartime detainees. If the Chairman provided secret reasons for choosing to release a particular high-profile detainee from a U.S. detention facility, individuals in the Departments of Defense, State, and Justice and the CIA would be aware of those reasons and would expect a similar outcome in similar future cases. They would likely balk or at least demand clarifications if the Chairman issued a secret reason in a second case that was diametrically opposed to his first one. This holds true even when the reasons are shared within a single agency such as the CIA and the underlying action is unlikely to become public: individual actors within the CIA would still expect a subsequent decision to be consistent with an official's previously stated reasons and would otherwise demand an explanation for the shift. If the official's subordinates are dissatisfied with that explanation, they might even have incentives to leak information about the decision.

The audience for the Chairman's initial reasons is much smaller than it would be with public reason-giving. As a result, Congress and the press would not be able to publicly critique (and possibly shame) the Chairman. Although in this context fewer people can witness and criticize a failure to explain a deviation from past practice, many interagency actors are nonetheless involved in repeated national security decisions and form a nonnegligible set of potential critics. Admittedly, the other executive actors able to evaluate the Chairman's reasons will generally reflect a narrower and more homogenous set of views. Yet the broader point stands: the risk of transaction or reputational costs on decision-makers who change positions without reason constrains their behavior in future, similar cases.²²⁰

220. Schauer, *supra* note 46, at 649 (arguing that "giving a reason creates a prima facie commitment on the part of the reason giver to decide subsequent cases in accordance with that reason").

4. *Strengthening Decision-Makers' Legitimacy*

Giving a public reason, particularly a sound one, can strengthen a decision-maker's legitimacy. However, since national security decisions infrequently receive public scrutiny and review, decision-makers cannot rely on the kinds of trappings that normally enhance the legitimacy of a public governmental decision. With public decisions, Congress, the press, and the public typically are able to ensure that the Executive followed regular procedures, test the decision's legality in court, and demand a justification for the policy. None of those options is usually possible with secret decisions. Writing about U.S. national security decisions under President Obama, a journalist recently noted, "The more imperial the executive has become, the harder it is to grapple with what any administration is actually doing in real time, and the more the public debate is reduced to the question of whether the president and his team can be trusted as human beings."²²¹

National security officials should embrace opportunities to enhance the legitimacy of their decisions given the otherwise limited democratic accountability surrounding classified decisions. Secret reason-giving can enhance the legitimacy of their decisions along two axes. First, the substance of the reason can strengthen the decision's internal legitimacy among other officials. Second, it can bolster the external legitimacy of national security officials if the public understands that the Executive reached its decision through a process that included the provision of reasons and justifications.

When an official presents secret reasons in support of her decision, she improves her overall reputation within the national security bureaucracy. When giving reasons vertically, an official can improve her reputation among her superiors if she presents careful, credible reasons in defense of a proposed decision. That elevated reputation can result in career advancement, choice assignments, and bonuses. There are no guarantees, of course, and because these reputational issues play out behind closed doors, there is little chance of a public outcry if an individual who gives excellent reasons is not praised or if an individual who provides sloppy or careless reason-giving nevertheless receives a promotion. In general, though, for people who remain in the bureaucracy for years, the quality of their work (including reason-giving) ultimately comes to light. Individuals giving secret reasons to subordinates rather than superiors garner a different type of legitimacy from providing credible reasons. When the President, for instance,

221. Mattathias Schwartz, *John Brennan, Former C.I.A. Spymaster, Steps Out of the Shadows*, N.Y. TIMES MAG. (June 27, 2018), <https://www.nytimes.com/2018/06/27/magazine/john-brennan-president-trump-national-security-state.html> [<https://perma.cc/5QMF-9XZZ>].

defends a new classified national security program, he can make his decision more widely respected within the bureaucracy by giving reasons; his subordinates may understand that this reflects a level of thought that signals the President's respect for the bureaucracy itself.²²²

Reputation also matters when officials give reasons horizontally across agencies. At the agency level, other agencies are more likely to respect and adhere to a well-reasoned decision or opinion from a peer agency. For example, a former head of OLC explained that OLC's legal opinions "will likely be valued only to the extent they are viewed by others in the executive branch . . . as fair, neutral, and well-reasoned."²²³ At the individual level, being seen as a credible reason-giver within one's own agency opens up career opportunities within an agency as well as in other agencies that may view that individual as a reliable and desirable colleague.²²⁴ In contrast, flimsy, poorly defended reasons will make other national security officials skeptical of an individual's future work product.

Externally, the government's national security decision-makers will garner greater public legitimacy if the public knows that their decisions are generally subjected to rigorous debate, including a reason-giving requirement.²²⁵ A deliberative process that features a diversity of views – something that a reason-giving requirement can enhance – "can earn greater perceived legitimacy despite the absence of citizen involvement" and even if it remains private.²²⁶ However, the extent to which the public will take on faith that the national security process truly entails extensive debate and justification is contested, and may depend on the

222. Schauer, *supra* note 46, at 658 ("[G]iving reasons may be [a] sign of respect . . . [A]nnouncing an outcome without giving a reason is consistent with the exercise of authority, for such an announcement effectively indicates that neither discussion nor objection will be tolerated . . . Even if compliance is not the issue, giving reasons is still a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one . . . Discussion can be the vehicle by which the subject of the decision feels more a part of the decision, producing the possibility of compromise and the respect for a final decision that comes from inclusion.").

223. Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1311 (2000).

224. JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 75-92 (1997) (discussing the roles of professionalism and peers in constraining bureaucrats).

225. DeRosa & Regan, *supra* note 49, at 30 ("The more that citizens believe that the decision-making process has featured such receptivity to different perspectives, the more confident they are likely to be that it has taken into account a wide range of public-regarding considerations, rather than simply narrow or self-interested ones. The result is that they are more likely to accept a decision as made thoughtfully in the national interest.").

226. *Id.* at 39.

reputation of a given administration and its efforts to publicly articulate its internal procedures.

5. *Fostering Accountability*

By definition, secret reason-giving is not made public—at least not initially. Because maximum accountability flows from situations in which governmental decisions and their reasons are completely transparent, secret reason-giving will always fall short of fostering full accountability. But when the Executive gives reasons to courts or Congress, those actors can review them and hold decision-makers to account (even confidentially) if the justifications are insufficient or impermissible.²²⁷ The 2018 NDAA offers a good example of how secret reason-giving sustains accountability. As discussed in Section III.B, Congress required that the Executive explain the legal, factual, and policy justifications for any changes to the U.S. frameworks for using military force. This ensured that lawmakers could review the Executive's choices and challenge its decisions if they disagreed with the secret justifications offered.

When the Executive gives reasons only to itself, however, officials may occasionally be willing to tolerate inferior reasons. Consider the series of OLC memoranda approving various harsh interrogation techniques discussed in Section II.B.1 on which other executive actors relied for several years. Another example is a set of decisions in the immediate aftermath of the 2003 Iraq invasion, including those to disband the Iraqi army and prohibit Ba'ath Party members from holding public office.²²⁸ In cases such as these, the audiences for the secret reasons fail to serve as a reliable stand-in for the public in evaluating the quality of the reasoning.²²⁹ This is a particular concern where the decision and reasons emerge from a vertical, top-down process, as where the President provides an unreasoned or weakly reasoned classified decision. It will be particularly hard for actors within the Executive to hold the President accountable for those poor reasons unless and until the decision leaks. The *Washington Post* test does some

227. See, e.g., Charlie Savage & Scott Shane, *Secret Court Rebuked N.S.A. on Surveillance*, N.Y. TIMES (Aug. 21, 2013), <https://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html> [<https://perma.cc/BT4Q-B2GU>].

228. Stephen Farrell, *Report Cites Americans for Purging Baath Party Members*, N.Y. TIMES (July 6, 2016), <https://www.nytimes.com/live/britain-inquiry-iraq-war/report-points-finger-at-americans-for-de-baathification-policy> [<https://perma.cc/AM4T-RHH4>]; Mark Thompson, *How Disbanding the Iraqi Army Fueled ISIS*, TIME (May 29, 2015), <http://time.com/3900753/isis-iraq-syria-army-united-states-military> [<https://perma.cc/8GB3-NWY9>].

229. Cf. Schwartzman, *supra* note 11, at 991 (noting that it is normatively desirable for the public to “have the opportunity to understand and evaluate [the] reasons”).

work here in forcing executive officials to consider the possibility that they will ultimately be held publicly accountable for giving or accepting poorly reasoned decisions, and a poorly reasoned decision is also more likely to leak than a carefully reasoned one.

There is a final way in which reason-giving, even when secret, may provide the possibility of long-term accountability: it may prompt officials to formalize their decision-making process and produce a classified document capturing the specific rationales behind the decision.²³⁰ The existence of an agency document, in turn, makes it easier for the government ultimately to disclose or declassify either the decision itself or the reasons accompanying it. This also creates a record that will be subject to FOIA and mandatory declassification review, increasing at the margins the possibility that the reason ultimately will become public. One example of this process was the release of the Obama Administration's targeted-killing policy, which was originally top secret.²³¹ If the policy had remained informal and was unaccompanied by specific reasoning, there would have been nothing to request through FOIA. The next Section discusses the extent to which this creates a disincentive for the Executive to undertake secret reason-giving at all.

B. *Problems with Secret Reason-Giving*

Secret reason-giving can hardly guarantee careful, accurate decision-making in every national security setting, and it produces some problems of its own. As with public reason-giving, it imposes costs on the decision-maker and the decision-making process. Further, a variety of structural factors, such as stove-piped intelligence processes and interagency power grabs, also contribute to imperfect national security decision-making and cannot be overcome by providing reasons. This Section identifies some of the main problems with secret reason-giving and evaluates how serious these costs and weaknesses are.

Perhaps the biggest critique of secret reason-giving is that it imposes only a weak form of constraint. This is particularly true when the reason-giver merely goes through the motions of developing a reason; when those receiving the reasons feel as though they have little latitude to push back, critique, or otherwise

230. Shapiro, *supra* note 47, at 182 (“A giving reasons requirement generates a record.”).

231. Spencer Ackerman, *ACLU Files New LawsUIT Over Obama Administration Drone ‘Kill List,’* GUARDIAN (Mar. 16, 2015), <https://www.theguardian.com/world/2015/mar/16/aclu-files-new-lawsuit-over-obama-administration-drone-kill-list> [<https://perma.cc/E95Y-E6DN>]; DeYoung, *supra* note 199.

signal dissatisfaction; or when those receiving the reasons have insufficiently diverse views or incentives to challenge poor reasons.²³² In reviewing the United Kingdom's decision to invade Iraq in 2003, for example, the Chilcot Inquiry concluded that UK "policy-makers did not insist on a high threshold of plausibility for the requisite international law justification."²³³ Where the reason is secret, there can be no public outcry about these failures, which may leave secret reason-giving a hollow exercise. In contrast, some subset of the audience for public reason-giving almost always has an incentive to challenge weak justifications. In short, the same critiques that some scholars direct at reason-giving generally apply to an even greater degree when that reason-giving happens away from the public eye.²³⁴

A second problem is that secret reasoning might offer false comfort to the public. The Executive may provide assurances that its national security agencies undertake extensive reasoning that improves decision-making, but there is little way for the public to test those reports.²³⁵ Perhaps the administration is simply reciting phrases from governing statutes as justifications for an activity.²³⁶ Perhaps the Executive is offering a credible reason that does not track its actual basis for action. Perhaps the national security officials are merely engaged in "multiple

232. DeRosa & Regan, *supra* note 49, at 39 (discussing examples of "participants reaching an outcome simply by bargaining rather than by reason-giving, or appealing to narrow reasons not shared by the larger public"). This problem might be particularly acute where the individuals who are the objects of the secret decision (such as members of a terrorist group) are particularly unpopular among the national security officials reviewing the decision's reasons.

233. Keitner, *supra* note 9 at 15-16.

234. See *supra* Section I.D (discussing skepticism about reason-giving).

235. One source of direct reporting on this comes from those who have served inside the executive branch. Cass Sunstein (who served as the head of OIRA during part of the Obama Administration) reports, for example, "When it is working well—and it often is—the executive branch places a large premium not only on accountability, but also on the exchange of information and reason-giving within the federal government . . ." Sunstein, *supra* note 37, at 130. Mary DeRosa (who served as NSC Legal Advisor) reports that the NSC-led Lawyers Group provides deliberative rigor to classified national security debates. DeRosa & Regan, *supra* note 49, at 36-37. These reports indicate that secret reason-giving frequently occurs and is taken seriously by its participants.

236. See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1250 (2018) (discussing legal justifications provided by the government under the Case Act, which rarely are made public and which, even when made public, sometimes provide little clarity about the basis for concluding an international agreement).

choice” reason-giving, as when they are asked to provide a justification for classifying a document under E.O. 13,526²³⁷ and can list something as basic as “section 1.4(b).”²³⁸ This is secret reason-giving in its most de minimis form, and it is unclear whether such reasoning actually improves the quality of the decision.

Third, like public reason-giving, secret reason-giving slows down the decision-making process.²³⁹ There are times at which it is necessary to make a national security decision quickly, with limited paperwork and fast implementation. However, it is easy to overstate this claim, as it is unusual for the government to act with such speed as to preclude officials from giving and memorializing their reasons. Even the second Bush Administration took several weeks before initiating operations against al-Qaeda and the Taliban after the September 11 attacks (although it obviously began to make those decisions shortly after those attacks).²⁴⁰

At the extreme, a requirement to give secret reasons for an interagency decision could prevent the Executive from making a decision entirely if the members of different agencies cannot agree on a reason.²⁴¹ Several scholars have identified situations in which the NSC Lawyers Group has been able to agree that a particular program would be lawful, but cannot agree on the legal reasons why that is so. Rebecca Ingber notes, “The Lawyers Group is comprised of lawyers of divergent legal views and instincts, who represent agencies that have differing and sometimes opposing interests at stake When multiple actors disagree, this dynamic leads to reaching a decision according to the lowest common denominator—the simplest statement that can draw sufficient agreement from the

237. Exec. Order No. 13,526 § 1.6(a)(5), 75 Fed. Reg. 707, 710 (Dec. 29, 2009) (requiring original classifiers to provide “a concise reason for classification that, at a minimum, cites the applicable classification categories in section 1.4 of this order”). Another example of “multiple choice” reason-giving is found in the context of national security letters. The FBI can impose a non-disclosure requirement on a recipient of a national security letter after the head of agency certifies that one of the statutory standards (that is, one reason) for nondisclosure is satisfied: good reason to believe that disclosure may endanger U.S. national security, interfere with a counterterrorism or counterintelligence investigation, interfere with diplomatic relations, or endanger a person’s life or physical safety. 18 U.S.C. § 2709(c)(1)(B) (2018).

238. § 1.6(a)(5), 75 Fed. Reg. at 710.

239. Something similar arises when Congress requires the Executive to make certain certifications before taking action. Mark A. Chinen, *Presidential Certifications in U.S. Foreign Policy Legislation*, 31 N.Y.U. J. INT’L L. & POL’Y 217, 271 (1999) (noting that certification requirements “impose a burden on the executive branch, in terms of the administrative costs of compliance, formulation, and implementation of policy”).

240. See *Statement by NATO Secretary General Lord Robertson*, *supra* note 190 (discussing classified briefing by U.S. government three weeks after the September 11 attacks).

241. Where the President is the sole decision-maker and the different agencies are willing to elevate a particular question to him, this challenge will not arise.

room.”²⁴² Similarly, Oona Hathaway has argued that “[a]voiding details makes it possible to avoid disagreements on matters that are non-essential. But it can also mean that legal conclusions are not firmly grounded and different agencies may have different reasons for arriving at similar conclusions.”²⁴³ One might argue that a consensus about the legality of a particular operation should suffice to allow it to move forward and that also requiring consensus on questions of legal rationales is unduly formalistic and risks bringing policymaking to a halt. There may also be times when reason-giving imposes other nontemporal costs. For example, if the risk of a leak is high, memorializing secret reasons that could insult a foreign ally might squander political or diplomatic capital.²⁴⁴

A fourth possible objection is that secret reason-giving imposes costs on the President. Not only does a reason-giving requirement take time away from the President’s legion duties, but it also might disempower him. Historically, some decision-makers justified their refusal to give reasons on the grounds that giving reasons would make them appear uncertain and weak and thus invite criticism.²⁴⁵ Others have argued that the President acts at the apex of his power when he orders, not when he persuades.²⁴⁶ If secret reason-giving arms actors in the national security bureaucracy with additional bases on which to object to a particular presidential decision and undercut its implementation, the Executive

242. Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, 110 AM. J. INT’L L. 680, 694 (2016); see also Schauer, *supra* note 46, at 635-36, 641 (arguing that reason-giving involves committing to certain principles and thus taking the conversation up one level of generality). A failure to reach consensus on reasons in the interagency context may reflect an inability among the participants to agree on the slightly more general principle at issue.

243. Oona A. Hathaway, *National Security Lawyering in the Lawyers Group Era 17* (June 17, 2018) (unpublished manuscript) (on file with author); *id.* at 15 (“Lawyers Group papers are never released to the public. . . . The conclusions find their way into the public eye through a diverse set of channels, but only rarely in a coherent legal narrative. . . . [Instead], they provide legal rationale in bits and pieces. Second, they generally provide the legal conclusion but none of the legal reasoning necessary to arrive at that conclusion.”). For a general discussion about the benefits of failing to reach complete agreement on rationales, see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

244. Cf. James F. Blumstein, *Constitutional Perspectives on Governmental Decisions Affecting Human Life and Health*, 40 LAW & CONTEMP. PROBS. 231, 251 (1976) (arguing that government articulation of standards or values can be harmful, such as where they overtly value one type of life over another). This would not preclude oral secret reason-giving, however.

245. Cohen, *supra* note 16, at 487 (offering justifications from twelfth- and thirteenth-century Europe); see also Holmes, *supra* note 210, at 341 (“Policymakers may even believe that being forced to give reasons for their actions, like being forced to conform to rules, involves a display of weakness that might embolden the enemy.”).

246. See, e.g., HOWELL, *supra* note 89.

might choose to rest on a “because I said so” rationale rather than anything more extensive.

A final reason that executive actors themselves might object to secret reason-giving is that it creates precedent within the Executive.²⁴⁷ This critique runs counter to the values of predictability discussed in Sections III.A.2 and III.A.3. Particularly in the national security context, where the stakes are high, threats constantly evolve, and flexibility is seen as a virtue, giving reasons creates expectations about the future and makes it more difficult to reverse course quickly. This precedent might be of particular importance in litigation: if it becomes public that the government articulated a particular rationale at Time *A*, it will be difficult for the government to reverse course in litigation at Time *B* even if circumstances have changed in important ways. Indeed, Fred Schauer has cautioned against imposing reason-giving as a general rule of law, partly because reason-giving commits the decision-maker to “deciding some number of cases whose full factual detail she cannot possibly now comprehend.”²⁴⁸ However, litigation risk may be lower in the national security context, as courts often afford the Executive a high degree of deference or avoid review altogether, even if demands for intraexecutive predictability still impose some constraint.

C. *The Comparative Importance of Secret Reason-Giving*

As Section III.A recognizes, secret reason-giving is likely to produce more modest gains in the quality and process of decision-making than public reason-giving does, largely because the audience for public reasons is wider, more diverse in its viewpoints, and less constrained in its ability to criticize the reasons. On the other hand, secret reason-giving may play a comparatively more important role in promoting accountability than public reason-giving. This is so for three reasons.

First, unreasoned public decisions are easier to identify and correct than unreasoned secret decisions. Consider two cases: in one, an agency publicly establishes a new rule without giving reasons, and in the other, the President signs off on a secret decision to provide clandestine military assistance to state *X*. In the first case, litigation is sure to follow immediately under the APA; in the meantime, the public can critique the rule on its own terms. In the second case, the public never learns about the secret military assistance and so never has an opportunity to challenge the reasoning, the decision, or the process by which the

247. See Cohen, *supra* note 16, at 488 (describing the related idea that “by refraining from giving reasons, courts would preserve their discretion to decide cases”).

248. Schauer, *supra* note 46, at 651.

Executive reached the decision. For this reason, secret reason-giving does comparably more work to correct and improve the underlying decisions than public reason-giving does.

Second, there are fewer bright-line legal and procedural constraints on national security policies and operations than on public ones. Secret decision-making is far less regulated by statute than is public decision-making, which is governed by many transsubstantive and subject-specific statutes, plus a variety of executive orders related to rulemaking and the role of OIRA.²⁴⁹ As a result, any additional tool that shapes, guides, or limits executive discretion has an outsized effect compared to an additional constraint applied to public decision-making. Substantively, one might draw a parallel between pressures on the administrative state to constrain its discretion (something fought over since the 1960s)²⁵⁰ and pressures on the national security President to constrain her discretion (something captured in the “unfettered Executive” literature).²⁵¹ Procedurally, secret reason-giving helps infuse “rule of law” values into the national security space, filling a gap that scholars have frequently decried.²⁵² The comparative lack of procedural formality in the national security space suggests that a firm expectation of secret reason-giving would embed norms of regularity, predictability, and good governance in national security decision-making.

Third, a President who is committed to secret reason-giving personally and within her administration will foster a contemplative, rather than dictatorial, presidency.²⁵³ This kind of President attempts to persuade rather than command.²⁵⁴ To some extent, these competing visions of the presidency are reflected in the work of Richard Neustadt and William Howell. Descriptively, Neustadt believed that the President’s most effective tool to accomplish her goals was the power of persuasion and that a resort to formal powers without efforts to persuade constituted a “painful last resort, a forced response to the exhaustion of all

249. See CAREY, *supra* note 36, at 29-31.

250. See Shapiro, *supra* note 47, at 180 (noting that proposals for improvement include both better legislative drafting and improving agency operations); *id.* (“Giving reasons requirements are a form of internal improvement for administrators.”).

251. See, e.g., POSNER & VERMEULE, *supra* note 54; PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009); Ashley Deeks, *Intelligence Communities, Peer Constraints, and the Law*, 7 HARV. NAT’L SECURITY J. 1 (2015).

252. See sources cited *supra* note 4.

253. See Holmes, *supra* note 210, at 332 (“Here lies the difference between a constitutional executive and an absolute monarch: the former must give reasons for his actions, while the latter can simply announce *tel est mon plaisir*.”).

254. Even a President who is committed to reason-giving might, on occasion, employ a command approach, which may be strategically effective if she uses it only rarely.

other remedies, suggestive less of mastery than failure—the failure of attempts to gain an end by softer means.”²⁵⁵ In contrast, Howell argued that the modern presidency often exerts power dictatorially, setting public policy on its own and leaving the other branches with little power to override it.²⁵⁶ In a recent illustration of Howell’s approach, President George W. Bush told Bob Woodward, “I’m the commander—see, I don’t need to explain—I do not need to explain why I say things. That’s the interesting thing about being the president. Maybe somebody needs to explain to me why they say something, but I don’t feel like I owe anybody an explanation.”²⁵⁷ The competing descriptions of the presidency raise a normative question: which model is more effective?²⁵⁸

A persuasive President may have a more successful presidency in the long term than a dictatorial President.²⁵⁹ Some of our most successful presidents—Abraham Lincoln, Theodore Roosevelt, Franklin Delano Roosevelt, and John F. Kennedy—have been skilled and willing orators who sought to persuade the country to support their policies.²⁶⁰ As Daphna Renan argues, we as a polity tolerate a robust national security presidency “armed with nuclear capabilities, overseeing a sprawling criminal code and a sweeping domestic administrative establishment” only because of self-constraining norms within the presidency.²⁶¹ As discussed earlier, the virtues of reason-giving—which include increased government efficiency and decision-maker legitimacy—suggest that a President who engages in secret reason-giving may more successfully implement her military and intelligence programs than a President who merely issues diktats.²⁶² Even Howell acknowledges that the President must rely on persuasion to convince subordinates to *execute* policies, notwithstanding the President’s power to *dictate*

255. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 24 (Free Press 1991) (1960). Persuasion and reason-giving are not identical tools, but one common method of persuasion involves reason-giving.

256. HOWELL, *supra* note 89, at 14; *see also id.* at 15 (stating that “unilateral action is the virtual antithesis of bargaining and persuading”).

257. BOB WOODWARD, *BUSH AT WAR* 145–46 (2002).

258. These descriptions also raise the question of which model is more desirable in a democracy. Given the virtues of reason-giving discussed herein, I find the persuasive model more compelling, but a full treatment of the issue exceeds the scope of this Article.

259. Consider President Truman contemplating Dwight Eisenhower winning the presidency: “He’ll sit here, . . . and he’ll say, ‘Do This! Do That!’ *And nothing will happen.* Poor Ike—it won’t be a bit like the Army. He’ll find it very frustrating.” NEUSTADT, *supra* note 255, at 10.

260. *See* JAMES TARANTO & LEONARD LEO, *PRESIDENTIAL LEADERSHIP: RATING THE BEST AND THE WORST IN THE WHITE HOUSE* 253 (2004) (ranking presidents).

261. Daphna Renan, *Presidential Norms and Article II*, 131 *HARV. L. REV.* 2187, 2239 (2018).

262. *See supra* Section III.A.

the policy itself unilaterally.²⁶³ Renan notes, “[P]residents are active participants in shaping, and reshaping,” the institutions of executive-branch legal review, and they “structure[] the administrative state to advance [their] political priorities.”²⁶⁴ Thus, although a President could conclude that she will best be able to advance her political priorities by not providing reasons whenever possible, it seems more plausible that she will instead offer justifications to ensure longer-term policy successes and a strong historical legacy.²⁶⁵ She might also conclude that she will receive better information and advice from national security officials if she encourages secret reason-giving throughout the national security bureaucracy writ large.²⁶⁶

Notwithstanding these three ways in which secret reason-giving is particularly important, poorly reasoned justifications can be costly—maybe more so than no reason at all. Misguided secret reasons are more difficult to correct than public reasons because there is no external pressure to do so. Further, if reason-giving creates precedent and expectations of consistency, then poor reason-giving will entrench bad precedents in the system.

In sum, there are good bases for skepticism that secret reason-giving will serve as a panacea for all that ails the national security ecosystem. There are a variety of reasons that the Executive might resist broad reason-giving requirements, and there may be cases in which the Executive should not be required to give reasons before undertaking a particular program.²⁶⁷ However, a general commitment to reason-giving will help avoid opportunistic, unprincipled policy choices in a space in which some members of the public are already suspicious

263. HOWELL, *supra* note 89, at 15.

264. Renan, *supra* note 151, at 808.

265. *See id.* (noting that the legal constraints to which the President subjects himself are largely endogenously created). To some extent, then, the President can use reason-giving or its absence to influence the bureaucracy.

266. *See* Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 268 (2010) (“[Franklin] Roosevelt wanted the authority of the executive dispersed among specialized agencies subordinate to the President, so the President would be presented with conflicting policy advice, disagreements, and options.”). In a more modern context, the White House’s disinterest in evaluating secret reason-giving from all of the relevant agencies contributed to the highly controversial decision to invade Iraq in 2003. *See* Warren P. Strobel, *Long-Classified Memo Surfaces Warning of “Perfect Storm” from Invading Iraq*, WALL ST. J. (Mar. 13, 2019, 4:30 PM), <https://www.wsj.com/articles/long-classified-memo-surfaces-warning-of-perfect-storm-from-invading-iraq-11552486945> [<https://perma.cc/S6U3-8GSM>].

267. For example, we might not require the Executive to give public or secret reasons for acting in national self-defense against a serious, ongoing armed attack, where the source of the attack is undisputed.

about the power of the government. Indeed, reason-giving in the national security context is not simply something that may be beneficial; given the high stakes of the decisions, it may also prove to be a fundamental requirement for the legitimate exercise of power. The next Part proffers additional normative arguments in favor of a robust expectation of reason-giving in the national security space and suggests ways to embed that expectation more firmly in government.

IV. PROMOTING SECRET REASON-GIVING

Recognizing the existence of secret reason-giving within the executive branch can help enrich the debate about the extent to which the President's power to make decisions about war and counterterrorism reflects unchecked authority. Secret reason-giving offers a modest but achievable way to constrain and improve national security decision-making, where both the process and substance of decisions are very often nonjusticiable, classified, or protected by executive privilege. If it is true that secret reason-giving plays an important role in constraining the Executive and advancing rule-of-law values, it may be valuable to ensure that it happens with greater regularity. This Part argues that Congress, the courts, and the Executive should each take steps to ensure that the Executive gives reasons for its national security decisions, even when those decisions and reasons are not made public.

A. *Using Congress to Foster Secret Reason-Giving*

Perhaps the most promising way to ensure that the Executive consistently undertakes secret reason-giving is for Congress more often to require the Executive to provide secret reasons for its national security decisions and policies. There are a range of ways Congress could seek do this. First, it might embed a reason-giving requirement in specific national security statutes, as it has done on issues ranging from delayed notification of covert action to the issuance of financial rewards for the arrest of foreign nationals accused of war crimes or genocide.²⁶⁸ In designing such a requirement, Congress might wish to focus on situations where the Executive might be tempted to act hastily, where the underlying decision is likely to be controversial, or where there may be both salutary and improper reasons for acting. Congress could also build specific secret reason-giving requirements into statutes that anticipate *ex parte*, *in camera* judicial review, particularly where the government is using classified information to take an action that affects liberty or property. Congress also could increase the level of detail that those requirements anticipate. Relevant contexts might include

²⁶⁸ See *supra* text accompanying note 124.

criminal cases involving CIPA, asset freezes, the imposition of special measures on banks suspected of money laundering, or the designation of individuals as security threats.²⁶⁹

Second, Congress might strengthen the expectation that the Executive will need to provide it with reasons even in cases in which Congress has not enacted a statute mandating the production of reasons. For instance, during classified briefings, congressional committees could demand that the Executive provide specific, detailed reasons for its policy choices, which would allow Congress to evaluate not only the decisions but the soundness of the underlying justifications. Sometimes a decision seems sound on its face but turns out to be based on a deeply flawed justification.²⁷⁰ A greater insistence by the intelligence, defense, and foreign-relations committees in Congress on executive secret reason-giving could foster more careful interagency coordination and dialogue and produce higher-quality decisions. Congress might also choose to emphasize written secret reason-giving requirements rather than tolerate oral reason-giving, whether during or after classified briefings, because requiring a written record increases the level of formality, is more likely to stimulate interagency consultation, enhances recordkeeping, and increases accountability by linking the reason and the reason-giver for future audiences.²⁷¹

When confronted with a badly reasoned decision, Congress could react in several ways. First, the relevant committee could seek to codify reason-giving requirements, including the types of reasons it expects. Second, the committee might grow skeptical of an agency that has given poor reasons. Agencies generally prefer to have cooperative, noncontentious relationships with their overseers, so knowing that oversight committees are likely to push the Executive to

269. See, e.g., *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174 (D.C. Cir. 2004) (contesting the revocation of a pilot's license on security grounds); *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990) (contesting the government's reliance on CIPA and the Attorney General's affidavit to bar the disclosure of classified information); *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109 (D.D.C. 2015) (contesting imposition of special measures under 31 U.S.C. § 5381A); *Kadi v. Geithner*, 42 F. Supp. 3d 1 (D.D.C. 2012) (contesting a government designation as a specially designated global terrorist and accompanying asset freeze).

270. See, e.g., *Report to the President of the United States, COMMISSION ON INTELLIGENCE CAPABILITIES U.S. REGARDING WEAPONS MASS DESTRUCTION 43-249* (2005), https://fas.org/irp/offdocs/wmd_report.pdf [<https://perma.cc/NH9H-7FJU>] (describing flawed U.S. intelligence about Iraq's purported weapons of mass destruction).

271. As one example of Congress insisting on written reasons, in 2010 Congress amended the covert-action provisions of the National Security Act of 1947 to require that the Executive's secret reason-giving be in writing, a change that the legislative history indicates was "intended to clarify and improve certain specific and important elements of this practice" and was triggered by "serious disputes" over the implementation of the Executive's notice practices. S. REP. NO. 111-223, at 25 (2010).

disclose its secret reasons creates incentives for officials to ensure they have done their homework beforehand. Third, Congress could enact a statute that actually overrides the decision the Executive has made. But this would be difficult, as Congress rarely summons the will to override an Executive decision by statute.²⁷² Still, even threats to legislate can prompt the Executive to develop internal reason-giving requirements, as happened with the Obama Administration's policy on the state-secrets privilege as discussed in Section II.C.2.²⁷³

A final path Congress might consider is to require the Executive to conduct declassification reviews of certain types of decisions that are likely to implicate secret reason-giving. This kind of statute would elevate the role of the "future public" in the Executive's mind as it conducts secret reason-giving. There is precedent here: Congress recently required the Executive to consider increasing its declassification of cybersecurity threats so that they could be shared with the private sector,²⁷⁴ and section 402 of the USA FREEDOM Act requires executive officials to conduct declassification reviews of FISC decisions and orders that contain significant interpretations of law.²⁷⁵ Congress also mandated the creation of a Public Interest Declassification Board to advise the President on the declassification of records of extraordinary public interest.²⁷⁶ The Executive predictably

272. See David Manners-Weber, *Certification as Sabotage: Lessons from Guantanamo Bay*, 127 *YALE L.J.* 1416, 1421 (2018) (describing other scholars' view of certifications as "parchment barriers") (citing Scott Horton & Randy Sellier, Commentary, *The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 *WIS. L. REV.* 825, 859); cf. Chinen, *supra* note 239, at 243-44 (noting that Congress has a limited ability to contest presidential certifications when it disagrees with a presidential assessment and that the courts are unlikely to provide relief because they will be reluctant to judge whether the Executive's assessment is accurate).

273. Congress held a number of hearings on the state-secrets privilege in 2008 and also introduced at least one bill that would have cabined the Executive's use of the privilege. See, e.g., State Secrets Protection Act, S. 2533, 110th Cong. (2008); *Reform of the State Secrets Privilege: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2008), <https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg40454/html/CHRG-110hhrg40454.htm> [<https://perma.cc/UL7Y-8VG2>]. In 2009, the Executive established its secret reason-giving requirement related to the state-secrets privilege.

274. Cybersecurity Act of 2015, Pub. L. No. 114-113, § 103, 129 Stat. 2935, 2939 (2015).

275. See *Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015*, Pub. L. No. 114-23, 129 Stat. 268 (2015); see also *Atomic Energy Act of 1954*, Pub. L. No. 115-439, § 142(a) (2019) ("The [Nuclear Regulatory] Commission shall from time to time determine the data, within the definition of Restricted Data, which can be published without undue risk of the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data . . .").

276. *Public Interest Declassification Act of 2000*, 50 U.S.C. § 3161 (2018).

resists congressional control of declassification, however, so securing presidential support for these statutes will be difficult.²⁷⁷

Even a slight increase in congressionally mandated requirements to provide reasons could have something of a multiplier effect.²⁷⁸ The Executive's anticipation that Congress has become more interested in reviewing some subset of executive reason-giving may improve the quality of the reasons for a wide swath of national security decisions. As I have argued elsewhere, "[W]hen 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 will weigh a greater number of alternatives."²⁷⁹ Uncertainty about when, precisely, Congress will demand secret reasons is likely to stimulate more systematic executive secret reason-giving overall. Of course, this also places an onus on Congress to actually review and analyze secret executive reasons, so that the Executive does not begin to perceive its reason-giving to Congress as underscrutinized.²⁸⁰ Additionally, if only certain congressional committees increase their demands for reason-giving, this might prompt an Executive that is not committed to secret reason-giving to structure its underlying activities in a way that "forum shops" for those oversight committees that are less insistent on receiving reasons.²⁸¹

Although congressional action is not the only way to enhance executive secret decision-making, statutes have the virtue of instilling requirements in law, rather than leaving them subject to unilateral and often opaque changes by the Executive. Further, they empower Congress to serve as a proxy for the public; as a body, Congress is better positioned than the courts and the Executive to bring to bear a range of public perspectives in evaluating reasons.

277. See, e.g., Presidential Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992, 2 PUB. PAPERS 2004-05 (Oct. 26, 1992), <https://bush41library.tamu.edu/archives/public-papers/5015> [<https://perma.cc/M4S6-KPSF>].

278. Stiglitz, *supra* note 1, at 8-9 (noting that the anticipation that someone will review one's reasons strengthens reasoning).

279. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 861 (2013).

280. See, e.g., DeRosa & Regan, *supra* note 49, at 31.

281. Cf. Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SECURITY L. & POL'Y 539, 541 (2012) (describing how the Executive's shifting uses of Titles 10 and 50 authorities were having a "disruptive impact" on the congressional accountability system).

B. Using Courts to Foster Secret Reason-Giving

There may also be modest opportunities for the courts to enhance executive secret reason-giving. First, Congress could remove existing hurdles to judicial review of national security decision-making. It might do this by amending the APA to require notice-and-comment rulemaking by national security agencies in certain circumstances, or by empowering or commanding courts to reduce their level of deference to the Executive's decisions.²⁸² In both cases, Congress would be creating a wider external audience for executive secret reason-giving, and empirical studies show that people give the best, most careful reasons when they believe that someone will review them.²⁸³ These kinds of changes, however, would undoubtedly meet with robust executive resistance, including a potential presidential veto, and would thus be unlikely to succeed.²⁸⁴

A variant on this approach is for the courts themselves to adopt a form of "hard look" review for foreign affairs and national security cases such that the courts would evaluate whether the agency in question had taken a "hard look" at the underlying decision and ensure that the agency's action was supported by logical reasons.²⁸⁵ However, given that courts tend to provide considerable deference to executive decision-making and often rely on political question, standing, or ripeness doctrines to avoid deciding national security cases on the merits, they seem unlikely to adopt a more assertive stance toward reviewing decisions now. Some scholars have argued that courts are increasingly treating foreign-relations cases more like domestic cases,²⁸⁶ but others insist that foreign-affairs cases remain subject to exceptional treatment by courts.²⁸⁷ If, however, Congress chooses to specify in greater detail what kinds of reasons the Executive must provide to courts in settings such as CIPA, state-secrets cases, or asset-freeze cases, that would provide courts with additional authority to insist on precise

²⁸². Knowles, *supra* note 4, at 932-38; Raven-Hansen, *supra* note 61, at 841-42.

²⁸³. See Stiglitz, *supra* note 1; see also Holmes, *supra* note 210, at 355 (proposing procedures such as obligatory reason-giving even in times of national security emergencies); William F. Peder- sen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 60 (1975) ("The effect of [probing] judicial opinions within the agency reaches beyond those who were concerned with the specific regulations reviewed. They serve as a precedent for future rule-writers and give those who care about well-documented and well-reasoned decision-making a lever with which to move those who do not.").

²⁸⁴. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1132-33 (2009) (arguing that Congress will never close the APA's procedural loopholes).

²⁸⁵. See Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 493-94 (2014).

²⁸⁶. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

²⁸⁷. See, e.g., Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away From "Exceptionalism,"* 128 HARV. L. REV. F. 294 (2015).

types of reasons, even if the courts declined on their own to adopt a “hard look” approach.

C. *Executive Self-Regulation*

The third option for advancing secret reason-giving falls entirely within the executive branch itself. A President who appreciates the instrumental values of requiring reasons could choose to institute a specific directive mandating their provision for specific national security-related decisions or could issue a more general presidential policy directive articulating the virtues of national security reason-giving, establishing expectations about when such reasoning will occur, and setting guidelines for the form and level of detail that it should take. Alternatively, she could also take less formal steps to foster a culture of reason-giving, including by giving a speech detailing its values and explaining her expectations for her administration’s internal deliberative processes.²⁸⁸ Senior administration officials might also describe publicly and in detail some of the Executive’s internal processes, including reason-giving, to attempt to increase the legitimacy of classified decision-making.²⁸⁹

The President has additional tools at her disposal. Like Congress, the President might employ shorter declassification deadlines for a variety of national security decisions to ensure that executive officials are sufficiently attuned to the quality of their secret reason-giving. For topics on which Congress has authorized the Executive’s reasons to be secret, the President or agency heads might require a separate summary justification to be released publicly even when the complete reason is secret. The Executive took this approach with regard to classifying or declassifying restricted nuclear data, providing that where the justification for classification or declassification itself contains classified information, certain executive actors shall “ensure that a separate justification can be prepared which is publicly releasable.”²⁹⁰ Finally, agency heads might urge their lawyers

288. Cf. Renan, *supra* note 261, at 2221-30 (discussing ways in which the Executive has developed robust but unwritten norms requiring, for example, processes that incorporate views from multiple agencies, are grounded in facts, and are informed by careful assessments of legality by administration lawyers).

289. See DeRosa & Regan, *supra* note 49, at 40-41. The Obama Administration took this approach with the public release of detailed (previously classified) procedures describing how the United States identifies terrorist targets and conducts interagency deliberations about operations. See *Presidential Policy Guidance*, *supra* note 145.

290. 10 C.F.R. § 1045.19(a) (2011).

to serve as secret reason-giving “watchdogs.”²⁹¹ Lawyers are trained to think, write, and reason clearly; agency heads could instruct agency lawyers to apply those skills to ensure that policy actors give persuasive reasons in any memoranda or supporting documents that the lawyers review. Because agency lawyers generally participate in important agency and interagency decisions, it would become the norm for key national security decisions to be accompanied by reason-giving.

These proposals are not comprehensive; rather, they are intended to serve as a starting point for future conversations about how to instill secret reason-giving in executive practice. The types of reasoning that the Executive already demands of itself show a range of ways in which the practice can improve government operations and increase public trust in the national security state. Although open questions remain about what specific approaches would be most effective and sustainable, it is clear that the act of reason-giving is one that we should encourage.

CONCLUSION

Reason-giving has many virtues. Perhaps the greatest one is that the mere fact of requiring a reason can improve the quality of the underlying decision. This is true even when no one can actually reverse or override the decision itself. Further, although public reason-giving fosters particular transparency and accountability with respect to decisions, rationales offered behind the scrim of classification can still offer some of those same benefits. These modest benefits may play an oversized role in the national security arena, where there are significant critiques of both the substance and processes of many decisions. Secret reason-giving is not a panacea for all of the challenges that arise in today’s national security state: it will not correct problems of overclassification or inattention by congressional or judicial overseers. But it offers an important and achievable corrective within the Executive itself. Even when the Executive is forced to make critical decisions quickly, as in a foreign-policy emergency, an enshrined practice of developing and offering reasons can improve decision-making in a high-stakes game.²⁹²

291. See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at xi-xii (2012) (describing giant distributed networks of lawyers, inside and outside the Executive, that enforced legal and political constraints against military and intelligence agencies).

292. Holmes, *supra* note 210, at 303 (“Only those who fail to appreciate the gravity of a looming threat would advocate a wholesale dispensing with rules that professionals have developed over time to reduce the error rate of rapid-fire choices made as crises unfold.”).