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NATIONAL SECURITY LIES

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ABSTRACT

What legal consequences, if any, exist (or ought to exist) when the President or other Executive Branch officials mislead, dissemble, or outright lie and then, when exposed, justify the deceit in the name of national security? This is a complicated question to answer, because some lies (such as those by the Carter Administration to deny the existence of a rescue mission on the eve of the ill-fated Operation Eagle Claw) are so naturally understandable, while others (such as the false stories surrounding the capture of Private Jessica Lynch in Iraq and the killing of Sgt. Pat Tillman in Afghanistan) seem to have been issued for less defensible reasons.

This article categorizes a number of notable national security lies in American history, examines the seductive appeal of national security lies for executive branch officials to explain why such lies may seem like better options than saying nothing, explains the harms caused by national security lies, and analyzes the likely reasons that national security lies generally incur no sanctions (criminal or otherwise). Finally, the article proposes a model for regulating national security lies that draws from the statutes governing the related areas of covert actions, classification of information, and invocation of state secrets to block litigation.

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"As always, if you or any member of your IM force are caught or killed, the Secretary will disavow any knowledge of your actions."
– "Voice on Tape" to Impossible Missions Force leader Jim Phelps[1]

"You can't handle the truth!"
– Col. Nathan Jessup to Lt. Daniel Kaffee[2]

I. INTRODUCTION

Presidents and their officers have lied throughout the years on a variety of subjects, ranging from President Bill Clinton's infamous public deceptions regarding his affair with former

1. MISSION: IMPOSSIBLE (Paramount 1966–73); PATRICK J. WHITE, THE COMPLETE MISSION: IMPOSSIBLE DOSSIER 119 (1991).

2. A FEW GOOD MEN (Castle Rock 1992).

intern Monica Lewinsky[3] to former National Security Council staffer Oliver North's outright lies to Congress about the Reagan Administration's compliance with the Boland Amendment to President Dwight Eisenhower's false statements regarding the American U-2 spy plane shot down in Soviet territory.[4] Indeed, historian Eric Alterman once wrote that "[i]n American politics today, the ability to lie convincingly has come to be considered an almost prima facie qualification for holding high office."[5]

For members of the public, lying is not always a trivial matter. It can be a federal crime to lie to a United States agent, or to a Congressional committee or subcommittee conducting an investigation, even when the lie is an unsworn statement.[6] False statements have resulted in prison terms for high-profile defendants such as Martha Stewart,[7] U.S. Olympic sprinter Marion Jones,[8] and I. Lewis "Scooter" Libby (formerly Vice President Cheney's chief of staff),[9] among others.

What legal consequences, if any, exist (or ought to exist) when the President or other Executive Branch officials mislead, dissemble, or outright lie and then, when exposed, justify the deceit in the name of national security? Obviously, this is not an easy question to answer, given the variety of contexts in which such lies can be delivered: under oath or not; before Congress or a gaggle of reporters; about a short-term covert operation underway or an embarrassing failure that the government wishes to distance itself from.

Here it is useful to distinguish what I will refer to as *national security lies* from other kinds of lies that Presidents and

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3. *See A Chronology: Key Moments in the Clinton-Lewinsky Saga*, CNN: ALL POLITICS (1998), https://www.cnn.com/ALLPOLITICS/1998/resources/lewinsky/timeline/.

4. *See U-2 Spy Incident*, HISTORY.COM (2009), http://www.history.com/topics/cold-war/u2-spy-incident; Glenn Kessler, *Presidential Deceptions—and Their Consequences*, WASH. POST (Mar. 29, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/03/27/presidential-lies-and-consequences-video/?utm_term=.b4751848a625 [https://perma.cc/DD2B-WLEJ].

5. ERIC ALTERMAN, WHEN PRESIDENTS LIE: A HISTORY OF OFFICIAL DECEPTION AND ITS CONSEQUENCES 1 (2004).

6. 18 U.S.C. § 1001 (2012).

7. *See* United States v. Stewart, 433 F.3d 273 (2d Cir. 2006).

8. Lynn Zinser & Michael S. Schmidt, *Jones Admits Doping and Enters Guilty Plea*, N.Y. TIMES (Oct. 6, 2007), http://www.nytimes.com/2007/10/06/sports/othersports/06balco.html.

9. Neil A. Lewis, *Libby Given 30 Months for Lying in C.I.A. Leak Case*, N.Y. TIMES (June 6, 2007), http://www.nytimes.com/2007/06/06/washington/06libby.html?mcubz=0. Shortly before Libby was to report to prison, he received a commutation of the prison sentence from President Bush. *See* Scott Shane & Neil A. Lewis, *Bush Commutes Libby Sentence, Saying 30 Months 'Is Excessive'*, N.Y. TIMES (July 3, 2007), http://www.nytimes.com/2007/07/03/washington/03libby.html.

their officers might offer. President Clinton and his supporters never justified or downplayed his Lewinsky-related lies on national security grounds; rather, the common refrain was that he lied about a purely personal matter,[10] which supposedly ameliorated or even justified the false statements, notwithstanding the fact that they were made under oath and in the direct presence of a federal judge no less.[11] Regardless, such *personal lies* benefit the speaker individually, but not the nation as a collective.[12]

Arguably deceptive statements made in furtherance of political matters, such as advancing legislation, are more common, but also harder to characterize clearly as lies. The false statements might obscure or mislead or outright deceive the public in an effort to generate democratic support for the proposed bill.[13] We might call these *political lies*. There are so many claims of this kind of lie that the *Tampa Bay Times* started a project known as PolitiFact to evaluate the veracity of claims

10. ALTERMAN, *supra* note 5, at 12 ("[L]ies told in the private realm, by a president or any other public figure, are no one's business but that of the liar and his intimates").

11. Jones v. Clinton, 36 F. Supp. 2d 1118, 1135 (E.D. Ark. 1999) (sanctioning President Clinton $1202 for the expenses incurred by the district judge "in traveling to Washington, D.C. at the President's request to preside over his January 17th deposition").

12. One might argue that President Clinton's lies about his affair with intern Lewinsky were intended to benefit the nation because he would have been able to carry out his political agenda more effectively had the lies been believed. But this is a degenerate argument, because every President will believe that his or her political agenda will benefit the nation, which in turn would justify any lie.

13. For example, consider President Obama's oft-repeated claim that, under the proposed Affordable Care Act, "if you like your health-care plan, you'll be able to keep your health-care plan, period. No one will take it away, no matter what." Text: *Obama's Speech on Health Care Reform*, N.Y. TIMES (June 15, 2009) http://www.nytimes.com/2009/06/15/health/policy/15obama.text.html?mcubz=3; *see also* Barack Obama, Remarks by the President on Health Insurance Reform in Portland, Maine (Apr. 1, 2010) ("And if you like your insurance plan, you will keep it. No one will be able to take that away from you. It hasn't happened yet. It won't happen in the future."). For a compilation of video clips of the President's statements, see Wash. Free Beacon, *36 Times Obama Said You Could Keep Your Health Care Plan*, YOUTUBE (Nov. 5, 2013), https://www.youtube.com/watch?v=qpa-5JdCnmo. Yet, it was impossible for the President's statement to have been accurate, because the ACA imposed minimum coverage requirements above those offered by some health insurance policies in existence; such policies would necessarily have had to be canceled and replaced by different, arguably better, but also likely more expensive, policies. Thus, PolitiFact called the claim the "Lie of the Year." Angie Drobnic Holan, *Lie of the Year: "If You Like Your Health Care Plan, You Can Keep It,"* POLITIFACT (Dec. 12, 2013), http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/ [https://perma.cc/9BM9-J2GE]. More recently, PolitiFact designated then-presidential candidate Donald Trump's "campaign misstatements" as the 2015 Lie of the Year. *See* Angie Drobnic Holan & Linda Qiu, *2015 Lie of the Year: The Campaign Misstatements of Donald Trump*, POLITIFACT (Dec. 21, 2015), http://www.politifact.com/truth-o-meter/article/2015/dec/21/2015-lie-year-donald-trump-campaign-misstatements/ [https://perma.cc/2LT6-4BHG].

by national politicians,[14] followed soon after by the *Washington Post*'s Fact Checker.[15] There is, to be sure, the possibility of overlap between national security lies and political lies, where the political matter has national security dimensions. Suppose, for example, that a President wants political support for military action against another country out of a genuine belief that the other country poses a threat to American national security. In an effort to win over recalcitrant members of Congress, the President knowingly overstates the case against the other country.[16] To the extent we can characterize the exaggeration as deceptive, it is in nature political (an effort to secure legislation in the form of an Authorization to Use Military Force) as well as national security (an effort born of genuine belief in a threat to the United States).

The typical motivation for the national security lie is to protect national security information from widespread disclosure, but where secrecy, for whatever reason, cannot achieve the same result. Presidential secrecy has received considerable attention in recent decades both in constitutional litigation and in academic journals,[17] especially with the development of the state secrets/military secrets doctrine and executive privilege.[18] Presidential deception, on the other hand, has drawn less attention from the legal community, apart from the sensationalistic Bill Clinton-Monica Lewinsky affair,[19] and while political scientists and historians have examined presidential deception generally, they have tended not to focus on national security.[20]

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14. *See About PolitiFact*, POLITIFACT, http://www.politifact.com/about/ (last visited Dec. 28, 2017).

15. *The Fact Checker* awards anywhere from one to four "Pinocchios" to rate the degree of falsity of statements by politicians (with a "Geppetto checkmark" given for a truthful assertion). *See* Glenn Kessler, *About the Fact Checker*, WASH. POST (Sept. 11, 2013), https://www.washingtonpost.com/news/fact-checker/about-the-fact-checker/?utm_term=.d08f24236a4d

16. *See infra* Part II.C.

17. *See, e.g.*, Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909 (2006); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007).

18. *See, e.g.*, D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2012); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010).

19. *See, e.g.*, RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999); Margaret Raymond, *Fool for a Client: Some Reflections on Representing the President*, 68 FORD. L. REV. 851 (1999).

20. Notable exceptions, discussed in more detail below, are ERIC ALTERMAN, WHEN PRESIDENTS LIE: A HISTORY OF OFFICIAL DECEPTION AND ITS CONSEQUENCES (2004); DAVID WISE, THE POLITICS OF LYING (1973); JOHN ORMAN, PRESIDENTIAL SECRECY AND

Part I of this Article provides a taxonomy of national security lies, sorting numerous historical and contemporary examples (or arguable examples) according to the contexts in which the false or misleading statements were made. Part II explores the seductive appeal of national security lies for executive branch officials to explain why such lies may seem like better options than saying nothing. Part III analyzes the legal and political harms inflicted by national security lies. Part IV then reviews the potential sanctions that can be imposed against Executive Branch officials for uttering national security lies, including criminal prosecution, impeachment, or removal from office. In practice, however, with a few glaring exceptions, there have been no formal consequences of any kind; Part V suggests a number of reasons to explain the absence of such consequences. Finally, Part VI proposes a statutory framework for regulating national security lies that recognizes the executive branch's need to mislead or deceive in certain conditions due to national security concerns.

II. A TAXONOMY OF NATIONAL SECURITY LIES

Executive Branch deception in the name of national security has a history almost as long as the nation itself,[21] although public recognition of that fact seems to be of a more recent vintage. For example, even as late as 1960, the American public was largely surprised that President Eisenhower had lied about the ill-fated U-2 spy plane that was shot down in Soviet airspace.[22]

A. Concealing Covert Operations

Sometimes an Executive Branch official will lie so as to conceal the existence of a covert operation that is in progress or on the verge of being launched. Premature disclosure could jeopardize its success, endanger American troops or agents, or embarrass the White House. Presumably, the false statement would be reactive in the sense that it would be offered only in response to a probing question where silence would effectively admit the existence of the operation. Silence would otherwise be

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DECEPTION (1980); Louis Fisher, *When Wars Begin: Misleading Statements by Presidents*, 40 PRESIDENTIAL STUD. Q. 171 (2010); Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 L. & CONTEMP. PROB. 285 (2005).

21. *See* ALTERMAN, *supra* note 5, at 15–16; WISE, *supra* note 20, at 342.

22. *See also* WISE, *supra* note 20, at 25–26 (noting that the 1970s were when the public began to perceive government lies).

the preferred method of ensuring the secrecy of the covert operation.

A prime example occurred on the eve of the Iran hostage rescue mission in 1980, several months after Iranian militants overran the U.S. Embassy in Tehran and captured sixty-six diplomats and Marines.[23] After the revolutionary government of Iran refused to take action to secure the release of the hostages despite, among other things, an adverse judgment by the International Court of Justice,[24] President Carter approved a covert rescue operation dubbed "Operation Eagle Claw."[25] With the newly created Delta Force already en route to its rendezvous point in the Iranian desert, Carter had a conversation with Senator Robert Byrd (D-WV) "primarily to receive his opinion about necessary notifications to Congress on any possible military action in Iran."[26]

According to the President's diary: "I told him that before we took any of the military acts that had been prominently mentioned in the press—mining, blockade, and so forth—I would indeed consult with Congress. And that at that time I had no plans to initiate this kind of action."[27]

Perhaps this statement was technically not a lie, as Eagle Claw was neither a mining operation nor a blockade. But it was misleading in its implication that "this kind of action" would be preceded by consultation with Congress. Although Byrd outwardly supported the President, there were reports that he was "'furious' over not being informed."[28]

Indeed, the Carter-Byrd conversation sounds remarkably similar to a secret conversation between President Carter's chief of staff, Hamilton Jordan, and Iranian Foreign Minister Sadegh

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23. *See, e.g.*, MARK BOWDEN, GUESTS OF THE AYATOLLAH: THE FIRST BATTLE IN AMERICA'S WAR WITH MILITANT ISLAM 639–41 (2006); JIMMY CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT 457 (1982). The Iranian militants released thirteen of the hostages—all female or African-American—later in the month "as a gesture to oppressed African-Americans and as a demonstration of the 'special status' accorded women under Islamic rule." BOWDEN, *supra* note 23, at 198–99. Six other embassy employees weren't captured at all, managed to escape to the Canadian mission, and were later smuggled out of the country by the CIA. *See* ANTONIO J. MENDEZ, MASTER OF DISGUISE: MY SECRET LIFE IN THE CIA 256–307 (1999).

24. *See* U.S. v. Iran, 1980 I.C.J. Rep. 1 (May 24).

25. For a riveting account of the details of the mission, see BOWDEN, *supra* note 23, at 395–468.

26. *See* CARTER, *supra* note 23, at 513.

27. *Id.* at 514. Carter did note that Byrd "drew a sharp distinction between the need to consult on a military plan, and the need to inform Congress at the last minute on any kind of covert mission." *Id.*

28. DAVID A. CORBIN, THE LAST GREAT SENATOR: ROBERT C. BYRD'S ENCOUNTERS WITH ELEVEN U.S. PRESIDENTS (2015).

Ghotbzadeh, in which the latter said, "I just hope your president doesn't do anything rash, like attack Iran or mine our harbors," to which the former responded, "Don't worry. He won't. President Carter is not a militaristic man."[29] It is, of course, quite understandable that an Executive Branch official would deceive a representative of a hostile nation, particularly regarding a covert operation whose public acknowledgement would doom it to failure, and it is hard to imagine any objections to such deception under American law. The point is that Carter's statement to Byrd was as deceptive as was Jordan's to Ghotbzadeh.

Besides Senator Byrd and Foreign Minister Ghotbzadeh, the Carter Administration also deceived *Los Angeles Times* reporter Jack Nelson, who told White House Press Secretary Jody Powell about having heard rumors about military action and asked, "You people aren't really thinking about doing anything drastic like launching a rescue mission, are you?"[30] Powell responded, "If and when we are forced to move militarily, I suspect it will be something like a blockade…[b]ut that decision is still a step or two down the road."[31] According to Mark Bowden's account of the Iran hostage crisis, "Nelson accepted Powell's word [and] wrote a story citing high-level White House sources stating that military action was not pending, and that a rescue attempt was entirely impractical."[32]

The Carter Administration's deception about the covert operation was unmasked after the mission ended in disaster: when the mission commander called for an abort due to a shortage of operable helicopters, one of the helicopters collided with a refueling airplane, causing both aircraft to explode.[33] Eight servicemen died, and the survivors abandoned several aircraft at the scene.[34]

B. Concealing Long-Term Covert Programs

Operation Eagle Claw was a quick strike covert military action. It failed, and the disastrous nature of the mission abort revealed its existence to the entire world. Even if the rescue mission had succeeded, the cloak of secrecy would have been lifted shortly afterward.[35] Either way, knowledge of Operation

29. BOWDEN, *supra* note 23, at 411.
30. *Id.* at 443.
31. *Id.*
32. *Id.*
33. *Id.* at 458–64.
34. *Id.* at 466–68.
35. Six U.S. Embassy workers who'd escaped the initial takeover of the building by

Eagle Claw could be kept from Congress and the public for only a short time.

But not all covert operations have involved quick strikes by the military. Some secret programs might have persisted indefinitely but for persistent questioning by investigative reporters or congressional members, or the actions of whistleblowers (or espionage suspects, depending on one's views of the person disclosing the existence of the program). Typically, we would not expect the Executive Branch to make false or misleading statements without having been prompted to do so, as silence would obviously accomplish the goal of keeping the existence of such programs from being known by the public. However, when an Executive Branch official finds themselves publicly questioned in a way in which either a truthful response or, critically, a refusal to answer will reveal the secret program, a false or misleading answer may be the only way that the official can continue to conceal the existence of the program.

Prime examples of the Executive Branch's lying or misleading Congress and the public about ongoing indefinite covert operations arise from the National Security Agency's domestic electronic surveillance programs over the past dozen or so years. Congress enacted the Foreign Intelligence Surveillance Act in 1978 to regulate domestic surveillance carried out to gather foreign intelligence (as opposed to evidence for use in a criminal trial).[36] Under FISA, the government is required to obtain a FISA warrant if it is targeting a "United States person";[37] the standard for such a warrant is probable cause to believe that the target is an agent of a foreign power.[38] Note that the Executive Branch would not have to show that there was probable cause to believe that the target had committed or was in the process of committing a crime, which would be the standard for a traditional criminal investigation wiretap.[39]

Iranian militants spent several weeks hiding in the Canadian Embassy before being smuggled out successfully in a CIA operation, with substantial assistance from the Canadian Ambassador. BOWDEN, *supra* note 23, at 641. The Canadians wisely shut their own embassy before the public announcement of the return of the Americans. *See generally* MENDEZ, *supra* note 23, at 256–307.

36. Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978).

37. The statute defines a "United States person" as "a citizen of the United States, an alien lawfully admitted for permanent residence . . . an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power" 50 U.S.C. § 1801(i) (2012).

38. 50 U.S.C. § 1805.

39. 18 U.S.C. § 2518.

Thus, if the government suspected a particular United States person of being a sleeper agent for al Qaeda, it could have sought a FISA warrant to conduct electronic surveillance, so long as the warrant application convinced the FISA court that the suspicion was supported by probable cause. In the view of the Bush Administration, however, FISA's requirements were too restrictive in light of the threat posed by al Qaeda. Sometime after 9/11, the National Security Agency turned its massive electronic surveillance capabilities inward and began spying on Americans with neither criminal search warrants nor FISA warrants:[40]

> There wasn't time for [individualized suspicion] anymore, not after 9/11. To find the needle in the haystack, the NSA had to be involved at all ends of the operation, and it had to be able to cast aside the notion of establishing why any particular person was suspected of having terrorist links. In the new wartime footing, the hundreds of billions of minutes of international calls into and out of the United States each year were not potential "signals intelligence," ripe for mining to understand the enemy's plans.[41]

And not just phone calls, but also e-mails.[42] During a campaign stop in Buffalo in April 2004, President Bush argued for renewal of the provisions of the USA PATRIOT Act that were due to expire:

> Now, by the way, . . . anytime you hear the United States government talking about wiretap, it requires, a wiretap requires a court order. Nothing has changed by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. We're talking about getting a court order. It's important for our fellow citizens to understand, when you think Patriot Act, . . . constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution.[43]

If that statement were explicitly limited to national security-related searches under provisions of the USA PATRIOT Act, it would have been accurate. At the end of his statement, Bush did say "when you think Patriot Act," but the operative parts of the statement—"anytime you hear . . . wiretap, it requires . . . a court

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40. *See, e.g.*, ERIC LICHTBLAU, BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE 152–54 (2008).

41. *Id.* at 143.

42. *Id.* at 153 ("[M]ost of the NSA's intercepts—75 percent by one estimate—were e-mails").

43. *Id.* at 159.

order" and "We're talking about getting a court order"—contained no such limitations.

That surveillance program, known as Stellar Wind, nearly led to a revolt within the Bush Justice Department after the Justice Department concluded that the program violated the Fourth Amendment.[44] The internal controversy resulted in a climactic showdown in the hospital room where Attorney General Ashcroft was recovering from acute pancreatitis, with White House Chief of Staff Andrew Card, Jr. and White House Counsel Alberto Gonzales racing to secure Ashcroft's re-approval of Stellar Wind before Acting Attorney General James Comey and Assistant Attorney General Jack Goldsmith could persuade Ashcroft otherwise.[45] Ashcroft refused to act, temporarily thwarting Card and Gonzales, but the next day, Comey, Goldsmith, FBI Director Robert Mueller, and others were prepared to resign *en masse*, a move that would have embarrassed the administration.[46] The budding revolt was quashed when President Bush agreed to change the program so that the FISA Court would be required to review NSA surveillance of domestic electronic traffic.[47]

Controversy over NSA surveillance did not end with the White House's agreement to FISA court supervision of Stellar Wind. In 2013, a defense contractor employee named Edward Snowden fled the United States and began leaking details about other secret NSA programs aimed at gathering information of American persons, such as cell phone records.[48] The leaked disclosures were particularly embarrassing to the Obama Administration given that, three months ago, in response to a Senator's question "Does the NSA collect any type of data at all on millions or hundreds of millions of Americans?" Director of National Intelligence James Clapper had testified "no sir, not wittingly."[49] This was an unambiguously false response (and one under oath), and one that Clapper had been given advance warning that he would be asked.[50]

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44. *See, e.g.*, GARRETT M. GRAFF, THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF GLOBAL TERROR 483–86 (2011); LICHTBLAU, *supra* note 40, at 179–80.

45. GRAFF, *supra* note 44, at 486–88; LICHTBLAU, *supra* note 40, at 180–82.

46. GRAFF, *supra* note 44, at 486–88.

47. *Id.* at 492–93; LICHTBLAU, *supra* note 40, at 184; JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 182 (2007).

48. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 6, 2013) https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.

49. *See* Scott Shane & Jonathan Weisman, *Earlier Denials Put Intelligence Chief in Awkward Position*, N.Y. TIMES (June 11, 2013), https://nyti.ms/11UOhjr.

50. *See* Ron Wyden, *Wyden Statement Responding to Director Clapper's Statements*

C. Building a Case for War

American history is replete with instances of armed conflicts and wars where the initial justification for the use of military force rested on false or misleading statements. There is a long history of American isolationism, perhaps blunted by World War II,[51] then revived by our experience in Vietnam. Louis Fisher, the former long-time constitutional expert at the Congressional Research Service, argues that "[a]t least since the Mexican-American War of 1846, presidents have a record of making misleading statements to justify wars."[52]

Fisher highlights the crucial distinction between false or misleading statements made during a war versus those "about the need for war."[53] This can be seen as analogous to the distinction in international humanitarian law (i.e., the laws of war) between *jus ad bellum* and *jus in bello*—that is, *why* a nation-state wages war against another, versus *how* it wages war. Deception about military strategies and tactics has long been accepted as an aspect of warfare. Deception about the reasons to go to war has, unfortunately, also had a long history in the United States.

1. Mexican-American War. In the middle of the 19th century, the American concept of Manifest Destiny inevitably led the United States to look toward what is now the southwestern part of the country, particularly New Mexico, Arizona, and California.[54] President Polk preferred to obtain the territory in exchange for forgiveness of Mexican debts, as he suspected that Congress would not authorize an aggressive war, but the

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About Collection on Americans, RON WYDEN: SENATOR FOR OREGON (June 11, 2013), https://www.wyden.senate.gov/news/press-releases/wyden-statement-responding-to-director-clappers-statements-about-collection-on-americans [https://perma.cc/Z7EV-39H9].

51. *See, e.g.*, President Gerald R. Ford, *The President as Leader: Problems in Contemporary Presidential-Congressional Relations*, 45 S.D. L. REV. 98, 100 (2000) ("It took the Second World War and the example of my hometown hero, Senator Arthur Vandenburg, to make me realize that American isolationism was an unaffordable luxury in the second half of the twentieth century"); Senator Joseph R. Biden & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 380 (1988) (contending that the Japanese attack on Pearl Harbor "ended American isolationism forever").

52. *See* Fisher, *supra* note 20, at 172–82.

53. *Id.* at 172.

54. GEORGE LOCKHART RIVES, 2 THE UNITED STATES AND MEXICO, 1821–1848: A HISTORY OF THE RELATIONS BETWEEN THE TWO COUNTRIES FROM THE INDEPENDENCE OF MEXICO TO THE CLOSE OF THE WAR WITH THE UNITED STATES 657–58 (1918) ("[I]t had always been the intention of the [Polk] administration to obtain [repayment of debt] by a cession of territory belonging to the Mexican republic").

Mexican government refused to agree to terms.[55] With Texas having joined the United States in 1845, the exact boundary between the United States and Mexico was in dispute, with each nation claiming the territory between the Nueces and Rio Grande rivers.[56] In 1846, President Polk sent a military force commanded by future-President Zachary Taylor toward the disputed region, eventually crossing the Nueces River to take a position on the banks of the Rio Grande.[57] When Mexican forces subsequently attacked, Polk asked Congress for a declaration of war, stating:

> But now, after reiterated menaces, Mexico has passed the boundary of the United States, has invaded our territory, and shed American blood upon the American soil. She has proclaimed that hostilities have commenced, and that the two nations are now at war.
>
> As war exists, and, notwithstanding all our efforts to avoid it, exists by the act of Mexico herself, we are called upon, by every consideration of duty and patriotism, to vindicate, with decision, the honor, the rights, and the interests of our country . . . .[58]

To be fair, Polk did not mislead Congress as to where American forces were located when they were attacked, forthrightly stating that they "had been ordered to take position between the Nueces and the Rio Grande."[59] He then stated that the Nueces Strip, as the territory between those two rivers was known, was American territory.[60] The bases for this claim were the Treaties of Velasco,[61] which had ended the conflict over Texas' fight for independence, pursuant to which Mexican forces were to retreat to south of the Rio Grande river.[62] However, the Mexican government never ratified the treaties, as Mexican signatory General Santa Anna had been a wartime detainee and thus coerced into signing.[63] The following year, after Polk reiterated before Congress his narrative about U.S. troops having been fired upon first, then-Representative Abraham Lincoln

55. *Id.* at 124, 132.

56. *Id.* at 137.

57. *Id.* at 138–39.

58. *Id.* at 158–59.

59. *Id.* at 158.

60. *Id.*

61. Texas State Library and Archives Commission, *The Republic of Texas—The Texas Revolution: The Treaties of Velasco* (Dec. 5, 2017), https://www.tsl.texas.gov/treasures/republic/velasco-01.html [https://perma.cc/G8T6-6U3A.

62. *Id.;* Public Treaty of Velasco art. 2–3, Tex.-Mex., May 14, 1836, https://www.tsl.texas.gov/treasures/republic/velasco-public-1.html [https://perma.cc/V54D-RPY3].

63. Texas State Library and Archives Commission, *supra* note 61.

challenged the president's account with a series of pointed questions about whether the Nueces Strip was indisputably American territory.[64] In 1848, the House of Representatives passed a censure of Polk "for unnecessarily and unconstitutionally" starting the war.[65]

Louis Fisher argues that Polk lied about not only the Mexican attack's having occurred on American soil but also the existence of a state of war between the two nations.[66] Eric Alterman similarly categorizes Polk's assertion as an obvious lie not worth further analysis and dissection in his book on presidential lies.[67] Following the House's censure, Polk himself walked back his definitive assertion that the Nueces Strip was U.S. soil, speaking "clearly of claims, not facts."[68] Of course, by then, the Treaty of Guadalupe Hidalgo had already ended the Mexican-American War, with the United States acquiring clear title to the Nueces Strip, as well as a vast swath of the southwest[69]—i.e., the territory that President Polk had been eyeing before the war.

2. Vietnam War. U.S. combat operations in Vietnam lasted from 1965 until 1973.[70] By the end, over 58,000 American troops had been killed, over 300,000 had been wounded, and the United States had spent $111 billion (unadjusted for inflation).[71] Although Congress never declared war against North Vietnam, it did pass the Gulf of Tonkin Resolution on August 10, 1964, by an 88-2 vote.[72] The key part of this act authorized President Johnson "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent

64. *See* December 22, 1847—Resolutions in the United States House of Representatives *in* 1 ABRAHAM LINCOLN: COMPLETE WORKS 97–98 (John G Nicolay & John Hay eds. 1920).

65. Fisher, *supra* note 20, at 174.

66. *Id.* at 173, 175.

67. *See* ALTERMAN, *supra* note 5, at 16.

68. Fisher, *supra* note 20, at 174.

69. *See, e.g.*, U.S. GEN. ACCOUNTING OFF., TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO 23–25 (2004).

70. *Vietnam War*, HISTORY.COM (2009), http://www.history.com/topics/vietnam-war/vietnam-war-history [https://perma.cc/BCN4-EVMP].

71. STEPHEN DAGGETT, CONG. RESEARCH SERV., COSTS OF MAJOR U.S. WARS, at CRS-2 (2008), http://fpc.state.gov/documents/organization/108054.pdf [https://perma.cc/X7BT-ZP2U].

72. Gulf of Tonkin Resolution, Pub. L. 88-408, 78 Stat. 384 (1964); *August 7, 1864 Congress Passes Gulf of Tonkin Resolution*, HISTORY.COM: THIS DAY IN HISTORY, http://www.history.com/this-day-in-history/congress-passes-gulf-of-tonkin-resolution (last visited Jan. 1, 2018) [https://perma.cc/RAP6-ZKR6].

further aggression."[73] John Hart Ely, a noted critic of expansive presidential war making power, conceded in his masterful book *War and Responsibility* that the Gulf of Tonkin Resolution was broad enough to authorize the subsequent military action; he faults federal legislators for voting for the resolution and systematically demolishes their post-hoc justifications for doing so.[74]

The impetus for the resolution was a pair of alleged attacks on U.S. warships in the South China Sea, the first on August 2, 1964, and the second on August 5th.[75] Just before midnight Eastern Time on August 4th, President Johnson delivered a national television address in which he stated in relevant part:

> As President and Commander in Chief, it is my duty to the American people to report that renewed hostile actions against United States ships on the high seas in the Gulf of Tonkin have today required me to order the military forces of the United States to take action in reply.
>
> The initial attack on the destroyer Maddox, on August 2, was repeated today by a number of hostile vessels attacking two U.S. destroyers with torpedoes. The destroyers and supporting aircraft acted at once on the orders I gave after the initial act of aggression. We believe at least two of the attacking boats were sunk. There were no U.S. losses.
>
> . . . .
>
> In the larger sense this new act of aggression, aimed directly at our own forces, again brings home to all of us in the United States the importance of the struggle for peace and security in Southeast Asia. Aggression by terror against the peaceful villagers of South Viet-Nam has now been joined by open aggression on the high seas against the United States of America.
>
> The determination of all Americans to carry out our full commitment to the people and to the government of South Viet-Nam will be redoubled by this outrage. Yet our response, for the present, will be limited and fitting. We Americans know, although others appear to forget, the risks of spreading conflict. We still seek no wider war.[76]

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73. Gulf of Tonkin Resolution, Pub. L. 88-408, 78 Stat. 384 (1964).

74. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 16–17 (1993).

75. *Id.* at 13.

76. *See* Lyndon B. Johnson, U.S. President, Report on the Gulf of Tonkin Incident (Aug. 4, 1964), https://millercenter.org/the-presidency/presidential-speeches/august-4-1964-report-gulf-tonkin-incident [https://perma.cc/886S-CNVZ].

While the first attack did take place (though was most likely not unprovoked, as Defense Secretary McNamara testified in front of Congress), the weight of history has determined conclusively that the second attack never occurred.[77] Additionally, while President Johnson characterized the North Vietnamese actions as aggressive, implying that the attacks were unprovoked, it appears that they were in response to U.S.-sponsored commando raids.[78]

The critical issue is not, as we know now, that there was no second attack, but rather, whether President Johnson and Secretary McNamara believed in 1964 that the second attack occurred, and whether the initial attack was an act of aggression, which would have suggested that it had been unprovoked. An exhaustive internal review by the NSA in 1998, declassified in 2005, concluded that the assertion of the second attack was based on critically flawed intelligence reports, and that there was "an active effort to make SIGINT fit the claim of what happened."[79] Even if accurate, this analysis does not prove that Johnson and McNamara knew that they were lying about a second attack, but it does suggest that they were careless, if not reckless, in asserting the second attack as a fact.[80]

3. Gulf War II. In March 2003, the United States led a coalition of nations (primarily the United Kingdom) in invading Iraq based on the stated rationale that Iraq was in violation of the terms of U.N. Security Council Resolution 1441,[81] which had (1) declared Iraq in breach of a previous Security Council resolution calling for complete cooperation with United Nations weapons inspectors,[82] (2) demanded that Iraq cease obstructing the weapons inspectors, and (3) reminded "Iraq that it [would] face serious consequences as a result of its continued violations of its obligations."[83] Iraqi leader Saddam Hussein was deposed

77. *See, e.g.*, Robert J. Hanyok, *Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2-4 August 1964*, CRYPTOLOGIC QUARTERLY, at 1, 3 (1998), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB132/relea00012.pdf [https://perma.cc/C33E-4JKY]. This is an internal NSA publication, but this particular article was declassified in 2005. ALTERMAN, *supra* note 5, at 199 (citing and quoting EDWIN E. MOISE, TONKIN GULF AND THE ESCALATION OF THE VIETNAM WAR 204–05 (1996)).

78. *See* ALTERMAN, *supra* note 5, at 184–85.

79. Hanyok, *supra* note 77, at 49.

80. ALTERMAN, *supra* note 5, at 202; *cf.* ELY, *supra* note 74, at 19–20 (describing the Johnson Administration's actions as "outrageous").

81. S.C. Res. 1441 (Nov. 8, 2002).

82. S.C. Res. 687 (Apr. 3, 1991).

83. S.C. Res. 1441 (Nov. 8, 2002).

quickly, tried and convicted in an Iraqi court, and executed by hanging on December 30, 2006.[84] From 2003 to 2011, when the last U.S. combat troops left Iraq,[85] more than 4400 American soldiers and Department of Defense personnel died there.[86]

Whether Resolution 1441 indeed authorized armed conflict by itself was disputed by many other nations, including three permanent members of the Security Council (Russia, China, and France).[87] The United States and Great Britain considered submitting a separate resolution that would have explicitly authorized an attack against Iraq, but when it became clear that such resolution would not receive support from the Security Council, they shelved the idea.[88] Under domestic law, however, President Bush was unambiguously entitled to attack Iraq, because on October 16, 2002, Congress passed an Authorization for Use of Military Force Against Iraq.[89] The House vote was 296-133, and the Senate vote was 77-23.[90] Most of the leading congressional Democrats who sought the party's nomination for the Presidential candidacy in 2004 or 2008 voted in favor of the AUMF, including Senators John Kerry (2004), John Edwards (2004 and 2008), Joe Lieberman (2004) and Hillary Clinton (2008); and Representative Richard Gephardt (2004).[91] In rallying that congressional support, however, the Bush Administration made a number of false claims:

a. The mobile biological weapons lab. On February 5, 2003, Secretary of State Colin Powell appeared before the United Nations and asserted that the United States had evidence that the Iraqi military was in possession of a mobile biological

84. *See Saddam Hussein Trial Fast Facts*, CNN LIBRARY (Mar. 13, 2017), http://www.cnn.com/2013/10/30/world/meast/saddam-hussein-trial-fast-facts/index.html.

85. Tim Arango & Michael S. Schmidt, *Last Convoy of American Troops Leaves Iraq, Marking a War's End*, N.Y. TIMES (Dec. 19, 2011), http://www.nytimes.com/2011/12/19/world/middleeast/last-convoy-of-american-troops-leaves-iraq.html.

86. U.S. DEP'T OF DEFENSE, CASUALTY REPORT (2013).

87. Michael Byers, *Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity*, 10 GLOBAL GOVERNANCE 165, 175 (2004).

88. *Id.* at 173–74.

89. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

90. *Roll Call Vote 107th Congress—2nd Session*, U.S. SENATE (Oct. 11, 2002), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00237 [https://perma.cc/7XSW-NTZW]; *Final Vote Results for Roll Call 455*, U.S. HOUSE OF REPRESENTATIVES (Oct. 10, 2002), http://clerk.house.gov/evs/2002/roll455.xml [https://perma.cc/N3Z8-6486].

91. Of course, there were notable candidates such as former Vermont Governor Howard Dean (2004) and then-Illinois State Senator Barack Obama (2008), who were not members of Congress in 2002 and hence had no opportunity to vote for or against the AUMF.

weapons laboratory, which would be in violation of Resolution 1441.[92] In his U.N. speech, Powell played three National Security Agency intercepts of Iraqi communications to support his claim that "every statement I make today is backed up by sources, solid sources. These are not assertions."[93]

The first intercept was a conversation between an Iraqi colonel and general in which the former said, "We have this modified vehicle . . . What do we say if one of them sees it?"[94] The second intercept said, "They are inspecting the ammunition you have . . . for the possibility there are forbidden ammo . . . We sent you a message yesterday to clean out all of the areas, the scrap areas, the abandoned areas. Make sure there is nothing there . . ."[95] The final intercept was an order from a Republican Guard colonel to a captain to "remove the expression 'nerve agents' from wireless instructions."[96]

Powell's presentation followed and amplified the claim that President Bush made in his 2003 State of the Union address:

> From three Iraqi defectors we know that Iraq, in the late 1990s, had several mobile biological weapons labs. These are designed to produce germ warfare agents and can be moved from place to a place to evade inspectors. Saddam Hussein has not disclosed these facilities. He has given no evidence that he has destroyed them.[97]

While not all foreign representatives were persuaded to support military action, Powell's presentation drew praise from several, such as the Bulgarian representative, who stated, "Mr. Powell's presentation was strong and compelling. Iraq must immediately co-operate fully and effectively," and the French representative, who stated, "I listened with great attention to the evidence [Mr. Powell] provided. It contains information, clues and questions that deserve deeper analysis . . ."[98]

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92. Colin L. Powell, U.S. Defense Secretary, Remarks to the United Nations Security Council (Feb. 5, 2003), http://web.archive.org/web/20050204130309/http://www.state.gov/secretary/former/powell/remarks/2003/17300.htm [https://perma.cc/Z55Z-ES6T].

93. *Id.*

94. JAMES BAMFORD, THE SHADOW FACTORY: THE ULTRA-SECRET NSA FROM 9/11 TO THE EAVESDROPPING OF AMERICA 144 (2008).

95. *Id.*

96. *Id.*

97. George W. Bush, U.S. President, State of the Union Address (Jan. 28, 2003), http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/bushtext_012803.html [hereinafter President Bush, 2003 State of the Union Address].

98. *See Powell Dossier: Reaction*, BBC (Feb. 5, 2003), http://news.bbc.co.uk/2/hi/middle_east/2730323.stm.

Author James Bamford has argued that "the public was never told how weak and ambiguous the best evidence [of Iraqi WMDs] was. They would be told the opposite."[99] Powell himself would later admit to feeling regret over his role in spreading the misleading assertions, which he said resulted from the failure of intelligence analysts to warn that the sources of the mobile lab claim were questionable.[100]

b. 16 words: Iraq and yellowcake uranium. During his 2003 State of the Union Address in January, President Bush also stated, "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."[101] This explosive charge was based on a British report known as the "September Dossier," which was published in September 2002 and which claimed "there is intelligence that Iraq has sought the supply of significant quantities of uranium from Africa" while also noting that "Iraq has no active civil nuclear power programme or nuclear power plants . . . ."[102]

Considering that a decade ago, just before the first Gulf War, Iraq had commenced a "crash program" to develop nuclear bombs that was "far larger and more dangerous than was known at the time,"[103] and given the continuing antagonistic relations between the two countries, the prospect of a nuclear-armed Iraq was sufficiently unsettling as to lead a number of Democratic Senators, including Hillary Clinton, to throw their support behind President Bush's request for authorization to use military force.[104]

Just two months after President Bush's 2003 State of the Union speech, United Nations weapons inspectors examined the documents that the British had relied upon—financial paperwork regarding the purported uranium transaction—and concluded

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99. *See* BAMFORD, *supra* note 94, at 145.

100. *See Colin Powell on Iraq, Race, and Hurricane Relief*, ABC NEWS (Sept. 8, 2005), http://abcnews.go.com/2020/Politics/story?id=1105979&page=1.

101. *See* President Bush, 2003 State of the Union Address, *supra* note 97.

102. *See* JOINT INTELLIGENCE COMMITTEE, IRAQ'S WEAPONS OF MASS DESTRUCTION: THE ASSESSMENT OF THE BRITISH GOVERNMENT 25 (2002), http://news.bbc.co.uk/nol/shared/spl/hi/middle_east/02/uk_dossier_on_iraq/pdf/iraqdossier.pdf.

103. *See* Barbara Crossette, *Crash Nuclear Program by Iraq is Disclosed*, N.Y. TIMES (Aug. 26, 1995), http://www.nytimes.com/1995/08/26/world/crash-nuclear-program-by-iraq-is-disclosed.html.

104. *See*. Michael Kranish, *Hillary Clinton Regrets Her Iraq Vote. But Opting for Intervention Was a Pattern*, WASH. POST (Sept. 15, 2016), https://www.washingtonpost.com/politics/hillary-clinton-regrets-her-iraq-vote-but-opting-for-intervention-was-a-pattern/2016/09/15/760c23d0-6645-11e6-96c0-37533479f3f5_story.html?utm_term=.7ff94ac96523 (quoting Sen. Clinton as saying in 2002, "[l]eft unchecked, Saddam Hussein will continue to increase his capacity to wage biological and chemical warfare and will keep trying to develop nuclear weapons").

that they were "obvious" forgeries.[105] Contemporaneous news accounts quoted unnamed sources as expressing disbelief that the CIA failed to notice clear discrepancies in the documents, such as one supposedly signed by a man who had not occupied his public office for fourteen years.[106] By 2008, the *New York Times* was referring to the claim in the 2003 State of the Union address as "discredited."[107]

c. Saddam Hussein and al Qaeda. President Bush and Vice President Cheney also claimed that Saddam Hussein played some role in the 9/11 attacks. Bush has noted that he never claimed a direct link between Saddam Hussein and 9/11, merely that "there were numerous contacts between Saddam Hussein and al Qaeda."[108] Cheney, however, went further, repeatedly stating that 9/11 mission leader Mohammed Atta had previously met with an Iraqi intelligence agent in Prague,[109] based on a Czech intelligence report.[110] The 9/11 Commission, however, reviewed Cheney's claim and rejected it.[111]

Although proving a causal connection is impossible, it appears that Bush's and Cheney's insinuations did affect public perceptions. Polls taken in early 2003 showed that nearly half of Americans thought that Saddam Hussein was "personally involved" in the 9/11 attacks, whereas in September 2001, only 3% of respondents to a poll named Saddam Hussein and/or Iraq as being responsible.[112] A different poll in early 2003 found that again nearly half of Americans believed erroneously that "most" or "some" of the 9/11 hijackers were Iraqis.[113]

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105. *See* David Ensor, *Fake Iraq Documents 'Embarrassing' For US*, CNN (Mar. 14, 2003), http://www.cnn.com/2003/US/03/14/sprj.irq.documents/.

106. *Id.*

107. *See* Alissa J. Rubin & Campbell Robertson, *U.S. Helps Remove Uranium From Iraq*, N.Y. TIMES (July 7, 2008), http://www.nytimes.com/2008/07/07/world/middleeast/07iraq.html.

108. *See* Dana Milbank, *Bush Defends Assertions of Iraq-Al Qaeda Relationship*, WASH. POST (June 18, 2004), http://www.washingtonpost.com/wp-dyn/articles/A50679-2004Jun17.html.

109. *Id. See also* Laurie Mylroie, *The Saddam-9/11 Link Confirmed*, FRONTPAGEMAG.COM (May 11, 2004), http://archive.frontpagemag.com/readArticle.aspx?ARTID=13077 [https://perma.cc/TF5N-2524] (explaining that Atta met with Ahmed al-Ani, an Iraqi intelligence official posted at the Iraq embassy in Prague).

110. Mylroiue, *supra* note 109.

111. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 228–29 (2004).

112. *See* Linda Feldmann, *The Impact of Bush Linking 9/11 and Iraq*, CHRISTIAN SCIENCE MONITOR (Mar. 14, 2003), https://www.csmonitor.com/2003/0314/p02s01-woiq.html [https://perma.cc/NTF4-BYW5] (citing *New York Times/CBS* polls). To be sure, the 2001 poll was open-ended, unlike the 2003 polls, so a direct comparison is not entirely accurate.

113. *Id.*

D. Propaganda Value During War

When it comes to military propaganda or deception, the Executive Branch may have an incentive to disseminate a false story on its initiative, without prompting from Congress or the press. Deceiving the opposing side in an armed conflict (so long as not violating the laws of war) is part and parcel of warfare,[114] dating back to the Trojan War when the Greeks hid inside a giant wooden horse that had supposedly been left behind as a gift.[115] The Trojan War, of course, is a product of mythology (though we might understand it as a reflection of the military norms of the era), but there are notable real-life examples of such military deception. The Battle of Midway, for example, was won in large part because of a simple deception that enabled U.S. cryptanalysts to determine that Midway Island was the target of a Japanese naval attack.[116] The U.S. cryptanalysts had broken the Japanese code but did not know what the target designation "AF" stood for.[117] To test whether "AF" was Midway, the Navy sent a false message that Midway was short on water, using a code that the Japanese were known to have broken.[118] When the Japanese subsequently encoded a message that "AF was short on water," the Americans had their answer and were able to position the Pacific fleet to ambush the Japanese navy.[119] Other examples of such military deception of the enemy include Operation Bodyguard, which tricked the Germans into believing that the D-Day invasion of Normandy was merely a diversion, leaving the Germans to defend elsewhere;[120] and the First Gulf War, when Coalition forces deceived the Iraqi military into believing that the initial attack would come straight at the Iraqi defenses, as opposed to eliding them.[121]

Such military deceptions, of course, are aimed at the adversary, and not at Congress or the public. The Midway lie was

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114. *See* JON LATIMER, DECEPTION IN WAR: THE ART OF THE BLUFF, THE VALUE OF DECEIT, AND THE MOST THRILLING EPISODES OF CUNNING IN MILITARY HISTORY, FROM THE TROJAN HORSE TO THE GULF WAR 6-36 (2001).

115. *Trojan Horse*, BRITANNICA.COM (Apr. 27, 2015), https://www.britannica.com/topic/Trojan-horse [https://perma.cc/C8C6-MCPN].

116. *Battle of Midway*, HISTORY.COM (2009), https://www.history.com/topics/world-war-ii/battle-of-midway [https://perma.cc/67SZ-HCLA].

117. WALTER LORD, INCREDIBLE VICTORY: THE BATTLE OF MIDWAY 20–23 (1967).

118. *Id.* at 23.

119. *Id.*

120. *See* MARY BARBIER, D-DAY DECEPTION: OPERATION FORTITUDE AND THE NORMANDY INVASION 26 (2007); Stephen E. Ambrose, *Eisenhower, the Intelligence Community, and the D-Day Invasion*, 64 WIS. MAG. HIST. no. 4, Summer 1981, at 261, 267.

121. LATIMER, *supra* note 114, at 298.

disseminated using a military code that was intended to keep the contents of the message secret (except from the Japanese). This is not to say that military deceptions of this nature (i.e., aimed at the enemy) are never received by the American public. The public may be an unwitting conduit of the misinformation. The target of the misinformation, however, is a foreign power. On the other hand, there are other instances where the U.S. government has taken the initiative to spread false information about military actions with the apparent goal of misleading or deceiving Congress, the press, and the American public. In these instances, the opposing side either does not care about the information because it is symbolic in a way that matters only to Americans; or the opposing side knows that the statement is false because it is in possession of contradictory information.

Immediately after the Imperial Japanese Navy's devastating surprising attack on Pearl Harbor—which killed more than 2,000 Americans, wounded nearly 1,300, and sank or damaged eight battleships and numerous other naval vessels[122]—U.S. Secretary of the Navy Knox "visited Pearl Harbor and, in a press conference after his return, . . . announced that the battleship *Arizona* had been lost and that the battleship *Oklahoma* had capsized but could be righted; the rest of the Pacific fleet was fine."[123] Secretary Knox's definition of "fine" included the *West Virginia* and the *California*, both of which had sunk;[124] the *Nevada*, which had been beached in addition to being bombed;[125] and the remaining three battleships, which had been hit by one or more bombs.[126] The only battleship that remained in service was the *Pennsylvania*.[127] In a more sympathetic account, military historian Gordon Prange concluded that Knox's report was a "surprisingly accurate account," though he also conceded that the listing of damaged ships "was not entirely candid but in view of later salvage operations, not too far off the mark."[128] Knox's public statement had been carefully crafted with and vetted by President Roosevelt, Secretary of State Hull, Secretary of War

122. *See, e.g.*, WALTER LORD, DAY OF INFAMY 210–211 (1957); GORDON W. PRANGE ET AL., AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR 490–92, 539 (1981).

123. MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 218 (1992).

124. *Id.*

125. ROGER DANIELS, FRANKLIN D. ROOSEVELT: THE WAR YEARS, 1939-1945 235 (2016).

126. *Id.* at 234–35.

127. Sarah Pruitt, *After Pearl Harbor: The Race to Save the U.S. Fleet*, HISTORY.COM (Dec. 1, 2016), https://www.history.com/news/after-pearl-harbor-the-race-to-save-the-u-s-fleet [https://perma.cc/KSH5-D2ZP].

128. PRANGE ET AL., *supra* note 122, at 588.

Stimson, and other advisors.[129] The apparent justification for misleading reports such as Knox's was, according to law professor Geoffrey Stone, a desire "to calm the public by minimizing the scale of the disaster";[130] and according to Prange, "the demands of security."[131] Notably, however, the concern was not to keep military or national security information from the enemy; at least, this could not have been a plausible reason to disseminate misleading information, as the attacking Japanese pilots were quite aware of the damage they had inflicted on the U.S. fleet.[132]

A more recent example that did not involve actual warfare was President Clinton's repeated public assertions in the mid-1990s that "there is not a single, solitary nuclear missile pointed at an American child tonight. Not one. Not one. Not a single one."[133] The underlying basis for Clinton's claim was a "detargeting pact" that the United States reached with Russia in 1994.[134] Under this agreement, both countries removed the specific targeting data from their nuclear weapons "to protect both countries from an accidental or unauthorized nuclear strike by the other."[135] This pact was, to be sure, a step of progress, as it would minimize the risk of accidental or unintentional launch of nuclear weapons.[136] To the extent that the statement was

129. *Id.*

130. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME; FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 263 (2004).

131. PRANGE ET AL., *supra* note 122, at 588.

132. Among others, Mitsuo Fuchida, the commander of the air strike force, circled Pearl Harbor for two hours to study the damage. LORD, *supra* note 117, at 171; PRANGE ET AL., *supra* note 122, at 539.

133. *See* Robert "Buzz" Patterson, Dereliction of Duty: The Eyewitness Account of How Bill Clinton Compromised America's National Security 53 (2003) (recounting author's personal observation of an August 26, 1996, speech in which Clinton stated, "'For the first time since the dawn of the nuclear age, on this beautiful night, there is not a single nuclear missile pointed at a child in the United States of America'"); Bill Gertz, *China Targets Nukes at U.S. CIA Missile Report Contradicts Clinton*, Wash. Times, May 1, 1998, at A1; *CIA Report Says China N-Arms Are Still Aimed at U.S. Target*, Associated Press (May 2, 1998), https://www.deseretnews.com/article/627709/CIA-report-says-China-N-arms-are-still-aimed-at-US-target.html [https://perma.cc/GC9A-XSZU].

134. *See* Michael Waller, *No Nukes Pointed This Way? Think Again*, WASH. TIMES (Jul. 6, 1998), http://jmichaelwaller.com/1998/07/06/no-nukes-pointed-this-way-think-again/ [https://perma.cc/CM7M-LFBM].

135. *Id.*

136. *Id.* The classic fictional depiction of the horrifying consequences of an accidental nuclear launch is FAIL SAFE (1962), in which a U.S. bomber is mistakenly dispatched to destroy Moscow, and in order to avert thermonuclear war, the President agrees to allow the Soviet Union to retaliate by annihilating New York City. Paul Brians, *Nuclear Holocausts: Atomic War in Fiction*, WASH. STATE UNIV. (Nov. 11, 2016), https://brians.wsu.edu/2016/11/16/nuclear-holocausts-atomic-war-in-fiction/ [https://perma.cc/Z2NX-A3Q9]. A similar but less pessimistic movie is

intended to comfort Americans that the United States no longer had any nuclear adversaries, however, it omitted the crucial fact that the targeting data could be reloaded in a matter of minutes.[137] In addition, Clinton's claim was not limited to Russia; at the time, China was a nuclear power and had twice rejected a similar de-targeting pact.[138] A 1998 CIA report concluded that China had at least thirteen nuclear missiles capable of striking the United States; when questioned about the report, the Chinese government's response was to press for a "no use pledge" because, as a Chinese spokesperson pointed out, "[t]o retarget a missile takes only a few minutes."[139]

Multiple post-9/11 incidents provide additional examples of national security lies that functioned as propaganda aimed at manipulating public opinion or Congress during times of ongoing armed conflict in Afghanistan and Iraq. For example, the initial accounts of the capture and subsequent rescue of Jessica Lynch and the death of Pat Tillman were wrong—and wrong in ways that embellished the perceived heroism and patriotism of the events.

Private Lynch was a member of a U.S. convoy in Iraq that was caught in an ambush by Iraqi insurgents in March 2003; eleven soldiers were killed, and six others besides Lynch were captured alive.[140] On April 2, 2003, the government announced that U.S. military personnel, with the assistance of an Iraqi doctor, had pulled off a daring nighttime rescue mission to liberate Lynch from the hospital where she was being detained.[141] According to unnamed government officials as well as a named public affairs officer, during the initial ambush, Lynch, despite being badly wounded, killed several assailants

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CRIMSON TIDE (1995), where an American nuclear submarine is ordered to launch missiles against Russia with the confirmation order cut off midstream. The captain intends to follow the order even without the full confirmation, but the executive officer argues that they could be inadvertently starting World War III if they launch in error. *See* Janet Maslin, *Film Review: Crimson Tide; Deciding the World's Fate From the Ocean's Bottom*, N.Y. TIMES (May 12, 1995), https://www.nytimes.com/movie/review?res=990CE5DF153AF931A25756C0A963958260?.

137. Waller, *supra* note 134.

138. *See CIA Report Says N-Arms Are Still Aimed at U.S. Target*, *supra* note 133; Waller, *supra* note 134.

139. *Id.*

140. JON KRAKAUER, WHERE MEN WIN GLORY: THE ODYSSEY OF PAT TILLMAN 206 (2009).

141. *Id.* at 209–10; *POW Rescued as Marines Stage Diversion*, CNN.COM (Apr. 2, 2003), http://www.cnn.com/2003/WORLD/meast/04/01/sprj.irq.lynch.rescue/index.html?iref=mpstoryview.

until she ran out of ammunition.[142] It was a made-for-TV story with a plucky American heroine, and not surprisingly, Hollywood did capitalize with "Saving Jessica Lynch," which aired on NBC in November 2003.[143]

The reality, however, was that Lynch fired no shots because her weapon jammed immediately.[144] Lynch subsequently testified before Congress that the initial account of her heroism "was not true" and that she was "confused as to why they chose to lie and tried to make me a legend when the real heroics of my fellow soldiers that day were, in fact, legendary."[145]

Pat Tillman famously walked away from a career as a professional football player to enlist in the U.S. Army after the 9/11 attacks, a decision that offered the military a potential bonanza of propaganda value.[146] On April 22, 2004, he was killed in a firefight in Afghanistan. The initial report stated publicly that enemy fighters ambushed Tillman and a fellow soldier, that Tillman fought "without regard for his personal safety," and that he received a posthumous promotion and the Purple Heart and Silver Star awards.[147] The Silver Star citation indicated that Tillman had put himself in the line of "devastating enemy fire."[148] It later emerged publicly that Tillman had been killed by friendly, not enemy, fire - and that various military leaders were aware of this fact at the time the public was being given the false

142. *See, e.g.*, Dana Priest et al., *A Broken Body, A Broken Story, Pieced Together*, WASH. POST (June 17, 2003), https://www.washingtonpost.com/archive/politics/2003/06/17/a-broken-body-a-broken-story-pieced-together/99444444-c9cf-4ae8-b724-7471564643fa/?utm_term=.bdd9496ec748; John Kampfner, *The Truth About Jessica*, THE GUARDIAN (May 15, 2003), https://www.theguardian.com/world/2003/may/15/iraq.usa2; Alex Neill, *Remains Found at Iraqi Hospital to be Flown to U.S.*, MILITARY TIMES (Apr. 3, 2003), http://news-press.gannettonline.com/gns/iraq/20030403-19986.shtml [https://perma.cc/74LH-2F2L].

143. *Saving Jessica Lynch* (NBC television broadcast Nov. 9, 2003); *Television; Saving Private Lynch from Misinformation*, N.Y. TIMES (Oct. 5, 2003), https://www.nytimes.com/2003/10/05/art/television-saving-private-lynch-from-misinformation.html.

144. *Jessica Lynch: 'I'm No Hero'*, ABC NEWS (Nov. 6, 2003), https://www.abcnews.go.com/Primetime/story?id=132434&page=1.

145. *See* Jessica Lynch, Testimony Before the House Committee on Oversight and Government Reform (Apr. 24, 2007), https://web.archive.org/web/20070425191716/https://oversight.house.gov/documents/20070424110022.pdf [https://perma.cc/7YLL-5UQF].

146. *See* KRAKAUER, *supra* note 140, at 143, 150.

147. *See Honor the Fallen: Army Cpl. Patrick D. Tillman*, MILITARY TIMES, http://projects.militarytimes.com/valor/army-cpl-patrick-d-tillman/263007/ [https://perma.cc/5HQU-CP8R].

148. *See* Scott Lindlaw & Martha Mendoza, *General Suspected Cause of Tillman Death*, WASH. POST (Aug. 4, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080301868.html.

account of Tillman's killing.[149] Worse yet, some of Tillman's fellow soldiers had attempted to cover up the fratricide and those who wanted to set the record straight at Tillman's funeral were ordered by superiors to lie.[150]

Once the false Lynch and Tillman accounts were revealed, critics and skeptics wondered if the Bush Administration had spread misleading information deliberately so as to draw attention away from bad news in the military conflicts in Iraq and Afghanistan.[151]

E. Mis-Defending National Security-Related Cases in Court

Litigation by or against the United States can trigger national security concerns and provide an occasional temptation for federal officials to lie or mislead the opposing party or even the courts in written filings in order to mislead the court. While one might expect that the possibility of judicially-imposed sanctions, or perjury or obstruction of justice charges, would serve to deter government officials from making misrepresentations to courts, some of the examples of national security lies discussed so far suggest otherwise.

1. The Japanese-American Internment Cases. Following the devastating Japanese sneak attack on Pearl Harbor on December 7, 1941, the Roosevelt Administration began to take steps ostensibly geared toward securing the West Coast from sabotage or revolt by the 100,000 or so persons of Japanese descent. On February 19, 1942, President Roosevelt issued Executive Order 9066, which authorized military commanders to designate sensitive areas from which "any or all persons may be excluded."[152] It also authorized the Secretary of War to relocate any excluded residents "to accomplish the purpose of this order."[153] The military commander for the West Coast, General

149. KRAKAUER, *supra* note 140 at 296–97, 321.

150. *Id.* at 302.

151. *See, e.g.*, Frank Rich, *Pfc. Jessica Lynch Isn't Rambo Anymore*, N.Y. TIMES (Nov. 9, 2003), http://www.nytimes.com/2003/11/09/arts/pfc-jessica-lynch-isn-t-rambo-anymore.html; *Soldier: Army Ordered Me Not to Tell Truth About Tillman*, CNN (Apr. 25, 2007), http://www.cnn.com/2007/POLITICS/04/24/tillman.hearing/index.html?eref=onion (quoting Tillman's brother as saying, "Revealing that Pat's death was a fratricide would have been yet another political disaster during a month already swollen with disasters. The facts needed to be suppressed. An alternative narrative had to be constructed, crucial evidence destroyed.").

152. Executive Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); JEFFERY F. BURTON ET AL., CONFINEMENT AND ETHNICITY: AN OVERVIEW OF WORLD WAR II JAPANESE AMERICAN RELOCATION SITES 25 (1999).

153. *See* Executive Order 9066, 7 Fed. Reg. 1407; BURTON ET AL., *supra* note 152, at

DeWitt, issued Military Proclamation No. 1, which excluded Japanese aliens as well as Japanese-American citizens from the western halves of Washington, Oregon, and California.[154] To accomplish the exclusion, DeWitt first instituted a nighttime curfew applicable to Japanese-Americans on the West Coast.[155] Subsequently, he enforced the exclusion order by forcibly relocating 110,000 Japanese aliens and Japanese-American citizens to other detention centers in other parts of the country.[156]

Ultimately, the Supreme Court decided four cases involving General DeWitt's orders. In *Yasui v. United States* and *Hirabayashi v. United States*, both decided on the same day in 1943, the Supreme Court upheld the curfew order against equal protection challenges.[157] The next year, in *Korematsu v. United States*, the Court upheld the exclusion order against the same kind of equal protection challenge.[158] Only in *Ex Parte Endo* did the Court hold that the internment of American citizens like Ms. Endo without any proof of disloyalty violated the constitution.[159]

Today, *Korematsu* and *Hirabayashi* are discredited decisions, and hardly anyone is willing to defend their holdings.[160] Relevant to the discussion of national security lies, however, is what key government officials knew in 1943 and 1944. In defending the curfew order during Yasui's criminal trial, the federal government adopted a strategy of argument by hypothetical, asking "'what type of conduct can reasonably be expected of those of Japanese ancestry now or in case of an attempted invasion by the Imperial Japanese forces of our coastal areas.'"[161] Before the Supreme Court, the government took an even more aggressive stance in *Yasui* and *Hirabayashi*, emphasizing that Oahu was the "'last stronghold of defense lying between Japan and the West Coast,'" and that "'the danger of an

30–31.

154. BURTON, *supra* note 152, at 32.

155. *Id.* at 33.

156. *Id.* at 33–36.

157. Yasui v. United States, 320 U.S. 115, 117 (1943). Hirabayashi v. United States, 320 U.S. 81, 104 (1943).

158. Korematsu v. United States, 323 U.S. 214, 223 (1944).

159. *Ex Parte* Endo, 323 U.S. 283, 307 (1944).

160. For a highly criticized effort, see MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR "RACIAL PROFILING" IN WORLD WAR II AND THE WAR ON TERROR, 121–24, 273–79 (2004).

161. Eric L. Muller, Hirabayashi *and the Invasion Evasion*, 88 N.C. L. REV. 1333, 1348 (2010) (citing Memorandum of Law, United States v. Yasui, No. C-16056 (W.D. Or. undated), microformed on Papers of the Commission on Wartime Relocation and Internment of Civilians, Reel 7, frames 259–98 (NARA)).

enemy attack [was] far within the realm of probability.'"[162] Based on his recent archival research, legal historian Eric Muller has demonstrated that the government's claim of a credible possibility of an enemy land invasion was false; American military leaders considered the possibility from late 1941 through mid-March 1942 but discounted it consistently,[163] with General DeWitt's superiors rejecting his request for more soldiers to defend the West Coast, as "[t]he Pacific Coast . . . seems subject to nothing more serious than air or naval raids."[164]

In the subsequent exclusion/internment cases, the government consistently defended its actions (as well as the discriminatory focus on Japanese-Americans *en masse* but not Italian-Americans or German-Americans) on the grounds "that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily. . . ."[165] The factual basis for this claim was based a report by General DeWitt, which, according to the government, contained "statistics and other details concerning the actual evacuation and the events that took place subsequent thereto."[166]

Forty years later, though, it came to light that the government had knowingly misled or lied to the Supreme Court in its briefing in *Korematsu*, when Fred Korematsu sought to re-open his case in the 1980s, seeking a writ of *coram nobis* to redress the wrongful conviction.[167] The United States argued that because it did not contest Korematsu's entitlement to the writ, the district court did not need to make any findings of fact.[168] The district judge disagreed and found that the government had in fact misled the Supreme Court back in 1943 when it concealed the existence of information conflicting with General DeWitt's report.[169] Specifically, the footnote that relied on General DeWitt's report had been revised from an earlier

162. *Id.* at 1348, 1349 (citing Brief of Appellee at 15, Hirabayashi v. United States, 320 U.S. 81 (1943), 1943 WL 71885, at *15, *60–61).

163. *Id.* at 1354–62.

164. *Id.* at 1361 (quoting Letter from Lieutenant Gen. L.J. McNair, U.S. Army, to Commanding Gen., Field Forces (Dec. 23, 1941), microformed on RG 165, Item 4612-5, Box 259).

165. Korematsu v. United States, 323 U.S. 214, 223 (1944).

166. Brief for the United States at 11, *Korematsu v. United States*, 323 U.S. 214 (1944) No. 22, 1944 WL 42850.

167. BURTON, *supra* note 152, at 58; Claudia Luther, *The Archives: Fred Korematsu, 86; Fought WWII Internment of Japanese Americans*, L.A. TIMES (Apr. 1, 2005), http://www.latimes.com/local/la-me-fred-korematsu-20050401-story.html.

168. Korematsu v. United States, 584 F. Supp. 1406, 1412 (N.D. Cal. 1984). As District Judge Patel noted, the government was not confessing error, but it had "taken a position tantamount to a confession of error." *Id.*

169. *Id.* at 1418.

version stating that the report was "in several respects . . . in conflict with the views of this Department."[170] That version, in fact, had been watered down from the footnote in the original draft, which stated that the report was "in several respects . . . in conflict with information in possession of the Department of Justice."[171]

Nearly thirty years after that, Acting Solicitor General Neal Katyal further confirmed the intentional nature of the government's false representations in the *Korematsu* brief when he confessed error on behalf of the Office of the Solicitor General due to then-Solicitor General Charles Fahy's suppression of a Naval Intelligence Report contradicting General DeWitt's factual assertions.[172]

In reviewing the known reputations and historical stances of the primary Justice Department lawyers involved in *Hirabayashi*, Professor Muller considered the possibility that they did not lie but rather fell prey to "the Japanese racial schema" so prevalent at the time; that is, the lawyers had a "blind spot . . . a proclivity to credit and defend the direst of depictions of external threats to national security and territorial integrity" despite no evidence of such threats.[173] Still, Muller ultimately acknowledged that "[w]e will never know for sure what led *these lawyers to sign a brief that so vigorously presented facts contradicting that they had reason to know*."[174]

Of course, it is impossible to know whether the Supreme Court would have reached the same conclusions in the Japanese-American Internment cases had the Roosevelt Administration not defended the curfew and exclusion orders with false assertions about the supposed threat posed by the targets of those orders. Professor Muller's assessment is that "[t]o a significant extent, the Court ended up resting its opinion in *Hirabayashi* on those falsehoods."[175] On the other hand, Jerry Kang has argued that the Justice Department's misrepresentations in the *Hirabayashi* brief made no difference to the outcome in the internment cases because the Court was

170. *Id.* at 1417.

171. *Id.*

172. *See* David G. Savage, *U.S. Official Cites Misconduct in Japanese American Internment Cases*, L.A. TIMES (May 24, 2011), http://articles.latimes.com/2011/may/24/nation/la-na-japanese-americans-20110525.

173. Muller, *supra* note 161, at 1378–81.

174. *Id.* at 1382 (emphasis added).

175. *Id.* at 1383.

going to defer to the Executive Branch anyway, and that it had ample evidence before it to contradict the misrepresentations:[176]

> Even if the original version of the Final Report and the suppressed intelligence memoranda had been made available in *Hirabayashi*, and even if the original *Korematsu* brief footnote had appeared in the *Hirabayashi* litigation, there is compelling circumstantial evidence that the Supreme Court would have applied the same techniques of segmentation and selective interpretation in order to affirm the convictions and not interfere with the internment machine.[177]

Regardless of the extent to which the Court may have relied upon General DeWitt's false claims, it is indisputable that a federal judge and a modern Solicitor General have concluded that the Justice Department misled the Justices as to the threat posed by Japanese-Americans living on the West Coast.

2. The Military/State Secrets Doctrine. Under the state secrets doctrine, the federal government can shield otherwise discoverable evidence from litigation by asserting that the evidence would reveal military or state secrets—and in some instances, the government can move to dismiss the litigation altogether if it persuades the judge that it cannot adequately defend itself without use of that evidence.[178]

This powerful doctrine arose in *United States v. Reynolds*,[179] which involved the 1948 crash of a military plane carrying a number of Air Force personnel and three civilians.[180] Six of the nine crew members, and three of the four civilian observers, were killed in the crash.[181] Family members of the civilian observers sued the United States under the Federal Tort Claims Act and, in the ensuing litigation, sought discovery of the Air Force's accident report.[182] The Air Force refused to turn over the report, claiming that its production would "seriously [hamper] national security, flying safety and the development of highly technical and secret military equipment."[183] The district court granted judgment as a matter of law in favor of the plaintiffs, but the

176. *See* Jerry Kang, *Denying Prejudice: Internment, Redress and Denial*, 51 UCLA L. REV. 933, 990–95 (2004).

177. *Id.* at 994.

178. *See, e.g.*, Totten v. United States, 92 U.S. 105, 106–107 (1875).

179. U.S. v. Reynolds, 345 U.S. 1, 1 (1953).

180. *Id.*

181. *Id.*

182. *Id.* at 2–3.

183. *Id.* at 5.

Supreme Court reversed the trial court's ruling that the report was discoverable.[184] Upon remand, the plaintiffs settled for $170,000.[185] Almost sixty years later, the daughter of one of the civilian victims came across a declassified copy of the accident report and discovered that the report not only disclosed no military secrets but attributed the plane crash to defective installment of an engine component[186]—an admission that no doubt would have strengthened the family's bargaining position back in 1948.

When tasked with resolving the question of whether government lawyers had misled the Supreme Court in *Reynolds*, the Third Circuit concluded that the government's invocation of the military secrets privilege was not fraudulent because "there [was] an obviously reasonable truthful interpretation of the statements made by the Air Force"[187] However, rather than hold that the government had not lied, the Third Circuit had merely ruled that the plaintiffs could not meet the burden of showing that the Air Force officials had perjured themselves.[188]

F. Disavowing Failed Operations

There have been a number of instances where an Executive Branch lie has followed the unintended discovery or revelation of a covert operation, typically one that ended in disaster. The 1960s espionage drama *Mission: Impossible* highlighted this sort of lie in virtually every episode, when team leader Jim Phelps' instructions would close with the warning: "[a]s always, if you or any member of your IM force are caught or killed, the Secretary will disavow any knowledge of your actions." [189]

In the 1950s, the Eisenhower Administration began secret flights over Soviet airspace with a reconnaissance plane known as the U-2.[190] This airplane flew high enough to be supposedly out of reach of Soviet aircraft and missiles, thus easing President Eisenhower's concerns that such surveillance overflights would be detected and viewed as hostile acts, potentially triggering war between the superpowers.[191] On May 1, 1960, Soviet forces in fact

184. *Id.* at 10–11.

185. Stipulation, *Reynolds v. United States* (1953), CV No. 10142, https://fas.org/sgp/othergov/reynoldspetapp.pdf [https://perma.cc/2Q6A-QPJA].

186. Barry Siegel, *A Daughter Discovers What Really Happened*, L.A. TIMES (Apr. 19, 2004), http://articles.latimes.com/2004/apr/19/nation/na-b29parttwo19.

187. Herring v. United States, 424 F.3d 384, 392 (3d Cir. 2005).

188. *Id.*

189. WHITE, *supra* note 1, at 119.

190. *See* TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA 183 (2007).

191. *See id.* ("The president had worried for five and a half years that the U-2 itself

shot down a U-2 plane piloted by CIA employee Francis Gary Powers.[192] The CIA officer in charge of the U-2 operation was aware that Powers' plane had crashed but assured CIA Director Allen Dulles that the pilot could not have survived.[193] When the Soviet government announced publicly that an American plane had crashed in Soviet territory, President Eisenhower relied on the CIA's assumption that Powers had perished and approved the release of a fake cover story, which was issued by the National Aeronautic and Space Administration ("NASA"):

> A NASA U-2 research airplane being flown in Turkey on a joint NASA-USAF Air Weather Service mission apparently went down in the Lake Van, Turkey, area at about 9:00 A.M., Sunday, May 1.
>
> During the flight in eastern Turkey, the pilot reported over the emergency frequency that he was experiencing oxygen difficulties. The flight originated in Adana with a mission to obtain data on clear air turbulence.
>
> A search is now underway in the Lake Van area. The pilot is an employee of Lockheed Aircraft under contract to NASA. The U-2 program was initiated by NASA in 1956 as a method of making high-altitude weather studies.[194]

Eisenhower had unwittingly fallen into the trap set by his counterpart, Soviet Premier Nikita Khrushchev, who exploited the situation masterfully. After NASA spread the false story, Khrushchev appeared before the Supreme Soviet (i.e., the legislative body) and declared:

> Comrades, I must tell you a secret. When I made my report two days ago, I deliberately refrained from mentioning that we have the remnants of the plane — *and we also have the pilot, who is quite alive and kicking*. We did this quite deliberately, because if we had given out the whole story, the Americans would have thought up still another fable. And now, just look at how many silly things they have said: Lake Van, scientific research and so on. Now when they learn that the pilot is alive, they will have to think up something else. *And they will!*[195]

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might start World War III.")

192. *See* FRANCIS GARY POWERS & CURT GENTRY, OPERATION OVERFLIGHT: THE U-2 SPY PILOT TELLS HIS STORY FOR THE FIRST TIME 82–83 (1970); MICHAEL R. BESCHLOSS, MAY-DAY: EISENHOWER, KHRUSCHEV AND THE U-2 AFFAIR 25 (1986).

193. BESCHLOSS, *supra* note 192, at 38.

194. *Id.* at 39.

195. *See id.* at 58–59. For a slightly different translation with the same general content, see POWERS & GENTRY, *supra* note 192, at 140–41.

The State Department subsequently issued a two-page statement that essentially admitted the truth of the U-2 espionage mission but justified the action by blaming the Soviet Union.[196] In key part, the statement read: "In accordance with the National Security Act of 1947, the President has put into effect . . . directives to gather by every possible means the information required to protect . . . against surprise attack."[197]

Immediate reaction to the Eisenhower Administration's concession that the NASA story was fictitious was mixed. A *New York Times* critic decried the fact that the country had "been caught spying over the Soviet Union and trying to cover up its activities in a series of misleading official statements."[198] Other critics, however, objected to the admission, not the false story.[199] The next morning, Eisenhower addressed the press directly and reinforced the State Department's previous explanation. According to Eisenhower, "special and secret" intelligence gathering "is a distasteful but vital necessity . . . . The emphasis given to a flight of an unarmed, nonmilitary plane can only reflect a fetish of secrecy."[200]

G. Concealing Executive Branch Misconduct or Mistakes

Related to the concept of disavowing failed operations by lying about them is that of lying to cover up Executive Branch misconduct or mistakes. Here too the misconduct or mistakes are ones about which the White House presumably would have preferred to stay silent, but has been forced by undesired disclosure to say something in response, and rather than admit the misconduct or mistake, the government official attempts to deceive or mislead Congress, the press, or the public.

1. The Iran-Contra affair. The Iran-Contra scandal involved two unrelated but paired unlawful and covert executive branch activities in the mid-1980s. In the first, key members of President Reagan's national security staff secretly negotiated an arms-for-hostage trade with Iranian leaders,[201] which appeared to violate the Arms Export Control Act,[202] requiring advance

196. BESCHLOSS, *supra* note 192, at 257.

197. *Id*.

198. *See id*. at 258.

199. *See id*. at 258–59.

200. *Id*. at 265.

201. The Iran-Contra Affair, PBS, http://www.pbs.org/wgbh/americanexperience/features/reagan-iran/ [https://perma.cc/XX74-M3Y3] (last visited Jan. 11, 2018).

202. Arms Export Control Act, 22 U.S.C. §§ 2751–2796 (2012).

notice to Congress of arms sales to foreign countries.[203] The missiles in question were sold to Israel, which then secretly sold them to Iran, despite a written requirement of U.S. agreement to any subsequent sale by Israel. The funds raised by the arms sales were then funneled to Contra rebels in Nicaragua in violation of the Boland Amendments.[204] One of the key national security staffers, Colonel Oliver North, both lied in earlier congressional testimony to conceal the Iran-Contra activities, and furthermore, once the scheme was unraveling in public, destroyed relevant documents that Congress had subpoenaed.[205] He was convicted of obstruction of justice and destruction of documents, but the D.C. Circuit reversed his conviction on the grounds that the independent counsel failed to show that key witnesses were not tainted by exposure to North's immunized testimony before Congress.[206]

2. The Al Shifa pharmaceutical plant. On August 7, 1998, the terrorist group al-Qaeda simultaneously attacked the U.S. embassies in Kenya and Tanzania with truck bombs, killing 224 people.[207] Two weeks later, on August 20, President Clinton ordered cruise missile strikes against the Al-Shifa pharmaceutical plant in Sudan, as well as targets inside Afghanistan, where al-Qaeda was based.[208] The Sudan attack destroyed the four buildings in the Al-Shifa complex, killed one worker, and wounded ten.[209] According to the Clinton Administration, the plant was targeted because it had links to al-Qaeda and was producing precursor chemicals for VX nerve gas.[210] Although many Republicans in Congress accepted the

203. 22 U.S.C. § 2751.

204. *See generally* Pub. L. No. 98-473, 98 Stat. 1837 (1984). For a detailed account of the investigation and subsequent prosecution of the key staffers, see JEFFREY TOOBIN, OPENING ARGUMENTS: A YOUNG LAWYER'S FIRST CASE: UNITED STATES V. OLIVER NORTH (rev. ed. 1992).

205. *Understanding the Iran-Contra Affairs: The Hearigns: The Majority Report*, BROWN UNIV. https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/h-themajorityreport.php [https://perma.cc/3K9A-8NCS] (last visited Jan. 1, 2018).

206. United States v. North, 910 F.2d 843 (D.C. Cir. 1990).

207. *See* Benjamin Weber, *Egyptian Gets 25-Year Term in 1998 Embassy Bombings; Judge Calls Plea Deal Generous*, N.Y. TIMES (Feb. 7, 2015), https://nyti.ms/1LWAZxz.

208. *See* James Bennet, *U.S. Fury on 2 Continents: The Overview; U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES (Aug. 21, 1998), http://www.nytimes.com/1998/08/21/world/us-fury-2-continents-overview-us-cruise-missiles-strike-sudan-afghan-targets.html.

209. Scott Peterson, *Sudanese Factory Destroyed by US Now a Shrine*, CHRISTIAN SCIENCE MONITOR (Aug. 7, 2012), https://www.csmonitor.com/World/Africa/2012/0807/Sudanese-factory-destroyed-by-US-now-a-shrine [https://perma.cc/JB32-2TS5].

210. Bennet, *supra* note 208.

explanation and supported the military action, there were a few skeptics who instinctively distrusted the President.[211]

As it turns out, the skeptics were not entirely wrong. Seven years later, government officials admitted in a *New York Times* story that the evidence "was not as solid as first portrayed" and that "there was no proof that the plant had been manufacturing or storing nerve gas."[212] The Clinton Administration had leaped to the conclusion that the Al-Shifa complex was engaged in chemical weapons production due to the presence of the precursor chemical in a soil sample taken from outside the plant.[213] The sample came, however, "from land that does not appear to have been owned by Al Shifa."[214] For that reason and more, there were internal debates about the strength of the evidence tying the pharmaceutical plant to al Qaeda and to chemical weapons production. Shortly after the missile attack, analysts at the State Department Bureau of Intelligence and Research were prepared to write a report reflecting a consensus view that "[c]ontrary to what the Administration was saying, the case tying Al Shifa to bin Laden or to chemical weapons was weak."[215] In addition, there have been reports that CIA Director George Tenet cautioned that "there were 'gaps' in the case linking bin Laden to the factory."[216]

As with some of the previous examples of national security lies, the government speakers in this instance would presumably deny that they had in fact lied in the sense of stating known falsehoods. There has been no evidence that President Clinton had affirmative knowledge that the Al Shifa pharmaceutical plant was not producing VX nerve gas or other chemical

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211. *See id.* (quoting Sen. Dan Coats as saying that "the president's record 'raises into doubt everything he does and everything he says, and maybe even everything he doesn't do and doesn't say'"). Ironically, the movie WAG THE DOG (New Line Cinema 1997), which had been released at the end of 1997, portrayed a beleagued Administration starting a fictional military conflict with Albania so as to distract the public from a sex scandal, giving rise to claims that reality was mirroring fiction.

212. *See* Marc Lacey, *Look at the Place! Sudan Says, 'Say Sorry,' but U.S. Won't*, N.Y. TIMES (Oct. 20, 2005), http://www.nytimes.com/2005/10/20/world/africa/look-at-the-place-sudan-says-say-sorry-but-us-wont.html.

213. *See* David S. Cloud, *Colleagues Say C.I.A. Analyst Played by the Rules*, N.Y. TIMES (Apr. 23, 2006), http://www.nytimes.com/2006/04/23/washington/colleagues-say-cia-analyst-played-by-the-rules.html?mtrref=www.google.com&gwh=CF19DE27A9160B6B2AABBAEAF3C14305&gwt=pay.

214. *See* James Risen, *To Bomb Sudan Plant, or Not: A Year Later, Debates Rankle*, N.Y. TIMES (Oct. 27, 1999), https://partners.nytimes.com/library/world/africa/102799us-sudan.html.

215. *Id.*

216. *Id.*

weapons.[217] If we broaden our understanding of the statement to include the degree of certainty of the alleged basis for the attack, then the Clinton Administration was at best "puffing" its case,[218] and at worst misleading Congress and the public.

3. John Ashcroft's continuing claim that hundreds of post-9/11 immigration detainees had 9/11 links. Following the terrorist attacks on September 11, 2001, federal authorities identified and detained over 760 noncitizens on suspected immigration violations, as well as a smaller number pursuant to material witness arrest warrants.[219] The ensuing immigration proceedings did result in the removal of non-citizens who had indeed overstayed or otherwise violated their entry visas, or who had committed non-terrorism-related felonies, but the only person who had even been indicted on a 9/11-related crime was Zacarias Moussaoui.[220] And he had been in federal detention—on immigration charges—since a few months before 9/11.[221] Yet, Attorney General Ashcroft continued to insist in 2003 that hundreds of the post-9/11 immigration detainees "had links to the September 11 investigation."[222]

4. Drastic use of national security letters. Certain provisions of federal law empower the FBI to issue so-called national security letters, which are administrative subpoenas requiring businesses to produce business records such as telephone records and subscriber information.[223] As subpoenas, these national security letters do not require judicial approval, and they come with gag orders to prevent the recipients from disclosing their existence other than as necessary to comply or to seek legal advice.[224] National security letters play an important role in counterterrorism and counterespionage efforts,[225] but they

217. *See* Lacey, *supra* note 212.

218. On puffery, see David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1400–19 (2006).

219. *See* U.S. DEP'T OF JUSTICE, OFFICE. OF INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF SEPTEMBER 11 ATTACKS 2 (2003).

220. *See* United States v. Moussaoui, 382 F.3d 453, 457 (4th Cir. 2004).

221. *Id.*

222. LICHTBLAU, *supra* note 40, at 50.

223. *See, e.g.*, 12 U.S.C. § 3414; 15 U.S.C. § 1681u; 18 U.S.C. § 2709.

224. *See, e.g.*, 18 U.S.C. § 2709(c). Moreover, keep in mind that the provision allowing the recipient to seek the advice of a lawyer was added only in 2006—after the incident discussed in this subpart. *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, § 116, 120 Stat. 192, 213 (2006).

225. Peter T. King, *Remembering the Lessons of 9/11: Preserving Tools and Authorities in the Fight Against Terrorism*, 41 J. LEGIS. 173, 177 (2014–15); Valerie

can also be abused due to the minimal oversight outside the Executive Branch.

In 2005, the *Washington Post* reported that the FBI was issuing as many as 30,000 national security letters a year since 9/11—an increase of 100 times over pre-9/11 totals.[226] In response to this alarming report, Assistant Attorney General William Moschella sent a letter to Congress in which he stated, "We urge the Congress not to let a distorted and misleading portrayal of the FBI's use of this vital investigative tool skew the debate over how best to ensure our national security."[227] Moschella further asserted that the 30,000 figure was "erroneous."[228] As to the annual number of national security letters issued, the Justice Department suggested that the true figure was around 9,000, rather than the 30,000 asserted by the *Washington Post*.[229] In fact, the Office of the Inspector General subsequently determined that there were over 39,000 national security letters issued in 2003, over 56,000 in 2004, and over 47,000 in 2005.[230] Moschella's claim was true only insofar as the figure was "erroneous," but still misleading as the Justice Department's claim of 9,000 was directionally false.

5. Benghazi. A final example in this subcategory involves the aftermath of the attack on the U.S. Embassy in Benghazi, Libya, on September 11, 2012, in which U.S. Ambassador Christopher Stevens and three other Americans died when Libyan militants stormed the building.[231] One point of contention that emerged between the Obama Administration and its political critics was whether the embassy attack was spontaneous and hence less foreseeable, or planned and arguably a consequence of the decision to support NATO in launching the

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Caproni, *Surveillance and Transparency*, 11 LEWIS & CLARK L. REV. 1087, 1094–95 (2007); *but see* Christophir Kerr, *What the Real Jack Bauers Really Need: A New Subpoena*, 1 WM. & MARY POL'Y REV. 51, 54–55 (2010) (arguing that national security letters needed to be strengthened because they were too weak to be useful).

226. *See* Barton Gellman, *The FBI's Secret Scrutiny*, WASH. POST (Nov. 6, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/05/AR2005110501366.html.

227. *See* Letter from William E. Moschella, Assistant Attorney General, to the Honorable Arlen Specter, Nov. 23, 2005, at 10, http://www.washingtonpost.com/wp-srv/nation/documents/dojletter112305.pdf.

228. *Id.* at 9.

229. *See* LICHTBLAU, *supra* note 40, at 96; Gellman, *supra* note 226.

230. U.S. DEP'T OF JUSTICE, OFFICE. OF INSPECTOR GEN., A REVIEW OF THE FEDERAL BUREAU INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS xix (2007).

231. For a riveting on the ground account of the Benghazi attack, *see generally* MITCHELL ZUCKOFF, 13 HOURS: THE INSIDE ACCOUNT OF WHAT REALLY HAPPENED IN BENGHAZI (2014).

military strikes in 2011 that ultimately deposed Libyan leader Muammar Gaddafi and led to an ensuing civil war in that country.[232] Over the next few days, several members of the Obama Administration made statements to varying degrees that the attack resulted from a spontaneous local riot in response to an inflammatory video posted on YouTube entitled "Innocence of Muslims," which satirized or mocked the Muslim prophet Muhammud.[233]

On the evening of the attack, Secretary of State Hillary Clinton stated publicly that:

> Some have sought to justify this vicious behavior as a response to inflammatory material posted on the Internet. The United States deplores any intentional effort to denigrate the religious beliefs of others. But let me be clear: There is never any justification for violent acts of this kind.[234]

A few days later, Press Secretary Jay Carney told reporters in the White House that:

> We also need to understand that this is a fairly volatile situation and it is in response not to United States policy, not to obviously the administration, not to the American people. It is in response to a video, a film that we have judged to be reprehensible and disgusting. That in no way justifies any violent reaction to it, but this is not a case of protests directed at the United States writ large or at U.S. policy. This is in response to a video that is offensive to Muslims.[235]

On September 16, U.S. Ambassador to the United Nations Susan Rice appeared on a number of Sunday talk shows and repeated the assertion that the preliminary view was that the

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232. *See* Jo Becker & Scott Shane, *Clinton, 'Smart Power' and a Dictator's Fall*, N.Y. TIMES (Feb. 26, 2016), https://www.nytimes.com/2016/02/28/us/politics/hillary-clinton-libya.html.

233. *See* Eugene Kiely, *Benghazi Timeline*, FACTCHECK.ORG (Oct. 26, 2012), http://www.factcheck.org/2012/10/benghazi-timeline/ [https://perma.cc/P6B8-DXY9] (last updated June 29, 2016) (citing Hillary Clinton, Sec'y of State, United States State Department, Remarks at Reception Marking Eid ul-Fitr, (Sept. 13, 2012), https://web.archive.org/web/20120916052310/http://www.state.gov/secretary/rm/2012/09/197735.htm [https://perma.cc/W66T-KTT5]; Press Briefing, Jay Carney, Press Sec'y, White House, Office of Press Sec'y (Sept. 14. 2012); Interview by Bob Schieffer, CBS News, with Magariaf, Amb. Rice, Libyan President and John McCain, U.S. Senator (Sept. 16, 2012)).

234. *See* Arshad Mohammed, *U.S. Confirms Death of Official in Benghazi Attack*, REUTERS (Sept. 11, 2012) http://www.reuters.com/article/us-libya-usa-clinton/u-s-confirms-death-of-official-in-benghazi-attack idUSBRE88B03F20120912.

235. *See* Press Briefing, Jay Carney, Press Sec'y, White House, Office of Press Sec'y (Sept. 14. 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/09/14/press-briefing-press-secretary-jay-carney-9142012 [https://perma.cc/A6RD-VSWK].

Benghazi attack was provoked by the "Innocence of Muslims" video.[236] As late as September 25, two weeks after the attack, President Obama appeared before the United Nations and stated:

> There are no words that excuse the killing of innocents. There is no video that justifies an attack on an embassy. There is no slander that provides an excuse for people to burn a restaurant in Lebanon, or destroy a school in Tunis, or cause death and destruction in Pakistan.[237]

To be sure, Obama did quickly state the day after the attack that "[n]o acts of terror will ever shake the resolve of this great nation."[238] Nevertheless, he muddled the message with subsequent conflicting statements such that PolitiFact rated as "Half True" the claim by Republican presidential candidate Mitt Romney that Obama waited fourteen days to call the attack an act of terrorism.[239]

Even stranger, in a private e-mail to her daughter just an hour after the attack, Secretary Clinton wrote: "Two of our officers were killed in Benghazi by an al Qaeda-like group."[240] She also admitted privately to Egyptian Prime Minister Hisham Kandil the next day that "[w]e know that the attack in Libya had nothing to do with the film. It was a planned attack—not a

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236. *See* Erik Schmitt, *After Benghazi Attack, Talk Lagged Behind Intelligence*, N.Y. TIMES (Oct. 21, 2012), http://nyti.ms/TBG2Fh; *see also* Interview by Candy Crowley, CNN: State Union, with Benjamin Netanyahu, Susan Rice, Nancy Pelosi, and Rudy Giuliani (Sept. 16, 2012). ("There was a hateful video that was disseminated on the internet. It had nothing to do with the United States government and it's one that we find disgusting and reprehensible. It's been offensive to many, many people around the world.

That sparked violence in various parts of the world, including violence directed against western facilities including our embassies and consulates. That violence is absolutely unacceptable, it's not a response that one can ever condone when it comes to such a video. And we have been working very closely and, indeed, effectively with the governments in the region and around the world to secure our personnel, secure our embassy, condemn the violent response to this video.")

237. *See* President Barack Obama, Address to United Nations General Assembly (Sept. 25, 2012).

238. Press Release, President Barack Obama, White House, Office of Press Sec'y (Sept. 12, 2012).

239. *See* Jon Greenberg, *Romney Says Obama Waited 14 Days to Call Libya Attack Terror*, POLITIFACT (Oct. 17, 2012), http://www.politifact.com/truth-o-meter/statements/2012/oct/17/mitt-romney/romney-says-obama-waited-14-days-call-libya-attack/ [https://perma.cc/4548-3M25].

240. *See* Kelly McLaughlin, *Hillary Told Daughter Chelsea that an 'Al-Qaeda-Like Group' Carried out the Benghazi Attack in an Email Sent the Night of the Deadly Consulate Assault*, DAILY MAIL, http://www.dailymail.co.uk/news/article-3404112/Emails-Hillary-Clinton-daughter-Chelsea-night-Benghazi-attacks-revealed.html#ixzz4XK4TiqCq (last updated Jan. 18, 2016).

protest."[241] In her written account of her time as Secretary of State, Clinton explained that:

> In the heat of the crisis we had no way of knowing for sure what combination of factors motivated the assault or whether and how long it had been planned. I was clear about this in my remarks the next morning, and in the days that followed administration officials continued to tell the American people that we had incomplete information and were still looking for answers. There were many theories—but still little evidence. I myself went back and forth on what likely happened, who did it, and what mix of factors—like the video—played a role. But it was unquestionably inciting the region and triggering protests all over, so it would have been strange not to consider, as days of protests unfolded, that it might have had the same effect here, too.[242]

Secretary Clinton's Deputy Chief of Staff for Policy, Jacob Sullivan, also explained in his congressional testimony that Secretary Clinton's initial public statement—the one including the "some have sought to justify this vicious behavior" line—was crafted carefully to indicate that "we didn't know the motives of the actual attackers of Benghazi, so I didn't want to say they did it because of the video, and so I chose the words very carefully to say that some have sought to justify it on that basis."[243]

III. WHY ISN'T SILENCE GOLDEN? THE PRESSURE TO LIE

As the previous Part showed, Executive Branch national security lies fall into different categories, so the extent of harm to the interests of the public, Congress, federal courts, and other stakeholders cannot be distilled into a single conclusion. At the outset, however, we should acknowledge that whether a government official keeps secret about a national security matter or provides false information about it, the public is being denied accurate and truthful information about critical national/foreign policy.

On the other hand, there surely can be a qualitative difference between silence and deception. Historian Eric

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241. HOUSE OF REPRESENTATIVES SELECT COMM. ON BENGHAZI, FINAL REPORT OF THE SELECT COMMITTEE ON THE EVENTS SURROUNDING THE 2012 TERRORIST ATTACK IN BENGHAZI, H.R. REP. NO. 114–848, at 166 (2016).

242. HILLARY CLINTON, HARD CHOICES 402 (2014).

243. *See* HOUSE OF REPRESENTATIVES SELECT COMM. ON BENGHAZI, MINORITY VIEWS: HONORING COURAGE, IMPROVING SECURITY, AND FIGHTING THE EXPLOITATION OF A TRAGEDY, H.R. Rep. No. 114–848, at 868 (2016).

Alterman notes that in 1795, President Washington sought congressional funding to implement a treaty that his Administration had negotiated with Great Britain, but that he refused to provide any details of the treaty despite being asked.[244] This, Alterman argues, was "anti-democratic behavior . . . but . . . admirably honest," because Congress was not misled at all about what it was being asked to fund; it was simply being kept in the dark.[245] Thus, if Congress had really wanted to know what the treaty was about, it could have denied funding, and then it would have been a test of whether Washington's desire for funding to implement the treaty outweighed his desire to keep the terms of the treaty secret. If, however, the President had lied about the terms of the treaty, then Congress might have been misled into funding a treaty that it would not have supported had it known the true facts. More recently, when William Colby became Director of the CIA in the early 1970s, he asserted that "we can give the American people true statements, and keep secret other matters that have to be secret [b]ut I do not believe we can tell them an untruth."[246]

Modern interpretation of the Fifth Amendment's Self-Incrimination Clause supports the distinction between silence/secrecy versus deception, at least in criminal matters. In *Murphy v. Waterfront Commission of N.Y. Harbor*, the Supreme Court noted that, without the right against self-incrimination, a defendant forced to testify in any government inquiry would face a "cruel trilemma" consisting of "self-accusation, perjury or contempt."[247] None of these options were acceptable. The key to escaping this dilemma was silence, thereby doing away with contempt sanctions for refusing to self-incriminate.[248] Nevertheless, this broad scope of the Fifth Amendment has had its critics. Judge Henry Friendly argued that "[n]o parent would teach such a doctrine to his children; the lesson parents preach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clean breast of it will not be."[249]

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244. ALTERMAN, *supra* note 5, at 15.

245. *Id.*

246. William J. Daugherty, *Approval and Review of Covert Action Programs Since Reagan*, 17 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 62, 64 (2004) (quoting William E. Colby, *The CIA's Covert Action*, THE CENTER MAG., at 71, 76 (Mar. – Apr. 1975)).

247. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

248. *Id.* at 79–80; *See also* Brogan v. United States, 522 U.S. 398 (1998).

249. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 680 (1968); *but see* Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 140–43 (2001) (arguing that a defendant's pre-trial silence should not be admissible).

While the Court has embraced the right to silence,[250] it has shown little to no tolerance for false responses to government officials. Thus, when given the chance to opine on the validity of the "exculpatory no" defense, under which a simple false denial of guilt would not constitute a violation of § 1001, the Court concluded that the text of the statute did not encompass such a defense,[251] in the process overruling at least seven lower federal courts.[252] The Court rejected the defendant's argument that for a suspect facing questioning by law enforcement agents, silence was just as unpalatable a choice as lying or self-incriminating:

> In order to validate the "exculpatory no," the elements of this "cruel trilemma" have now been altered—ratcheted up, as it were, so that the right to remain silent, which was the *liberation* from the original trilemma, is now *itself* a cruelty. We are not disposed to write into our law this species of compassion inflation.[253]

Brogan's reasoning can make sense only in the context of criminal investigations and prosecutions, where there are officially no negative consequences to remaining silent. Criminal suspects under arrest are informed that they have the right to remain silent (among other rights).[254] If the suspect decides to go to trial, he or she cannot be forced to testify, and furthermore, the prosecutor cannot comment on the defendant's choice not to take the witness stand.[255] Therefore, the only official "cost" to the defendant of invoking the right to silence is the lost opportunity to tell one's side of the story. The jury is, in fact, generally instructed along the lines of: "[a] defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that the defendant did not testify."[256]

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250. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (requiring the recitation to criminal suspects in custody of their right to remain silent, among other rights, and waiver of such rights as a precedent condition to make custodial confessions admissible in court).

251. *Brogan*, 522 U.S. at 408.

252. *See, e.g.*, Moser v. United States, 18 F.3d 469, 473-74 (7th Cir. 1994); United States v. Taylor, 907 F.2d 801, 805–06 (8th Cir. 1990); United States v. Equihua-Juarez, 851 F.2d 1222, 1224 (9th Cir. 1988); United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988); United States v. Tabor, 788 F.2d 714, 717-19 (11th Cir. 1986); United States v. Fitzgibbon, 619 F.2d 874, 880-81 (10th Cir. 1980); United States v. Chevoor, 526 F.2d 178, 183-84 (1st Cir. 1975).

253. *Brogan*, 522 U.S. at 404.

254. *See Miranda*, 384 U.S. at 479.

255. *See* Griffin v. California, 380 U.S. 609, 615 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.").

256. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS 3.3 (2010), at 38.

Whether the jury obeys the instruction is a different matter,[257] but at least the instruction makes clear that the law treats silence as equally consistent with innocence or guilt in the criminal process.

However, the rule against drawing adverse inferences does not necessarily apply in civil or administrative matters. The Securities and Exchange Commission, for example, has frequently sought to draw adverse inferences based on its targets' failure "to testify in response to probative evidence offered against them," with a fair degree of success.[258] In *Baxter v. Palmigiano*, the Supreme Court suggested that a major reason for the prohibition of adverse inferences against non-testifying defendants in criminal cases were that the "stakes are higher and the State's sole interest is to convict."[259]

Importantly, Executive Branch officials generally stand in a different position compared to the typical civil defendant when it comes to adverse inferences based on silence, due to the availability of the state secrets doctrine. This doctrine enables the federal government not only to shield relevant but sensitive evidence whose public disclosure in civil litigation could harm national security, but also to seek dismissal of the case due to the government's inability to litigate effectively without the evidence.[260] Without this defense, the government might find itself in a difficult dilemma: reveal the national security secrets,

257. It is possible that a jury, despite (or perhaps because of) this instruction, will infer guilt from the defendant's failure to testify, which was why the defense lawyer in *Lakeside v. Oregon*, did not want the judge to give a "no inference" instruction to the jury. Lakeside v. Oregon, 435 U.S. 333, 335 (1978). The Court agreed that it "may be wise for a trial judge not to give" the instruction when the defense objects, but held that giving the instruction was not a due process violation. *Id.* at 340–41. While there is little that can be done to police such a jury, the Court has more recently expressed a sanguine view that jurors will respect the "no inference" instruction. *See* Mitchell v. United States, 526 U.S. 314, 329–30 (1999) ("Principles once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition."); Portuondo v. Agard, 529 U.S. 61, 67 (2000) ("It is reasonable enough to expect a jury to comply with that instruction since, as we observed in *Griffin*, the inference of guilt from silence is not always 'natural or irresistible.'").

258. *See, e.g.*, SEC v. Jasper, 678 F.3d 1116, 1125 (9th Cir. 2012) (citing Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)); SEC v. Brown, 658 F.3d 858, at 863 (8th Cir. 2011) (citing *Baxter*, 425 U.S. at 320); SEC v. Levine, 279 Fed. Appx. at *8 (D.C. Cir. 2008) (citing *Baxter*, 425 U.S. at 318); SEC v. Brennan, 230 F.3d 65, 76 n.1 (2d Cir. 2000) (citing *Baxter*, 425 U.S. at 318–20); SEC v. Graystone Nash, Inc., 25 F.3d 187, 190 (3d Cir. 1994) (citing *Baxter*, 425 U.S. at 318); SEC v. Cherif, 933 F.2d 403, 412 (7th Cir. 1991) (citing *Baxter*, 425 U.S. at 318).

259. *Baxter*, 425 U.S. 308 at 318–19.

260. United States v. Reynolds, 345 U.S. 1, 10 (1953); *see also* Totten v. United States, 92 U.S. 105, 107 (1875).

or keep the secrets and lose the case.[261] Thus, the Bush Administration defeated a civil rights lawsuit brought by a former detainee alleging torture following his extraordinary rendition at the pleading stage, on the grounds that an attempt to defend against the detainee's claims would unreasonably risk exposure of CIA means and methods.[262] Between September 11, 2001, and 2006, the Bush Administration invoked the state secrets doctrine in at least 18 cases with published opinions.[263]

To the extent that the federal government seeks to avoid being sanctioned for failing to produce discoverable evidence (that is, to be subjected to a penalty not unlike the adverse inference that can be drawn when a party invokes the Fifth Amendment in a civil matter), the state secrets doctrine more than adequately vindicates the government's interest. The government not only gets to shield evidence that would tend to support the plaintiff's case, but also gets to argue that it cannot defend itself adequately because it will not disclose evidence that would support its defense.[264] Where government actors seek to avoid civil liability, the state secrets privilege discussed earlier provides effective protection.

Where the goal is to avoid disclosure of secret or covert government activity, however, invocations of privilege or of silence may be tantamount to admission of the existence of the secret. One prime example dates back to a 2006 Senate hearing on the scope of the National Security Administration's warrantless surveillance program during the Bush Administration. When Attorney General Alberto Gonzales testified that the President had lawfully ordered the secret surveillance pursuant to his Commander-in-Chief powers, Senator Dianne Feinstein asked, "Has the president ever invoked this authority with respect to any activity other than NSA surveillance?"[265] Gonzales essentially claimed the right to remain silent, saying "I am not comfortable going down the road of saying yes or no as to what the president has or hasn't

261. A related issue occurs in federal criminal prosecutions, where classified information becomes relevant to the case (especially if possibly exculpatory and therefore required to be disclosed to the defense under *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). To ameliorate this problem, Congress enacted the Classified Information Procedures Act, which permits the government, with court approval, to provide an adequate substitute or stipulation for the classified information. 18 U.S.C. App. III §6(c) (2012).

262. El-Masri v. United States, 479 F.3d. 296, 311–313 (4th Cir. 2007).

263. *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1315, 1329–32 (2007) (Appendix listing cases).

264. *See, e.g.*, *Totten*, 92 U.S. at 107.

265. SHANE HARRIS, THE WATCHERS 289 (2006)

authorized."[266] In doing so, he let the secret out in the open; as journalist Shane Harris observes, "[f]or the moment everyone knew that the Bush administration had been covering up and deceiving Congress for years. Anyone could see that there was more to 'the program' than Gonzales was letting on."[267]

Gonzales might have preferred to respond falsely, "No, the President has not otherwise invoked this authority," thereby deceiving the targets of the secret surveillance as well as Feinstein and other members of Congress. In this particular circumstance, such a lie might have accomplished what his attempted invocation of silence failed to do, which is to say, to keep certain surveillance programs secret. But would such a lie have been justified?

IV. HARMS OF NATIONAL SECURITY LIES

It is easy to criticize executive branch lies of any sort as causing harms such as damaging the prestige of the White House and the credibility of the President or distorting public support for government proposals. National security lies are especially subject to some of these criticisms because they threaten our constitutional structure more than political lies do: they are typically more difficult to detect, and they impede Congress' ability to gather national security information. Consider the related issue of government secrecy and over-classification of information. As one commentator notes:

> It is frequently too easy for government officials (usually in the executive branch of government) to claim special, inside knowledge about a matter and, for alleged national security reasons, not to share that knowledge with all citizens (or even with most members of Congress). Then, citizens (or Congress) are put into a position of having to accept the decision of the governmental official who has the knowledge, the insider's rationale being that, if others knew what the insider knows, they would agree with the insider's judgement. The use of secrecy to limit debate and citizen control of government can undermine the government's credibility, legitimacy, and efficiency.[268]

Nonetheless, when the Executive Branch invokes secrecy to conceal information, Congress at least is made aware that it is in an asymmetric situation where it does not know as much as the

266. *Id.*

267. *Id.*

268. ARVIN S. QUIST, SECURITY CLASSIFICATION OF INFORMATION 136 (rev. ed. 2002).

President does. Legislators can either accept the President's representation that the classified/concealed information would, if disclosed, persuade them to support the President; or discount the information. When an executive branch official lies about a national security matter, however, legislators are lulled into believing that they have the same information that the President has. They might still discount the national security lie (which, of course, they would not know to be a lie), but that would require a different kind of skepticism than discounting concealed information. Without access to relevant and needed information that has been kept secret by the Executive Branch, Congress may be unable to legislate or otherwise provide oversight on areas within its institutional domain.[269]

Ordinary political lies do not suffer from the problem of asymmetric information, where Congress and the public lack access to critical information that the Executive Branch possesses. Compare the asymmetry of information in the national security context to the more even playing field present with most political lies. Consider, for example, President Obama's repeated statements in support of the Affordable Care Act in 2009 that "if you like your health-care plan, you'll be able to keep your health-care plan, period. No one will take it away, no matter what."[270] Because the Affordable Care Act imposed a requirement that health insurance include "essential benefits," its implementation in 2013 necessarily forced insurance companies to cancel incompatible policies and to replace them with ones that offered the requisite greater scope of coverage, albeit with higher premiums.[271] Critics charged the President with having lied in 2009.[272] (One can, of course, quibble about whether President

269. McGrain v. Daugherty, 273 U.S. 135, 175 (1927) ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information.").

270. President Barack Obama, Address to the Am. Med. Ass'n (June 15, 2009), https://www.cbsnews.com/news/text-obamas-ama-speech-on-health-care/.

271. 42 U.S.C. § 18022 (2012); See Jonathan Cohn, *Obama Made a Misleading Statement About Obamacare Rates*, NEW REPUBLIC (Aug. 12, 2013), https://newrepublic.com/article/114270/obama-obamacare-press-conference-misleading-rate-shock [https://perma.cc/4EAQ-7P93]. The policies at issue here are individual policies purchased on the open market, as opposed to employer-provided health plans. *See Insurance Policies Not Worth Keeping*, N.Y. TIMES SUNDAY REVIEW, Nov. 3, 2013, at 10 SR.

272. The Washington Post's "Fact Checker" rated it as four Pinocchios. *See* Glenn Kessler, *The Fact Checker: Obama's Pledge That 'No One Will Take Away' Your Health Plan*, WASH. POST (Oct. 30, 2013) http://www.washingtonpost.com/blogs/fact-checker/wp/2013/10/30/obamas-pledge-that-no-one-will-take-away-your-health-plan/?hpid=z1; *see also* Kessler, *supra* note 15 (explaining that a four Pinocchios rating means the claim is a "whopper."). PolitiFact declared it the "Lie of the Year." *See* Holan,

Obama in fact lied, as opposed to misspoke,[273] oversimplified, over-promised, or simply engaged in puffery,[274] but the point is that the statement was false.) Nevertheless, the falsity of the President's claim that "if you like your health-plan, you'll be able to keep your health-plan, period" was arguably apparent given the text of the statute.[275] In fact, various contemporaneous news accounts did point out the incongruity between the President's repeated claim and the actual requirements of the Affordable Care Act.[276] Moreover, if the Executive Branch had concealed material information about the Affordable Care Act in order to shield it, the very concealment itself would be apparent and likely subject to withering criticism.[277]

One measure of the degree of harm imposed by a national security lie is to consider whether the government would have been able to obtain a prior restraint to block publication of the information that it is seeking to conceal through its deception. After all, if the justification for a national security lie is that silence would be functionally equivalent to an acknowledgment of the truth, which would damage American national security irreparably, then at a minimum, the government should be able to satisfy the extremely high bar for persuading a court to order silence on a speaker.

In *Near v. Minnesota*, the Supreme Court held that the First Amendment generally prohibits the issuance of prior restraints, certainly over alleged defamation, but noted that in exceptional circumstances, the government might well succeed in blocking "publication of the sailing dates of transports or the number and location of troops."[278] This national security exception was

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supra note 13.

273. *See Insurance Policies Not Worth Keeping*, *supra* note 271.

274. *Cf.* Hoffman, *supra* note 218, at 1400 n.24.

275. Obama, *supra* note 270.

276. *See, e.g.*, Calvin Woodward, *Obamacare Fact Check: Slippery Claims on Health Care Law Costs, Coverage, Budget*, ASSOC. PRESS (last updated Sept. 29, 2013), https://www.deseretnews.com/article/765638789/FACT-CHECK-Slippery-claims-on-healthlaw-budget.html [https://perma.cc/3KMS-K7YY].

277. Consider, for example, then-House Speaker Nancy Pelosi's unfortunately phrased defense of the Affordable Care Act during the lead-up to its passage, when she said, "[W]e have to pass [this] bill so that you can find out what's in it." *See, e.g.*, Jonathan Capeheart, *Pelosi Defends Her Infamous Health Care Remark*, WASH. POST (June 20, 2012), http://www.washingtonpost.com/blogs/post-partisan/post/pelosi-defends-her-infamous-health-care-remark/2012/06/20/gJQAqch6qV_blog.html. Although the full context of her entire statement demonstrates that she was trying to say that the Affordable Care Act did not contain "death panels" or abortion-related provisions, she also conceded that the quoted line was "a good statement to take out of context." *See id.*

278. Near v. Minnesota, 283 U.S. 697, 716 (1931).

apparently uncontroversial even among the strongest free speech advocates on the Court, Justices Brandeis and Holmes.[279]

Near's dicta resurfaced in *The Pentagon Papers Case*,[280] in which the Court considered whether the United States could secure prior restraints to block the *New York Times* and the *Washington Post* from publishing lengthy excerpts from a secret government study about the origins of the Vietnam War,[281] while the military conflict was still raging in Asia. The district court had granted the prior restraint against the *New York Times*, and while the newspaper was appealing that injunction, the *Washington Post* began publishing additional excerpts,[282] until the government obtained an injunction against that paper as well.[283] The Supreme Court accepted review on an expedited schedule and then reversed the injunctions by a 6-3 vote via a short per curiam opinion noting merely that the government had failed to carry the high burden needed to justify a prior restraint.[284]

The prior restraint analogy suggests that *some* national security lies might not cause unjustifiable public harm if the national security lie operates to mislead or deceive the public, including our adversaries, from discovering the modern equivalents of sailing dates or troop movements, especially if the lie is uttered in a context where silence would have been tantamount to admitting the secret. On the other hand, the prior restraint analogy also suggests that *other* national security lies do cause unjustifiable public harm.

Some factors relevant to a retrospective evaluation of the harm caused by a national security lie include the specificity of the question(s) that provoked the lie; the impact of the lie on future governance; the anticipated duration of the lie; and the inevitability (or lack thereof) of the eventual disclosure of the lie due to external events.

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279. *See* FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS 141 (1981).

280. United States v. New York Times Co., 403 U.S. 713, 714 (1971) ("The Pentagon Papers Case").

281. Daniel Ellsberg, a former RAND Corp. analyst and author of portions of the Pentagon Papers while working for the Department of Defense, gained access to the entire 7000 pages of the study, photocopied it, and made the bulk of it available to *New York Times* reporter Neil Sheehan. *See* DAVID RUDENSTINE, THE DAY THE PRESSED STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 33–40, 46–47 (1996).

282. Ellsberg provided the *Post* with an additional set of the Pentagon Papers. *See id.* at 127–128, 134–35.

283. *Id.* at 169.

284. *The Pentagon Papers Case*, 403 U.S. at 714.

Specificity of the question(s) that provoked the lie: Consider May 2011, when President Obama gave the go-ahead for the secret mission to capture or kill Osama bin Laden.[285] At a general press conference, there would have been an obvious difference in the specificity between the question "is the government studying any military options for capturing or killing Osama bin Laden?" versus the question "do you know where Osama bin Laden is located and are there American troops hunting him right now?" President Obama could have answered the first question truthfully or declined to answer without necessarily alerting bin Laden that he was going to be doomed; indeed, a false response likely would have been unbelievable and therefore provided no increase in operational security. A truthful answer to the second question might well have been disastrous, and a refusal to answer would most reasonably have been interpreted as "yes," and again risked alerting bin Laden to escape. Accordingly, a national security lie in response to the second question would be more defensible than a national security lie to the first question.

Impact of the lie on future governance: President Eisenhower's lie regarding the U-2 plane probably harmed American prestige in the eyes of the world as well as caused embarrassment when Nikita Khrushchev skillfully exploited the propaganda value of having captured pilot Gary Powers alive. That lie had, however, little to no impact on future governance. It did not conceal or enable a controversial or potentially unlawful government program (such as Stellar Wind).[286] One might argue that it is possible that President Eisenhower would have been emboldened had the U-2 lie been successful at concealing the true purpose of the surveillance mission (if, for example, the plane had been destroyed when it crashed), and continued to send additional U-2 flights. The key, however, is that Eisenhower's lie was only an indirect effort to conceal the existence of the surveillance missions; the main purpose was to explain why an American plane had strayed into Soviet airspace.[287] Even if the world had believed Eisenhower's fiction, any future U-2 flights would have been at similar risk of being shot down.

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285. *See* MARK BOWDEN, THE FINISH: THE KILLING OF OSAMA BIN LADEN 208–09, 230 (2012).

286. *See* Michael Isikoff, *The Whistleblower Who Exposed Warrantless Wiretaps*, NEWSWEEK (Dec. 12, 2008), http://www.newsweek.com/whistleblower-who-exposed-warrantless-wiretaps-82805 (explaining that "Stellar Wind" was the codename of NSA secret intelligence gathering activites conducted without judicial review).

287. *See* BESCHLOSS, *supra* note 192, at 372.

Inevitability of the eventual disclosure of the lie due to external events: A final consideration is whether the national security lie would have been disclosed inevitably due to external events without being unearthed by the press or leaked by whistleblowers. For example, if Operation Eagle Claw had been successful, the various lies by the Carter Administration would have been exposed, because the miraculous appearance of the American hostages would have given away the fact that there had been a rescue operation. The harm from that lie would therefore be minimal.

V. POTENTIAL CONSEQUENCES OF EXECUTIVE OFFICER (NATIONAL SECURITY) LIES

Suppose that an executive branch official is caught in a national security lie, and the official's justification fails to satisfy the public such that the President feels the need to take some corrective action. What are the potential consequences that can be inflicted on the official?

A. Criminal Liability for Executive Branch Officers Who Lie

It may seem odd to contemplate an Executive Branch officer being prosecuted for national security lies, given that prosecution is a core executive function.[288] A federal prosecutor who brings charges against an Executive Branch official would be pursuing a fellow executive officer, a potentially tricky dilemma if the prosecutor and target are close working colleagues, share political ideologies, or are otherwise important members of the Presidential administration. But of course, not all prosecutions of executive branch officers (not necessarily limited to lying-offenses) involve very high-level officers; it is not unheard of for lower-level CIA agents or other inferior officers to find themselves in the crosshairs of federal prosecutors.[289]

Even considering high-level officers, there are a number of ways in which such prosecutions could occur. At various times in the past, Attorneys General have appointed special prosecutors to investigate potential executive branch misconduct without laboring under a conflict of interest. Following the Watergate scandal and the Saturday Night Massacre,[290] Congress passed

288. *See* Morrison v. Olson, 487 U.S. 654, 685 (1988).

289. *See, e.g.*, United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990) (affirming dismissal of indictment against the CIA's Costa Rica station chief, due to government noncompliance with the Classified Information Procedures Act).

290. On October 20, 1973, President Nixon directed Attorney General Richardson to fire Special Prosecutor Archibald Cox. Richardson declined to do so and resigned instead.

the Ethics in Government Act, which created an independent counsel position to be selected by a panel of federal judges whenever the Attorney General was presented with credible evidence of wrongdoing by the President, Vice-President, and other high-level Executive Branch officials.[291] Independent counsels appointed pursuant to this statute prosecuted officials in the Reagan, Bush, and Clinton Administrations for various crimes, including the lying-related ones.[292] The Ethics in Government Act contained a sunset provision, and when it expired, Congress opted not to renew it, so this particular avenue for prosecution of executive branch officers is not currently available.[293] Of course, special prosecutors remain a possibility, though subject to the Attorney General's willingness to appoint them.

Finally, *former* high-level executive officers can find themselves targets of prosecution by a subsequent Administration, particularly if the new Administration views the actions of its predecessor as potentially criminal. This does not always take place; although Barack Obama campaigned clearly against the perceived excesses of the Bush Administration's counterterrorism policy, including waterboarding and other abusive treatment of suspected al Qaeda detainees, his Administration did not prosecute any high-level Bush Administration officers.[294] Still, the possibility of prosecution by a future Administration cannot be discounted completely, which may explain why some Presidents have issued end-of-term pardons to executive branch officials before any prosecutions have commenced.[295]

The federal criminal statutes most likely applicable to national security lies are those prohibiting false statements to federal officials, perjury, and obstruction of justice. Of course, depending on the circumstances, not every national security lie

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Nixon then directed Deputy Attorney General Ruckelshaus to fire Cox. Ruckelshaus also declined to do so and resigned. *October 20, 1973: Watergate Special Prosecutor Dismissed*, HISTORY.COM (2009), http://www.history.com/this-day-in-history/watergate-special-prosecutor-dismissed [https://perma.cc/GQB9-ZMVP]. It fell upon Solicitor General Robert Bork, third in the Justice Department, to carry out the order, which he did. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A01.

291. Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824 (1978).

292. *See* Niles L. Godes & Ty E. Howard, *Independent Counsel Investigations*, 35 AM. CRIM. L. REV. 875, 892 & n.157 (1998).

293. *See* L. Darnell Weeden, *A Post-Impeachment Indictment of the Independent Counsel Statute*, 25 N. KY. L. REV. 536, 539 (2001).

294. *See* Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 583 (2013).

295. *See infra* Part V.D.

will in fact fall within any of these statutes, and furthermore, there are judicially recognized defenses that may defeat a prosecution attempt.

1. False statements. Under 18 U.S.C. § 1001, it is a federal crime to make a false statement knowingly and willfully "in any matter within the jurisdiction of the executive, legislative, or judicial branch" of the federal government.[296] Although § 1001 prosecutions typically involve allegedly false statements made to federal agents (i.e., Executive Branch employees), the 1996 legislative revisions include lies made to Congress within the scope of the statute.[297]

A number of features make § 1001 a particularly potent tool for prosecutors, including the absence of requirements that the speaker be under oath at the time that the false statement is uttered, or that the government officials were successfully deceived or even influenced by the false statement.[298] Critics of § 1001 have complained that the statute is so broad so as to enable the federal government to manufacture a crime where none would otherwise exist.[299] Despite this criticism, Congress has declined to amend the statute to limit its reach.

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296. 18 U.S.C. § 1001.

297. *See, e.g.*, House Rep. No. 104-680, 104th Cong., 2d Sess. (1996); *see also* United States Attorneys' Manual, at 9-902 ("The new statute effectively overrules *Hubbard*, and expressly provides that § 1001 covers false statements that are made to all three branches of the federal government, without regard to whether the entity may be categorized as a 'department' or 'agency.'"). Previously, § 1001 stated that it covered any false statement "within the jurisdiction of any department or agency of the United States." In *United States v. Bramblett*, 348 U.S. 503 (1955), the Court confirmed that the statute applied to false statements made by a legislator to the House of Representatives' Disbursing Office. However, in *Hubbard v. United States*, 514 U.S. 695 (1995), the Court reversed course and concluded the judicially-created "judicial function" exception to §§ 1001 demonstrated that *Bramblett* was seriously flawed, and that a more narrow interpretation of "department or agency" was appropriate. *Id.* The 1996 revisions legislatively overruled *Hubbard*. *See 1996 Amendments to 18 U.S.C. § 1001*, U.S. DEP'T. OF JUSTICE, OFFICE OF THE U.S. ATTORNEYS, https://www.justice.gov/usam/criminal-resource-manual-902-1996-amendments-18-usc-1001 [https://perma.cc/E2EB-XGWE].

298. *See, e.g.*, United States v. LeMaster, 54 F.3d 1224, 1231 (6th Cir. 1995); United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992); United States v. Service Deli Inc., 151 F.3d 938, 941 (9th Cir. 1998). For more discussion of § 1001's history and purpose, see Tung Yin, *Independent Appellate Review of Knowledge of Falsity in Defamation and False Statements Cases*, 15 BERK. J. CRIM. L. 325, 331–38 (2010).

299. *See* Brogan v. United States, 522 U.S. 398, 410 (1998) (Ginsburg, J., concurring) (discussing United States v. Tabor, 788 F.2d 714 (11th Cir. 1986), in which the federal government successfully prosecuted a notary public for falsely denying that she had violated state law). One of the persistent objections to the government's false statements case against entrepreneur Martha Stewart was that she was convicted for lying about something that wasn't a crime. *See* Jeffrey Toobin, *A Bad Thing: Why Did Martha Stewart Lose?*, THE NEW YORKER (Mar. 22, 2004), https://www.newyorker.com/magazine/2004/03/22/a-bad-thing.

However, actual cases of § 1001 prosecutions involving false statements to Congress are almost non-existent. A former Congressman was convicted in 1953 of lying to the Disbursing Office of the House of Representatives when he falsely claimed that a woman was his official clerk and therefore should be paid.[300] The Supreme Court rejected the defendant's argument that § 1001 did not apply to statements made outside the Executive Branch, noting that neither the legislative history nor purpose of the statute supported such a narrow reading.[301] Thirty-some years later, National Security Advisor John Poindexter and National Security Council staffer Oliver North were prosecuted by an independent counsel for, among other things, lying to Congress about the Iran-Contra affair, which was apparently the only other instance of a true § 1001 case involving lies to Congress.[302] Their convictions were subsequently reversed on appeal.[303]

The dearth of § 1001 cases involving lies to Congress may be explained by the fact that most of the instances of lies by executive officers involved official testimony or other formal appearances that were covered by perjury or obstruction of justice, or involved false claims for payment, all of which are separate federal crimes.[304]

300. United States v. Bramblett, 348 U.S. 503 (1955)

301. *Id.* at 507–10.

302. *See* Peter W. Morgan, *The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U. L. REV. 177, 180 (1992).

303. United States v. North, 920 F.2d 940 (D.C. Cir. 1990).

304. 18 U.S.C. §§ 287, 1503, 1505, 1510, 1621, 1623.

2. Obstruction of justice. There are many different obstruction of justice statutes covering all manner of misconduct. 18 U.S.C. § 1505, titled "Obstruction of proceedings before departments, agencies, and committees," makes it a crime for any person who "corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before . . . any committee of either House or any joint committee of the Congress. . . ."[305] In 1991, the D.C. Circuit ruled that, as written, § 1505 was too vague to cover lying before Congress (though § 1001 still applied).[306] Subsequently, Congress amended section 1505 to overrule the D.C. Circuit's statutory interpretation,[307] and a more recent Fifth Circuit case confirms that a person who lies in congressional testimony can be convicted of obstruction of justice.[308]

3. Perjury. Lies under oath during Congressional testimony can result in criminal liability under 18 U.S.C. § 1621;[309] lies under oath during judicial proceedings can result in criminal liability under § 1621 or 18 U.S.C. § 1623.[310] On rare occasions, executive branch officials have been at risk of facing perjury charges for national security lies.

During the mid-2000s, the chief judge of the FISA court, Colleen Kollar-Kotelly, became so incensed over her perception that the Justice Department's FISA warrant applications were improperly tainted by the NSA's warrantless surveillance that she threatened to refer warrant application signatories to the Justice Department for perjury prosecutions.[311] Then-Attorney General Alberto Gonzales found himself facing a potential perjury charge in 2007 based on his testimony to Congress about the NSA's warrantless surveillance program.[312]

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305. 18 U.S.C. § 1505.

306. *See* United States v. Poindexter, 951 F.2d 369, 386 (D.C. Cir. 1991) ("Even if that statute may constitutionally be applied to all attempts to influence or to obstruct a congressional inquiry by influencing another to violate his legal duty, it would still not cover the conduct at issue on this appeal—making false and misleading statements to the Congress").

307. *See* United States v. Safavian, 451 F.Supp. 2d 232, 246–47 (D.D.C. 2006), *rev'd on other grounds*, 528 F.3d 957 (D.C. Cir. 2008).

308. United States v. Rainey, 757 F.3d 234, 247 (5th Cir. 2014).

309. 18 U.S.C. § 1621.

310. 18 U.S.C. § 1621, 1623.

311. *See* LICHTBLAU, *supra* note 40, at 172–73.

312. *See* Dan Eggen, *Senator May Seek Gonzales Perjury Probe*, WASH. POST (July 26, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/25/AR2007072502284_pf.html.

However, not all national security lies will expose their speakers to potential criminal prosecution. Such lies to the public would generally not satisfy one or more of the elements of the criminal statutes discussed above. For example, the Carter Administration's false denials of an imminent hostage rescue mission and President Eisenhower's deception regarding the U-2 mission were not made in congressional hearings or within the jurisdiction of the legislative branch.

B. Impeachment

The Constitution provides for the removal of United States officers through impeachment by the House of Representatives and subsequent trial and conviction by the Senate for "treason, bribery, or other high crimes and misdemeanors."[313] Note that impeachment might operate as either an alternative or addition to criminal prosecution, except as to a sitting President, for whom impeachment and removal is arguably constitutionally required before prosecution.[314] Even an impeachment that results in a Senate acquittal, as happened with President Clinton,[315] might be understood as punishment akin to censure or other public obloquy.[316]

Impeachment is an extremely unusual event, with only nineteen federal officers impeached since 1787, making it only slightly more frequent than successful post-Bill of Rights amendments of the Constitution.[317] Of those nineteen federal

313. U.S. Const. art. II, § 4.

314. *See* Susan Low Bloch, *Can We Indict a Sitting President?*, 2 NEXUS 7 (1997) (summarizing symposium articles on this topic). During the Monica Lewinsky scandal, the Office of Independent Counsel reportedly prepared a legal memorandum concluding that it could indict President Clinton without first successfully removing him from office. *See also* Don Van Natta, Jr., *The President's Trial: The Independent Counsel; Starr is Weighing Whether to Indict Sitting President*, N.Y. TIMES (Jan. 31, 1999), http://www.nytimes.com/1999/01/31/us/president-s-trial-independent-counsel-starr-weighing-whether-indict-sitting.html?mcubz=3.

315. Alison Mitchell, *The President's Acquittal: The Overview; Clinton Acquitted Decisively: No Majority for Either Charge*, N.Y. TIMES (Feb. 13, 1999), http://www.nytimes.com/1999/02/13/us/president-s-acquittal-overview-clinton-acquitted-decisively-no-majority-for.html?mcubz=3.

316. *Cf.* Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 722 (1999) ("[A]lternatives [to impeachment and conviction] included favoring impeachment with the hope and expectation that the Senate would acquit"); Michael Kramer, *Moral Lapse, Impeachment Will Soil Clinton's Legacy*, N.Y. DAILY NEWS (Jan. 17, 2001), http://www.nydailynews.com/archives/news/moral-lapse-impeachment-soil-clinton-legacy-article-1.912969 (describing Clinton as "the first elected President ever impeached—a stain Clinton has delusionally labeled a badge of honor"); *but see* Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59, 70–71 (2001).

317. *Impeachments of Federal Officials*, BALLOTPEDIA (Oct. 10, 2017),

officers, the vast majority—fifteen—were federal judges,[318] and only three have been Executive Branch officials: two Presidents and a Cabinet member. In 1868, the House impeached President Andrew Johnson for his intentional violation of the Tenure in Office Act when he dismissed Secretary of War Edwin Stanton without Senate approval (as required by the Act); the Senate acquitted Johnson by a single vote.[319] Eight years later, Secretary of War William Belknap found himself facing possible impeachment over allegations of graft and corruption.[320] Belknap tried to obviate impeachment proceedings by resigning his office, but the House impeached him anyway.[321] Neither of those cases involved lying of any kind. On the other hand, lying was the essential gravamen of the impeachment charges against President Bill Clinton,[322] though the lies were not national security-related, but rather, personal in nature.

C. Removal from Office

Finally, Executive Branch officials other than the President and Vice-President can be removed from office as a sanction for misconduct, including the dissemination of a national security lie.[323] In general, executive branch officials are ultimately subject to dismissal by the President;[324] even the Bush Administration's controversial firing of eight United States Attorney in 2006 was less a matter of authority as it was about "flawed process," according to the Inspector General's post-investigation report.[325] The Inspector General noted that "Presidential appointees can be removed for any reason or for no reason, as long as it is not an illegal or improper reason."[326]

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https://ballotpedia.org/Impeachments_of_federal_officials [https://perma.cc/S9K9-6KF2].

318. *See* Cass Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 301 (1998).

319. *See, e.g.*, WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 215–17, 234–25 (1992).

320. *War Secretary's Impeachment Trial*, U.S. SENATE: ART & HISTORY, https://www.senate.gov/artandhistory/history/minute/War_Secretarys_Impeachment_Trial.htm [https://perma.cc/UT2R-WBCX] (last visited Jan. 4, 2018).

321. *See* BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 127 (2012).

322. The specific impeachment charges were perjury and obstruction of justice, but the factual claim was that the President falsely denied a sexual relationship with intern Monica Lewinsky while testifying under oath during his deposition in the sexual harassment case brought by Paula Jones.

323. See Bowsher v. Synar, 478 U.S. 714, 720–21 (1986).

324. 28 U.S.C. § 541(c) ("Each United States attorney is subject to removal by the President.").

325. U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 356–57 (2008).

326. *Id.*

Similarly, in *Morrison v. Olson*, the Supreme Court did uphold a statutory limitation on the scope of the President's ability to dismiss the independent counsel despite the fact that the independent counsel was an executive branch official.[327] But the limitation on dismissal authority was not an absolute prohibition. Rather, in an effort to prevent a recurrence of the "Saturday Night Massacre" (in which the Attorney General and Deputy Attorney General resigned rather than carry out President Nixon's order to fire Special Prosecutor Archibald Cox),[328] Congress sought to require "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties" to fire the independent counsel.[329]

VI. WHY IS IT SO HARD TO HOLD PRESIDENTS AND EXECUTIVE OFFICIALS ACCOUNTABLE FOR NATIONAL SECURITY LIES?

As the previous part has shown, legal mechanisms to hold Executive Branch officials accountable for national security lies exist: chief among them, impeachment and prosecution. In practice, however, accountability remains more in the realm of theory than reality. A number of reasons explain why executive branch officials have been seemingly able to lie with impunity while mostly escaping consequences.

A. A Thin Line Between Lies Versus Exaggerations, Slips of the Tongue, and Mistakes

The first—and most likely primary—reason Executive Branch officials are so rarely held accountable for national security lies is that proving (in a court of law, the court of public of opinion, or elsewhere) that the statement in question was indeed a lie, as opposed to an exaggeration, a slip of the tongue, or an honest mistake, can be quite difficult. This is especially true in criminal cases, where there are a number of defenses and doctrines that force the prosecution to demonstrate falsity to a high degree of precision.

To say that a speaker lied is typically understood as meaning that he or she *intentionally* spoke *falsely*, whereas a person misspeaks when he or she intends to speak truthfully but accidentally utters a wrong word that renders the statement

327. Morrison v. Olson, 487 U.S. 654 (1988).

328. *See supra* note 290 and accompanying text.

329. *Morrison*, 487 U.S. at 663.

incorrect.[330] Although determining a speaker's true intent can be challenging, it is one that the criminal justice system is familiar with. *Mens rea* can be demonstrated through direct evidence if the defendant admits his or her state of mind, or through circumstantial evidence. The task therefore is not impossible.

Most of the speakers of the national security lies discussed in Part I have or would probably deny that they lied in the sense of speaking falsely intentionally. In some instances, it is fair to say that there is far from sufficient evidence to conclude that the speakers *knew* that their statements were false. On the other hand, it is also fair to say that in many of those same instances, the speakers at least had reasons to question whether they were speaking truthfully. When a person misspeaks, often he or she will correct that misstatement without being prompted or immediately upon being questioned.[331]

Nevertheless, in a criminal case where liability is predicated on the falsity of a defendant's statement, the government must eliminate any ambiguities that would make the statement true (or at least not false).[332] In one notable case, the Fourth Circuit reversed a false claims conviction based on allegedly fraudulent reimbursement requests submitted by a government contractor.[333] The contractor had billed the government for the contractual per diem of $33, even though it was actually paying its employees less than that amount.[334] The court concluded:

> When the Government concedes that the clause is ambiguous, it necessarily concedes that the defendants' construction of the per diem clause, which is one of the constructions, is reasonable. Such a conclusion requires a ruling that the defendants cannot be convicted under § 1001 for a statement or billing which may be said to be accurate within a reasonable construction of the contract. This is so because one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract.[335]

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330. According to philosopher Harry Frankfurt, "bullshit" falls in between lying and misspeaking in that the person who bullshits does not care whether the statement is true, whereas the liar knows that his or her statement is false. *See* HARRY G FRANKFURT, ON BULLSHIT (2005).

331. This may be a primary reason that one of the federal perjury statements contains a recantation defense. *See* 18 U.S.C. § 1623 (2012).

332. *See* United States v. Race, 632 F.2d 1114 (4th Cir. 1980).

333. *Id.* at 1123.

334. *Id.* at 1117–19.

335. *Id.* at 1120.

An important extension of this principle is the literal truth defense, under which an intentionally misleading statement will not give rise to criminal liability if the statement was "literally true."[336] For example, in a bankruptcy proceeding, a debtor was asked under oath, "Do you have any bank accounts in Swiss banks?" to which he answered "no" truthfully.[337] He was then asked, "Have you ever?" to which he answered truthfully that "the company had an account there for about six months."[338] Because the follow-up question sought to ascertain whether the debtor had owned a Swiss bank account in the past (a fact not addressed by the previous question, which covered the present), the debtor's answer was technically non-responsive.[339] The questioner moved on to a different topic without ever questioning the debtor about the Swiss bank account that *he* used to have. In reversing the debtor's perjury conviction, the Supreme Court did not dispute that the debtor's intention was to mislead the questioner with the non-responsive answer.[340] The Court explained, however, that it was the questioner's responsibility to detect non-responsive answers and to insist on responsive ones.[341] Any other rule would "inject a new and confusing element into the adversary testimonial system we know."[342]

President Carter's misleading statement on the eve of the Iran hostage rescue mission would perhaps fall within the literal truth defense.[343] It was completely true that the Carter Administration did not attempt to mine or blockade the Strait of Hormuz. It was the listener's obligation to ascertain whether Carter was providing mere examples of actions that he would not take without consulting Congress or whether he was listing the entire universe of such actions. Similarly, President Clinton's claim that there were no nuclear missiles aimed at American

336. *See* Bronston v. United States, 409 U.S. 352 (1973).

337. *Id.* at 353–54.

338. *Id.*

339. "The company had one for about six months" would be responsive to the question, "Has the company ever had a Swiss bank account." President Clinton appeared to rely on the literal truth defense to justify his negative response during his deposition in the Paula Jones lawsuit to whether there "is" a sexual relationship between him and intern Monica Lewinsky. Later on, he explained that whether his statement could be true depended on "what the meaning of the word 'is' is." *See* KEN GORMLEY, THE DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR 549 (2010).

340. *Bronston*, 409 U.S. at 360.

341. *Id.* at 360–62.

342. *Id.* at 359.

343. This observation depends on his written recollection accurately capturing his conversation with Senator Byrd. The diary entry from which the passage in the memoir is drawn does not use quotation marks, so it is a paraphrase, not a direct quote (albeit a contemporaneous one).

cities was true in a very narrow and technical sense when limited to Russia: at that very moment, without the targeting chips inserted, the missiles were indeed "aimed" nowhere except at the top of their silos. The fact that Russian military personnel could re-insert the targeting chips in moments did not render the actual statement untrue. The misleading nature of the statement lay in the fact that the listener could (and no doubt was intended to) infer that Americans were safe from nuclear missiles whether due to accidental launch or intentional hostility.

Even statements that turned out to be unambiguously false, such as the various claims by the Bush Administration that Iraq under Saddam Hussein was reconstituting its nuclear, chemical, and biological weapons programs, can be re-characterized—with varying degrees of success—as mistaken, rather than knowingly false at the time. Soon after the United States invaded Iraq, Hans Blix, the chief U.N. weapons inspector, submitted a report to the U.N. Security Council summarizing his conclusions.[344] Blix's primary points were that there was no "evidence of the continuation or resumption of programmes of weapons of mass destruction" of earlier stocks of chemical and biological weapons, but unable to verify exact quantities that had been destroyed.[345] Subsequently, a U.S.-led Iraq Survey Group, headed initially by David Kay, later by Charles Duelfer, spent a year and a half after the invasion searching for nuclear, chemical, or biological weapons.[346] Duelfer's final report, released in late 2004, concluded that Saddam Hussein retained an interest in reconstituting Iraq's WMD programs but that they were mostly destroyed or decayed in 1991 following the cease-fire that stopped the first Gulf War.[347] Following receipt of Duelfer's report, President Bush stated:

> The chief weapons inspector, Charles Duelfer, has now issued a comprehensive report that confirms the earlier conclusion of David Kay that Iraq did not have the weapons that our intelligence believed were there.

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344. Executive Chairman of the U.N. Monitoring, Verification & Inspection Commision, *Thirteenth Quarterly Report of the Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission in accordance with paragraph 12 of Security Council resolution 1284*, U.N. Doc. S/2003/580 (May 30, 2003).

345. *Id.* at 5.

346. Douglas Jehl, *Skeptic May Take Over Iraq Arms Hunt*, N.Y. TIMES (Jan. 23, 2004), http://www.nytimes.com/2004/01/23/world/skeptic-may-take-over-iraq-arms-hunt.html.

347. *See* CIA, DCI SPECIAL ADVISOR REPORT ON IRAQ'S WMD (2004), https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004 [https://perma.cc/Z7HH-AQRH].

> The Duelfer report also raises important new information about Saddam Hussein's defiance of the world, and his intent and capability to develop weapons.
>
> . . . .
>
> The Duelfer report makes clear that much of the accumulated body of 12 years of our intelligence and that of our allies was wrong. And we must find out why and correct the flaws.[348]

Reporter Bob Woodward of "Watergate" fame, who wrote multiple books about the behind-the-scenes process leading to the decision to attack Iraq,[349] stated in 2015 that he agreed that Bush had not lied:

> I spent 18 months looking at how Bush decided to invade Iraq. And lots of mistakes, but it was Bush telling George Tenet, the CIA director, don't let anyone stretch the case on WMD. And he was the one who was skeptical. And if you try to summarize why we went into Iraq, it was momentum. The war plan kept getting better and easier, and finally at the end, people were saying, hey, look, it will only take a week or two. And early on it looked like it was going to take a year or 18 months. And so Bush pulled the trigger. A mistake certainly can be argued, and there is an abundance of evidence. But there was no lying in this that I could find.[350]

In a similar vein, Laurence Silberman, a federal appellate judge who served in 2004-05 as the co-chair of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, wrote in 2015 that:

> Our WMD commission ultimately determined that the intelligence community was "dead wrong" about Saddam's weapons. But as I recall, no one in Washington political circles offered significant disagreement with the intelligence community before the invasion. The National

348. *See Transcript: Bush Responds to WMD Report*, WASH. POST (Oct. 7, 2004), http://www.washingtonpost.com/wp-dyn/articles/A14897-2004Oct7.html.

349. *See* BOB WOODWARD, PLAN OF ATTACK (2004) (In *Plan of Attack*, Woodward reported that CIA Director George Tenet's "declaration [that it was a "slam dunk" that WMDs would be found] was 'very important' in [Bush's] decision making."); BOB WOODWARD, STATE OF DENIAL: BUSH AT WAR, PART III (2006); *but see* GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA (2007) (contending that Bush did not need to be swayed to decide to attack Iraq).

350. *See* Chris Wallace, *Mike Huckabee Lays Out Path to 2016 Republican Nomination; Amb. John Bolton Talks NSA Surveillance, Growth of ISIS*, FOX NEWS (May 24, 2015), http://www.foxnews.com/transcript/2015/05/24/mike-huckabee-lays-out-path-to-2016-republican-nomination-amb-john-bolton-talks/.

> Intelligence Estimate was persuasive—to the president, to Congress and to the media.[351]

To be sure, the Woodward-Silberman assessment that Bush was mistaken, not deceptive, is not shared universally, and some critics have argued that "[i]t's one thing to simply repeat an intelligence assessment that is wrong, and quite another to take a disputed, credibly challenged intelligence assessment and state it as uncontested fact."[352] The debate between those two positions—and the extent to which the Woodward-Silberman view is dominant—highlights one reason it is difficult to hold an executive branch official accountable for national security lies: the threshold issue of whether the official even lied at all ends up dominating the analysis to the exclusion of the subsequent issues of the defensibility of the lie, the harm it caused, and appropriate sanctions.

B. "National Security" as the Executive Branch's Shield of Athena

"National security" has something of a magic quality when invoked by the Executive Branch as the justification for various actions that might otherwise raise serious constitutional questions. Federal courts have noted a traditional reluctance "to intrude upon the authority of the Executive in military and national security affairs,"[353] with resulting deference that favors the President in such litigation. Congress also tends to take a less adversarial position than it might otherwise be inclined to take when national security is at stake.[354] In this way, "national security" is something like the Greek goddess Athena's mythical

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351. Laurence H. Silberman, *The Dangerous Lie that "Bush Lied,"* WALL STREET J., Feb. 8. 2015, at A.13.

352. Simon Maloy, *Yes, Bush Lied About Iraq: Why Are We Still Arguing About This?*, SALON (Feb. 10, 2015), http://www.salon.com/2015/02/10/yes_bush_lied_about_iraq_why_are_we_still_arguing_about_this/ [https://perma.cc/3E4A-V54F].

353. *See* Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (dismissing challenge to summary denial of security clearance); *see also* Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 79–80 (2005) (noting courts' apparent hostility toward claims of a right of access to national security information "during a time of crisis"); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 937 (2006) ("National security information likewise triggers judicial modesty.").

354. *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). As one example, consider that much of the USA PATRIOT Act consisted of reforms desired by the Clinton Justice Department in the 1990s but that languished until the 9/11 attacks, after which Congress enacted the PATRIOT Act in six weeks. *See, e.g.*, JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 71 (2006).

shield, Aegis, which, bearing the head of Medusa, could shatter the morale of her enemies.

Of course, the government does not always win when it raises national security as a shield. Most notably, when the Nixon Administration sought to block continued publication of the classified history of the Vietnam War known as the Pentagon Papers on the grounds that the unauthorized disclosures were harming foreign relations irreparably,[355] the Supreme Court dissolved the injunction by a 6-3 vote, with a *per curiam* opinion explaining that the government had not met its heavy burden of justifying a prior restraint.[356] The *Pentagon Papers Case* is, however, the outlier.

More typical is the dicta from *Near v. Minnesota*,[357] the case that several Justices cited in the *Pentagon Papers Case* for the central proposition that the government bore a heavy burden in arguing for a prior restraint.[358] Although *Near* rejected the issuance of a prior restraint based on a claim of defamation, the Court went on to distinguish national security and military secrets: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[359] Lower courts have quoted this dictum on a number of occasions to acknowledge that national security concerns may call for different censorship rules than would otherwise apply in free speech matters.[360]

In *United States v. Progressive, Inc.*, a federal district judge did rely on the *Near* dicta to enjoin a magazine from publishing an article by freelance writer Howard Morland titled *The H-bomb*

355. *See* Fred P. Graham, *Court Here Refuses to Order Return of Documents Now*, N.Y. TIMES, June 16, 1971, at 1, 18. Even some members of the *New York Times* staff worried that they might be harming national security by continued publication. *See* DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 57–63 (1996).

356. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

357. Near v. State of Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931).

358. *Pentagon Papers*, 403 U.S. at 714, 723, 724, 726, 748, 761.

359. *Id.* at 716.

360. *See, e.g.*, Stokes v. City of Madison, 930 F.2d 1160, 1169 (7th Cir. 1991) ("[A] powerful overriding interest justifies a narrowly drawn prior restraint. Such interests include national security matters . . . ."); Burch v. Barker, 861 F.2d 1149, 1155 (9th Cir. 1988) ("Prior restraints are permissible in only the rarest of circumstances, such as imminent threat to national security."); Halperin v. Dep't of State, 565 F.2d 699, 707 (D.C. Cir. 1977) ("[W]e hesitate to order the release of material that would allegedly do grave damage to the national security without judicial scrutiny of the merits of that allegation. The responsibility of the courts to exercise some discretion in extreme circumstances is suggested by dicta in First Amendment cases involving prior restraint.").

secret: How we got it—why we're telling it.[361] Using only public sources, Morland had gathered enough information to explain how to build a hydrogen (nuclear fusion) bomb—a design that the U.S. government had classified in the interest of national security.[362] The district judge acknowledged that publication of the article was not likely to lead to an individual building his own thermonuclear bomb in a basement, as doing so would require significant industrial capabilities; rather, the national security concern lay in the possibility that foreign nations would be able "to move faster in developing a hydrogen weapon."[363] After distinguishing *The Pentagon Papers Case* on the ground that it involved a historical study with "no cogent reasons" as to the national security impact there, the court reduced the conflict to "a stark choice between upholding the right to continued life and the right to freedom of the press," with a mistake in favor of publication possibly "pav[ing] the way for thermonuclear annihilation for us all."[364] Despite being mentioned in any in-depth discussion of prior restraints, however, the precedential value of *Progressive, Inc.* is far from clear because the case never reached an appellate court, having been mooted when two newspapers published a letter containing substantially the same information as that in Morland's article.[365]

First Amendment rights are not the only constitutional rights that have yielded to claims of national security. The infamous Japanese-American exclusion case, *Korematsu v. United States*,[366] opened with a strong statement "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[367] But what the Court gave with one hand, it took away with the other, when it accepted military justification for the exclusion order, closing with the nonsensical argument that:

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an

361. United States v. Progressive, Inc., 467 F. Supp. 990, 991 (W.D. Wisc. 1979).

362. *Id.* at 992–93. The government admitted that "some of the information is in the public domain," but it also argued that "much of the data is not, and that the Morland article contains a core of information that has never before been published." *Id.* at 993.

363. *Id.*

364. *Id.* at 995–96.

365. *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 156–57 (1991).

366. Korematsu v. United States, 323 U.S. 214 (1944).

367. *Id.* at 216.

> invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.[368]

Large-scale internment of American citizens by executive order alone may seem unthinkable today, even during wartime, but aliens stand in a different position. In *Zadvydas v. Davis*, the Court interpreted an immigration statute so as to deny the Attorney General the power to detain removable aliens indefinitely, but noted in passing that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches with respect to matters of national security"[369]—in other words, that in cases of potential terrorism, an alien might well find himself detained indefinitely, and if so, the Constitution might tolerate such detention. *Zadvydas* was decided shortly before the 9/11 attacks and proved prophetic; not long after the attacks, Congress enacted 8 U.S.C. § 1226a (as part of the USA PATRIOT Act), which directs the Attorney General to detain removable alien terrorism suspects who cannot be immediately removed for up to six months, with further six month periods of detention available "only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[370]

National security concerns may also trump the Fourth Amendment. In *Indianapolis v. Edmond*, the Court invalidated a city roadblock that stopped drivers without any individualized suspicion for the purpose of detecting and blocking narcotics trafficking.[371] Unlike previous checkpoints that had survived judicial scrutiny, the Indianapolis roadblock did not serve a special need, such as border control[372] or highway safety;[373] the Court recognized that the primary purpose of this roadblock was "the ordinary enterprise of investigating crimes," for which

368. *Id.* at 223.

369. Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

370. 8 U.S.C. § 1226a(a)(6). Because the Bush Administration opted to detain suspected al Qaeda and Taliban fighters on the American naval base at Guantanamo Bay, Cuba, it did not seek rely on section 1226a to justify such long-term noncriminal detention.

371. Indianapolis v. Edmond, 531 U.S. 32 (2000).

372. *Cf.* United States v. Martinez-Fuentes, 428 U.S. 543, 561–64 (1976).

373. *Cf.* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990).

individualized suspicion was necessary before effecting a seizure (i.e., stopping a motorist without consent).[374] However, the Court added the by-now familiar national security dictum: "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack . . . ."[375]

Even government action that is not merely a possible infringement of individual liberties (as in the previous examples) but a grave crime such as torture has its defenders when national security is at stake. As John Yoo noted, prominent Senators such as Charles Schumer and John McCain both conceded in the mid-2000s that if faced with a serious enough risk of mass casualties, government authorities should "do what you have to do."[376] Compared to the seemingly more drastic actions detailed above, national security lies may seem less significant, and therefore even more reasonably justified under the banner of "national security."

C. Foxes Guarding the Henhouse

From a cynical perspective, we might expect that any given White House Administration will be generally reluctant to investigate national security lies (or indeed, most other forms of misconduct) within itself. This concern, after all, was the primary justification for the Ethics in Government Act that created the independent counsel position, which is why Congress lodged the power to appoint the independent counsel among the judiciary rather than in the Executive Branch.[377] That Act further provided that the Attorney General could remove the independent counsel "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[378] This job tenure provision was created so as to minimize the likelihood of a repeat of the Saturday Night Massacre, when

374. City of Indianapolis v. Edmond, 531 U.S. 32, 44–46 (2000).

375. *Id.* at 44.

376. *See* YOO, WAR BY OTHER MEANS, *supra* note 354, at 172–73 (quoting Sens. Schumer and McCain).

377. *See* Morrison v. Olson, 487 U.S. 654, 677 (1988) ("Congress of course was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers."). Under the Ethics in Government Act, when the Attorney General was presented with credible evidence of wrongdoing by high ranking federal officials, the matter would be referred to a panel of three federal judges selected by the Chief Justice; this panel would appoint an independent counsel. *See* 28 U.S.C. §§ 591–593.

378. 28 U.S.C. § 596(a)(1).

Solicitor General Bork (as acting Attorney General) fired Special Prosecutor Cox at the behest of President Nixon because Cox was pushing aggressively to review tapes of White House conversations against the President's wishes.[379]

When the independent counsel provision of the Ethics in Government Act was challenged on separation of powers grounds in *Morrison v. Olson* in 1988, Justice Scalia cast the lone vote to strike it down as an unconstitutional infringement of a core Presidential executive function.[380] In response to the concern that a President might, in the absence of an independent counsel, block the investigation of close associates, Justice Scalia argued that there were sufficient checks against such malfeasance: "Congress, for example, can impeach the executive who willfully fails to enforce the laws," and "there is the political check that the people will replace those in the political branches . . . who are guilty of abuse."[381]

Whatever might be said about their merits, the multi-year long investigations by independent counsels Lawrence Walsh and Ken Starr proved unpopular enough with Congress that when the independent counsel provision of the Ethics in Government Act hit its sunset date in 1999, there was a bipartisan lack of interest in renewing it.[382]

With the demise of the independent counsel statute, pressure to investigate potential Executive Branch misconduct has been left to those mechanisms identified by Justice Scalia—namely, Congress (through its power to impeach) and the public (through its disapproval). The record since 1999 on this front has been mixed. One of the few instances of affirmative prosecution is the Valerie Plame affair. Plame, a twenty-year employee of the CIA, was publicly identified by columnist Robert Novak as a covert operative in mid-July 2003.[383] It is a federal crime for any person having authorized access to classified information to blow a covert operative's cover intentionally by passing along information to an unauthorized person.[384] Attorney General John Ashcroft appointed career federal prosecutor Patrick Fitzgerald as special counsel to investigate the leak, and Fitzgerald zeroed in on I. Lewis Libby, who was serving as Vice President Cheney's

379. *See* Kilpatrick, *supra* note 290, at A01.

380. *See Morrison*, 487 U.S. at 697 (Scalia, J., dissenting).

381. *Id.* at 711.

382. *See* Weeden, *supra* note 293, at 537.

383. Robert D. Novak, *Mission to Niger*, WASH. POST (July 14, 2003), http://www.washingtonpost.com/qp-dyn/content/article/2005/10/20/AR2005102000874.html ("Valerie Plame [ ] is an agency operative on weapons of mass destruction").

384. 50 U.S.C. § 421 (2012).

chief of staff.[385] Lewis was eventually convicted of lying to federal agents in violation of 18 U.S.C. § 1001, for which he received a thirty-month prison sentence and a $250,000 fine.[386] President Bush commuted the prison sentence shortly before Libby was to begin serving it, but not the fine.[387]

D. Subsequent Administrations Play Ball

As we have seen, since the expiration of the independent counsel statute, White House Administrations have a mixed record of investigating their own misconduct. A new Administration, on the other hand, might be expected to have little incentive to cover up its predecessor's deceptions. Of course, the subsequent Administration may well be an effective continuation of the previous one. Gerald Ford was serving as Vice-President and succeeded President Nixon when the latter resigned.[388] One of Ford's first actions as President was to pardon Nixon for any possible federal crimes related to the Watergate scandal.[389] Ford explained that he wanted to "spare Mr. Nixon and the nation further punishment in the Watergate scandals."[390] Similarly, George H.W. Bush succeeded Ronald Reagan after serving as Vice-President for both of Reagan's terms in office, and here too, Bush pardoned several Reagan Administration officials.[391]

The dynamic of party loyalty, where the succeeding Administration comes from the same political party as the previous Administration (and indeed, generally from within that Administration, as when the Vice-President becomes President),

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385. *See generally*, *Transcript of Special Counsel Fitzgerald's Press Conference*, WASH. POST (Friday, Oct. 28, 2005), http://www.washingtonpost.com/qp-dyn/content/article/2005/10/28/AP2005102801340.html (describing the events leading up to Fitzgerald's identification of Libby as the source of Valerie Plame's uncovering).

386. Scott Shane & Neil A. Lewis, *Bush Commutes Libby Sentence, Saying 30 Months "Is Excessive,"* N.Y. TIMES (July 3, 2007), http://www.nytimes.com/2007/07/03/washington/03libby.html?mtrref=www.google.com&gwh=6C5369170225A739D03F37A99A2BB12F&gwt=pay. Libby, however, was not charged with blowing Plame's cover, and Deputy Secretary of State Richard Armitage later admitted to having been Novak's source. *See* MICHAEL ISIKOFF, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR (2006).

387. *Id.*

388. Aldo Beckman, *Ford's Story of Pardon—He Refused a Deal*, CHI. TRIB., Oct. 16, 1974, at 1.

389. *Id.*

390. *See* Hon Herbers, *Ford Gives Pardon to Nixon, Who Regrets "My Mistakes,"* N.Y. TIMES, Sept. 8, 1974, at 1.

391. *See* David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails "Cover-Up,"* N.Y. TIMES (Dec. 25, 1992), http://www.nytimes.com/books/97/06/29/reviews/iran-pardon.html?mcubz=3.

is obviously not present when control of the White House changes from one major party to the other. Indeed, such change is an anticipated outcome, under Justice Scalia's observation about the lack of need for an independent counsel statute, of a previous Administration's unreasonable refusal to investigate itself.[392] President Gerald Ford's controversial decision to pardon his predecessor before any criminal charges were ever filed may well have been the reason he lost the election in 1976,[393] leading to a change of control of the White House from Republican to Democratic.[394]

Yet, in practice, when it comes to national security-related matters, successive Administrations of different parties have been considerably less than zealous about investigating the potential misdeeds of their predecessors, even when those misdeeds had been a subject of the election campaign. For example, as a presidential candidate, then-Senator Barack Obama sharply criticized the Bush Administration over its handling of the global war on terrorism, particularly its embrace of coercive interrogation practices.[395] Upon assuming office, President Obama did immediately issue an executive order limiting interrogation methods to those permitted under the Army Field Manual.[396]

However, when given the opportunity to prosecute egregious instances of the previous Administration's excessive interrogations gone wrong, the Obama Justice Department took no action. Specifically, in 2002 and 2003, two detainees in U.S. custody overseas died during or shortly after interrogation under circumstances that reeked of homicide.[397] The first, an Afghan suspected militant named Gul Rahman, was found dead of hypothermia after having been left stripped to his waist all night in an unheated cell in a secret prison, where the ambient

392. *See* Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting).

393. *See, e.g.*, Calvin Woodward & Jeff Wilson, *Cheney Hails Ford's Pardon of Nixon*, WASH. POST (Dec. 30, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000977_pf.html.

394. Marjorie Hunter, *Ford Isn't Running But Won't Bar Race: Says in Interview That He Would Still Grant Nixon a Pardon—Feels Apology Was Owed*, N.Y. TIMES, Apr. 22, 1979, at 17.

395. *See, e.g.*, Jeff Zeleny, *Barack Obama Criticizes Bush as He Outlines Foreign Policy Goals*, N.Y. TIMES (Apr. 23, 2007), http://www.nytimes.com/2007/04/23/world/americas/23iht-obama.5.5408168.html.

396. Executive Order 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

397. *See* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES (May 20, 2005), http://www.nytimes.com/2005/05/20/world/asia/in-us-report-brutal-details-of-2-afghan-inmates-deaths.html.

temperature approached freezing.[398] The second was an Iraqi fighter named Manadel al-Jamadi, who died in the Abu Ghraib prison of a blood clot resulting from severe trauma, later determined to be physical assault.[399] A military pathological examination concluded that al-Jamadi's death was homicide.[400] Attorney General Eric Holder tasked federal prosecutor John Durham, who was already investigating the CIA's destruction of videotapes of interrogations,[401] with investigating the actual interrogation practices, including the Rahman and al-Jamadi deaths.[402] In mid-2011, Durham recommended a full criminal review of both incidents, although a year later, he recommended closing the cases.[403] On August 12, 2012, Holder announced that "[b]ased on the fully developed factual record concerning the two deaths, the [Justice] Department has declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."[404]

E. Impeachment is a Nuclear Weapon

In the original constitutional design, Congress and the President were expected to be political adversaries, checking each other's ambitions.[405] In theory, Congress possesses powerful tools with which to engage in this checking function. It can refuse to fund Presidential programs with which it disagrees,[406] and, as an ultimate response, it can impeach and remove the President from office.[407] Cabinet officials are also subject to impeachment and removal.[408]

For a number of reasons, the Madisonian vision of the political branches checking each other has been true only some of

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398. *See* Tung Yin, *Eric Holder: Prosecutorial Discretion and Extrajudicial Deaths*, JURIST, (Sept. 26, 2012), http://www.jurist.org/forum/2012/09/tung-yin-holder-discretion.php [https://perma.cc/83F7-L7F5].

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *See Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees*, U.S. DEP'T OF JUSTICE (Aug. 30, 2012), http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html [https://perma.cc/GT8Q-UHHF].

405. *See, e.g.*, THE FEDERALIST PAPERS NO. 51 (Madison) ("Ambition must be made to counteract ambition.").

406. *See, e.g.*, JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 156–60 (2005) (arguing that Congress could have blocked the Iraq invasion by refusing to appropriate funds).

407. U.S. CONST. art. I, §§ 2, 3.

408. U.S. CONST. art. I § 4.

the time. Law professors Daryl Levinson and Richard Pildes have argued that political party loyalty has eclipsed political branch loyalty so that the sort of checking function occurs only when Congress and the White House are in control of different parties, and even then, less so when national security is at issue.[409]

Recall that only eighteen federal officers, mostly federal judges, have been impeached in the entire history of the United States.[410] It should not be surprising that so many more federal judges have been impeached than Executive Branch officials. The most important distinction is that Article III judges have life tenure, such that impeachment is the *only* way to oust a recalcitrant jurist.[411] The President, on the other hand, can serve no more than two terms, and Cabinet officials are typically (but not always) limited to serving the President who appointed them.[412] Thus, there is slightly less pressure to impeach corrupt Executive Branch officials, because they can be removed more easily. In addition, at any given time, there are many more federal judges than there are high-level Executive Branch officers.[413]

It is possible that, notwithstanding the dearth of impeachments of Executive Branch officials, the threat of impeachment serves to deter such officials from engaging in misconduct: "there likely have been countless high crimes and misdemeanors that were never committed in the first place because of the mere *possibility* of impeachment."[414] On the other hand, the aftermath of the Clinton impeachment stands as a warning to those who push for impeachment on questionable grounds. Even before the Senate ultimately acquitted Clinton,

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409. Levinson & Pildes, *supra* note 354, at 2324–25.

410. For a listing of the first sixteen impeachments, see Frank O. Bowman III & Stephen L. Sepinick, *"High Crimes and Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1598–1600 (1999). The remaining two were federal judges Samuel B. Kent and Thomas Porteous.

411. Former U.S. District Court Judge Walter Nixon refused to resign his judgeship even after having been convicted of making false statements and even "continued to collect his judicial salary while serving out his prison sentence." United States v. Nixon, 506 U.S. 224, 226 (1993). *Cf.* Sunstein, *supra* note 318, at 302–03 (arguing that impeachment for federal judges may be more expansive for the President because of Article III life tenure).

412. U.S. CONST. amend. XXII, § 1.

413. *Compare The Executive Branch*, WHITE HOUSE.GOV, https://www.whitehouse.gov/1600/executive-branch [https://perma.cc/RKA3-G292] *with* AUTHORIZED JUDGESHIPS, U.S. COURTS.GOV, http://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/SMH3-QV62] (showing 860 Art. III judgeships and 20 Art. I judgeships in 2016).

414. *See* Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 71 (2001).

House Republicans felt the sting of disapproval from voters; instead of picking up seats (as is common for the opposition party during the sixth year of a Presidency), Republicans lost five seats, and Speaker Newt Gingrich ended up resigning his seat.[415] One lesson to be drawn might be that impeachment of the President remains "a remedy of last resort, designed to make possible the removal from office of those presidents whose egregious official misconduct has produced a social consensus that continuation in office is no longer acceptable."[416]

VII. REGULATING NATIONAL SECURITY LIES

As we saw in the previous part, there are a host of political and structural reasons that result in the lack of meaningful consequences for Executive Branch officials who intentionally lie. Accordingly, any realistic suggestion for regulating national security lies by Executive Branch officials must take into account the likelihood that enforcement mechanisms will be, at best, of limited effectiveness. Rather than relying on the threat of lawsuits or criminal prosecution, or direct conflict with Congress, an approach more likely to succeed is one that creates a framework for executive branch officials to issue national security lies when they deem it necessary, so that there will be subsequent exposure of the lies and their justification.

A. Other Models for Regulating Covert Activity and Secrecy

The problems posed by the Executive Branch's unilateral control over the information that would reveal the false or misleading nature of statements by federal officials is hardly unique. Covert activity and classification of government secrets are two related areas in which we see the same dynamic of asymmetric access to information and lack of institutional capability of oversight by the coordinate branches.

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415. Alison Mitchell, *The Speaker Steps Down: The Career; The Fall of Gingrich, an Irony in an Odd Year*, N.Y. TIMES (Nov. 7, 1998) http://www.nytimes.com/1998/11/07/us/the-speaker-steps-down-the-career-the-fall-of-gingrich-an-irony-in-an-odd-year.html.

416. Sunstein, *supra* note 318, at 315; Michael J. Gerhardt, *The Perils of Presidential Impeachment*, 67 U. CHI. L. REV. 293, 301 (2000) ("Congress will also likely recognize that any impeachment inquiry into a popular president or an inquiry without strong public support must be kept very short."). Indeed, in the run-up to the 2014 mid-term congressional elections, the Republican-controlled House seriously considered suing President Obama based on claims that he exceeded his constitutional authority through the waivers and delays in implementing the Affordable Care Act; however, Speaker of the House John Boehner dismissed the idea of impeaching the president. *See* Ashley Parker, *Republicans Switch Firm Handling Obama Suit*, N.Y. TIMES (Sept. 19, 2014), https://nyti.ms/1r7VAWi.

1. Covert activity. U.S. Presidents have sent agents on secret missions since the beginning of the nation, after Congress approved President George Washington's request for funding for covert actions.[417] President Thomas Jefferson used a secret agent to try to foment an overthrow of the Tripoli government, which was supporting the Barbary Coast pirates.[418] As M.E. Bowman has explained, "modern covert action originates primarily in World War II,"[419] and not surprisingly, public knowledge of such missions leans heavily since that time. To be sure, "covert action" does not have a fixed definition, although W. Michael Reisman and James E. Baker provide a useful one: "action is accomplished in ways unknown to some parties (not necessarily the targets)."[420]

The National Security Act of 1947 dramatically reorganized the U.S. intelligence community, including the creation of the Central Intelligence Agency (largely out of the World War II-era Office of Strategic Services).[421] The CIA Director's statutory duties included intelligence gathering and analysis, and in addition, performance of "such other functions and duties related to intelligence affecting the national security as the President . . . may direct."[422] This last duty became known as the "fifth function" because it was fifth in the listing in the original 1947 Act.[423] The CIA has claimed authority to engage in covert operations (as opposed to espionage and intelligence gathering) under this statutory provision.[424] Apart from the National Security Act, the most significant document relating to covert actions was Executive Order 12,333, which President Reagan

417. *See History of American Intelligence*, CIA, https://www.cia.gov/kids-page/6-12th-grade/operation-history/history-of-american-intelligence.html [https://perma.cc/D7N2-J9R5] (last updated Mar. 23, 2013).

418. *See id.*; *see also* RICHARD ZACKS, THE PIRATE COAST: THOMAS JEFFERSON, THE FIRST MARINES, AND THE SECRET MISSION OF 1805, 42–44 (2005).

419. M.E. Bowman, *Secrets in Plain View: Covert Action the U.S. Way*, 72 INT'L L. STUD. 1, 3 (1996); *see also* STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 156–59 (1996).

420. W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 13 (1992).

421. *See* National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947). For a compilation of subsequent amendments, see *Reports*, U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE, http://www.intelligence.senate.gov/nsact1947.pdf [https://perma.cc/3QPS-JH4S] (last visited Jan. 12, 2018).

422. National Security Act of 1947 § 104A(d)(4).

423. *Id*. Subsequent amendments to the 1947 Act have changed the numbering such that the "other functions and duties" is now fourth in the listing. *See* 50 U.S.C. § 403–4a(d)(4).

424. *See* Bowman, *supra* note 419, at 5

issued on December 4, 1981, in order to set forth guidelines regarding executive branch participation in "special activities."[425]

In the wake of the Iran-Contra scandal,[426] Congress passed additional legislation in an attempt to restrain the President's authority to order covert operations. The Intelligence Authorization Act, Fiscal Year 1991,[427] included multiple reporting provisions, along with a requirement of a written Presidential finding to support any covert action. Section 503 of that act amended the National Security Act to read in relevant part as follows:

> (a) The President may not authorize the conduct of a covert action . . . unless the President determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States, which determination shall be set forth in a finding that shall meet each of the following conditions:
>
> (1) Each finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than 48 hours after the decision is made.
>
> (2) Except as permitted by paragraph (1), a finding may not authorize or sanction a covert action, or any aspect of any such action, which already has occurred.
>
> . . .
>
> (5) A finding may not authorize any action that would violate the Constitution or any statute of the United States.
>
> . . .
>
> (c)(1) The President shall ensure that any finding approved pursuant to subsection (a) shall be reported to the intelligence committees as soon as possible after such approval and before the initiation of the covert action authorized by the finding, except as otherwise provided in paragraph (2) and paragraph (3).
>
> (2) If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority

425. Executive Order 12,333, 46 Fed. Reg. 59941 (Dec. 4, 1981).

426. *See supra* Part II.G.1.

427. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429.

> members of the intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate . . . .
>
> (3) Whenever a finding is not reported pursuant to paragraph (1) or (2) of this section, the President shall fully inform the intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice.[428]

The current version of the National Security Act therefore imposes three related requirements on the President in order to justify any covert operation: (1) written finding that (2) the covert action is necessary to further U.S. foreign policy objectives and is important to U.S. national security; and (3) notice to Congressional intelligence committee members.

2. Classification authority. One of my primary contentions has been that national security lies are best understood as attempting to keep secret matters that would be revealed by either a truthful answer or a "no comment." It is therefore useful to consider how long secret—i.e., classified—information retains such status. It is striking that Congress has not enacted any statutes to create the procedures for classifying information, having left that task to the President;[429] rather, the existence of classified information is referred to in a number of espionage-related statutes.[430]

Thus, the procedures for classification of national security information are set forth most recently in Executive Order 13,526, which was issued by President Barack Obama in 2009.[431] The relevant procedures include:

> SEC 1.3. CLASSIFICATION AUTHORITY
>
> (a) The authority to classify information originally may be exercised only by:
>
> (1) the President and the Vice President;

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428. Intelligence Authorization Act § 503 (codified at 50 U.S.C. § 413b). Note that the Intelligence Authorization Act, Fiscal Year 2010, Pub. L. No. 111-259, 124 Stat. 2654, further modified the reporting requirements so that if the President invokes the provision under section 413b(c)(1) to limit disclosure of the written finding to the Gang of Eight, he or she must provide all members of the intelligence committees with "a general description regarding the finding or notification, as applicable, consistent with the reasons for not yet fully informing all members of such committee."

429. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) (noting that the authority to classify national security information "flows primarily from this constitutional investment of power in the President, and exists quite apart from any explicit congressional grant").

430. *See, e.g.*, 18 U.S.C. § 798(b); 42 U.S.C. § 2162.

431. Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009).

(2) agency heads and officials designated by the President; and

(3) United States Government officials delegated this authority

SEC. 1.5. DURATION OF CLASSIFICATION

(a) At the time of original classification, the original classification authority shall attempt to establish a specific date or event for declassification based upon the duration of the national security sensitivity of the information. Upon reaching the date or event, the information shall be automatically declassified. The date or event shall not exceed the time frame established in paragraph (b) of this section.

(b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it shall be marked for declassification for up to 25 years from the date of the original decision.

. . .

SEC. 3.3. AUTOMATIC DECLASSIFICATION

(a) Subject to paragraphs (b)-(d) and (g)-(i) of this section . . . all classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin, except as provided in paragraphs (b)-(d) and (g)-(i) of this section.

(b) An agency head may exempt from automatic declassification under paragraph (a) of this section specific information, the release of which should clearly and demonstrably be expected to:

> (1) reveal the identity of a confidential human source, a human intelligence source, . . . or impair the effectiveness of an intelligence method currently in use, available for use, or under development;
>
> (2) reveal information that would assist in the development, production, or use of weapons of mass destruction;
>
> (3) reveal information that would impair U.S. cryptologic systems or activities;
>
> (4) reveal information that would impair the application of state-of-the-art technology within a U.S. weapon system;
>
> (5) reveal . . . [actual] U.S. military war plans that remain in effect . . . ;
>
> (6) reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States;
>
> . . .
>
> (8) reveal information that would seriously impair current national security emergency preparedness plans or reveal current vulnerabilities of systems, installations, or infrastructures relating to the national security;
>
> . . . .

A number of features of the Executive Order are worth discussing. First, the number of persons entitled to classify government documents as "confidential," "secret," or "top secret" is small, but it is not limited to the President alone.[432] Apart from the Vice President, however, any other person's authority to classify information derives ultimately from the President.[433] Second, the statute does not allow permanent classification of information, but rather sets a maximum classification period along with a default automatic declassification date.[434]

3. State secrets doctrine. As has been discussed earlier, the state secrets privilege is a judicially created doctrine that permits the United States to withhold from discovery in civil litigation any sensitive material whose disclosure would harm national security.[435] According to the Supreme Court, the government's invocation of the state secret privilege requires "a formal claim of privilege, lodged by the head of the department which has control

432. *Id.* at 708.
433. *Id.*
434. *Id.* at 709.
435. *See supra* Part II.E.2.

over the matter, after actual personal consideration by that officer."[436] Similar to the classification authority, the state secrets doctrine can be invoked by high-ranking executive branch officials beyond the President.[437]

B. A Model for Regulating National Security Lies

The three doctrines/approaches discussed in the preceding section provide a workable framework for regulating national security lies by Executive Branch officials. After describing the key points of the proposed statute, I explain how the covert action, classification authority, and state secrets doctrine support the model.

Proposed Statutory Points

> 1. The President or other high-ranking Executive Branch official may authorize a known false or materially misleading national security statement if he or she determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States.
>
> 2. Such determination shall be in writing, unless an immediate statement by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the official's decision shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than 48 hours after the decision is made.
>
> 3. If and when the President or other high-ranking Executive Branch official learns or has reason to believe that a subordinate has made a false or materially misleading statement, he or she shall make a written finding as soon as possible but in no event more than 48 hours after discovering the false or materially misleading statement.
>
> 4. All findings in support of known false or materially misleading national security statements shall be automatically published publicly within six months of the end of the Presidential term during which the statements were issued, unless the subsequent Presidential Administration determines, in a written finding that complies with (1), that maintaining the deception is necessary to further U.S foreign policies and is important to

436. United States v. Reynolds, 345 U.S. 1, 7–8 (1953).

437. *Id.* at 6–8.

> U.S. national security because revealing the deception would:
>
> (a) reveal the identity of a confidential human source, or a human intelligence source, or reveal information about the application of an intelligence source or method;[438]
>
> (b) reveal information that would assist in the development or use of weapons of mass destruction;[439]
>
> (c) reveal information that would impair U.S. cryptologic systems or activities;
>
> (d) reveal information that would impair the application of state of the art technology within a U.S. weapon system;
>
> (e) reveal actual U.S. military war plans that remain in effect;[440]
>
> (f) reveal information, including foreign government information, that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States;[441] or
>
> (g) reveal information that would seriously and demonstrably impair current national security emergency preparedness plans or reveal current vulnerabilities of systems, installations, infrastructures, or projects relating to the national security.

1. Why make the President or high-level executive official sign off on national security lies? The provision requiring a written finding in support of a national security lie parallels the statutory requirements for the initiation of covert actions first

438. Possible examples of intelligence methods that an executive branch official might invoke this subpart to lie about would be Stellar Wind or PRISM.

439. In 2010, computer experts discovered a computer worm that they dubbed Stuxnet, which had attacked Iran's nuclear enrichment program. The Obama Administration debated whether to shut down the computer worm, in part because of concerns that any definitive tracing of Stuxnet back to the United States could unleash cyberattacks against American targets. *See* David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 1, 2012), http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?mtrref=undefined&gwh=91450D5BCB6EFC667FFC4D89B857F520&gwt=pay.

440. Operation Eagle Claw (the Iran hostage rescue mission) was worth keeping secret by lying about it while it was pending.

441. Public acknowledgement of U.S. drone strikes in Yemen and Pakistan, countries that officially banned but tacitly permitted such attacks, would potentially cause internal friction and impact U.S. relations negatively. *See* Hakim Almasmari, *Drone Strikes Must End, Yemen's Parliament Says*, CNN WIRE (Dec. 15., 2013), http://www.cnn.com/2013/12/15/world/meast/yemen-drones/index.html.

established by the Intelligence Authorization Act of 1991.[442] The requirement of a written finding will not, by itself, prevent a President or high-ranking Executive Branch officer from spreading an indefensible national security lie if he or she is set on doing so. Such an official can fabricate the factual support for the need for the national security lie, or perhaps plausibly deny after the fact that the statement was a lie. No legal requirements or regulations are likely to have any meaningful effect in stopping such recalcitrant individuals from deceiving Congress and the public. At best, we can hope for deterrence from the threat of subsequent criminal prosecution, in which the official's signed written finding might well prove his or her criminal mental state.

For government officials acting in good faith (as most, if not all of those responsible for the deceptions discussed in Part I, could be characterized), problematic national security lies likely result from groupthink or other cognitive biases that have impaired their ability to evaluate the negative consequences of their contemplated falsehoods. Executive Branch groupthink occurs when too many officials are of a like-mind and fail to challenge the prevailing conventional wisdom.[443] Ideally, the relevant decision-making group (or advisors to the decision-maker) will include adequate diversity of policy, experience, and ideas so as to raise and argue dissenting points of view. Unfortunately, when it comes to high-level positions, advisors tend to be ideologically aligned with their selectors.[444]

The written finding requirement is not a guaranteed remedy to groupthink or heuristic biases, but it does impose a degree of formality and precision. That formality and precision, in turn, should force more serious evaluation of what otherwise might be half-baked ideas about the wisdom and desirability of particular national security lies;[445] as legal writing texts emphasize, clear writing requires clear thinking.

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442. *See supra* Part VII.A.1.

443. *See, e.g.*, IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 5 (1982).

444. *See* Tung Yin, *Great Minds Think Alike: The "Torture Memo," Office of Legal Counsel, and Sharing the Boss's Mindset*, 45 WILLAMETTE L. REV. 473, 495-502 (2009).

445. *Cf.* William E. Conner, *Reforming Oversight of Covert Actions After the Iran-Contra Affair: A Legislative History of the Intelligence Authorization Act for FY 1991*, 32 VA. J. INT'L L. 871, 922–23 (1992) ("Furthermore, the very process of committing justification for a particular covert action to paper and producing a written Finding should weed out weak, ill-conceived arguments and faulty reasoning."); JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 153–54 (2007) (noting that congressional oversight plays an important role not just in "program administration," but more significantly in "program initiation").

Moreover, by forcing the President or high-level executive official to create a written finding that acknowledges the national security lie, he or she would no longer have "plausible deniability" of the lie.[446] The written finding requirement essentially adopts the so-called "Front Page of the Newspaper" standard, where government officials are advised to ask themselves, "How would I feel if the course of action I am considering were reported on the front page of the local newspaper or blog? If you would be at all uncomfortable, the best course of action is not to do it."[447] In other words, Executive Branch officials are put on notice that their national security lies, along with the justifications for those lies, will be made public eventually. The act of committing the national security lie—and its justification—to paper ensures that the "Front Page" standard is not merely an academic exercise, but an actual one where the decision-maker can see the exact wording that would appear on the front page of major newspapers.

Moreover, a contemporaneous written finding that memorializes both the national security lie itself as well as the rationale for the lie will "provid[e] Congress with a means of reconstructing events."[448] While a determined prevaricator might well be clever enough to lay a foundation in advance to provide a seemingly plausible justification for a national security lie that is revealed years later, an official acting in good faith who might otherwise view past events in a revisionist light may instead find his or her recollection refreshed.[449]

2. Why allow anyone other than the President to authorize a national security lie? Drawn from the state secrets doctrine, the provision that permits the head of the department to authorize a national security lie within the jurisdiction of that department or agency is meant to relieve the President of the burden of having to review and approve every official false or misleading statement pertaining to national security. There is, of course, no such provision with regard to covert action; by law, only the

446. *Cf.* William J. Daugherty, *Approval and Review of Covert Action Programs Since Reagan*, 17 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 62, 63–64 (2004) (discussing one of the primary effects of the Intelligence Authorization Act).

447. *The "Front Page" Test: An Easy Ethics Standard*, INST. FOR LOCAL GOV'T (Feb. 2012), http://www.ca-ilg.org/sites/main/files/file-attachments/front_page_test_081513_0.pdf [https://perma.cc/672Y-GZBZ].

448. *See* Conner, *supra* note 445, at 922.

449. *Cf.* FED. R. EVID. 803(5) (creating exception to rule against hearsay for "[a] record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made . . . by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge").

President can authorize a covert operation.[450] The issue, then, is whether a false or misleading statement made in furtherance of U.S. national security is more akin to a covert operation or to a government secret that must be kept from a litigation adversary despite its relevance.

It is true that in an average year, the number of instances in which the government invokes the state secrets privilege is small enough that it would not seem like a burden for the President to oversee each matter personally. On the other hand, the number of published opinions in which courts either accept or reject the state secrets defense surely undercounts the true number, since not all district court decisions are published, and some plaintiffs will elect not to appeal when their cases are dismissed under the privilege. Moreover, the number of instances in which the state secrets doctrine is actually invoked is not an accurate measure of the number of instances in which a department head had to decide whether to invoke the privilege in pending litigation; that is, there is an unknown number of instances in which a department head considered a subordinate's request to invoke the privilege and declined to do so.

Principally, whether anyone other than the President should be able to assert the authority to issue a national security lie comes down to whether such a lie resembles covert action or government litigation. The President cannot be expected to keep track of all government litigation in which there might be state secrets at risk of exposure, but can (and should) know about all covert actions. Secrecy, like lies, is fundamentally about concealing information, not action, and for that reason, the authority to issue a national security lie should extend beyond the President.

3. Why disclose all national security lies six months after the end of the Administration that authorized them? Presumptive publication of findings underlying official national security lies within six months after the end of the Administration under whom the lies were issued uses inertia against continued deception, while still permitting the incoming Administration an opportunity to maintain those lies that are deemed necessary for national security.

Inertia has typically meant that new Administrations do not pursue the perceived misconduct of past Administrations, even those of the opposite political party (other than through rhetorical attacks), because the new Administration must take

450. *See* 50 U.S.C. § 413b (2012).

some affirmative action to redress the past, as opposed to moving forward on its own policy agenda.[451] Under the proposed approach, inertia means that previous lies will automatically be revealed, unless the new Administration decides to ratify the previous Administration's deceptions. To do so, however, the new Administration must issue its own written finding justifying the maintenance of the national security lie, knowing that such finding will be presumptively disclosed six months after the end of that Administration's term. This means that the new Administration cannot simply blame the previous Administration for the original lie, because if the new Administration really believed that the lie was indefensible, it would have allowed the previous Administration's finding to be disclosed.

It is true that in some contexts, path-dependency may prevent a new Administration from simply reversing its predecessor's action,[452] even if the new Administration would not have engaged in that action on a blank slate. For example, based on his public, contemporaneous statements,[453] we can assume that then-State Senator Obama would not have sought an AUMF to attack Iraq in 2003 had he been in the White House.[454] Yet, upon assuming the Presidency in early 2009, he was realistically unable to withdraw all U.S. combat forces immediately, because doing so likely would have resulted in intersectarian violence or worse.[455] Having attacked Iraq and deposed its leader, Saddam Hussein, the United States had altered the geopolitical landscape in a way that could not be restored to its pre-invasion state.

Do false or misleading statements foster this same kind of path-dependency? Peter Marguiles explains that "[b]ecause of path-dependence, unduly risky actions taken by officials at one point can hamstring future decisionmakers."[456] This is because

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451. *See supra* Part VI.D.

452. *See, e.g.*, Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603–04 (2001).

453. *See Transcript: Obama's Speech Against The Iraq War*, NPR (Jan. 20, 2009), http://www.npr.org/templates/story/story.php?storyId=99591469.

454. *But see* Tung Yin, *Broken Promises or Unrealistic Expectations? Comparing the Bush and Obama Administrations on Counterterrorism*, 20 TRANSNAT'L L. & CONTEMPORARY PROB. 465 (2011) (noting differences between what Barack Obama said he would do as President and what he actually did in his first two years in office).

455. Indeed, near the end of the presidential campaign in 2008, then-Senator Obama proposed a sixteen-month timetable for withdrawal of all U.S. troops from Iraq, based on the objective of "mak[ing] sure that our troops are safe and that Iraq is stable." *See* Jeff Zeleny, *Obama Might 'Refine' Iraq Timeline*, N.Y. TIMES (July 3, 2008), https://thecaucus.blogs.nytimes.com/2008/07/03/obama-open-to-refine-iraq-withdrawal-timeline/ [https://perma.cc/AL4Q-A6RZ].

456. Peter Marguiles, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 52 (2008).

path-dependence results from the feature of increasing returns when sticking with the path, compared with greatly increased costs when deviating from the path.[457] Put another way, lies might create the need for more lies.

The problems with the declassification of information process may give pause to drawing upon it as any kind of model for regulation national security lies. As Professor Mark Fenster has argued, "Too many documents are classified . . . at the same time, various military and intelligence agencies, and the presidential administrations that oversee them, allow—or even encourage—the expansion of classification authority throughout the bureaucracy and an increase in the number of classified documents."[458] One result of this classification promiscuity is a massive backlog of classified documents waiting for declassification review. As of 2009, when President Obama established the National Declassification Center to speed up the review process,[459] there were over 400 million pages of federal documents awaiting declassification review and release under the 25-year rule of § 3.3(a).[460] The backlog will almost certainly grow, as the increase in classified documents over the past quarter century means that every year, more and more documents will pass the 25-year threshold for declassification review.

It is unlikely that there are anywhere near as many national security lies as there are pieces of classified information. Most classified documents acquire their status derivatively—that is, they were created by someone who did not have original classification authority under section 1.3 of the executive order, but who did have lawful access to and referred to or incorporated a classified document.[461] No doubt there are many inaccurate or

457. *See* Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000).

458. Mark Fenster, *Disclosure's Effects: Wikileaks and Transparency*, 97 IOWA L. REV. 753, 786 (2012); Christina E. Wells, *"National Security" Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1203 (2004) ("In addition to encouraging simple errors in classification, the current classification scheme facilitates over-classification arising from other motives. Bureaucrats tend toward secrecy because it allows them to maintain their power").

459. *See* Executive Order 13,526, 75 Red. Reg. 707, 719–20 (Dec. 29, 2009).

460. *See Frequently Asked Questions about the National Declassification Center (NDC)*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/declassification/ndc/faqs.html [https://perma.cc/V8MA-KUPZ] (last reviewed Nov. 13, 2017).

461. *See* 12 C.F.R. § 403.4(a); Laurent R. Hourcle, *Military Secrecy and Environmental Compliance*, 2 N.Y.U. ENVTL. L.J. 316, 327 (1993) ("Although only a limited number of persons can make original classification decisions, classified information tends to beget other classified information through derivative classification"); Heidi Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential*

false national security-related statements that are derivative of an original national security lie. However, in many such instances, the derivative statement will not constitute a separate national security lie, because the speaker/writer is not aware of the original lie.

4. Is there reason to believe the President or high-level Executive Branch officials would comply with the proposed model? The proposed model for regulating national security lies provides checks and balances only in the long term and indirectly at that, via reputational accountability, with no judicial review. One may wonder whether the President and high-level Executive Branch officials would simply ignore the proposed regulations and lie with the sense of security that no judge or congressional representative is in a position to point out such non-compliance or to take any meaningful action to stop the lies.

At the outset, it should be noted that no laws or regulations would stop a government actor determined to pursue a particular course of action. The Boland Amendment, for example, unambiguously prohibited the Executive Branch from providing any funding or resources to the Contras in Nicaragua,[462] yet Reagan Administration National Security Council staffers John Poindexter and Oliver North still implemented the "arms for hostages" trade that ultimately blew up into the Iran-Contra scandal.[463] That a regulatory process includes no judicial authority with jurisdiction to review compliance with that process does not mean that the process is "not law." That criticism is frequently directed at international law, which likewise lacks a central judicial body to provide definitive resolutions of legal disputes.[464] Yet, as noted international law scholar Louis Henkin observed, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[465] Henkin argued that when

Supremacy, 5 U. ST. THOMAS J.L. & PUB. POL'Y 62, 100 (2010) (noting in 2009 there were 2557 persons with "original classification" authority but "several million" with derivative classification authority).

462. Department of Defense Appropriation Act, 1984, Pub. L. 98-212, 97 Stat. 1421 (1983); Intelligence Authorization Act for Fiscal Year 1984, Pub. L. 98-215, 97 Stat. 1473 (1983); Pub. L. 98-473, 98 Stat. 1837 (1984); International Security and Development Cooperation Act of 1985, Pub. L. 99-83, 99 Stat. 190 (1985).

463. For a succinct summary of the arms for hostages trade in cartoon form, see STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 494 (5th ed. 2011).

464. To be sure, there are international judicial authorities, including the International Court of Justice and the International Criminal Court, that adjudicate international disputes, but those courts' jurisdictions depend on the consent of the nations involved.

465. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed.

challenged about the legality of their actions, nation-states generally claimed compliance with international law, as opposed to openly defying it.[466] Why, he wondered, would they provide legal justifications (no matter flimsy) unless they felt some obligation imposed by international law?[467]

The National Security Act and Intelligence Authorization Act approaches to restraining the President's authority to order covert actions might be understood best as "bend, don't break," in the sense that they neither forbid the President from engaging in such actions, nor require him or her to obtain Congressional approval, mandating only that the President make appropriate findings and communicate them to at least select members of Congress.[468] They may be contrasted with the more direct and controlling approach that Congress attempted with regard to Presidential war powers through the War Powers Resolution of 1975,[469] with more questionable results.

Under the War Powers Resolution, the President is statutorily required to report to Congress within 48 hours any time American military forces are placed "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" or when deployed into foreign territory or waters.[470] Furthermore, when the reporting requirement is triggered by the "imminent involvement in hostilities" prong, a 60-day clock begins; if Congress has not authorized the use of military force by the end of the 60 days, "the President shall terminate any use of United States Armed Forces"[471] Pro-Congress critics of the War Powers Resolution contend that it has generally (or utterly) failed to control the President because any conflict lasting up to 60 days essentially has been pre-approved.[472] To be sure, this criticism may be overstated; since 1975, for conflicts resembling traditional war (Iraq/Gulf War I; Afghanistan/al-Qaeda; Iraq/Gulf War II), some White House occupants have sought and received congressional approval via statutory Authorizations for Use of Military Force.[473] On the other hand, during that same time, on at least

1979).

466. *Id.* at 43.

467. *Id.* at 49.

468. *Supra* Part VII.A.1.

469. 50 U.S.C. § 1541.

470. 50 U.S.C. § 1543(a)(1).

471. 50 U.S.C. § 1544(b).

472. *See* ELY, *supra* note 74 at 48–49; HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

473. *See* Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224

eleven significant occasions, the Executive Branch has sent U.S. armed forces into actual combat without any legislative authorization:

- Gulf of Siam/*SS Mayaguez* rescue (1975)[474]
- Iran hostage rescue attempt (Operation Eagle Claw) (1980)[475]
- Intervention in Lebanon (1982–84)[476]
- Invasion of Grenada (1983)[477]
- Retaliatory bombing of Tripoli, Libya (1986)[478]
- Persian Gulf conflicts with Iran (1986–88)[479]
- Invasion of Panama/capture of Gen. Manuel Noriega (Operation Just Cause) (1989)[480]
- Somali warlord capture mission (Black Hawk Down) (1993)[481]
- Intervention in Bosnia (1991–99)[482]
- Intervention in Kosovo (1999)[483]
- Military support in Libya (2011)[484]

Until the mid-1990s, no President had violated either the reporting requirement or the 60-day clock of the War Powers Resolution, even in the instances listed above, as the prevailing

(2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498 (2002). As to whether an AUMF satisfies the Declare War Clause, see Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048, 2059–62 (arguing "yes").

474. *War Powers*, LIBRARY OF CONGRESS, https://www.loc.gov/law/help/war-powers.php [https://perma.cc/3ZM6-LBJ8] (last updated Nov. 27, 2017).

475. *President Carter Takes Responsibility for Failed Mission to Free Iran Hostages* (NBC NIGHTLY NEWS television broadcast Apr. 25, 1980), https://static.nbclearn.com/files/nbcarchives/site/pdf/2916.pdf [https://perma.cc/D67C-QTZ7].

476. *War Powers*, *supra* note 474.

477. Brian Hughes, *Interactive: Presidents Historically Have Ignored War Powers Resolution*, WASH. EXAM'R (Sept. 6, 2013), http://www.washingtonexaminer.com/interactive-presidents-historically-have-ignored-war-powers-resolution/article/2535123.

478. Michel Chossudovsky, *America's Planned Nuclear Attack on Libya*, GLOBAL RESEARCH (Mar. 30, 2007), https://www.globalresearch.ca/america-s-planned-nuclear-attack-on-libya/24049.

479. John H. Cushman Jr., *U.S. Strikes 2 Iranian Oil Rigs and Hits 6 Warships In Battles Over Mining Sea Lanes in Gulf*, N.Y. TIMES (Apr. 19, 1988), http://www.nytimes.com/1988/04/19/world/us-strikes-2-iranian-oil-rigs-hits-6-warships-battles-over-mining-sea-lanes-gulf.html?pagewanted=all [https://perma.cc/582W-6F7E].

480. Peter Eisner & Manuel Noriega, *The Invasion of Panama, and How George H.W. Bush Misled America*, NEWSWEEK (Mar. 18, 2017), http://www.newsweek.com/donald-trump-george-hw-bush-fall-panama-noriega-570478.

481. *What a Downed Black Hawk In Somalia Taught America*, NPR (Oct. 5, 2013, 4:45 PM), http://www.npr.org/2013/10/05/229561805/what-a-downed-black-hawk-in-somalia-taught-america.

482. *War Powers*, *supra* note 474.

483. Brian Hughes, *supra* note 477.

484. *Id.*

practice was to submit a report "consistent with" (as opposed to "required by") the act for those military actions lasting fewer than 90 days—thus not even triggering the clock.[485] However, the Clinton Administration's aerial bombing campaign in Kosovo in 1998 was authorized neither by Congress nor by the United Nations Security Council and exceeded 60 days.[486] Regrettably, the Clinton Administration did not provide any justification for its initial air strikes,[487] though the Office of Legal Counsel did issue an opinion concluding that a subsequent congressional appropriation bill "constituted Congressional authorization for continuing bombing efforts in Kosovo even after the running of the 60 day clock"[488]

Similarly, the Obama Administration's military support of the allied coalition against Libya in 2011 seemed to run afoul of the War Powers Resolution: the 60-day clock started on March 19, 2011 when U.S. warships launched cruise missiles against Libyan air defense systems,[489] yet two months later, U.S. forces had still not withdrawn.[490] State Department Legal Adviser Harold Koh defended the Obama Administration before the Senate Foreign Relations Committee in a 2011 hearing in which he argued that the U.S. efforts in Libya did not trigger the 60-day clock because they were not "hostilities" within the meaning of the statute.[491] Although this argument did not persuade many critics,[492] the important point is that Koh went to great lengths to

485. *See* ELY, *supra* note 74, at 49.

486. *See* Dawn Johnsen, *When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law*, 53 HOUS. L. REV. 1065, 1092 (2016); BAKER, *supra* note 445, at 189.

487. *See* Johnsen, *supra* note 486 at 1092–93 (arguing that it was desirable that the Clinton Administration not attempt to justify the Kosovo strikes, lest it establish a precedent for violating international law).

488. Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 365 (2000). As James E. Baker has noted, the War Powers Resolution expressly "states that funding authorizations and appropriations shall not constitute authorization" BAKER, *supra* note 445, at 189.

489. *See Libya: US, UK and France attack Gaddafi forces*, BBC NEWS (Mar. 20, 2011), http://www.bbc.co.uk/news/world-africa-12796972.

490. *See* Alan J. Kuperman, *Obama's Libya Debacle: How a Well-Meaning Intervention Ended in Failure*, FOREIGN AFF. (2015), https://www.foreignaffairs.com/articles/libya/obamas-libya-debacle [https://perma.cc/FYL3-S3RL].

491. *See Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 8 (2011) (Statement of Hon. Harold Koh, Legal Advisor, U.S. Dep't of State, Washington, DC).

492. *See, e.g.*, Paul Starobin, *A Moral Flip-Flop? Defining War*, N.Y. TIMES (Aug. 11, 2011), http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html?mcubz=0&mtrref=undefined&gwh=63E27F904E98E1368934E2D948F0BC2D&gwt=pay&assetType=opinion ("He is not winning support for his position in the academic world or even in some key parts of the administration. Legal advisers at both the Justice Department and Pentagon have declined to back the no-hostilities brief").

concoct a justification that the Administration had complied with the War Powers Resolution, and not that the Administration was free to ignore the statute.[493] By contrast, the Obama Administration could have conceded that the 60 day clock had been triggered, but argued that the withdrawal requirement was unconstitutional as a legislative veto in violation of *INS v. Chadha*.[494]

This is not to say that "bend, don't break" is necessarily the best approach for managing inter-branch conflicts between Congress and the President. An extremely criticized suggestion along such lines in the interrogation context was Alan Dershowitz's proposal for "torture warrants," which Professor Dershowitz proposed as a way of addressing the pressure that law enforcement officers would face in a "ticking time bomb" scenario.[495] The torture warrant would be a judicially approved warrant for law enforcement officers to engage in non-lethal torture in appropriately dire circumstances. According to Dershowitz, in such situations, police officers will engage in torture whether lawful or not, and therefore the legal regime should regulate torture openly and transparently. Not surprisingly, Dershowitz's proposal drew withering criticism.[496]

There is an important difference between torturing and starting potentially aggressive wars on the one hand, and telling national security lies on the other hand. Although some scholars have advanced sophisticated consequentialist arguments in favor of torture,[497] the intentional infliction of physical or mental suffering is considered so repugnant that the international law ban on it is considered non-derogable no matter what the circumstances.[498] Under federal law, torture carries a statutory maximum of twenty years, unless death occurred as a result, in

493. *Id.*

494. INS v. Chadha, 462 U.S. 919 (1983); *but see* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984) (arguing that the War Powers Resolution was a valid definition of war under Congress's Article I powers).

495. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 160 (2002).

496. *See, e.g.*, J. Jeremy Wisnewski, *Unwarranted Torture Warrants: A Critique of the Dershowitz Proposal*, 39 J. SOCIAL PHIL. 308 (2008); MATTHEW H. KRAMER, TORTURE AND MORAL INQUIRY: A PHILOSOPHICAL ENQUIRY 242–66 (2014); Marcy Strauss, *Torture*, 48 N.Y. L. REV. 201 (2003/04).

497. *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW 719–23 (1997) (arguing that the deontological objection to torture, while generally valid, breaks down when the number of human lives at stake surpasses a certain threshold).

498. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

which case the maximum penalty includes death. [499] Similarly, the post-World War II Nuremburg and Tokyo trials serve as precedents that the initiation of an aggressive war is a grave war crime.[500]

Lying, on the other hand, even about matters of national security, simply does not fall into the same category of wrong as torturing a person or starting a war. As noted earlier, lying to federal officials can be a federal crime, but the relatively short statutory maximum of five years under 18 U.S.C. § 1001 suggests that it is a much less serious wrong than torture or starting wars under false pretenses.[501] Besides the statutory maximum, the existence of legal defenses such as literal truth and materiality suggest a greater tolerance for some misleading and deceptive statements, whereas efforts to minimize certain forms of deliberate mistreatment as "torture lite" have generally been derided.[502] Accordingly, even if "bend, don't break" can be seen as a problematic philosophy in situations where it would seemingly legitimize some degree of Presidential action in areas such as aggressive war-making or coercive interrogation, the same kind of legitimization of national security lying would be less problematic.

VIII. CONCLUSION

Unless one takes the principled but unrealistic position that neither the President nor his or her aides should ever lie,[503] there will be temptations to mislead or deceive Congress, the press, and the public. The goal is to provide an incentive structure that will limit, as much as practicable, the instances of lying to ones where the harms of doing so are minimal, the gains are significant, and the duration of the lie is no more excessive than necessary. Modeled after the established statutory rules concerning covert actions, information classification, and the state secrets doctrine, the proposal in this Article provides an

499. *See* 18 U.S.C. § 2340A.

500. *See, e.g.*, KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW (2011). This is not to say that every use of American military force that is not authorized by Congress—and that is not directly defensive in nature, *see* The Prize Cases, 67 U.S. 635 (1863)—is aggressive in nature. One would be hard-pressed to detect any American intent to acquire foreign territory in even the most problematic recent uses of military force (Kosovo and Libya). Conversely, even a congressionally-authorized use of military force might well be perceived as aggressive, as with the second Gulf War.

501. 11 U.S.C. § 1001.

502. *Id*. See 18 U.S.C. § 2340.

503. *Cf.* ALTERMAN, *supra* note 5, at 314.

avenue for executive branch officials to invoke a process to justify a national security lie, but with the understanding that the lie will eventually be disclosed.