A (QUALIFIED) DEFENSE OF SECRET AGREEMENTS

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INTRODUCTION

Secret international agreements have a bad reputation. Ever since states misused secret agreements during World War I, commentators have been quick to condemn these agreements as pernicious and destabilizing to international peace and security. As that war wound down, the prevailing view—crystallized most prominently by President Woodrow Wilson in his

Fourteen Points—was that the use of secret agreements exacerbated the war's violence and should be abandoned. Many of the secret agreements of that era also undercut notions of self-determination and revealed hypocritical policies by democratic governments. The concerns triggered by secret agreements were so salient that states crafting the League of Nations Covenant and then the United Nations Charter included provisions intended to eliminate the use of these agreements.

Conventional wisdom holds that the Charter has largely achieved this goal. As a descriptive matter, commentators today commonly assert that the use of secret agreements is rare, due in part to the norms in the Charter that favor the publication of international agreements and disfavor secrecy.[1] Many international legal scholars seem implicitly to accept this descriptive claim, and focus their work almost entirely on the public products of state-to-state interactions (such as international agreements and resolutions produced by international organizations).[2] Those who study foreign relations and the Executive's powers within the U.S. legal system likewise tend to focus on the Executive's public behavior and outputs; they spend much less time exploring how the Executive conducts international relations behind the curtain. It is almost enough to make one believe that secret agreements have disappeared from the international stage.

Many would celebrate this disappearance. Various scholars argue that secret agreements inhibit peaceful relations among states and that their use signals that states are pursuing substantive goals that violate international law.[3] This normative perspective on secret agreements finds its genesis in the

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1. *See, e.g.*, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 1341 (Oliver Dorr & Kirsten Schmalenbach eds., 2012) [hereinafter VIENNA CONVENTION COMMENTARY] (stating that secret treaties no longer play an essential role in international relations); Charles Lipson, *Why Are Some International Agreements Informal?*, *in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 293, 328 (Beth A. Simmons & Richard H. Steinberg eds., 2007); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 583 (2005) (describing secret agreements as "[l]ess in favor today"). For a general discussion of transparency norms in international law, see TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi & Anne Peters eds., 2013).

2. *See generally, e.g.*, ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2d ed. 2007) (containing extensive discussion of treaty practice but virtually no discussion of secret agreements); SECRECY AND FOREIGN POLICY (Thomas Franck & Edward Weisband eds., 1974) (discussing various aspects of secrecy in foreign relations but mentioning "secret treaty commitments" in a single paragraph). Some scholars may recognize that secret commitments exist and that states find them useful, but choose not to write about the issue because of the methodological challenges described herein.

3. *See generally, e.g.*, Richard Caddell, *Secret Treaties*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrum ed., 2006) ("In the current era, secret treaty-making carries negative connotations . . . .").

specific historical context of World War I, but a range of secrecy scholars today have limned more contemporary critiques of secret law.[4]

There the story has stood: secret agreements are rare, and that is something to celebrate. But the story is wrong, descriptively and normatively. Secret international commitments, it turns out, are pervasive today.[5] An entire ecosystem of these commitments permeates U.S. foreign policy. The United States concludes about a dozen legally binding secret international agreements a year.[6] There is reason to think it concludes many more politically binding secret arrangements as well.

Glimpses of these commitments are seen infrequently, but in the past dozen years numerous secret commitments have come to light. For example, Pakistan secretly authorized the United States to conduct lethal strikes from Pakistani airspace against terrorist groups.[7] Other states have entered into non-public agreements with the United States in which they affirm that they will treat humanely people the United States transfers to them.[8] Tunisia secretly has agreed to allow the United States to fly drones from a base in Tunisia to combat ISIS,[9] and Libya and the United States have concluded a secret agreement on defense contacts and cooperation.[10] Other examples of

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4. *See, e.g.*, ELIZABETH GOITEIN, BRENNAN CTR. FOR JUSTICE, THE NEW ERA OF SECRET LAW 15–27 (2016) (articulating philosophical, constitutional, and practical objections to secret law); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491 (2007); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 259 (2010); Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SECURITY J. 241, 245 (2015).

5. As discussed in more detail in Part I, this article uses the term "secret commitments" to include both secret agreements (which are binding under international law) and secret arrangements (which are only politically binding).

6. Arthur W. Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 402 n.24 (1977) (noting that the United States enters into approximately ten to twelve classified agreements a year).

7. Adam Entous et al., *U.S. Unease Over Drone Strikes*, WALL ST. J. (Sept. 26, 2012), https://www.wsj.com/articles/SB10000872396390444100404577641520858011452.

8. For one example, see Opposition to Emergency Application for Stay at 6, Mohammed v. Obama, 561 U.S. 1042 (2010) (No. 10A52), https://www.state.gov/documents/organization/179251.pdf (describing secret nature of assurances from Algeria); Andrea Shalal-Esa & David Alexander, *U.S. Transfers Two Guantanamo Detainees to Algeria*, REUTERS (Aug. 29, 2013, 1:20 PM), http://www.reuters.com/article/us-usa-guantanamo-algeria-idUSBRE97S0HU20130829.

9. Adam Entous & Missy Ryan, *U.S. Has Secretly Expanded Its Global Network of Drone Bases to North Africa*, WASH. POST (Oct. 26, 2016), https://www.washingtonpost.com/world/national-security/us-has-secretly-expanded-its-global-network-of-drone-bases-to-north-africa/2016/10/26/ff19633c-9b7d-11e6-9980-50913d68eacb_story.html?utm_term=.64a92073d11d.

10. *Libya, U.S. Said to Sign Secret Defense Pact*, MIDDLE E. NEWSLINE (Jan. 20, 2009), http://www.menewsline.com/article-1150,2501-Libya-U-S-Said-To-Sign-Secret-D.aspx.

secret commitments related to military, intelligence, and nuclear cooperation abound.

The apparent proliferation of secret commitments among states raises several key questions: First, how did we transition from the post-war era's apparent aversion to secret agreements to a widespread use of secret agreements and arrangements today? Were the Charter's framers overly optimistic or simply hypocritical? Second, how worried should we be about the contemporary proliferation of secret commitments? Do the concerns that prompted the Charter's framers to be wary of secret agreements still apply?

This article sets out to describe and defend—with certain qualifications—the use of secret commitments in contemporary practice, with a focus on those to which the United States is a party. Secret commitments should not always be viewed with suspicion and hostility. Notwithstanding their opacity, these commitments perform a critical role in shaping legal and strategic interactions between the United States and other states. Further, the evidence belies the idea that states predominately resort to secrecy when they intend to violate international norms. Most of those commitments that have come to light are—counter-intuitively, perhaps—consistent with the U.N. Charter, and in some cases actually advance the Charter's purposes.

The article proceeds as follows. Part I establishes what we know about the secret commitment landscape. It identifies the types of international commitments covered by this article and introduces evidence about the volume of secret commitments that exist today. It then turns the clock back, offering a brief history of secret agreements to excavate the roots of the public aversion to them and the steps states subsequently took in the League of Nations Covenant and the U.N. Charter to minimize their use. A close study of how those provisions developed reveals that the norm against secret agreements was shaky from the beginning.

Taking that as a starting point, Part II explores and defends the contemporary use of secret commitments. It argues that even though states have not stanched their use of inter-state secrecy, the commitments they conclude raise fewer concerns than in the World War I era. Although some of the earlier era's concerns about the use of secret agreements endure today, the international landscape has changed in ways that renders a number of the early concerns anachronistic. One key change—perhaps *the* key change—that helps account for this shift is the adoption and entrenchment of the U.N. Charter, with its rules against aggression, its preservation and clarification of the right of self-defense, and its norms promoting sovereignty, international law, and human rights.

To support the argument that secret commitments often are defensible, Part II examines concrete categories of commitments that have come to light,

including commitments related to military and intelligence cooperation and the deployment of nuclear and conventional weapons. It then steps back to explore the nature of these secret commitments along two axes of potential criticism: the *reasons* that states use secrecy in the commitments, and the *contents* and *goals* of the secret commitments themselves. It distills from the available evidence five reasons why states employ secrecy in their international commitments and argues that most (though not all) of these reasons are legitimate. Using secrecy can advance international peace and security by facilitating private transparency between states, protecting state sovereignty, fostering non-obvious bilateral relationships, and mitigating tensions among states. Further, as a substantive matter, many of these commitments are intended to enhance self-defense, avoid interstate conflict, or promote norms of international law, and thus advance—or at least operate consistently with—the substantive goals of the Charter.

Certain secret commitments remain troubling or deeply opaque, however, and so Part III shifts to the normative, identifying various existing dynamics in the U.S. system that might assuage concerns about the abuse of secret commitments and proposing some procedural protections that all states might develop to minimize the democratic challenges that secret commitments pose. Although Congress can play a helpful role here, even altering procedures within the executive branch itself can diminish some of these persistent concerns.

Secret commitments are worth studying in their own right, but a more complete understanding of secret commitments also provides new insights into the literature on executive power and lawmaking, government secrecy, and compliance with international agreements. The executive power scholarship explores how much authority the executive branch does or should have in the national security area, how the other branches may serve as checks, and the extent to which the Executive makes and is bound by law. A growing body of literature on government secrecy focuses—often critically—on the use of secrecy by the Executive, Congress, and the courts to shape domestic rules out of the view of the public.[11] And international legal

11. For recent work on U.S. government secrecy, see GOITEIN, *supra* note 4, at 15–27; HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (2015); RAHUL SAGAR, SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY (2013); Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 450 (2014); Rudesill, *supra* note 4, at 245. For work on comparative secrecy, see MICHAEL P. COLARESI, DEMOCRACY DECLASSIFIED: THE SECRECY DILEMMA IN NATIONAL SECURITY (2014). For recent scholarship on secret historical treaties, see Antony T. Anghie, *Introduction to Symposium on the Many Lives and Legacies of Sykes-Picot*, 110 AM. J. INT'L L. UNBOUND 105, 107–08 (2016); Megan Donaldson, *Textual Settlements: The*

scholars have long considered why states conclude international commitments, the extent to which the binding or non-binding nature of those commitments matters, and why states comply with or violate their commitments. But none of these three bodies of literature takes into account secret commitments in framing its inquiries and conclusions.

Part IV explores how taking account of secret commitments can deepen our understandings in each of these areas. First, in the executive power realm, the fact that secret commitments are largely consistent with domestic and international law strongly suggests that the Executive perceives itself to be bound by law, even in the absence of external checks by Congress and the courts. Second, secret commitments challenge the traditional approach in secrecy literature that treats Congress as the dominant check on the Executive; the U.S. partners to secret commitments also may serve as a crucial check on abuses of secrecy. Third, secret commitments complicate the treaty literature, which tends to treat a state's reputation as an important driver of compliance and often views political commitments as far less stable than legal commitments. A state's reputation as law-compliant plays a much-diminished role in stimulating compliance with secret commitments; nevertheless, secret political commitments appear to be about as stable as legally binding ones. Secret commitments thus offer important test cases against which to press our existing understandings of how the Executive behaves individually and how states behave collectively in their international relations.

This article does not argue that all secret commitments are beneficial; indeed, some secret commitments that have come to light are troubling. It also is true that we only have visibility into a small sample of these commitments, and therefore must be cautious in drawing broad conclusions. Nevertheless, many secret commitments of which we are aware advance substantive principles contained in the U.N. Charter. Indeed, the overall consistency of modern secret commitments with Charter norms suggest that states have internalized those norms more deeply than we might have predicted.

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Two preliminary comments, one on methodology and one on the article's heavy reliance on U.S. practice. First, there are significant methodological hurdles to writing about secret commitments, when one must rely only on commitments that have been declassified or leaked, when only pieces of those

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Sykes-Picot Agreement and Secret Treaty-Making, 110 AM. J. INT'L L. UNBOUND 127, 127 (2016); John Quigley, *Leon Trotsky and the Prohibition Against Secret Treaties*, 19 J. HIST. INT'L L. 246 (2017).

commitments are known, and when the nature and contents of what are surely many other secret commitments remain unknown. A surprising number of secret commitments have come to light since World War I, and thus provide a broad set of examples in which to ground this article. Nevertheless, it is impossible to assess the extent to which the commitments that have come to light are representative of the part of the iceberg that remains underwater. It also is theoretically possible that states have strategically leaked certain secret commitments and not others. It is unclear that they have done so in practice, however, because not all of the leaked commitments paint states in a positive light.[12]

Second, by virtue of the reach of U.S. military and intelligence activities around the world, the United States is almost certainly over-represented in the number of secret commitments it has concluded. This, coupled with an active U.S. press, means that we know more about secret U.S. commitments than about those from other states. The article draws from other states' available secret commitments to inform the analysis of why states employ secrecy and to create a typology of secret commitments. The primary emphasis, however, is on secret commitments to which the United States is a party.

I. THE SECRET COMMITMENT LANDSCAPE

For many, the phrase "secret commitment" conjures up a clandestine deal negotiated in a smoky room between two governments to invade, spy on, or interfere with the government of a third, enemy state. Such commitments exist, to be sure, but secret agreements are far more varied than that in their contents and goals. This Part lays the groundwork for considering secret commitments by defining and defending the inclusion in this article of several types of secret commitments among states. It also offers a perspective on the quantity of secret commitments that exist today, to illustrate why an assessment of post-Charter secret commitments is overdue. It then turns to key historical secret agreements and their critiques to elucidate why secret commitments have had such a negative valence.

A word on terminology: this article encompasses a broad set of secret commitments among states, including secret treaties or secret annexes to public treaties ratified by legislatures; secret executive agreements (which have the status of international agreements on the international plane but are

12. Indeed, some government actors with access to secret commitments might choose to leak a commitment to make their government look good, while others might choose to leak a commitment to paint their government in a negative light.

not approved by legislatures); and secret arrangements that take the form of political commitments. The phrase "secret agreement" identifies agreements that the states parties intended to be legally binding under international law, and the phrase "secret arrangement" identifies those commitments that are not legally binding. "Secret commitment" captures both secret agreements and secret arrangements.[13] By "secret," I mean commitments that the involved states do not intend to make known to the public or, usually, other states.[14] A state's legislature may or may not know about the secret commitment.[15]

Using this capacious framing best captures the full range of non-public commitments by which states advance their national security or foreign policy goals.[16] Excluding secret political arrangements would miss a broad swath of important interactions among states. As a result, the exclusion would render less robust this article's argument that inter-governmental secrecy does not seem to conceal extensive violations of international law. If states generally practiced legal caution in concluding secret agreements and channeled their law-breaking activity into secret political arrangements, a paper that focused only on secret agreements would overlook an important part of the secrecy story.

A. U.S. Treaties and Executive Agreements

States in general, and the United States in particular, conclude a variety of secret agreements that they intend to be binding under and regulated by international law. In defining the agreements to which its rules apply, the Vienna Convention on the Law of Treaties ("VCLT") defines a treaty as an "international agreement concluded between states in written form and

13. In some cases, it is not clear from the public record whether a particular secret commitment is an agreement or an arrangement.

14. Secret agreements sometimes contain provisions clarifying that the parties will share the arrangement with a limited set of third states. *See* Donaldson, *supra* note 11, at 129 (noting that Japan, Italy, and the United States were informed about the Sykes-Picot secret arrangement between Britain and France).

15. For instance, the Dutch Constitution provides that its parliament generally approves treaties, but makes an exception for situations in which "it is in the interests of the state that it should remain secret or confidential." AUST, *supra* note 2, at 185.

16. A few secret agreements are not national security-related, but instead relate to economic topics or other bilateral cooperation such as extradition. *See* discussion *infra* Part II.A.5 (discussing Japan's agreement to pay to restore Okinawa and Poland's agreement with Switzerland to transfer Polish assets in Switzerland to Swiss government); discussion *infra* Part II.C.4 (discussing China's secret agreement with North Korea to return escaped "convicts").

governed by international law, . . . whatever its particular designation."[17] The VCLT recognizes that states may conclude binding international agreements in oral form, even though the VCLT does not apply to them.[18] A core feature of these international agreements is that the parties intend them to be governed by international law; further, the parties intend at least some elements of the agreement to be legally binding.

In the U.S. system, the terminology surrounding international agreements is slightly different. The United States generally demarcates as "treaties" (or "Article II treaties") those international agreements to which the Senate has given advice and consent to ratification. International agreements that the President concludes under her own constitutional authority and in which Congress has no formal role are usually termed "sole executive agreements." The two different forms have the same weight on the international plane: both reflect legally binding commitments governed by international law.

The United States historically has concluded a very limited number of Article II treaties containing secret provisions.[19] The United States entered into a treaty with the Creek Indians in 1790 that included secret clauses.[20] President Washington obtained advance approval for that treaty from the Senate, and after its conclusion did not send it back for the Senate's further advice and consent.[21] The 1848 Treaty of Guadalupe-Hidalgo contained a

17. Vienna Convention on the Law of Treaties art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf [hereinafter VCLT].

18. *Id.* art. 3.

19. The United States (at least conceptually) is able to conclude secret Article II treaties because the Senate's procedures allow it to conduct its business in secret. Standing Rules of the Senate, Nos. XXXV–XXXVII, S. DOC. NO. 258, at 39–42 (1936); *see also* MILDRED AMER, CONG. RESEARCH SERV., 98-718 GOV, SECRET SESSIONS OF THE HOUSE AND SENATE (2008). A Senate Rule provides that "[a]ll confidential communications made by the President of the United States to the Senate shall be by the Senators and the officers of the Senate kept secret; and all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy." Standing Rules of the Senate, No. XXIX(3), S. DOC. NO. 113-18, at 63 (2013). The Framers themselves assumed that at least some Senate discussions of treaties would be secret. SAGAR, *supra* note 11, at 24 (quoting Madison as asserting that "the policy of not divulging the most important transactions and negotiations of nations is universally admitted").

20. 1 DAVID HUNTER MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 20 (1931).

21. Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 261 n.63 (2012) (quoting S. EXEC. JOURNAL, 1st Cong., 2d Sess. 55–56 (1790)). One secret clause in that treaty granted the chief Creek negotiator a trade monopoly and a position with the U.S. Army at the rank of brigadier general. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 128 (2009); James L. Appleton, *Treaty of New York (1790)*, ENCYCLOPEDIA ALA. (Sept. 2, 2011), http://www.encyclopediaofalabama.org/article/h-1537.

secret article that would have allowed Mexico to delay ratifying the treaty for eight months, but the Senate omitted that article in voting to provide advice and consent to ratification.[22]

Far more prevalent in U.S. practice are secret executive agreements. Congress has recognized that the Executive may and does conclude secret agreements. The Case-Zablocki Act ("Case Act"), which requires the Executive to transmit all executive agreements to Congress, provides a method by which the Executive may transmit classified agreements only to the Senate Foreign Relations Committee and House Foreign Affairs Committee.[23] It also requires the Executive to provide to Congress a list of each agreement that the Executive has concluded during the preceding calendar year, but provides that the list may be classified.[24] The Case Act thus effectively affirms that the Executive may conclude secret agreements with other states.

At least one other provision of U.S. law anticipates that executive actors will conclude agreements that may be secret. Executive Order 12,333 assigns to the Director of National Intelligence the authority to enter into intelligence and counter-intelligence agreements and arrangements with foreign governments and international organizations.[25] Although the provision is not explicit that the agreements may be classified, it is reasonable to assume that intelligence agreements generally will not be made public.

It is impossible to quantify with confidence the total number of U.S. secret agreements that are currently in force, or that the government historically has concluded. One scholar reports, based on a 2009 interview with Senate Foreign Relations Committee staff, that between 5% and 15% of executive agreements currently in force are classified.[26] Another author (who was then

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Another secret clause provided that the Creeks could import $60,000 worth of goods without paying duties on them. *Enclosure: Secret Article of the Treaty with the Creeks, 4 August 1790*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-06-02-0084-0002 (last visited July 17, 2017).

22. Jesse S. Reeves, *The Treaty of Guadalupe-Hidalgo*, 10 AM. HIST. REV. 309, 324 (1905).

23. 1 U.S.C. § 112b(a) (2012).

24. *Id.* § 112b(d).

25. Exec. Order No. 12333, 3 C.F.R. § 1.3(b) (1981) ("In addition to fulfilling the obligations and responsibilities prescribed by the Act, the Director: . . . In regard to the establishment and conduct of intelligence arrangements and agreements with foreign governments and international organizations: (A) May enter into intelligence and counterintelligence arrangements and agreements with foreign governments and international organizations; [and] (B) Shall formulate policies concerning intelligence and counterintelligence arrangements and agreements with foreign governments and international organizations.").

26. Oona Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 252 (2009).

the Assistant Legal Adviser for Treaty Affairs at the U.S. State Department) stated, "The United States enters into approximately ten to twelve classified agreements each year."[27] A further data point is a Senate-produced report that calculated the number of late transmittals of executive agreements under the Case Act, and which identified the percentage of late transmittals in which the underlying agreement was classified. The report showed that the Executive transmitted 1,245 agreements late, of which 117—or 9.4%—were classified.[28] (It is possible that secret agreements are over-represented in late transmittals because the process of transmitting them is more cumbersome.) If we estimate that the United States is party to approximately 18,500 agreements, this means that the United States is probably party to approximately 1,000–1,800 secret agreements.[29] Specific examples of these agreements are discussed in Part II.

These numbers render inaccurate the often-repeated claim that secret agreements are dead. Oliver Dörr and Kirsten Schmalenbach write, "[T]he fact that today secret treaties do not play an essential role is less a result of [Article 102 of the U.N. Charter] than of an overall change in the conduct of international relations."[30] Charles Lipson shares this view, noting, "[T]here are powerful reasons why secret treaties are rare today. The first and most fundamental is the rise of democratic states with principles of public accountability and some powers of legislative oversight. Secret treaties are difficult to reconcile with these democratic procedures."[31] Lipson further asserts that the United States *itself* does not use secret agreements, which he believes has helped minimize their use more broadly.[32] Treaty scholars such as Duncan Hollis have identified that the domestic laws of several states

27. Rovine, *supra* note 6, at 402 n.24; *see also Transmittal of Executive Agreements to Congress: Hearings Before the S. Comm. on Foreign Relations on S. 596*, 92d Cong. 40 (1971) (statement of Alexander Bickel, Professor, Yale Law School) ("I would think that a rather large proportion of executive agreements might turn out to be classified.").

28. GOITEIN, *supra* note 4, at 49.

29. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 5 (2015), https://fas.org/sgp/crs/misc/RL32528.pdf (noting that actual number of executive agreements may be higher, though seeming to include agreements that may have terminated or expired).

30. VIENNA CONVENTION COMMENTARY, *supra* note 1, at 1341.

31. Lipson, *supra* note 1, at 328.

32. *Id.* ("The second reason [that secret treaties are rare] is that ever since the United States entered World War I, it has opposed secret agreements as a matter of basic principle and has enshrined its position in the peace settlements of both world wars.").

envision the conclusion of secret agreements,[33] and one writer has recognized an uptick in the use of secret agreements in recent years, particularly in the wake of the September 11 attacks.[34] Overall, however, there is a common belief that secret agreements are rare. One goal of this article is to dispel that belief.

B. U.S. Political Arrangements

Just as states conclude politically binding (but legally non-binding) commitments in the public context that are intended to set parameters for their interactions, so too do states conclude politically binding commitments in secret. Further, there is reason to think that states adhere to these politically binding secret commitments with some regularity.

1. Secret Political Arrangements in U.S. Law

Section A identified a group of agreements that meet the definition of "treaty" found in the VCLT. But there are almost certainly many more secret arrangements that states do not intend to be governed by international law.[35] In common parlance, these are political arrangements that happen to be secret. Some of these arrangements, which set out rules or modes of operation to be followed in one or more interactions between or among states, are surprisingly detailed. A paradigmatic example would be a secret memorandum of understanding (MOU) between the U.S. Defense Department and a foreign military agency to guide specific types of intelligence interactions.[36] Other examples include arrangements between the CIA and its foreign counterparts and oral or tacit arrangements between the

33. THE OXFORD GUIDE TO TREATIES 30 n.129 (Duncan B. Hollis ed., 2014) (noting that some states appear to endorse the making of secret treaties and citing domestic laws of the United States and the Netherlands).

34. CHRISTOPHER KUTZ, ON WAR AND DEMOCRACY 116 (2016) ("Despite the emerging norm against secret treaties, the War on Terror and the particular conflict with ISIS seems to have increased their frequency, simply in virtue of the incentives they provide for cooperation between countries (like the United States and Iran) that are divided diplomatically but nonetheless find coordinate interests.").

35. *See, e.g.*, AUST, *supra* note 2, at 44 ("Many arrangements, especially in the defence field and other sensitive areas, are naturally kept confidential for reasons of national security, and are therefore found only in classified MOUs.").

36. Glenn Greenwald et al., *NSA Shares Raw Intelligence Including Americans' Data with Israel*, GUARDIAN (Sept. 11, 2013, 10:40 AM), https://www.theguardian.com/world/2013/sep/11/nsa-americans-personal-data-israel-documents (describing NSA-Israel MOU on raw intelligence feeds).

United States and foreign states, the legal status of which may be ambiguous. Pakistan's reported consent to the U.S. use of armed drones to target individual members of al Qaeda in the Federally Administered Tribal Areas may reflect such a secret tacit arrangement.[37] Some of these secret arrangements explicitly state that the parties do not intend them to create legally binding obligations.[38]

Compared to secret agreements (at least those to which the United States is a party), secret arrangements often are seen and approved by fewer people because the Executive has no statutory obligation to transmit them to Congress.[39] The Case Act establishes a mechanism by which the Department of State (DOS) should be informed of these arrangements, so that the DOS can determine whether the arrangement is or is not an international agreement.[40] However, it is not clear that each agency actually shares every one of its arrangements with the DOS. Some arrangements may be highly classified, which might make the initiating agency reluctant to share the arrangement's contents. Alternatively, agencies may have worked out a *modus vivendi* with the DOS, whereby the DOS determines that certain categories of arrangements do not represent international agreements and thus effectively blesses another agency's conclusion of such arrangements without DOS involvement.

The fact that only a limited *number* of people and a limited *category* of people are aware of these arrangements means several things. First, the arrangements constitute what Professor David Pozen has referred to as "deep secrets."[41] That is, these arrangements are often "unknown unknowns," where the public is generally unaware that the arrangements even exist.[42] (In contrast, an agreement is a shallow secret when the public knows that a particular secret agreement exists, but does not know the content of the agreement.) Less is known about these arrangements because there are fewer players in a position within either government to leak them to the press or the public. Second, the arrangements almost surely contain narrower national

37. Entous et al., *supra* note 7; *see also* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 18–20 (2013) (discussing consent's international legal status, including as a form of international agreement).

38. JEFFREY RICHELSON, THE U.S. INTELLIGENCE COMMUNITY 381 (7th ed. 2015) (noting, with regard to NSA-Israeli MOU, that MOU states that it was "not intended to create any legally enforceable rights" or be "a legally binding instrument according to international law").

39. 1 U.S.C. § 112a (2012) (requiring Secretary of State to transmit to Congress the text of any executive agreement other than a treaty).

40. *Id.* § 112b(e) ("[T]he Secretary of State shall determine for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of this section.").

41. Pozen, *supra* note 4.

42. *Id.*

undertakings than do secret agreements (of which Congress and the DOS, as well as the originating agency, at a minimum, are aware). If only a single agency—or a limited set of actors within an agency—knows of the arrangement, its implementation by definition cannot require the involvement of large numbers of government officials.

Compared to secret agreements, it is even more difficult to estimate the number of secret arrangements between the United States and other states. This is because many of them are negotiated by intelligence agencies, which tend to be the best secret-keepers within governments. Jeffrey Richelson and Desmond Ball assert that over 1,000 intelligence arrangements exist among the five states that are parties to the Five Eyes agreement (the United States, United Kingdom, Canada, Australia, and New Zealand).[43] Richelson describes some of them, including arrangements regarding defense intelligence analysis,[44] ocean surveillance,[45] and satellite imagery exchanges.[46] Secret arrangements also exist between various U.S. and Israeli intelligence agencies.[47] The U.S. CIA reportedly has established connections with more than 400 foreign agencies, which almost certainly entails concluding secret arrangements with some of those agencies.[48] Likewise, the CIA's Canadian equivalent has more than 250 intelligence-sharing arrangements with foreign intelligence entities.[49] These arrangements may take the form of memoranda of understanding or even oral agreements between intelligence officials.[50] Defense agencies also seem to conclude a wide variety of secret cooperative arrangements.[51]

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43. JEFFREY RICHELSON & DESMOND BALL, THE TIES THAT BIND: INTELLIGENCE COOPERATION BETWEEN THE UNITED KINGDOM/UNITED STATES OF AMERICA COUNTRIES—THE UNITED KINGDOM, THE UNITED STATES OF AMERICA, CANADA, AUSTRALIA AND NEW ZEALAND 155 (1985); *see also* ADAM SVENDSEN, INTELLIGENCE COOPERATION AND THE WAR ON TERROR: ANGLO-AMERICAN SECURITY RELATIONS AFTER 9/11, at xix–xxi (2010) (identifying MOUs related to human and defense intelligence dating to the 1940s); Richard Aldrich, *Transatlantic Intelligence and Security Cooperation*, 80 INT'L AFF. 731, 737 (2004).

44. RICHELSON, *supra* note 38, at 351.

45. *Id.*

46. *Id.* at 353.

47. *Id.* at 357–58; Greenwald et al., *supra* note 36.

48. Elizabeth Sepper, *Democracy, Human Rights, and Intelligence Sharing*, 46 TEX. INT'L L.J. 151, 155 (2010); *see also* Loch Johnson, *The Liaison Arrangements of the Central Intelligence Agency*, *in* THE CENTRAL INTELLIGENCE AGENCY: SECURITY UNDER SCRUTINY 85, 93 (Athan Theoharis et al. eds., 2006).

49. Sepper, *supra* note 48, at 155.

50. *Id.* at 158; see also *supra* text accompanying note 18 for a description of VCLT's treatment of oral agreements.

51. *See, e.g.*, Amos Harel, *Israel-India Strategic Ties Are No Longer a Secret*, HAARETZ (Feb. 18, 2015), http://www.haaretz.com/israel-news/1.643024 ("Until the change in government

2. Potency of Political Arrangements

One obvious difference between secret executive agreements and secret political arrangements is that the former carry with them binding international legal obligations and the latter do not. For that reason, one might argue that this article should exclude the latter from consideration because there is little reason to expect that political arrangements reflect anything but time-limited expectations between states about how their arrangement partners will behave and do little to govern the behavior of states that have crafted the arrangement. However, more so than in the non-secret context, the distinction between legally binding commitments and political arrangements is narrow.

On the one hand, secret international agreements are harder for a state to enforce than public international agreements. A secret international agreement will rarely contain a dispute resolution mechanism that involves third party adjudicators, which is one means by which states give their legal commitments teeth.[52] Likewise, states may choose to comply with public international agreements to preserve their reputation (both with its treaty partner and with other states in the international community) as law-compliant, even if they would have preferred not to comply in a particular instance.[53] When the international agreement at issue is secret, the reputational costs of violating that agreement are reduced, because only the state or states that are parties to the agreement will be aware of the violation. If we assume that states comply more consistently with public agreements than public arrangements, the impact of choosing between secret agreements and arrangements may be somewhat smaller than the impact of choosing between public agreements and arrangements.

On the other hand, there are several reasons to think that states tend to comply with their secret political commitments, and that in many cases those commitments fairly predict the behavior of both states. In some cases, the United States has employed political arrangements to establish relatively intricate relationships with foreign states, and has invested significantly in

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last year, the Indians preferred to keep a low profile regarding security cooperation with Israel."); MIDDLE E. NEWSLINE, *supra* note 10 (describing arrangement between United States and Libya on defense contacts and cooperation).

52. One exception is the Iranian-Israeli oil pipeline agreement, which appeared to contain an arbitration clause. *See Swiss Court Orders Israel to Pay Up for Iranian Oil*, TIMES ISR. (Aug. 8, 2016, 6:00 PM), http://www.timesofisrael.com/swiss-court-orders-israel-to-pay-up-for-iranian-oil/.

53. *See generally* Andrew T. Guzmán, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002).

foreign bases and foreign intelligence centers in reliance on those secret arrangements.[54] Congress itself has expressed concern about the Executive's

> political commitments . . .which were not and could not be legally binding at all, but which effectively pledge the faith and 'credit' of the United States nonetheless . . . . [T]hough Presidents as well as foreign governments know the difference between political commitments and legal obligations, and are well aware of the braking powers of Congress, they know, too, that in the end, Senates and Congresses, theoretically free to disown such commitments, cannot do so lightly.[55]

If the United States took its secret political commitments lightly, Congress would have no reason to worry.

Further, whether the goal is to conclude an agreement or arrangement, negotiating a document that ultimately will remain secret increases transaction costs, because it requires particularly complicated logistics. Many negotiations, even for agreements that eventually will become public, take place out of public view. But negotiating secret commitments can only occur in a limited number of places (such as secure facilities), and among a limited set of actors (such as those who have certain security clearances). Therefore, concluding a secret arrangement may signal a high level of commitment to the underlying relationship.[56] (On the other hand, the Executive usually does not share secret arrangements with Congress, which might reduce the level of care and detail put into the arrangements and thus lower the costs of concluding them.) In view of the quantity and range of secret arrangements in U.S. practice and their apparent ability to affect state behavior, this article includes secret political arrangements in its analysis of secret commitments in today's international ecosystem.

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54. *See, e.g.*, *Pine Gap: Review of the Agreement Between the Government of Australia and the Government of the United States of America Related to the Establishment of a Joint Defence Facility at Pine Gap: Hearing Before the J. Standing Comm. on Treaties, Official Committee Hansard*, 1999 Parliament (Austl. 1999) (testimony of Desmond John Ball, Professor & Paul Dibb, Professor, Australian National University), http://nautilus.org/wp-content/uploads/2016/03/Ball-Dibb-testimony-1999.pdf [hereinafter Ball & Dibb Testimony]; RICHELSON, *supra* note 38, at 390 (describing U.S. financial contributions to Jordan's intelligence directorate, including paying part of the costs of the CIA-General Intelligence Directorate's bilateral operations center); Dana Priest, *Help From France Key in Covert Operations*, WASH. POST (July 3, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/02/AR2005070201361.html (discussing Alliance Base, a joint intelligence operations center in Paris).

55. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 223–24 (2d ed. 1996).

56. *See* Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273, 276 (2010) ("High *ex ante* costs send a credible signal of intentions: no rational government would pay a high 'down payment' on a cooperative enterprise if they did not intend to carry it out.").

C. Secret Agreements in the Pre-Charter Era

Having identified the basic forms of secret commitments that exist today in U.S. practice, this section returns to a question with which this article opened: why, as World War I wound down, were many states—including the United States—so hostile toward secret agreements? To understand this, it is useful to take a snapshot of some key pre-Charter agreements and examine common critiques, including arguments that secret treaties exacerbated the violence of World War I, extended the war's duration, and threatened to undercut the self-determination of peoples in various nations. This hostility toward secret agreements prompted states to develop treaty registration provisions in the Covenant of the League of Nations and the U.N. Charter. The drafters intended these provisions to dissuade states from concluding secret agreements in the future. But the history surrounding the provisions' adoption forecasts the difficulties in actually abolishing the use of secret agreements as a tool of international relations.

1. Key Historical Agreements and Their Critiques

a. Seminal Secret Treaties

Secret treaties have a long history, but first emerged from the shadows into an intense spotlight during World War I ("WWI").[57] Several secret treaties came to light in 1917, when the Bolsheviks seized power in Russia and located various secret agreements in Russian government archives. Leon Trotsky chose to publish them because he thought that doing so would bring the former Russian government and European powers into disrepute and bolster anti-capitalist sentiment.[58]

One of the most famous secret treaties that Trotsky revealed was the Sykes-Picot agreement between France and Britain. France and Britain hoped to drive Turkey out of Arab territory in the Ottoman Empire.[59] Under Sykes-Picot, if France and Britain achieved this goal, they would allow the Arabs to

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57. EDWARD GROSEK, THE SECRET TREATIES OF HISTORY 16–88 (2007) (listing several pre-1800 secret treaties); Donaldson, *supra* note 11, at 127 (noting that techniques of secret treaty-making were well-established before World War I).

58. LEON TROTSKY, *Statement by Trotsky on the Publication of the Secret Treaties*, *in* SOCHINENIA (Gosizdat ed., 1923), *reprinted in* 1 SOVIET DOCUMENTS ON FOREIGN POLICY: 1917–1924, at 8–9 (Jane Degras ed., 1951).

59. *See Britain and France Conclude Sykes-Picot Agreement*, HISTORY, http://www.history.com/this-day-in-history/britain-and-france-conclude-sykes-picot-agreement (last visited July 7, 2017).

form a state but would preserve important governance roles for themselves in designated areas of control.[60] Sykes-Picot stood in tension with an earlier promise Britain had made to the Arabs: in exchange for Arab assistance fighting Turkey, Britain had promised the Sharif of Mecca (who oversaw Islam's holiest shrines) complete independence.[61]

Russia was party to a number of WWI-era secret agreements released by Trotsky. In 1915, for example, Russia, France, and Britain exchanged a variety of diplomatic notes pursuant to which France and Britain assented to Russia's request to annex Constantinople if those states won the war.[62] In return, Russia would recognize Britain's sphere of influence in Persia, allow free transit of goods through Constantinople, and permit free passage through the Straits by merchant vessels. Russia's goal in concluding the agreement was to secure access to a warm water port.[63]

Another secret agreement that provoked significant reaction after its publication was the London Treaty of April 26, 1915, which brought Italy into WWI on the Allies' side.[64] At the start of the war, Italy had bargained with both sides to obtain the best deal for itself in exchange for entering the war. In the London Treaty, France, Russia, and Britain promised Italy various districts then held by the Ottoman Empire and Germany, as well as part of Dalmatia (now in Croatia) and Albania.[65] If the states parties had implemented it after the war, the agreement would have brought under Italian control hundreds of thousands of Slavs, Germans, Albanians, and Greeks.[66] Italy also would have received a share of war reparations and a loan from the United Kingdom of fifty million pounds.[67]

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60. Letter from Sir Edward Grey to M. Cambon (May 16, 1916), *in* 4 DOCUMENTS ON BRITISH FOREIGN POLICY, 1919–1939, at 245, 245–47 (E.L. Woodward & Rohan Butler eds., 1952) (the "Sykes-Picot" agreement).

61. Victor Kattan, *Palestine and the Secret Treaties*, 110 AM. J. INT'L L. UNBOUND 109, 109 (2016); *Pre-State Israel: The Hussein-McMahon Correspondence (July 15–August 1916)*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/the-hussein-mcmahon-correspondence-july-1915-august-1916 (last visited July 7, 2017) (quoting British High Commissioner Sir Henry McMahon's fourth letter to Sharif Husayn stating, "Great Britain is prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca").

62. 1 RAY STANNARD BAKER, WOODROW WILSON AND WORLD SETTLEMENT: WRITTEN FROM HIS UNPUBLISHED AND PERSONAL MATERIAL 49–51 (1922).

63. *Id.* at 52.

64. HOUSE OF COMMONS, PARLIAMENTARY PAPERS, 1920, Cmd. 671 (UK), http://www.gwpda.org/1915/londontreaty.html; *see also* BAKER, *supra* note 62, at 52–55.

65. BAKER, *supra* note 62, at 52–53.

66. *Id.* at 54.

67. *Id.* at 53–54.

A fourth agreement that came to light was the arrangement between Japan and the Allies, by which the Allies agreed to grant to Japan, at the successful conclusion of the war, the Shantung islands of China.[68] The agreement also partitioned the German-owned Pacific islands between Britain and Japan.[69] In exchange, Japan would provide naval assistance against German U-boats in the Mediterranean.[70]

Although these were perhaps the most prominent secret agreements concluded during WWI, they were hardly the only ones. States concluded various other secret commitments related to the war, including an agreement between Britain and France to divide Togoland and Cameroon;[71] between the Allies and Romania to persuade the latter to join the war on the Allied side;[72] and between France and Russia to allocate control over Poland and parts of Germany.[73]

b. Critiques of the Treaties

During and after the war, many commentators were highly critical of these secret agreements. Some post-war critics of secret agreements painted with a broad brush. Paul Reinsch, who was the U.S. Minister to China during WWI, wrote, "The American people at this time [1919] very nearly lost patience with the entire business, and turned away from European affairs with complete disgust. This is the most outstanding effect produced by the secret diplomacy of Europe as far as the American people are concerned."[74] Reinsch aggressively advocated for the end of secret agreements, going so far as to argue that their conclusion represented an aggressive act. As a normative matter, he urged:

> No international engagement shall be binding unless ratified by a representative body, and published to all the nations. Otherwise it shall be absolutely void, and shall not give rise to any rights or obligations; in fact, an attempt to make an agreement contrary to these conditions shall be considered an act hostile to the peace of the world. That should be the recognized law.[75]

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68. *Id.* at 60.
69. *Id.* at 47, 59–60.
70. *Id.* at 60.
71. *Id.* at 47–48.
72. *Id.* at 55–56.
73. *Id.* at 56–59.
74. PAUL REINSCH, SECRET DIPLOMACY: HOW FAR CAN IT BE ELIMINATED? 205 (1922).
75. *Id.* at 207.

Professor Manley Hudson struck a similar note, describing the "crystallization of the revulsion which followed the publication of the secret treaties into a determination that the end of the war should signalize [sic] the beginning of a new era in the conduct of international relations."[76]

Others were more specific in their critiques. One of the most potent claims was that secret alliances enhanced aggression and exacerbated the length of the war.[77] That is, by using secret agreements to entice other states into the war, states were able to enhance their own war-fighting capacity. This in turn could tempt them to use force against other states or continue to fight beyond their original capacity to do so, because they had greater confidence that they could sustain their war-making. These agreements thus represented "machinations among governments to wage war"[78] and were worthy of condemnation for enhancing and extending the conflict. Further, once states became aware of secret agreements among states on the other side of the conflict, those states were stimulated to fight even harder for victory, because they could more clearly perceive what was at stake if they lost.[79]

A second problem with the WWI secret agreements was that they created opportunities for states to discreetly claim sovereignty beyond their (European) borders and, in so doing, suppress the rights of self-determination of foreign peoples. Various WWI secret agreements, if states had implemented them after the war, would have put a large number of people under the control of foreign states. Italy would have gained control of some Slavs, Germans, Albanians, Greeks, and Turks.[80] The United Kingdom would have obtained control over parts of Turkey, Jerusalem, and some north Pacific Islands.[81] President Wilson was impatient with these assertions of foreign control, informing the Peace Conference that the United States was "indifferent to the claims both of Great Britain and France over peoples unless those peoples wanted them. One of the fundamental principles to which the United States adhered was the consent of the governed."[82] Secret agreements enabled European powers to evade the likely objections of local people over whom they sought to take control and more generally to

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76. Manley Hudson, *The Registration and Publication of Treaties*, 19 AM. J. INT'L L. 273, 273 (1925).

77. *See, e.g.*, BAKER, *supra* note 62, at 55 (arguing that the Treaty of London "undoubtedly embittered and prolonged the great war").

78. Quigley, *supra* note 11, at 253.

79. BAKER, *supra* note 62, at 44, 80.

80. *Id.* at 54.

81. *Id.* at 49, 60, 68.

82. *Id.* at 76. President Wilson thus sought to establish a commission that could assess the desires of people within states that might become post-war "mandatories." *Id.*

disadvantage weaker powers, which would be hard-pressed to reject such control when it was presented to them as a fait accompli.[83]

A further critique was that secret agreements fostered an atmosphere of distrust among various groups. As it became known that states had concluded certain secret agreements, other states—particularly smaller, less powerful states—became concerned that there were other agreements out there about which they knew nothing.[84] According to Ray Baker, secret agreements made it harder for states at the Peace Conference to achieve peace, because they "bore a crop of suspicion, controversy, balked ambition . . . poisoned its discussions, and warped and disfigured its final decisions."[85] They also tainted relations between governments and their citizens. The agreements aroused citizens' suspicions because they appeared to reflect their governments' interest not only in defending their territory—as was publicly claimed—but also in seeking geographic expansion.[86]

A final common critique was that secret agreements infringed on democratic norms. As Leon Trotsky argued, "To abolish secret diplomacy is the first condition of an honourable, popular, and really democratic foreign policy."[87] In this view, a true democracy would inform its citizens of all aspects of the state's foreign policy, so that citizens could approve, reject, or alter the government's approach. Agreements made in secret and intended to remain non-public more easily fail to reflect the consent of the governed.[88] As a related matter, the use of secret agreements makes it more difficult for a state to justify publicly what it is doing or explain the rationale behind its decisions.[89] In addition, when it became apparent that states had agreed to things in secret that were in tension with publicly known commitments, that hypocrisy diminished their own citizens' confidence in their governments.[90] These critiques retain their potency today, although most contemporary democracies recognize that governments must keep certain facts and policies secret to protect their national defense.

Not all commentators opposed these secret agreements. Some believed that they were fairly crafted to achieve the acceptable Allied goal of restoring the balance of power in Europe and guarding against future attempts to

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83. Quigley, *supra* note 11, at 258–59.
84. BAKER, *supra* note 62, at 27–28.
85. *Id.* at 80.
86. *Id.* at 29, 39, 80.
87. CHARLES A. MCCURDY, THE TRUTH ABOUT THE "SECRET TREATIES" 4 (1918).
88. *See* BAKER, *supra* note 62, at 76.
89. *See id.* at 29.
90. *See id.* at 42.

disrupt that balance.[91] Others took a pragmatic approach, recognizing that it often is necessary to conceal agreements made among states fighting on the same side in a war.[92] But the dominant perspective in the wake of WWI and the Peace Conference was that secret agreements were pernicious and a hurdle to re-establishing world peace.

c. Treaty Registration Requirements

In January 1918, in a speech to the U.S. Congress, President Wilson famously set forth his Fourteen Points, which he saw as the basis for the peace negotiations to end WWI.[93] In the preamble to his Points, he announced, "The day of conquest and aggrandizement is gone by; so is also the day of secret covenants entered into in the interest of particular governments and likely at some unlooked-for moment to upset the peace of the world."[94] His first Point was to promote "[o]pen covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind."[95] He later

91. THE NEW AGE, WHAT ABOUT THE SECRET TREATIES? 6 (1918), https://ia601301.us.archive.org/5/items/whataboutsecrett00unse_0/whataboutsecrett00unse_0.pdf.

92. MCCURDY, *supra* note 87, at 4 ("We cannot be expected to tell our enemies the terms of agreements made for the purposes of the war, or to publish all our intimate discussions with our Allies. Such agreements and discussions are naturally kept secret, not from a sense of guilt, but as a matter of common sense."); *The Secret Treaties*, SPECTATOR, Aug. 2, 1918, at 118–19, http://archive.spectator.co.uk/article/3rd-august-1918/6/the-secret-treaties ("[T]here is no need to apologize for any of the 'secret Treaties' which purport to have been made by the Allies. On the contrary, these documents, which may or may not be authentic, throw a favourable light on the Allied diplomacy, and contemplate rearrangements of territory that must be made if we are to have a stable peace."). For an example of a secret wartime agreement during World War II, see *Agreement Between the United States and Cuba for Military Cooperation, Signed at Habana, June 19, 1942*, OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1942v06/d306 (last visited July 7, 2017), (making available Cuban land on which the United States could establish a heavy bombardment and operational training and combat unit and specifically providing that the agreement would be secret).

93. *Wilson's Fourteen Points, 1918*, OFF. HISTORIAN, https://history.state.gov/milestones/1914-1920/fourteen-points (last visited July 7, 2017). The idea of establishing an international commitment to abandon secret treaties did not originate with President Wilson. During the war, the Central Organization for a Durable Peace declared, "If the civilized nations of the world really want to create the conditions of a durable peace, they must come to an agreement absolutely forbidding all secret treaties." Mikael H. Lie & Halvdan Koht, *Parliamentary Control of Foreign Politics*, *in* 2 ORGANISATION CENTRALE POUR UNE PAIX DURABLE, RECUEIL DE RAPPORTS SUR LES DIFFÉRENTS POINTS DU PROGRAMME-MINIMUM 241, 251 (1916).

94. President Woodrow Wilson, Message to Congress: Fourteen Points (Jan. 8, 1918), (transcript available at https://www.ourdocuments.gov/doc.php?flash=true&doc=62&page=transcript).

95. *Id.*

clarified that he anticipated that states would continue to undertake private communications, and that what he sought to bar was the conclusion of secret agreements or policies between states.[96] A version of this concept garnered support during the drafting of the Covenant of the League of Nations.[97]

2. Covenant of the League of Nations

One way for the international community to have addressed the threat of secret agreements would have been to impose uniform constitutional requirements on each state in the exercise of its treaty-making powers.[98] By agreeing to a role for each state's legislature in approving international agreements, states would presumably have rendered it far more difficult for any of them to maintain the secrecy of agreements. Another way for states to manage the "secret agreement" problem—and the one that states ultimately pursued—was to impose penalties on any agreement that failed to meet the requirement of publication.[99]

Article 18 of the Covenant ultimately stated, "Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered."[100] States did in fact begin to register many of their agreements, a practice that continues today under the Charter.[101]

Plainly, the Covenant's goal was to establish a principle of international law that secret international engagements were not binding.[102] Supporters of this position apparently believed that rendering secret agreements non-binding would discourage (if not eliminate) their use. However, this reflects misperceptions about how states continued to weigh the value of secret

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96. BAKER, *supra* note 62, at 46 (quoting President Wilson's June 12, 1918 letter to Secretary of State Lansing: "When I pronounced for open diplomacy, I meant, not that there should be no private discussions of delicate matters, but that no secret agreements should be entered into, and that all international relations, when fixed, should be open, above board, and explicit.").

97. Hudson, *supra* note 76, at 274.

98. *Id.* at 273–74.

99. *Id.* at 274.

100. League of Nations Covenant art. 18.

101. *See* Manley O. Hudson, *The Registration of Treaties*, 24 AM. J. INT'L L. 752, 752–55 (1930) (describing the registration requirement as an "innovation in international life" that is "so significant").

102. *See* Manley O. Hudson, *The Registration of Treaties of the United States*, 22 AM. J. INT'L L. 852, 853 (1928).

agreements and about the limited practical distinction between secret (binding) agreements and secret (non-binding) arrangements.[103]

3. U.N. Charter

In the wake of World War II, states returned to the negotiating table in the hope of crafting a more effective international institution than the League of Nations to promote international peace and security. During the U.N. Charter negotiations, states sought to incorporate a version of Article 18 of the Covenant, though the article that emerged from the Charter negotiations is less potent than Article 18 had been. Article 102 of the Charter states:

> Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.[104]

This is a less potent sanction than the Covenant envisioned, because the only penalty suffered by a state using a secret agreement is an inability to invoke that agreement before U.N. organs such as the International Court of Justice and the Security Council.[105] Given the lack of frequency of such situations, Article 102 mostly serves merely as a normative signal of the drafters' dislike of secret agreements.[106]

4. Seeds of Non-compliance

A variety of actors celebrated the enactment of these registration provisions, first in the Covenant and then in the Charter. Not least were international law scholars, who both vilified the substance of earlier secret agreements and anticipated advantages for international law generally in making all agreements public. Manley Hudson, for instance, who was a leading supporter of this development, expressed enthusiasm for the

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103. *See* discussion *supra* Part I.B.2.

104. U.N. Charter art. 102, ¶ 1–2.

105. NORMAN BENTWICH & ANDREW MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 178 (1950).

106. Article 80 of the VCLT also envisions that states must register their treaties with the U.N. Secretariat, though it does not impose sanctions on states that fail to register them. VCLT, *supra* note 17, art. 80, ¶ 1.

Covenant's approach not only because Article 18 advanced "open diplomacy" but also because it facilitated "the scientific study of the conventional law of nations."[107] Although states registered a large number of their agreements, they did not register all of them.[108] In the midst of the celebrations, there were clear signs that the norm against secret agreements was already on thin ground.

a. Textual Challenges

The challenges to developing a norm that would force states truly to abandon the use of secret agreements were apparent from the moment states concluded the Covenant. One challenge was textual. The Covenant itself did not literally ban the use of secret agreements; rather, it provided that international agreements and "engagements" would not be binding until registered.[109] This raised several interpretive questions. One was whether a secret agreement was void *ab initio* or, rather, voidable at the request of one of the parties. International law authority Charles Cheney Hyde adopted the latter view.[110] Another question related to the types of agreements that Article 18 covered. The United Kingdom argued that Article 18 was only intended to prohibit "secret aggressive treaties injurious to the peace of nations," even though the registration practice included "every" treaty and international agreement.[111]

In addition, the Covenant applied to legally binding commitments, which invited the use of creative drafting to circumvent its application. As Megan Donaldson points out, "[A]lthough Article 18 [of the Covenant] was drafted with sweeping language to capture *all* manner of legal commitments regardless of nomenclature and form . . . foreign ministries drew on the same techniques of drafting evident in some of the prewar secret arrangements . . . to craft agreements with at least some claim to legal force, but which were not unambiguously legally binding—and thus escaped the reach of Article 18."[112] Creative lawyering thus facilitated the continuing use of secret commitments that did not clearly fall within Article 18's purview.

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107. Hudson, *supra* note 76, at 288 (noting that before the Covenant registration requirement "the world's treaty law came to lack unity"); *see also* R.B. Lillich, *The Obligation to Register Treaties and International Agreements with the United Nations*, 65 AM. J. INT'L L. 771, 771–72 (1971).

108. *See, e.g.*, Hudson, *supra* note 102, at 853 (listing treaties registered with the League of Nations between June 1920 and December 1923).

109. League of Nations Covenant art. 18.

110. 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW 7 (1947).

111. Hudson, *supra* note 76, at 281.

112. Donaldson, *supra* note 11, at 130–31.

b. Practical Challenges

Another challenge to the idea that states would surrender their use of secret agreements flowed from the realpolitik nature of international diplomacy. States will always insist on the need for secret diplomacy, and as long as there is secret diplomacy there is an obvious opportunity to conclude secret agreements. Even as President Wilson was proclaiming the first of his Fourteen Points ("open covenants of peace openly arrived at"), and even as states such as France and the United Kingdom publicly accepted that vision, those states continued to negotiate secret agreements during the Peace Conference.[113] Indeed, during Peace Conference discussions, states continued to consult with Italy how secretly to divide Turkey.[114] More broadly, the French and British governments remained interested in retaining the ability to craft secret binding agreements, at least on some subjects.[115] Immediately after the armistice was concluded, one commentator wrote, "I admire and appreciate the principles of President Wilson; but I cannot understand how any one who has his eyes open for a moment believes in their realization."[116]

Those who advocated for forcing secret agreements into a non-binding or less binding form misperceived how states would respond to this sanction. As discussed *supra*, there is reason to believe that states have incentives to comply with secret arrangements, even when those arrangements are not legally binding.[117] Therefore, the modest sanctions built into the Covenant (and the even more modest sanctions built into the Charter) were unlikely to deter states from continuing to rely on the use of secret arrangements, whatever their formal legal status.

The short-lived nature of states' enthusiasm for Wilson's first Point (and for Article 18 of the Covenant) is further evidenced by the various secret treaties that states concluded before World War II. In 1925, for instance, Italy and Albania concluded a secret military pact in which Albania accepted an Italian protectorate over Albania.[118] In 1936 the Italians and Spanish concluded a secret agreement in which Italy promised to help Spain re-establish order within its territory, and in which both sides agreed to continue

113. BAKER, *supra* note 62, at 62–63.

114. *Id.* at 69–70 (noting that even after Wilson put forward his Fourteen Points, "these secret discussions kept right on, for the spoils to be divided were indeed rich"); *see also id.* at 81 ("[Y]et we know that 'secret arrangements' are still being made, all or parts of which have not been registered.").

115. Donaldson, *supra* note 11, at 130.

116. BAKER, *supra* note 62, at 87.

117. *See* discussion *supra* Part I.B.

118. GROSEK, *supra* note 57, at 178.

to trade with each other even if one state was drawn into war.[119] These states were members of the League of Nations when they concluded these agreements.[120] These examples illustrate that secret treaties retained their appeal in the Covenant period. Indeed, the agreements among Britain, the U.S.S.R., and the United States that emerged from the Yalta Conference in 1945—just months before states convened to create the United Nations—were largely kept secret.[121] Notwithstanding the common trope that secret agreements must be abandoned, states clearly were loath to give them up.

II. DEFENDING SECRET COMMITMENTS IN THE CHARTER ERA

According to conventional wisdom, decades after these post-war norms developed, the norms endure in state practice. Few have challenged the ideas that states do not conclude secret agreements today[122] and that this dearth of secret agreements is entirely salutary. These notions persist largely because there has been no intervening event that has caused states or commentators to reconsider secret agreements' negative reputation after the world wars and the subsequent movement to require states to register their agreements. The persistent belief that secret agreements have fallen into desuetude today is incorrect, however. One recent report on secret law identifies some secret agreements of modern vintage.[123] In general, though, it is not sufficiently understood that states, including the United States, employ secret commitments in a wide variety of subject areas and often do so for normatively defensible reasons.

This Part first identifies five common categories of secret commitments, including commitments to advance intelligence-sharing, structure military cooperation, and regulate nuclear weapons. It then identifies two axes along which we might object to the use of secret commitments: the *reasons* why states today place some of their international commitments behind the veil of secrecy, and the *substance* of the secret commitments themselves. This Part

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119. *Id.* at 182.

120. *National Membership of the League of Nations*, LEAGUE OF NATIONS PHOTO ARCHIVE, http://www.indiana.edu/~league/nationalmember.htm (last visited June 22, 2017).

121. Eric Foner & John A. Garraty, *The Reader's Companion to American History*, HISTORY.COM (2009), http://www.history.com/topics/world-war-ii/yalta-conference; *see also* Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525, 538 (2014) (noting that "[a]t Yalta, the Big Three signed a 'secret agreement' to cede Chinese territorial interests from (vanquished) Japan to the (victorious) Soviet Union").

122. *See* VIENNA CONVENTION COMMENTARY, *supra* note 1, at 1341; Lipson, *supra* note 1, at 328.

123. GOITEIN, *supra* note 4, at 47–49; *see also* GROSEK, *supra* note 57, at 220–24 (identifying twelve secret agreements that date after 1970).

evaluates the acceptability of these secret commitments along each axis, and concludes that in many cases, both the reason why states make a commitment in secret and the substance of the commitment itself are supportable. Specifically, it shows that, although some problematic reasons for using secrecy exist today, most commitments that have come to light are secret for legitimate reasons and are substantively consistent with Charter rules. The Charter is an appropriate benchmark against which to measure the contents of these commitments because it defines the basic acceptable norms of inter-state behavior.

A. Categories of Commitments

To better evaluate the valence of today's secret commitments, it is critical to identify to the greatest extent possible the types of commitments that have come to light. This section sorts secret commitments into general categories based on subject matter. This sets the stage in the following sections for an evaluation and qualified defense of the commitments' secret nature and substantive goals.

1. Intelligence Cooperation

Given that states' intelligence activities are among the most secretive acts they perform, it is predictable that states seek to conceal from the public eye the intelligence-related commitments they conclude with other states. These commitments range in scope: some establish long-term, stable intelligence relationships, while other anticipate shorter-term, more discrete cooperation.

The United States is party to several intelligence agreements that have been in place for many decades. These durable agreements with close allies establish the modalities by which the United States and its partners undertake certain intelligence collection and exchanges. The Five Eyes agreement among the United States, United Kingdom, Canada, Australia, and New Zealand is the most famous long-standing secret intelligence agreement (though earlier versions of the agreement have been declassified).[124] The agreement allocates electronic surveillance collection among the five states and anticipates a high level of coordination and intelligence sharing.[125] The

124. *Newly Released GCHQ Files: UKUSA Agreement*, UK NAT'L ARCHIVES, http://www.nationalarchives.gov.uk/ukusa/ (last visited June 11, 2017) (links to UKUSA agreement on which Five Eyes was based).

125. RICHELSON & BALL, *supra* note 43, at 142–44.

Five Eyes reportedly have added other states as "third parties," which have a formalized relationship with the Five Eyes but remain outside the core group.[126] The United States and Australia have concluded several secret agreements related to a joint defense facility at Pine Gap, Australia, from which the two states conduct electronic surveillance and monitor nuclear weapons development and testing, among other things.[127] In 1999, they renewed the Pine Gap agreement, which they first concluded in 1966. In 2008, the United States and Australia also secretly agreed to share classified geospatial intelligence from surveillance satellites and reconnaissance aircraft.[128] It appears that the United States may help Australia operate its surveillance satellite and have access to the imagery the satellite collects.[129]

Secret commitments also help establish the rules of the road for joint intelligence operations. Two examples recently emerged. First, the Government of Mexico apparently concluded an arrangement with the U.S. Government that granted "high-flying U.S. spy planes access to Mexican airspace for the purpose of gathering intelligence" to suppress narcotics trafficking.[130] Mexican authorities retained operational control during the drone flights.[131] Second, in the wake of September 11, intelligence services of France, the United Kingdom, the United States, Germany, Canada, and Australia established Alliance Base, an operations center in Paris that planned and undertook joint counter-terrorism field operations.[132]

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126. RICHELSON, *supra* note 38, at 382 (noting that the Five Eyes brought Sweden's NSA equivalent under the terms of UKUSA in 1954); *see also* NAT'L SEC. AGENCY/CENT. SEC. SERV., PRESIDENTIAL TRANSITION 2009, at 46 (2008), http://nsarchive.gwu.edu/dc.html?doc=2822120-20081103 (defining "Second Parties" to mean Five Eyes partners and "Third Parties" as all other nations that partner with NSA/CSS).

127. *See* Ball & Dibb Testimony, *supra* note 54; Kim Beazley, *Sovereignty and the US Alliance*, *in* AUSTRALIA'S AMERICAN ALLIANCE 203, 216–17 (Peter J. Dean et al. eds., 2016).

128. Philip Dorling, *Australia and the US Agree on a Spy Satellite Deal*, SYDNEY MORNING HERALD (Feb. 7, 2011), http://www.smh.com.au/technology/technology-news/australia-and-the-us-agree-on-a-spy-satellite-deal-20110206-1aii0.html.

129. *Id.*

130. Dana Priest, *U.S. Role at a Crossroads in Mexico's Intelligence War on the Cartels*, WASH. POST (Apr. 27, 2013), https://www.washingtonpost.com/investigations/us-role-at-a-crossroads-in-mexicos-intelligence-war-on-the-cartels/2013/04/27/b578b3ba-a3b3-11e2-be47-b44febada3a8_story.html.

131. *Id.*

132. Richard J. Aldrich, *International Intelligence Cooperation in Practice*, *in* INTERNATIONAL INTELLIGENCE COOPERATION AND ACCOUNTABILITY 18, 31–32 (Hans Born et al. eds., 2011); Priest, *supra* note 54. Alliance Base reportedly closed in 2009 due to disagreements between the United States and France. David Servenay, *Terrorisme: Pourquoi Alliance Base a Fermè à Paris*, LE NOUVELLE OBSERVATEUR (May 24, 2010), http://tempsreel.nouvelobs.com/rue89/rue89-monde/20100524.RUE6722/terrorisme-pourquoi-alliance-base-a-ferme-a-paris.html. For another example, see NAT'L SEC. AGENCY/CENT. SEC.

The United States also has concluded intelligence agreements that help build and bolster other states' intelligence capacities. The National Geospatial-Intelligence Agency, which maintains U.S. satellites and collects geospatial intelligence to facilitate (among other things) national security policymaking, counter-terrorism, and warfighting, has entered into more than 400 agreements with over 120 countries to build their geospatial intelligence capacities, enabling international partners to "operate in coalition environments, transform and modernize their defense structures, and protect common interests."[133] Some of these agreements appear to be classified.[134] Similarly, in 1949 the CIA agreed to provide funding and equipment to Turkey's intelligence organization in exchange for the raw communications intelligence traffic that Turkey collected.[135] Later, the National Security Agency and the Turkish General Staff concluded a secret commitment pursuant to which the United States could operate signals intelligence sites on Turkish soil.[136] The United States enhances allies' capabilities in exchange for access to the information that the allies obtain with those more advanced capabilities.

Yet other secret intelligence commitments establish more discrete (and possibly shorter-term) modalities of cooperation. Consider two examples related to Israel. The United States reportedly sold F-16 jets to Israel under a secret agreement in which Israel agreed to use the F-16 jets for defensive purposes only.[137] International law generally forbids preemptive uses of force.[138] Bilateral cooperation also exists with Israel in the signals intelligence

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SERV., *supra* note 126, at 19 (describing the Real Time Regional Gateway program as sharing NSA's signals intelligence analysis with "deployed U.S. and government agencies and military forces along with [U.S.] 2nd and 3rd party partners in Theater through special agreements").

133. Dawn Eilenberger, *Collaborating with a World of Partners*, PATHFINDER: GEOSPATIAL INTELLIGENCE MAG., Mar.–Apr. 2008, at 5, 6, https://www.hsdl.org/?view&did=19370.

134. *See* NAT'L ARCHIVES & RECORDS ADMIN., NAT'L ARCHIVES, MANAGEMENT OF HARD COPY MAPPING PRODUCTS IN THE NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY 10 (2011), https://www.archives.gov/files/records-mgmt/pdf/nga-inspection.pdf (stating that a significant number of NGA products are marked "Limited Distribution" and not available to the public, sometimes because they contain information derived from bilateral agreements with foreign governments).

135. RICHELSON, *supra* note 38, at 383.

136. *Id.*

137. SEYMOUR HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE 229 (1983); *see also* Ashley S. Deeks, *Confronting and Adapting: Intelligence Agencies and International Law*, 102 VA. L. REV. 599, 656–57 (2016) (citing ROY PATEMAN, RESIDUAL UNCERTAINTY: TRYING TO AVOID INTELLIGENCE AND POLICY MISTAKES IN THE MODERN WORLD 129 (2003)). Israel arguably violated the agreement when it used the jets to attack Iraq's Osirak nuclear reactor. *See* TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE CHARTER 97 (2010).

138. Deeks, *supra* note 137, at 657.

sphere. In 2013, Edward Snowden leaked a memorandum of understanding between the National Security Agency and the Israeli Signals Intelligence National Unit (ISNU).[139] Pursuant to the memorandum, NSA would share raw signals intelligence with the ISNU, which would handle that intelligence in accordance with U.S. law (including the requirement to minimize U.S. person information).[140] NSA appears to train Israeli personnel in the minimization process.[141] European states also seem to have established certain intelligence-sharing commitments in the wake of the 2015 Paris attack and 2016 Brussels attacks, though the scope and breadth of the commitments is unclear.[142]

2. Military Cooperation

Another significant category of secret commitments creates and regulates defense relations between states, including by structuring defensive partnerships, military cooperation, training, and basing. The United States has concluded many of these commitments, as have other states. As one scholar put it:

> As we came to learn only in the 1970s, the United States and presumably the Soviet Union made agreements throughout the Cold War with foreign friends, backed by the promise to use force if necessary. Some of these arrangements were concluded by Executive Agreement, open or secret; others were simply off the record. Some agreements allowed for American bases on the ally's territory, some even for positioning nuclear weapons there.[143]

As discussed further in section B, the United States and its partners may employ secrecy in these contexts to increase the certainty each state has about the other's support during a future attack or threat of armed conflict, and to diminish the perception of an infringement on sovereignty that might arise when foreign troops are present on the host's soil.

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139. Greenwald et al., *supra* note 36.

140. *See* Ashley S. Deeks, *Intelligence Communities, Peer Constraints, and the Law*, 7 HARV. NAT'L SECURITY J. 1, 26 (2015).

141. Greenwald et al., *supra* note 36.

142. Julian E. Barnes & Stephen Fidler, *Brussels Attacks Give New Impetus for More Intelligence-Sharing in Europe*, WALL ST. J. (Apr. 18, 2016), https://www.wsj.com/articles/brussels-attacks-give-new-impetus-for-more-intelligence-sharing-in-europe-1460952001.

143. Jonathan A. Bush, *The Binding of Gulliver: Congress and Courts in an Era of Presidential Warmaking*, 80 VA. L. REV. 1723, 1742 (1994) (reviewing JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993)).

The United States has concluded a number of classified "status of forces agreements" ("SOFAs") with other states.[144] The U.S.-Spanish SOFA, for example, apparently contains a secret annex limiting how the United States may use its Spanish bases.[145] Likewise, a secret U.S.-UAE basing agreement limits U.S. activities from the base to defending the UAE from an attack, though that limit may be softening.[146] Other secret defense agreements authorize military operations by one or both of the parties. For example, the U-2 aircraft piloted by Gary Powers in 1960 lifted off from Peshawar, Pakistan, and was scheduled to land in Bodo, Norway (before the U.S.S.R. shot it down).[147] This indicates the presence of advance, secret arrangements

144. According to the U.S. State Department, approximately ten U.S. status of forces agreements (or parts thereof) are classified. INT'L SEC. ADVISORY BD., U.S. DEP'T OF STATE, REPORT ON STATUS OF FORCES AGREEMENTS 9 (2015), https://www.state.gov/documents/organization/236456.pdf; R. CHUCK MASON, CONG. RES. SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 n.1 (2012), https://www.fas.org/sgp/crs/natsec/RL34531.pdf. Canada also has negotiated at least one secret status of forces agreement (with the UAE). Paul Koring, *Ottawa Negotiating to Keep Secret Base*, GLOBE & MAIL (Apr. 7, 2009), https://www.theglobeandmail.com/news/national/ottawa-negotiating-to-keep-secret-base/article20422515/.

145. CQ ALMANAC, SUBCOMMITTEE COMPLETES FOREIGN COMMITMENTS PROBE (1970), https://library.cqpress.com/cqalmanac/document.php?id=cqal70-1292276 ("The Spanish base agreements . . . have had secret annexes which limit the manner in which the bases can be used."); JOHN CHIPMAN, NATO'S SOUTHERN ALLIES: INTERNAL AND EXTERNAL CHALLENGES 147 (2004). The 1969 U.S.-Turkish Defense Cooperation Agreement (since voided) also contained secret provisions. *See Doc. 240 Memorandum of Conversation*, OFF. HISTORIAN, https://history.state.gov/historicaldocuments/frus1969-76v30/d240 (last visited July 17, 2017) (discussing a secret provision in the 1969 agreement permitting the "emergency use of facilities"). The 1980 Agreement on Defense and Economy contains a number of secret provisions that are "thought to expand US authority over its bases in Turkey and broaden the scope of the 'NATO commitment' to include potential operations in the Middle East." Joe Stork, *The Carter Doctrine and US Bases in the Middle East*, MIDDLE E. RES. & INFO. PROJECT, http://www.merip.org/mer/mer90/carter-doctrine-us-bases-middle-east?ip_login_no_cache=fb40061e79b69c5f9b409ed8f3e2b658 (last visited June 11, 2017).

146. Rajiv Chandrasekaran, *In the UAE, the United States Has a Quiet, Potent Ally Nicknamed 'Little Sparta,'* WASH. POST (Nov. 9, 2014), https://www.washingtonpost.com/world/national-security/in-the-uae-the-united-states-has-a-quiet-potent-ally-nicknamed-little-sparta/2014/11/08/3fc6a50c-643a-11e4-836c-83bc4f26eb67_story.html?utm_term=.16bab1dd1c0f. The UAE might have wanted to keep the agreement secret because of sovereignty concerns; the United States might have wanted to keep the restrictions secret to leave other states uncertain about what the United States was allowed to do from that base.

147. Thomas Gibbons-Neff, *The True Story Behind the U2 Shootdown in "Bridge of Spies,"* WASH. POST (Oct. 19, 2015), https://www.washingtonpost.com/news/checkpoint/wp/2015/10/19/the-true-story-behind-the-u2-shoot-down-in-bridge-of-spies/?utm_term=.6f079706e8f7; *see also* Chandrasekaran, *supra* note 146 (describing agreement authorizing U-2 spy planes to fly from U.S. base in UAE).

between the United States and Pakistan, as well as the United States and Norway. In a more recent example, the United States and Afghanistan concluded a classified arrangement in 2014 giving the United States permission to engage in direct combat against the Taliban, the Haqqani networks, and al Qaeda in Afghanistan.[148]

Foreign examples exist as well. In 1954, France and Cambodia concluded an agreement by which 720 French military instructors would train Cambodian armed forces.[149] In the early 1980s, Grenadian Prime Minister Maurice Bishop entered into five secret agreements with the Soviet Union, Cuba, and North Korea, pursuant to which those states would make large shipments of military equipment to Grenada, help train soldiers, and base military advisers on Grenada.[150] In one of the more troubling secret defense cooperation agreements that has come to light in the post-Charter era, Israel concluded a secret agreement with Britain and France in 1956. In the so-called Protocol of Sèvres, the three states planned to invade Egypt in response to President Nasser's decision to nationalize the Suez Canal.[151] In reliance on the Protocol, Israel attacked Egypt and occupied Sinai and the Gaza Strip, and France and the United Kingdom invaded Egypt to secure the Canal.[152] Other states undoubtedly have concluded secret defense pacts that have not come to light.

3. Nuclear-Related Agreements

A third category of secret agreements implicates nuclear weapons. Two types of agreements have emerged in this area. One category encompasses agreements between the United States and its allies that coordinate the

148. Parviz Azizi, *Pakistan, India, and the Secret War for Afghanistan*, GEOPOLITICAL MONITOR (Dec. 3, 2014), https://www.geopoliticalmonitor.com/pakistan-india-secret-war-afghanistan/.

149. CENT. INTELLIGENCE AGENCY, CENTRAL INTELLIGENCE BULLETIN RDP79T00975A001800450001-2, at 7 (1954), https://archive.org/details/CENTRALINTELLIGENCEBULLETIN79T00975A0018004500012.

150. Matthew L. Sandgren, *War Redefined in the Wake of September 11: Were the Attacks Against Iraq Justified?*, 12 MICH. ST. J. INT'L L. 1, 17 (2003). *See generally* Dietrich André Loeber, *Insights into Soviet Treaty Practice: The Secret Soviet-Grenadian Military Agreements of 1980–1982*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 297, 297–316 (1987).

151. The text of the Protocol can be seen at S. Ilan Troen, *The Protocol of Sèvres: British/French/Israeli Collusion Against Egypt, 1956*, 1 ISRAEL STUD. 122, 131–34 (1996), https://www.brandeis.edu/israelcenter/about/troen1/TheProtocolOfSevres.pdf.

152. *See* K.T. Chao, *Legal Nature of International Boundaries*, 5 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 29, 76 n.195 (1985); Karen Scott, *Commentary on Suez: Forty Years On*, 1 J. ARMED CONFLICT L. 205, 208 (1996).

detection of nuclear tests by third states, establish understandings about permissible uses of nuclear weapons, and facilitate technology-sharing. The other category consists of arms control agreements between the United States and the U.S.S.R./Russia to regulate the quantity, type, or testing of nuclear weapons in each state's arsenal.

Many of the U.S. secret agreements that fall into the first category are bilateral agreements with the United Kingdom, with which the United States long has had a "special relationship."[153] For instance, President Harry Truman and then-U.K. Prime Minister Clement Attlee signed a secret agreement promising "full and effective co-operation in the field of atomic energy."[154] In 1964, the United States and United Kingdom reached a draft agreement anticipating that the United States would install equipment at U.K. stations to help detect nuclear tests.[155] According to the draft, "All data from UK operated stations [would] be promptly transmitted to the US (AFTAC) through a single communications link"; the United States would provide the United Kingdom with "data recorded at US detection facilities."[156] Recently, the United States and United Kingdom amended their agreement for Cooperation on the Uses of Atomic Energy for Mutual Defense Purposes of July 3, 1958.[157] The amendment, which governs the transfer of classified information concerning nuclear weapons and technology, the evaluation of enemies' potential capabilities, and various other issues, contains "classified portions."[158] These agreements reflect an interest in cooperation between the closest of allies on a technology that states generally have treated as highly

153. *See* Dan Roberts & David Smith, *US and UK Special Relationship is 'Enduring', Obama Says After Brexit*, GUARDIAN (June 24, 2016), https://www.theguardian.com/politics/2016/jun/24/brexit-vote-impact-on-us-donald-trump-election-2016 (quoting a State Department spokesperson using the term).

154. Melissa Pine, *Transatlantic Nuclear Cooperation: The British Perspective, 1945–1991*, *in* THE BRITISH WAY IN COLD WARFARE: INTELLIGENCE, DIPLOMACY AND THE BOMB, 1945–1975, at 105, 106 (Matthew Grant ed., 2009) (noting that 1946 Atomic Energy Act voided this agreement and a comparable agreement between Roosevelt and Churchill); *see also* JIM BAGGOTT, THE FIRST WAR OF PHYSICS: THE SECRET HISTORY OF THE ATOM BOMB, 1939–1949, at 359–76 (2009) (discussing Attlee agreement and noting that the United States lost the secret aide memoire, which required the UK to furnish it with a copy).

155. RICHELSON, *supra* note 38, at 383.

156. *Id.*

157. Press Release, Office of the Press Sec'y, White House, Message to the Congress—Amendment Between the United States and United Kingdom of Great Britain and Northern Ireland, (July 24, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/07/24/message-congress-amendment-between-united-states-and-united-kingdom-grea.

158. *Id.*

sensitive and delicate, in an effort to further the two states' national security.[159]

The secret nuclear agreements between the United States and U.S.S.R./Russia advance a different goal: disarmament and détente. In 1974, Secretary of State Henry Kissinger negotiated two protocols with the Soviet Union about dismantling or redeploying nuclear weapons, which "went into great detail but were kept secret."[160] According to Secretary Kissinger, the protocols were kept secret at the Russians' behest because of Moscow's "reluctance to allow its own public in on the facts of nuclear life."[161] At the same summit, the United States and the U.S.S.R. signed a secret agreement limiting underground nuclear tests, which also provided for an exchange of geographical and geophysical information on underground testing sites that each country used to perfect its weapons.[162] Discussing the protocols, Kissinger stated, "[W]e will certainly make diplomatic history, because it will be the first time that secret agreements are publicly signed. The agreements are being kept secret at the request of the Soviet Union, because they involve dismantling procedures for replacement missiles under the interim [strategic arms limitation] agreement and the ABM agreement. However, they will be submitted to the appropriate congressional committees upon our return to the United States."[163] The United States thus kept the agreements secret from the public but fostered a level of internal oversight by sharing them with parts of Congress.

The United States has entered into a variety of nuclear agreements with states other than Russia; these too have tended to contain secret provisions. For example, Ukraine signed a trilateral agreement with Russia and the United States that required it to relinquish all weapons to Russia; a secret

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159. Some of the U.S.-U.K. secret arrangements reflect an interest by the United Kingdom in ensuring that the United States used caution before employing nuclear weapons. William Burr, *Consultation is Presidential Business*, NAT'L SECURITY ARCHIVE (July 1, 2005), http://nsarchive.gwu.edu/NSAEBB/NSAEBB159/ (containing documents related to secret understandings on the use of nuclear weapons between 1950 and 1974).

160. Flora Lewis, *Secrecy May Curb Strategic Arms Debate*, N.Y. TIMES (July 9, 1974), http://www.nytimes.com/1974/07/09/archives/secrecy-may-curb-strategic-arms-debate-us-accepts-secrecy.html?_r=0; *see also* David Koplow, *When Is an Amendment Not an Amendment? Modification of Arms Control Agreements Without the Senate*, 59 U. CHI. L. REV. 981, 1008 (1992).

161. *Id.*

162. *Id.*

163. Press Conference, Dr. Henry A. Kissinger, U.S. Sec'y of State (July 3, 1974), *in* 16 SURVIVAL: GLOBAL POLITICS & STRATEGY 239 (1974), http://www.tandfonline.com/doi/abs/10.1080/00396337408441503?needAccess=true&journalCode=tsur20.

annex to that agreement stipulated that it must do so within three years.[164] The United States established a secret arrangement with China that allowed the United States to place intelligence-gathering equipment in China, including devices to monitor Soviet compliance with the Nuclear Test Ban Treaty.[165] Likewise, Iran secretly allowed the United States to use listening sites inside Iran to verify Soviet compliance with arms reduction treaties.[166] Even the U.S.-North Korean nuclear framework agreement had a secret annex.[167] In short, the highly sensitive nature of nuclear weapons and technology has led states to prefer to keep many of their agreements in this area out of the public eye.

4. Weapons-Related Commitments

The United States has concluded a variety of agreements that regulate how states that purchase U.S. weapons may employ those weapons. Many of those agreements are public, but in some cases the restrictions are secret. Perhaps the worst-kept secret agreement in this category is one between the United States and Israel limiting how Israel may use U.S.-manufactured cluster munitions. The agreement reportedly prohibits Israel's use of cluster munitions "in populated areas and against targets that are not clearly military."[168] (Using cluster munitions in civilian-populated areas is likely to result in civilian deaths during or after an armed conflict, by virtue of the way the munitions work.) In at least two cases, the United States has opened

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164. MCGEORGE BUNDY, WILLIAM J. CROWE, JR. & SIDNEY D. DRELL, REDUCING NUCLEAR DANGER: THE ROAD AWAY FROM THE BRINK (1994); *The U.S.-Russia-Ukraine Trilateral Statement and Annex, January 14, 1994*, ATOMIC ARCHIVE, http://www.atomicarchive.com/Docs/Deterrence/Trilateral.shtml (last visited June 23, 2017).

165. Chris Sibilla, *Bad Blood: The Sino-Soviet Split and the U.S. Normalization with China*, ASS'N FOR DIPLOMATIC STUD. & TRAINING, http://adst.org/2016/08/bad-blood-sino-soviet-split-u-s-normalization-china/ (last visited June 8, 2017).

166. WILLIAMS DAUGHERTY, EXECUTIVE SECRETS: COVERT ACTION AND THE PRESIDENCY 27 (2004).

167. Kenneth W. Dam, *Law, Diplomacy, and Force: North Korea and the Bomb*, CHI. UNBOUND, no. 33, 1994, at 1, 9, http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1014&context=occasional_papers; John H. Cushman Jr., *Halting Weapons Spread; Wider Development of Cluster Munitions After U.S. Cutoff Shows Inevitable Growth*, N.Y. TIMES (July 15, 1986), http://www.nytimes.com/1986/07/15/us/halting-weapons-spread-wider-development-cluster-munitions-after-us-cutoff-shows.html (discussing 1978 secret agreement).

168. Daryl Kimball, *Cluster Munitions at a Glance*, ARMS CONTROL ASS'N, https://www.armscontrol.org/factsheets/clusterataglance (last updated Nov. 2012).

investigations into Israel's possible violation of that agreement, and in one case suspended sales of cluster munitions to Israel for six years.[169]

The United States may have established similar classified restrictions on its sales of armed drones. In 2015, the Obama Administration announced that it would permit the export of armed drones, while establishing principles to which foreign state purchasers would need to adhere.[170] One such principle is that the purchasers would have to agree to use the drones for "national defense or other situations in which force is permitted by international law."[171] The U.S. policy governing sales remains classified, which suggests that the subsequent agreements between the United States and drone-purchasing states may also be classified.

5. Economic Commitments

The four categories of commitments just discussed directly implicate national security. Some states have employed secrecy even for commitments that do not directly implicate their national security but instead implicate the national economy or fisc. For example, the United States and Japan kept secret a commitment pursuant to which Japan agreed to pay to restore Okinawa's land to its original state after the United States ceded control of the island to Japan in 1972.[172] Poland and Switzerland concluded a secret agreement in the aftermath of World War II, by which Poland transferred Polish assets in Switzerland to the Swiss government, which used those assets to compensate Swiss citizens whose assets the Polish government had

169. David S. Cloud & Greg Myre, *Israel May Have Violated Arms Pact, U.S. Says*, N.Y. TIMES (Jan. 28, 2007), http://www.nytimes.com/2007/01/28/world/middleeast/28cluster.html (describing an investigation in 1982); Kimball, *supra* note 168 (describing investigations in 1982 and 2006–07).

170. John Dyer, *The U.S. Has Issued New Rules for the Foreign Sale of Military Drones*, VICE NEWS (Feb. 18, 2015), https://news.vice.com/article/the-us-has-issued-new-rules-for-the-foreign-sale-of-military-drones; Missy Ryan, *Obama Administration to Allow Sales of Armed Drones to Allies*, WASH. POST (Feb. 17, 2015), https://www.washingtonpost.com/world/national-security/us-cracks-open-door-to-the-export-of-armed-drones-to-allied-nations/2015/02/17/c5595988-b6b2-11e4-9423-f3d0a1ec335c_story.html?utm_term=.961af0efa7f9.

171. Ryan, *supra* note 170.

172. Keiji Hirano, *Convicted for Spilling Beans on Secret Okinawa Treaty*, JAPAN TIMES (June 10, 2005), https://www.japantimes.co.jp/news/2005/06/10/national/reporter-who-blew-whistle-on-state-shenanigans-sues-for-redress/#.WT4dQBiZORs; George R. Packard, *The United States-Japan Security Treaty at 50: Still a Grand Bargain?*, FOREIGN AFF., Mar.–Apr. 2010, at 92, 98, https://www.foreignaffairs.com/articles/japan/2010-03-01/united-states-japan-security-treaty-50 (describing an alleged payment by Japan to United States to cover costs involved in return of Okinawa to Japanese sovereignty).

appropriated.[173] In these cases, the governments presumably sought to keep their commitments concealed from the public because they feared that their citizens would not understand or support these expenditures of funds.

Certain trade agreements have been accompanied by secret side letters. For instance, in a secret side arrangement to the 1986 U.S.-Japan Semiconductor Arrangement, Japan indicated that it would work to help the United States achieve a higher market share of semiconductor sales in Japan, and accepted a target of 20% market share for foreign semiconductors by 1991.[174] The United States and China concluded a non-public memorandum of understanding governing the trade in textiles; the document seems to have been kept secret because it envisioned that the Chinese reduction in quotas (which U.S. textile manufacturers liked) would be superseded if and when China joined the World Trade Organization.[175]

B. Reasons for Secrecy

As this article has shown, states today keep some of their international commitments secret. Because there has been scant attention paid to the existence of the commitments, there has been little scholarly analysis of why states resort to secrecy in their commitments. This section undertakes such an analysis. There are at least five reasons why states employ secrecy when concluding international commitments. Some of these reasons are readily justified under international law and longstanding expectations of state behavior; others are more difficult to justify.

1. Publicity Would Defeat Commitment's Legitimate Purpose

States keep a variety of commitments secret because the information they contain is properly classified under the domestic law of one or more of the states parties and its disclosure would defeat the purpose of the commitment. Consider, for example, a commitment to share intelligence collected using classified capabilities. Concluding that commitment in unclassified form

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173. Detlev F. Vagts, Editorial Comment, *Switzerland, International Law and World War II*, 91 AM. J. INT'L L. 466, 474 (1997).

174. BRYAN JOHNSON, HERITAGE FOUND., LET THE U.S.-JAPAN SEMICONDUCTOR AGREEMENT EXPIRE 1–2 (1996), http://thf_media.s3.amazonaws.com/1996/pdf/bu277.pdf; PHILIP A. MUNDO, NATIONAL POLITICS IN A GLOBAL ECONOMY: THE DOMESTIC SOURCES OF U.S. TRADE POLICY 260 (1999). The United States subsequently acknowledged the existence of the side letter, though the United States and Japan differed on its meaning.

175. John Judis, *Trick of the Trade*, NEW REPUBLIC, June 16, 1997, at 10, 10–11.

would reveal the very existence of the capabilities that states sought to keep secret under their domestic laws. A similar need for secrecy attaches to commitments that advance non-proliferation goals. A secret nuclear agreement between the United States and the U.S.S.R. in 1974 included details about how each side would dismantle replacement missiles.[176] If the information were made public, it would have revealed very sensitive information that might help non-nuclear weapons states develop nuclear weapons and thus hinder widely-held non-proliferation goals.[177]

The need for secrecy in the area of military operations and plans is well-accepted by states. States have a long history of keeping secret those commitments that establish and structure military coordination, training, or plans to preserve advantages over current or future enemies. As Myers McDougal and Asher Lans put it in the context of World War II,

> No person concerned with the security of this continent could reasonably expect that the details of the military arrangements [contained in a 1940 secret agreement between the United States and Canada] should have been publicized for the edification of the German and Japanese general staffs. Similarly, it would be unreasonable to expect that armistice or other military agreements made with regard to active war zones during the continuance of combat should be publicly disclosed.[178]

Jeremy Bentham, who pled generally for publicity in the conduct of government activity, deemed secrecy acceptable "if publicity favors the projects of an enemy."[179] Even philosopher Sissela Bok, who is generally skeptical about the use of secrecy because of its ability to corrupt, notes that military secrecy may be necessary to implement "certain plans, to provide the crucial element of surprise."[180] Bok recognizes the close link between military secrecy and a state's right of self-defense, which she describes as self-evident and sacred.[181]

Using secrecy in military contexts such as these reduces uncertainty for the states that are parties to the commitments, while sustaining uncertainty

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176. Lewis, *supra* note 160.

177. Press Conference, Kissinger, *supra* note 163.

178. Myers S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II*, 54 YALE L.J. 534, 552 n.91 (1945).

179. SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 174 (1982).

180. *Id.* at 172, 176.

181. *Id.* at 194.

for those who are not parties.[182] In the context of weapons sales, the parties might opt for secrecy because the states seek to reduce uncertainty between themselves about how the purchaser may use the weapon, while leaving external players uncertain about what restrictions might exist on the purchaser's military operations.

It is no surprise that commitments implicating information of the type that is commonly classified in domestic systems endure in secret. And where the substantive purpose of those commitments is consistent with generally accepted norms of military and intelligence cooperation, the secrecy of the commitments is not troubling.

2. Enhanced Transparency Behind the Veil

Secrecy in international commitments also can facilitate transparency among the states that hold discussions behind that veil. For example, Russia and the United States might only be willing to consider negotiating an agreement related to nuclear weapons if they can discuss in some detail the nature and number of those weapons. Each might be willing to share certain information with the other, but *only* with the other. Indeed, in 1974, Secretary of State Henry Kissinger signed an agreement with the Soviets to limit underground nuclear tests, which offered an example of "sharing of secrets of nuclear affairs among Soviet and American officials, but not publicly."[183] The secrecy of the setting facilitates the exchange of information between the United States and Russia about a sensitive issue at the core of the negotiation. Indeed, the U.S-Soviet/Russian agreements offer a paradigmatic example of using secrecy to enhance open exchanges behind the veil between players who are otherwise skeptical of each other's motives.

Diplomatic assurances offer another example. The United States has entered into a number of secret commitments with states into whose custody the United States seeks to transfer individuals. The transfers may occur in the context of extradition, immigration removals, military detention, or renditions.[184] In these assurances, the receiving state may commit to treat the

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182. *See* INT'L SEC. ADVISORY BD., *supra* note 144, at 58 ("Some countries may also want SOFAs confidential because they do not want to make public the way their agreement compares to other (public) agreements with regional neighbors or other competitors."); c*f.* Emilie M. Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47, 49, 69 (2012) ("[O]ne of the roles of international institutions is to provide information that lowers uncertainty and to help states manage the effects of uncertainty.").

183. Lewis, *supra* note 160.

184. ASHLEY S. DEEKS, COUNCIL ON FOREIGN RELATIONS, AVOIDING TRANSFERS TO TORTURE 11–18 (2008).

individual humanely, provide a fair trial, and allow non-governmental observers to visit the individual in detention. A declaration produced by a State Department official during Guantanamo litigation explains how secrecy can further transparency:

> If the Department were required to disclose outside appropriate Executive branch channels its communications with a foreign government relating to particular mistreatment or torture concerns, that government, as well as other governments, would likely be reluctant in the future to communicate frankly with the United States concerning such issues. I know from experience that the delicate diplomatic exchange that is often required in these contexts cannot occur effectively except in a confidential setting.[185]

The idea that states employ secrecy in their commitments to enhance inter-state transparency is supported by the appearance of the secrecy/transparency paradox in other contexts. For example, in the context of foreign surveillance, David Kris and Doug Wilson have written that the Foreign Intelligence Surveillance Act

> encourages, and in some cases requires, the government to provide extensive disclosures to the [Foreign Intelligence Surveillance Court] . . . . The FISC needs that information, and candor from the government, to perform its essential function. But if the government entertains a fear that the FISC will release that information to the public, its incentive will be to reduce disclosures to their bare minimum.[186]

Secrecy thus allows the Executive to be far more forthcoming to a body overseeing its actions. Similarly, in 2010 the executive branch began to include classified annexes in its War Powers Reports to Congress. Through the use of secrecy, the Executive was able to provide Congress with more details about executive military operations. Although the FISA and War Powers examples are not cases involving secret commitments, they help illustrate how the conclusions of commitments in secret can enable informational exchanges among relevant players. In particular, states that are not used to working with each other—and that may be in a publicly adversarial posture—may need to employ secrecy to be able to cooperate at all.

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185. Clint Williamson, Ambassador at Large for War Crimes Issues, Dep't of State Office of War Crimes Issues, Declaration of Clint Williamson ¶ 10 (June 8, 2007) (transcript available at https://www.state.gov/documents/organization/150081.pdf) [hereinafter Williamson Declaration].

186. DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS 134 (2d ed. 2012).

3. Deference to Sovereignty

Another reason that a state chooses to keep a commitment secret is out of deference to its partner's sovereignty or national pride. In some instances, the partner believes that the commitment, if made public, would signal an unwelcome surrender of its sovereignty or reveal military or political weakness.[187] The secrecy of U.S. diplomatic assurances exemplifies deference to the sovereignty of the state providing assurances. The United States has explained that it usually keeps secret its decisions to seek assurances and the content of the assurances themselves "in order to avoid the chilling effects of making such discussions public."[188] Some states presumably take offense at the request for assurances, because the request implies that the state has a reputation for mistreating people in its custody. Keeping the diplomatic assurances secret allows the United States to obtain the commitments it requires while minimizing the impact on the receiving state's dignity.

In a number of cases, the United States has kept secret its SOFAs, pursuant to which other states agree to allow the United States to operate bases and house military personnel inside their countries.[189] According to the State Department, one reason SOFAs may be classified is because of the "potentially damaging implications of making concessions on sovereignty to the United States. In a few cases, the reason appears to be sensitivity (sometimes felt by both the United States and the host) about the very idea that there are U.S. military personnel in the host country."[190] Keeping the SOFAs secret limits perceived damage to the host state's sovereignty and self-image as independent or militarily self-sufficient. A state may also seek to keep a military cooperation commitment secret to avoid positioning itself as a terrorist target. Recently Tunisia agreed to allow U.S. drones to fly out

187. In a somewhat unusual example, in 1953 France concluded a secret agreement with the United States, allowing the U.S. Army to try Polish nationals before courts martial in France, rather than having them tried before French civil courts. The parties presumably kept the agreement secret because it reflected a surrender of jurisdiction, which is an aspect of French sovereignty. Lloyd Norman, *Reveal Secret French Treaty on Army Trials*, CHI. TRIB., Aug. 25, 1953, § 1, at 12.

188. Williamson Declaration, *supra* note 185, ¶ 9.

189. INT'L SEC. ADVISORY BD., *supra* note 144, at 58 ("Roughly ten [status of forces agreements] are classified, sometimes with regard to their existence as well as the contents of the agreement."); *see also* CHIPMAN, *supra* note 145, at 147 (describing a non-public SOFA between the United States and Spain); MASON, *supra* note 144 (listing an annex of several classified U.S. SOFAs, including agreements with Chad (1987); Kenya (1980); Kuwait (1991); Malaysia (1990); Oman (1980); Qatar (1992); Somalia (1990); and UAE (1994)).

190. INT'L SEC. ADVISORY BD., *supra* note 144, at 58–59.

of a base in Tunisia, but reportedly wanted the commitment kept secret to avoid raising its profile as a target for ISIS.[191]

Additionally, in the context of weapons sales, the United States and the purchasing states might choose to keep the use restrictions secret because the purchaser perceives the limitations as a challenge to its sovereignty. That is, the purchaser would prefer to be able to use the weapons it acquires in whatever way it sees fit, and may accept restrictions grudgingly, because the restrictions seem to encroach on its freedom of action as a sovereign state.

4. Lack of Public Support

More troubling is the use of secrecy to avoid public scrutiny, where the governments concluding the secret commitment are concerned that their publics would be unlikely to support it. For example, the commitments between the United States and other states that agree to host U.S. nuclear facilities or allow the transit of nuclear weapons through their territories are often kept secret.[192] Secrecy related to nuclear weapons serves three goals. First, secrecy removes the need for the host state to explain and defend to its citizens its decision to host U.S. nuclear facilities, which many could see as inviting attack or retaliation by Russia. Second, secrecy makes it easier for the U.S. executive branch to avoid difficult conversations with Congress about its overseas defense commitments (of which nuclear basing is a part).[193] Third, and less troublingly, secrecy allows the United States and the host state to conceal from adversary states (such as Russia) precisely what the U.S. nuclear posture is.

Sometimes the two states employing secrecy are public adversaries. In 1968, Israel and Iran concluded an agreement by which Iran would provide

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191. Entous & Ryan, *supra* note 9.

192. CQ ALMANAC, *supra* note 145 ("The stationing of nuclear weapons in foreign countries represents a special kind of commitment between the United States and the host country. In almost every one of these countries a veil of secrecy hides the presence of such weapons. Nowhere is this veil stronger than in the United States."); *see also* Jeffrey Lewis, *More on US-Japan "Secret Agreements,"* ARMS CONTROL WONK (Mar. 11, 2010), http://www.armscontrolwonk.com/archive/202660/more-on-us-japan-secret-agreements/ (noting that the Japanese government released documents regarding the storage and transit of U.S. nuclear weapons in Japan); Packard, *supra* note 172, at 97–98 (describing secret 1960 agreement between U.S. and Japan providing that U.S. ships and planes may carry nuclear weapons while in transit through Japanese ports and airspace). The United States also concluded several secret agreements with Greece authorizing the United States to base nuclear weapons in Greece. Claudia Wright, *The U.S., Greece and A-Arms*, N.Y. TIMES (Feb. 27, 1981), http://www.nytimes.com/1981/02/27/opinion/the-us-greece-and-a-arms-by-claudia-wright.html.

193. CQ ALMANAC, *supra* note 145.

oil to Israel; Israel pledged to keep the agreement secret and prevent the Israeli press from publishing reports about the arrangement.[194] The legally binding deal advanced legitimate goals of both states—buying and selling oil—but required secrecy because each state presumably perceived that its public would condemn the agreement for political reasons.[195]

Pakistan's erstwhile consent to the use of U.S. armed drones in Pakistani airspace offers a more recent example of the use of secrecy to avoid public debate.[196] The government of Pakistan (or a department thereof) appears to have given the United States consent to conduct drone strikes against members of al Qaeda and other militants inside Pakistan.[197] However, the Pakistani government perceived those strikes as unpopular among its citizens and thus sought to keep its consent secret, to distance itself from the strikes.[198] Secrecy thus suppresses citizens' ability to assess and contest the government's foreign policy decisions. At the same time, the Pakistani government understandably might conclude that it better protects Pakistan's sovereignty to give the United States secret consent to use its airspace than to deny consent and have the United States conduct airstrikes from its airspace anyway, under a more controversial international legal theory.

The extent to which the use of secrecy to avoid public debate is troubling depends in part on the substance of the underlying commitment. One might, of course, object to the use of secrecy to avoid public engagement even if one is comfortable with the underlying substance of the commitment. That is, one might prioritize a commitment to democratic engagement even where the underlying commitment itself is substantively consistent with international law. Part III takes up a normative exploration of ways to enhance democratic values in the secret commitment arena, regardless of the underlying content of the commitment.

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194. Aluf Benn, *What Is the State Hiding in the Israel-Iran Oil Saga?*, HAARETZ (Jan. 10, 2016), http://www.haaretz.com/israel-news/.premium-1.696469.

195. Iran has initiated arbitration against Israel to obtain its share of the pipeline's revenues, which indicates that the underlying arrangement was of a legal nature. Zafrir Rinat & Aluf Benn, *Israel to Change Status of Confidentiality Around Eilat Ashkelon Pipeline Company*, HAARETZ (Jan. 7, 2016), http://www.haaretz.com/israel-news/.premium-1.695972.

196. *Cf.* Chandrasekaran, *supra* note 146 (noting that a U.S. base in the UAE "has never been identified by the U.S. Air Force in publicly available materials because the UAE government had been concerned that touting the extent of its cooperation with the United States could antagonize some of its citizens" but also describing new UAE interest in publicizing its cooperation with the United States).

197. Entous et al., *supra* note 7.

198. *Id.*

5. Facilitating Illegality

Most troublingly, states may employ secrecy to facilitate the conclusion of commitments that are of questionable legality under international or domestic law (or both). For example, the CIA reached commitments with several foreign intelligence services to host secret detention facilities in which the CIA would hold and interrogate high value terrorism suspects.[199] In some cases, the host service's provision of consent likely violated the host state's domestic law, and so the commitments could not have proceeded had they been concluded publicly.[200] Hosting a secret detention facility might also have violated the hosts' international obligations, including the European Convention on Human Rights.[201] In cases like this, the secrecy of the commitment is intended to shield the commitment from public challenge as to its consistency with international and domestic law.

Other examples of secret commitments that facilitated unlawful activity include "extraordinary renditions" by the United States, where the understanding between the United States and the receiving state may have been that the receiving state would aggressively interrogate the person transferred. This resulted in the mistreatment of a number of detainees, including Maher Arar (transferred via Jordan to Syria)[202] and Abu Omar (rendered by the CIA to Egypt).[203] Decades earlier, the White House secretly sold weapons to Iran, notwithstanding domestic and international arms

199. *See, e.g.*, Greg Miller & Adam Goldman, *Rise and Fall of CIA's Overseas Prisons Traced in Senate Report on Interrogations*, WASH. POST (Dec. 11, 2014), https://www.washingtonpost.com/world/national-security/rise-and-fall-of-cias-overseas-prisons-traced-in-senate-report-on-interrogations/2014/12/11/067232b4-8143-11e4-9f38-95a187e4c1f7_story.html?utm_term=.1e7ff2f7e3b.

200. *Poland, Lithuania Won't Host New Secret CIA Rendition Prisons*, PRESSTV (Jan. 27, 2017), http://www.presstv.ir/Detail/2017/01/27/507919/Poland-Lithuania-CIA-secret-jails-black-sites.

201. *See* Deeks, *supra* note 37, at 38 n.156. *See generally* EUR. COURT OF HUMAN RIGHTS, FACTSHEET: SECRET DETENTION SITES (2014), http://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF (describing cases of *El-Masri v. Macedonia*, *Al Nashiri v. Poland*, and *Abu Zubaydah v. Poland*).

202. *See* Benjamin Weiser, *Appeals Court Rejects Suit by Canadian Man Over Detention and Torture Claim*, N.Y. TIMES (Nov. 3, 2009), http://query.nytimes.com/gst/fullpage.html?res=940DE1DA1730F930A35752C1A96F9C8B63.

203. *See Italy Convicts Abducted Egypt Cleric Abu Omar*, BBC NEWS (Dec. 6, 2013), http://www.bbc.com/news/world-europe-25258573. For a discussion of the rendition program more generally, see OPEN SOC'Y JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION (2013).

embargoes against that country.[204] Those involved in the Iran-Contra affair relied on secrecy to conceal the illegality of their actions.

Secret agreements concluded for this reason are obviously problematic. As with the "uncertain public support" rationale, the reason for using secrecy is intimately linked to the underlying substance of the agreement itself. The more that states believe that it is in their own interest to act consistent with international law, the less likely it is that this rationale will enter into play.

C. Substantive Consistency with the U.N. Charter

Even where the *reason* that states employ secrecy is legitimate, as in the first three categories above, the *substance* of the commitment itself may or may not be internationally lawful. This section identifies several key rules and principles in the U.N. Charter and argues that the underlying purposes of most of the secret commitments that have come to light are consistent with Charter norms, at least as states such as the United States traditionally have interpreted them.[205]

Article 2(3) of the Charter provides that states must "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[206] The companion provision in Article 2(4) requires states to "refrain in their international relations from the threat or use of force" against other states.[207] Article 51 preserves the "inherent right of individual or collective self-defense if an armed attack occurs."[208] The entire thrust of the Charter is to minimize armed conflict among states and to foster the peaceful resolution of disputes. The Charter also seeks to advance respect for human rights and international law as one of the overarching purposes in Article 1. The General Assembly has

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204. *The Iran-Contra Affair*, PBS, http://www.pbs.org/wgbh/americanexperience/features/general-article/reagan-iran/ (last visited June 22, 2017).

205. One could argue that states that employ secret international agreements are violating a procedural requirement of the Charter. That is, one could interpret Charter Article 102 to require states to register all international agreements eventually. (That article requires states to register those agreements "as soon as possible.") A state that never registered its secret agreements would thus be in violation of Article 102. However, one also could argue that by definition, it will never be possible to register secret agreements, and Article 102 implicitly recognizes that. In any event, this section focuses on states' compliance with substantive (rather than procedural) provisions of the Charter.

206. U.N. Charter art. 2(3).

207. *Id.* art. 2(4).

208. *Id.* art. 51.

pursued this goal by creating bodies such as the International Law Commission and the Human Rights Council.

One can identify at least three recurrent strategic goals that the secret commitments discussed in section A seek to advance. The majority of these commitments (1) strengthen a state party's ability to preserve or exercise its right of individual or collective self-defense; (2) minimize the chance of armed conflict; or (3) advance human rights or other international laws. Each of these goals has direct parallels in the U.N. Charter.

The fact that many of these secret commitments appear to be consistent with the core rules and goals of the Charter will be counter-intuitive to some. The conventional perception is that states generally employ secrecy to conceal nefarious, illegal, or quasi-legal activities.[209] Conventional wisdom thus would predict that many secret commitments would reflect goals that are contrary to the public rules, including the U.N. Charter. This section argues that conventional wisdom is wrong: the secret commitments that have come to light are generally consistent with substantive Charter norms as those norms have been interpreted by various states. Section D draws some broader conclusions about what that signals for the Charter's durability.

Many of the Charter's norms related to the use of force are contested.[210] For instance, not all states agree with the U.S. interpretation of Articles 2(4) and 51.[211] This section emphasizes the consistency between the public U.S. interpretation of these rules and the contents of secret commitments to which the United States is a party, while recognizing that not all states construe U.S. actions (whether public or private) in this area as consistent with the Charter.[212]

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209. *See* EDMUND JAN OSMANCZYK & ANTHONY MANGO, ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 2092 (3d ed. 2003) (stating that states often keep agreements secret because they are made at the expense of third states or involve bribes or threats); WOODROW WILSON, THE NEW FREEDOM 114 (1918) ("Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety.").

210. Gabriella Blum, *Prizeless Wars, Invisible Victories: The Modern Goals of Armed Conflict*, 49 ARIZ. ST. L.J. 633, 658–79 (2017); *see also* Ashley S. Deeks, *Multi-Part Tests in the* Jus ad Bellum, 53 HOUS. L. REV. 1035, 1048 (2016); Matthew Waxman, *Regulating Resort to Force: Form and Substance in the UN Charter Regime*, 24 EUR. J. INT'L L. 151, 151–52 (2013).

211. *See* Blum, *supra* note 210, at 658–73.

212. For instance, Russia has criticized the U.S. use of force in Syria against ISIS as being in violation of international law. Scott Stearns, *Russia: US Airstrikes in Syria Violate International Law*, VOA NEWS (Sept. 26, 2014), http://www.voanews.com/a/russia-us-airstrikes-syria-violate-international-law/2463923.html.

1. Enhancing Self-defense

Many of the agreements just discussed strengthen the ability of the United States to act in its own self-defense or in defense of its traditional allies.[213] SOFAs, mutual defense agreements, and commitments that authorize military training or joint operations all reflect U.S. efforts to secure stable military partnerships around the world. Having commitments such as these in place before an armed attack occurs lowers transaction costs to cooperation when speed may be of the essence, because the commitments have created a playbook of rules and procedures for the cooperating states to follow. This improves the practical effectiveness of their self-defense response. Further, commitments crafted well in advance of crises are more likely to reflect careful consideration of international and domestic laws that regulate their military responses, and therefore facilitate states' compliance with those laws when a crisis hits.[214]

Intelligence cooperation, including the sharing of intelligence facilities, serves the same self-defense-related goals.[215] States' intelligence services cooperate to obtain wider geographic and cultural intelligence coverage, to address borderless problems that a single state cannot manage alone, and to help detect and anticipate threats.[216] The Five Eyes agreement enhances the ability of each of its members to identify and respond to national security threats stemming from both state and non-state actors. Secret operational cooperation such as that among Alliance Base partners allowed states to more effectively address and suppress non-state terrorist threats against Europe and the United States.

The secret U.S. agreements with the United Kingdom on nuclear issues offer a third type of agreement that attempts to further the parties' self-defense. Each state alone is able to detect certain enemy nuclear capabilities that might threaten its survival. Sharing classified information related to those capabilities and sharing advanced nuclear technologies serves as a force

213. *U.S. Collective Defense Arrangements*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/collectivedefense/ (last visited June 22, 2017) (listing U.S. collective defense arrangements).

214. James Baker, *What's International Law Got to Do with It? Transnational Law and the Intelligence Mission*, 28 MICH. J. INT'L L. 639, 653 (2007) ("Regularized process, documented in an overt or clandestine binding agreement, can address such concerns in advance and facilitate timely intelligence collection when it matters most.").

215. Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 223–26 (1999) (arguing that spying supports a state's right of self-defense).

216. Deeks, *supra* note 140, at 7–9.

multiplier, allowing each state to continue to maintain a more credible nuclear deterrent.[217]

An important caveat is in order here. It cannot be gainsaid that a state could convert self-defense capabilities into tools to facilitate acts of aggression if it were so inclined. A state that has developed, through the use of secret commitments, a military force and intelligence service with a world-wide reach conceivably could employ those agents to initiate conflict with adversaries and thus destabilize international relations. However, to date there is no evidence that the United States has employed its secret commitments for these purposes. Further, some of the secret SOFAs apparently provide that the United States only may use the foreign base in question for the purpose of defending the host state against attack.[218]

In sum, various secret commitments enhance the defensive capacity of the United States by extending its ability to deploy troops around the world and improving its intelligence partnerships. This, in turn, secures the credibility of the United States and its allies as actors capable of responding in individual or collective self-defense to acts of aggression forbidden by the U.N. Charter.

2. Avoiding Conflict

Some of the secret commitments discussed in section A are best understood as commitments that help reduce the chance of inter-state conflict. The secret nuclear agreements between the United States and U.S.S.R./Russia offer a paradigmatic example: they reflect efforts between the two major nuclear powers to reduce nuclear stockpiles and weapons systems and limit underground tests, thus diminishing the chance of nuclear conflict.[219]

Another secret commitment that would minimize the chance of an unintended or rash use of nuclear weapons is the long-running understanding between the United States and United Kingdom that requires both states to authorize the use of a nuclear weapon in certain cases. First developed in the 1950s, these secret personal understandings between the leaders of the two governments—termed "nuclear release procedures"—reflected that both leaders should jointly approve the conduct of nuclear strikes from U.K. bases

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217. Richard Norton-Taylor, *UK-US Sign Secret New Deal on Nuclear Weapons*, GUARDIAN (July 29, 2014), https://www.theguardian.com/world/defence-and-security-blog/2014/jul/29/nuclear-weapons-us-uk-cooperation.

218. Chandrasekaran, *supra* note 146.

219. *See supra* text accompanying notes 160–63.

and the release of U.S. nuclear depth bombs stored in the United Kingdom.[220] (These provisions may have changed in the 1990s, as the U.S. nuclear posture changed.) Although the United Kingdom may have had a variety of reasons to seek these commitments, they would have the effect of slowing a resort to a weapon of tremendous destructive capability and thus serving as at least a modest speed bump on the road to a nuclear conflict.

Secret consent by a state to the use of force by another state inside the former's territory may also help reduce interstate conflict. For example, media reports suggest that in 2013 the United States obtained the Libyan government's consent to forcibly remove terrorist suspect Abu Anas al Libi from Tripoli. (The U.S. Justice Department had indicted him for his role in the 1998 bombings of U.S. embassies in Kenya and Tanzania.) Unnamed U.S. officials suggested that Libya knew about the operation beforehand, gave consent, and assisted the United States.[221] By obtaining secret consent rather than using force under a more controversial self-defense theory, the United States was able to signal respect for Libya's sovereignty and avoid potential clashes between U.S. and Libyan forces. Pakistan's secret consent to U.S. drone strikes offers a similar example.[222] Indeed, the level of force that the acting state undertakes in the face of secret consent might be more constrained than the level of force the acting state would undertake pursuant to a self-defense theory.

Secret limitations on the use of conventional weapons by a purchasing state also may reduce the level of destruction that occurs during an armed conflict. Sales of weapons to a state are not inherently unlawful, unless they violate the selling or buying state's international or domestic law obligations. Many weapons sales are unclassified, and there is wide debate about whether selling weapons to states increases or decreases the likelihood of conflict.[223]

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220. JOHN BAYLIS & KRISTAN STODDART, THE BRITISH NUCLEAR EXPERIENCE: THE ROLES OF BELIEFS, CULTURE AND IDENTITY 228–29 (2014). *See generally* Burr, *supra* note 159.

221. Michael Schmidt & Eric Schmitt, *U.S. Officials Say Libya Approved Commando Raids*, N.Y. TIMES (Oct. 9, 2013), http://www.nytimes.com/2013/10/09/world/africa/us-officials-say-libya-approved-commando-raids.html.

222. Entous et al., *supra* note 7; Michael Hirsch, *Pakistan Signed a Secret 'Protocol' Allowing Drones*, ATLANTIC (Oct. 23, 2013), https://www.theatlantic.com/international/archive/2013/10/pakistan-signed-secret-protocol-allowing-drones/309640/.

223. *Compare* Thom Shanker, *U.S. Foreign Arms Sales Make Up Most of Global Market*, N.Y. TIMES (Aug. 26, 2012), http://www.nytimes.com/2012/08/27/world/middleeast/us-foreign-arms-sales-reach-66-3-billion-in-2011.html (describing U.S. goal of weapons sales to Middle East as furthering U.S. policy of working with "Arab allies in the Persian Gulf to knit together a regional missile defense system to protect cities, oil refineries, pipelines and military bases from an Iranian attack"), *with* Peter Beaumont, *The $18bn Arms Race Helping to Fuel Middle East*

The focus here is the secret nature of the restrictions contained in particular weapons sales or transfer agreements. If a weapons-selling state imposes secret restrictions on the places, contexts, or targets against which the purchasing state may use those weapons (as the United States reportedly has done with Israel's purchase of cluster munitions and conceivably may do with other states' purchases of armed drones), those restrictions will affect the buying state's calculus about its military tactics, and potentially its overall military strategy. In general, restrictions on weapons use can decrease their misuse; enforcement power lies in the selling state's ability to halt future sales.

One of the best-known secret commitments that averted a conflict was the agreement between the United States and the Soviet Union that ended the Cuban Missile Crisis. In the public deal, President Kennedy pledged not to invade Cuba and Soviet leader Nikita Khrushchev agreed to dismantle the Soviet nuclear missile sites in Cuba.[224] In a secret side deal, the United States agreed to withdraw its nuclear missiles from Turkey.[225] The United States sought successfully to keep the commitment secret for several reasons. First, President Kennedy did not want it to seem as though the United States had succumbed to Soviet blackmail.[226] Second, "revealing Turkey's cooperation with the nuclear missile program would have undermined Turkish political actors internally and threatened to align it more than it would like with the United States internationally."[227] Third, the United States did not want to be seen as betraying its NATO allies by removing the missiles from Turkey and thus undercutting the military protection provided by the United States.[228] The secret part of the deal seems to have been critical to terminating the missile crisis.

Some secret commitments may reduce potential conflict less directly, by deterring aggression by other states. For instance, to the extent that the

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Conflict, GUARDIAN (Apr. 23, 2015), https://www.theguardian.com/world/2015/apr/23/the-18bn-arms-race-middle-east-russia-iran-iraq-un (describing weapons sales by the West to Sunni Gulf states as "plunging the Middle East deeper into an arms race" and exacerbating conflict between Saudi Arabia and Iran).

224. *Cuban Missile Crisis*, JOHN F. KENNEDY PRESIDENTIAL LIBR., https://www.jfklibrary.org/JFK/JFK-in-History/Cuban-Missile-Crisis.aspx (last visited June 22, 2017).

225. *Id.*; Jim Hershberg, *Anatomy of a Controversy: Anatoly F. Dobrynin's Meeting with Robert F. Kennedy, Saturday, 27 October 1962*, NAT'L SECURITY ARCHIVE, http://nsarchive.gwu.edu/nsa/cuba_mis_cri/moment.htm (last visited June 22, 2017).

226. Hershberg, *supra* note 225.

227. KUTZ, *supra* note 34, at 115–16.

228. *See* Hershberg, *supra* note 225 (describing Dobrynin's October 27 cable outlining special decision of NATO Council to station missiles in Turkey).

existence of secret SOFAs are shallow secrets (that is, it is public that a given SOFA exists, even though the contents of the SOFA are not public), the SOFAs may deter enemy states from attacking either the United States or the hosting state because of uncertainty over what their collective military response would be.

3. Furthering International Law

A third—and particularly surprising—role that various secret commitments play is as a mechanism by which to promote compliance with international law.[229] These commitments may arise when one of the parties to the commitment is attuned to the rule of law or fears litigation. Diplomatic assurances are a good example: the United States has obtained many sets of secret diplomatic assurances, pursuant to which receiving states agree to treat individuals transferred to them by the United States in a manner consistent with the Convention Against Torture.[230] Although the receiving states seek to keep their commitments secret (for reasons discussed *supra*), these assurances help protect individuals against mistreatment by states.

Some secret commitments that regulate the use of weapons or intelligence also help advance related international laws. Recall the U.S.-Israeli commitment regarding cluster munitions that requires the Israeli government not to use those weapons in populated areas. This restriction advances Israel's compliance with the laws of armed conflict related to distinction and precautions. (Distinction requires a state to take steps to distinguish between combatants and civilians and only target the former.[231] The rule of precautions requires a state to take all feasible precautions to avoid incidental loss of civilian life.[232]) The commitment also reportedly requires Israel to provide the United States with information about where Israel uses cluster munitions, to facilitate the cleanup of unexploded ordnance.[233] This advances the

229. Secret agreements have emerged that seek to ensure compliance both with international laws that protect states and with those that protect individuals. For a discussion of these two different categories of international law, see generally Deeks, *supra* note 137.

230. DEEKS, *supra* note 184, at 1–3.

231. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict arts. 48, 51(2), 52(2), June 8, 1977, 1125 U.N.T.S. 3.

232. *Id.* art. 57(1).

233. INT'L COMM. OF THE RED CROSS, HUMANITARIAN, MILITARY, TECHNICAL AND LEGAL CHALLENGES OF CLUSTER MUNITIONS 14 (2007), https://shop.icrc.org/expert-meeting-report-quot-humanitarian-military-technical-and-legal-challenges-of-cluster-munitions-quot-778.html

humanitarian aim of avoiding post-conflict harm to civilians, a goal reflected in treaties such as Protocol V to the Convention on Certain Conventional Weapons on explosive remnants of war and the Cluster Munitions Convention.

Even certain arrangements among intelligence agencies may reflect an interest by the negotiating states in ensuring that their activities comport with international law. One reason for this interest in legal compliance is the increasing regulation of intelligence activities in countries such as the United States, Canada, and the United Kingdom, where those intelligence agencies are increasingly expected to adhere to international norms and domestic oversight.[234] More generally, secret intelligence arrangements can infuse bilateral intelligence relationships with norms of professionalism, which may include a norm favoring adherence to the rule of law.[235]

4. Exceptions

A few secret commitments that have come to light appear to be in explicit tension with one or more of the three Charter norms just discussed. These commitments often arise in the context of covert action by the CIA. In particular, the secret arrangements pursuant to which the CIA controlled secret detention facilities in Poland, Romania, and Lithuania and employ harsh interrogation techniques against the detainees held there are troubling.[236] The secrecy of the arrangements facilitated the commission of acts that many believe violated international law—and also the domestic laws of both the United States and the host states. The Stuxnet worm offers another example. The United States and Israel reportedly worked together (pursuant, one assumes, to a secret arrangement) to develop a cyber worm that penetrated Iran's nuclear facility at Natanz and caused physical damage to its centrifuges.[237] Some have argued that the operation constituted a use of force against Iran, one not justified by a right of self-defense.[238]

(describing a secret agreement between the United States and Israel outlining restrictions on Israel's use of cluster munitions).

234. Deeks, *supra* note 140, at 18–20.

235. Sepper, *supra* note 48, at 163.

236. Miller & Goldman, *supra* note 199.

237. David Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 2, 2012), http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html (describing "unusually tight collaboration" between United States and Israel).

238. *See, e.g.*, MICHAEL N. SCHMITT, INT'L GROUP OF EXPERTS, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 45 (2013); Andrew Moore, *Stuxnet and*

Other examples of covert actions by the CIA—especially in the 1960s and 1970s—are difficult to reconcile with the Charter and other norms of international law.[239] In many cases, however, these actions did not transpire pursuant to secret commitments between states, and thus do not directly implicate the claims in this paper. In some instances, the CIA conducted the activity unilaterally. In other cases, it cooperated with non-state actors to achieve its goal.[240] It cannot be gainsaid that some assistance to non-state actors would violate the Charter, such as the provision of military assistance to anti-government rebels attempting to overthrow a government.[241] However, this paper focuses on secret interstate commitments, both because this is where the historical criticism originated and because interstate commitments (more so than state-to-non-state actor commitments) potentially consolidate the power of two or more dominant actors on the international stage. This article does not address covert assistance to non-state actors.

Several examples of secret commitments that are in tension with the Charter and international law involve states other than the United States. Perhaps the most prominent secret agreement that seems to have violated the Charter is the 1956 Protocol of Sevres concluded by Israel, France, and Britain. That agreement emboldened Israel to attack Egypt forces in the Sinai and facilitated the seizure of the Suez Canal by France and the United Kingdom—acts inconsistent with Charter Article 2(4). Another example is a secret agreement between China and North Korea titled, "The People's Republic of China-Democratic People's Republic of Korea (DPRK) Escaped Criminals Reciprocal Extradition Treaty."[242] Although the treaty text is not

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Article 2(4)'s Prohibition Against the Use of Force: Customary Law and Potential Models, 64 NAVAL L. REV. 1, 1 (2015).

239. For instance, the CIA tried to assassinate Fidel Castro and provided assistance to non-state forces that assassinated Lumumba of Congo and Trujillo of the Dominican Republic. ABRAM SHULSKY, SILENT WARFARE: UNDERSTANDING THE WORLD OF INTELLIGENCE 90 (3d ed. 2002). As the Church Committee put it, "Many covert operations appear to violate our international treaty obligations and commitments, such as the charters of the United Nations and the Organization of American States." SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. No. 94-755, at 131 (2d Sess. 1976).

240. *See generally* WILLIAM COLBY & PETER FORBATH, HONORABLE MEN: MY LIFE IN THE CIA (1978).

241. This also would violate the norm of non-intervention, to the extent that such a norm is distinct from Article 2(4) of the Charter. *See* U.N. Charter art. 2(4).

242. Kyu Chang Lee, *Protection of North Korean Defectors in China and the Convention Against Torture*, 6 REGENT J. INT'L L. 139, 139 (2008); *see also* Alison Carrinski, *The Other North Korean Dilemma: Evaluating U.S. Law Toward North Korean Refugees*, 31 SUFFOLK TRANSN'L L. REV. 647, 650–51, 651 n.18 (2008). Operation Condor, a 1975 intelligence-sharing

publicly available, the title suggests that it requires China to return to North Korea individuals who have been charged with or convicted of crimes in North Korea but who (in all likelihood) will not receive a fair trial or be treated humanely on return.[243] It is not clear why North Korea and China have kept the text secret, since most extradition treaties are public, but it is possible that China fears receiving public criticism for agreeing to forcibly return individuals to North Korea.

One other area of U.S. foreign policy and intelligence activity may appear to undercut the argument that secret commitments generally are consistent with the Charter. U.S. assistance to a foreign government, which may be given pursuant to a secret commitment, sometimes facilitates the recipient government's ability to engage in international law violations. Secret U.S. assistance to Augusto Pinochet, for instance, allowed him to engage in widespread repression of his opponents, even if the United States did not specifically intend that result.[244] In a more contemporary context, the United States sometimes provides both public and classified assistance to Saudi Arabia and Pakistan, two foreign governments not known for their commitment to the rule of law. In those cases, the U.S. assistance may facilitate international law violations by the recipient state.[245] However, certain U.S. statutes, including the Leahy Amendment, attempt to cabin the misuse of such assistance.[246] Similarly, the United States seems attuned to legal problems that can arise when it assists states that are fighting armed conflicts in ways that violate international law. Under the Obama Administration, the United States limited its intelligence-sharing with the Saudi government in the Yemen conflict, to avoid facilitating certain legally

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arrangement among Chile, Argentina, Brazil, Paraguay, and Uruguay used to track the activities of political opponents, offers another example. *See* CENT. INTELLIGENCE AGENCY, CIA ACTIVITIES IN CHILE (2000), https://www.cia.gov/library/reports/general-reports-1/chile/./.

243. A similar agreement may exist between Russia and North Korea. Jung Kwon-hyun, *Russia-NK Border Repatriation Clause Confirmed*, CHOSUN ILBO (Seoul), Dec. 5, 1999, *discussed in NAPSNet Daily Report*, NAUTILUS INST. (Dec. 6, 1999), http://oldsite.nautilus.org/archives/////napsnet/dr/9912/DEC06.html#item16.

244. JEREMI SURI, HENRY KISSINGER AND THE AMERICAN CENTURY 238–41 (2009). On the other hand, in 1974 CIA officers and assets were tasked with reporting on human rights violations by Pinochet's government and used their liaison relationships with the Chilean security services to admonish them for human rights abuses. CENT. INTELLIGENCE AGENCY, *supra* note 242.

245. Lawrence Wright, *The Double Game: The Unintended Consequences of American Funding in Pakistan*, NEW YORKER (May 16, 2011), http://www.newyorker.com/magazine/2011/05/16/the-double-game.

246. 22 U.S.C. § 2378d (2012). CIA assistance to foreign militaries is not subject to Leahy provisions, however.

problematic strikes.[247] Further, although some of the non-democratic assistance may come through secret arrangements, the United States also supports those governments publicly.[248] Secret commitments that entail assistance to such governments therefore are more shallow secrets, because the public is aware of general U.S. support for these regimes and is well-positioned to critique such support.[249]

To be clear, this article does not argue that U.S. foreign policy and intelligence operations are always consistent with the U.N. Charter. Instead, it limits its claims to the revealed content of secret commitments between the United States and one or more other states. Although some CIA activities may be inconsistent with international law, only a few of these activities implicate the arguments in this piece, because only a few implicate secret commitments. Although U.S. foreign policy and covert actions have not always aligned with international law, most secret commitments that have come to light between U.S. and foreign states appear to be consistent with the Charter. The next section considers why that may be the case.

D. Internalizing the Charter

There is an evergreen debate in legal scholarship about whether, why, and to what extent states actually comply with the use of force prohibitions in the Charter. Thomas Franck famously bemoaned the death of Article 2(4) in 1970, arguing that "the high-minded resolve of Article 2(4) mocks us from its grave."[250] His article triggered an immediate response by Louis Henkin, who argued that Franck overstated the volume of non-compliance with Article 2(4) and ignored the work it performs in deterring violations of the

247. Missy Ryan, *With Small Changes, U.S. Maintains Military Aid to Saudi Arabia Despite Rebukes over Yemen Carnage*, WASH. POST (Dec. 13, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/12/13/with-small-changes-u-s-maintains-military-aid-to-saudi-arabia-despite-rebukes-over-yemen-carnage/?utm_term=.f9315f1ad1ab.

248. SHULSKY, *supra* note 239, at 78 (noting that "the same disputes about which governments should be considered friendly and worthy of assistance would be likely to occur as in the case of noncovert foreign aid").

249. For a critique of U.S. assistance to Pakistan between 2001 and 2009, see AZEEM IBRAHIM, U.S. AID TO PAKISTAN—U.S. TAXPAYERS HAVE FUNDED PAKISTANI CORRUPTION 4–6 (2009), http://www.belfercenter.org/sites/default/files/legacy/files/Final_DP_2009_06_08092009.pdf.

250. Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L. L. 809, 809 (1970).

norm against aggression.[251] More recently, Michael Glennon argued that "international 'rules' concerning use of force are no longer regarded as obligatory by states."[252]

Those skeptical of the Charter's durability and persuasive power might understandably anticipate that states would conclude a variety of secret commitments that run contrary to the Charter's rules. After all, if states only pay lip service to the Charter's norms but have not internalized them as true rules, they should have limited compunction about agreeing to disregard them in non-public contexts.[253] (Some actions taken pursuant to secret Charter-violating commitments undoubtedly would come to light, but states might be able to conduct many other acts under the radar.) Yet few secret commitments that have surfaced reveal provisions that overtly challenge Charter norms. Indeed, the most patent violation of the Charter in the past decade was not conducted in secret, nor was it conducted pursuant to a secret commitment with another state. Russia's invasion and occupation of Crimea was overt and unilateral.[254] Some U.S. actions that rely on secret commitments—particularly targeted killings that rely on consent—are undergirded by contested legal theories, but the United States has a reasonable argument that these uses of force are consistent with its right of self-defense.

We might attribute the fact of limited secret Charter violations to several things. First, it cannot be ignored that many secret commitments between states have not become public, and maybe never will. Thus, there may be a range of secret commitments that in fact anticipate or facilitate Charter violations. It is impossible to discount this possibility, and thus this section is cautious in its extrapolations. Second, states may conclude secret exchanges

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251. Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 544 (1971) ("Even where force is used, the fact that it is unlawful cannot be left out of account and limits the scope, the weapons, the duration, the purposes for which force is used.").

252. Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539, 540 (2002) (arguing that the Charter's use-of-force and self-defense regimes have collapsed).

253. Any such secret agreements would not, as a legal matter, supervene a state's obligations under the Charter. First, ordinary later-in-time rules regarding treaties do not apply to the Charter, by virtue of Charter Article 103. Second, it cannot be the case that a state could override its public treaty obligations (in a multilateral treaty such as the Convention Against Torture) to one of the states parties via a secret, later-in-time agreement. This is especially true in the United States, where the Senate would have provided advice and consent to an Article II treaty such as the Convention Against Torture and would roundly reject an argument by the Executive that it could amend or override that treaty obligation through a secret bilateral agreement.

254. *See* Henkin, *supra* note 251, at 547 ("[T]he Soviet Union, unable to arrange, even to fabricate, an invitation by Czechoslovakia, has to invade, not intervene, and bear even within its family the full onus of blatant violation.").

that look consistent with Charter norms but do so for reasons other than an interest in complying with the Charter. A state might conclude, for example, that it is in its self-interest to avoid a secret commitment to aid and abet violations of the Convention Against Torture because it wishes to avoid eventual foreign criminal prosecutions or domestic civil litigation.[255] Third, states might individually remain willing to violate the Charter but believe that it is too risky to enter into bilateral commitments to do so because there is a higher chance that the commitment will leak or that the partner state will change its mind. A fourth explanation is that states generally have internalized the Charter norms against aggression and in favor of human rights and internal self-determination. At the very least, they arguably understand—or at least intuit—that concluding commitments that undercut the Charter is illegitimate.[256] This is not to suggest that states never violate Charter norms—that is an unduly optimistic interpretation of the facts—but rather to suggest that the basic contours of the Charter's substantive norms operate as a baseline against which states contemplate and structure their military and intelligence cooperation, even in secret.

This fourth explanation finds support in, and in turn supports, a constructivist view of international relations. Those who adhere to the constructivist view generally perceive states' interests and values as socially constructed, rather than fixed *ex ante*.[257] "States develop norms in the context of their mutual interactions, internalize them, and then comply with them because they understand them to be correct or appropriate."[258] The fact that states have not produced secret commitments that are inconsistent with the Charter may reflect that states have internalized its norms and ultimately comply with them because they deem them to be desirable norms of conduct in both public and private contexts.

Revisiting the problems with pre-Charter secret treaties helps illustrates how today's secret commitments tend to avoid most of the problematic aspects of those older agreements. In particular, the historical agreements

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255. Henkin addresses the argument that reasons other than the existence of Article 2(4) may have led states to fight fewer conventional wars, including the existence of nuclear weapons, greater territorial stability, and changes in national interests that reduced the temptation to resort to force. *Id.* at 545.

256. *See* VCLT, *supra* note 17, at 344 (stating that a treaty that conflicts with a *jus cogens* norm is void).

257. ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 20 (1999); Kenneth W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT'L L. & INT'L REL. 9, 14–15 (2004).

258. Ashley S. Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291, 322 (2015).

were said to (1) facilitate aggression and enhance conflict; (2) undercut self-determination; and (3) hinder democratic oversight of government acts. The first two problems generally are minimized in today's agreements. With regard to aggression and territorial conquest, the earlier secret agreements served as "machinations among governments to wage war."[259] Today both overt and covert aggression against other states is a less prominent feature of international relations—as the Charter intended it to be. The military commitments that have come to light are framed in a self-defense posture, not as efforts to structure how to seize and allocate territory and political influence after conflict.

The second critique of the historical secret agreements—that they enabled European states to exploit foreign peoples who lived beyond their borders and to suppress self-determination by those peoples—also lacks resonance in today's commitments. Concepts of self-determination and post-colonialism are now firmly embedded in international relations, due in part to historical developments.[260] For instance, the Charter established a Trusteeship Council that helped former colonies and other groups of peoples advance toward independent statehood. The Council suspended its work in 1994, after the last remaining U.N. trust territory established its independence.[261] To the extent that some secret U.S. military cooperation agreements extend the reach of the United States geographically, the agreements appear to do so in a manner that respects the sovereignty of allies and host states.[262]

President Wilson also worried that secrecy enabled powerful European states to exercise control over less powerful states outside that region.[263] While the states concluding secret commitments in both the pre- and post-Charter eras did and do not always have equal military and geopolitical power, today's secret commitments appear to reflect reasonable quid pro quos. In a number of cases, the United States "buys" cooperation, intelligence, or temporary access to territory from its partners, using money, training, facilities, or increased intelligence flows. The commitments thus

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259. *See* Quigley, *supra* note 11, at 253.

260. For a worrisome signal to the contrary, see Tyler Pager, *As President Trump Muses About Seizing Iraq Oil, Energy Experts Say It Makes No Sense*, BOS. GLOBE (Jan. 24, 2017), https://www.bostonglobe.com/news/politics/2017/01/24/president-trump-muses-about-seizing-iraq-oil-energy-experts-say-makes-sense/agDuY3hkEXKxisI302rZbI/story.html (discussing President Trump's statement that the United States should have seized Iraqi oil when it occupied Iraq).

261. *Trusteeship Council*, UNITED NATIONS, http://www.un.org/en/sections/about-un/trusteeship-council/index.html (last visited June 23, 2017).

262. *See, e.g.*, CQ ALMANAC, *supra* note 145 (noting secret provisions limiting how United States may use its Spanish bases).

263. Quigley, *supra* note 11, at 260–61.

appear to respect the principle of sovereign equality on which the Charter was founded. The pre-Charter fears that secret agreements promoted conquest, aggrandizement, and sovereign inequality lack resonance in today's secret commitments.

One concern about pre-Charter secret agreements retains currency in this post-Charter era, however. By definition, secret commitments now, as then, escape all but the most limited democratic scrutiny. A consistent critique of secret law is that it lacks legitimacy and undercuts notions of democracy under which the ruled can check their rulers.

Secrecy's costs "include inherently less legitimacy for activities that do not receive full democratic due process consideration by government and the people, who are sovereign. Secrecy raises the question of how the people remain self-governing regarding matters that are hidden from public view."[264] The secrecy of a commitment also makes it more difficult for the Executive to describe its justifications and rationales to the public, even if the fact of the commitment comes to light.[265] Although the U.S. democratic system has come to accept the need for secret facts and, in some cases, secret law (such as Foreign Intelligence Surveillance Court opinions, classified addenda to intelligence statutes, and secret Office of Legal Counsel opinions), government secrecy continues to offer the possibilities of undue accretions of power by the Executive; concealment of improper or unlawful actions; and decisions of inferior quality. For this reason, Part III evaluates existing structural protections against abuse and introduces several normative proposals to address the enduring problem of the perceived democratic illegitimacy of secret commitments.

III. CHECKING SECRET COMMITMENTS

As Part I illustrated, different secret commitments travel along different paths from their negotiation to their conclusion and implementation. In the U.S. system, Article II treaties with classified provisions or annexes, to which the Senate provides advice and consent to ratification, are the least common but are exposed to the largest number and variety of actors. A secret MOU concluded between a CIA station overseas and its counterpart in the host state has a much smaller and less diverse audience. Only a handful of people in the U.S. government may know about the latter arrangement, unless and until it is leaked. Secret agreements concluded as sole executive agreements and

264. Rudesill, *supra* note 4, at 311.

265. *But see generally, e.g.*, Williamson Declaration, *supra* note 185.

transmitted to Congress's foreign relations committees fall in the middle in terms of the number and diversity of people aware of the commitment. In David Pozen's terminology, Article II treaties are relatively shallow secrets, whereas CIA MOUs are deep secrets.[266]

Secret commitments inherently face perceptions of illegitimacy; those that are known to the smallest group of people are seen as the most problematic and least legitimate because they face the fewest checks on their substance, legality, and quality. That is, the number and type of government officials serving as proxies for the U.S. citizens in whose name they conclude the commitments are at their narrowest in these cases.[267] As Part II showed, there are cases in which states employ secrecy to conceal their deals from public scrutiny or to cloak substantive provisions that would be illegal under international or domestic law. Secret laws and decisions also are criticized for being of lower quality, because they fail to incorporate the expertise and advice that a wider group of actors could contribute.[268]

Drawing from the U.S. Constitution, statutes, and scholarly literature on checks and balances, this Part first identifies current inter-branch, inter-agency, intra-agency, and foreign constraints on the misuse of secret commitments and then offers some normative proposals to reduce the democratic legitimacy and quality concerns that surround secret commitments. The normative proposals bear a cost, however: an increased risk of leaks.

A. Legislative Checks

The Senate plays a constitutional role in providing advice and consent to Article II treaties that have classified terms or annexes.[269] This represents the most intensive and formal opportunity for U.S. actors outside the executive branch to evaluate the contents and wisdom of any secret aspects of a treaty. Indeed, it offers the chance for another branch to block the Executive's ratification of the treaty. Examples of this are few and far between, however, presumably because the Executive has long believed that it has constitutional authority to conclude most secret agreements as executive agreements, and

266. *See* Pozen, *supra* note 4, at 316–17.

267. SHULSKY, *supra* note 239, at 144 (noting that in a democracy, secrecy potentially calls into question the political legitimacy of an intelligence service).

268. W. MICHAEL REISMAN & JAMES L. BAKER, REGULATING COVERT ACTION 14 (1992) ("[S]hielding certain plans from critical scrutiny may permit inherently defective operations to be set in motion.").

269. U.S. CONST. art II, § 2, cl. 2.

would prefer to share those texts with as few actors as possible to minimize the chance of leaks.

The Senate's advice and consent role is not the only way in which Congress can engage with secret agreements, however. As discussed in Part I.A, the Case Act provides another avenue by which certain congressional actors obtain access to and have the opportunity to check secret executive agreements. Through the Case Act reporting requirements, the Senate Foreign Relations Committee and House Foreign Affairs Committee obtain copies of these agreements and have the opportunity to follow up with questions or criticisms or convene closed hearings.[270] The legislative history reflects that the statute's sponsor, Senator Case, anticipated that the Executive would transmit a wide variety of sensitive agreements, including intelligence agreements; nuclear basing agreements; intergovernmental agreements between Cabinet or independent agencies in the United States and their foreign counterparts; nuclear technology sharing agreements; military assistance agreements; agreements with foreign intelligence agencies; and contingency agreements with countries with which the United States does not have treaty-based security commitments.[271] The Case Act also requires the Executive to reduce oral international agreements to writing, and the legislative history of the Act indicates that Congress included that provision specifically to "require the transmission of intelligence sharing and intelligence liaison agreements, many of which are oral."[272] Assuming the Executive complies rigorously with the Case Act requirements, the foreign relations committees have ample opportunities to evaluate U.S. secret agreements.[273]

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270. *See supra* note 23 and accompanying text.

271. S. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 219 (Comm. Print 2011).

272. *Id.* at 222.

273. *Hearings*, *supra* note 27, at 39 (statement of Sen. Case, Member, S. Comm. on Foreign Relations) ("Even in the case of agreements which were classified, it would be possible for the appropriate committees to consider whether the President's decision was sound. What action might be taken then, I think, is still a little unclear and I would rather leave it so."); *see also id.* at 63–64 ("The most important purpose of this legislation is to make the American people aware of what our international relationships are on a continuing basis, for two reasons. First, so that the public, where those arrangements are sound and the direction of policy is wise, can support it . . . . Second, so that the administration from time to time is checked in its efforts to do things that are unwise by the force of public opinion on a continuing basis."). Little is known about how the SFRC and HFAC compile and store these agreements or share information with other non-committee members about their contents.

B. Inter-agency Checks

In a variety of cases, then, Congress will have good visibility into U.S. secret agreements, but limited or no visibility into the fact and content of U.S. secret arrangements. That does not mean that there are no opportunities to identify and rein in problematic uses of secret arrangements. Actors within the executive branch play important roles in checking both secret agreements and secret arrangements.

Particularly in the national security area, where Congress and the courts face institutional and structural challenges to providing robust oversight, it has become commonplace to turn to checks within the executive branch itself as an alternative to inter-branch checking.[274] The inter-agency policy-making process requires—and indeed benefits from—exchanges among different executive agencies with distinct mission statements. Each agency pursues its own goals and policies, while trying to avoid policies that undercut the agency's mission or unduly weaken its standing in relation to other agencies. Professor Cass Sunstein argues that inter-agency discussions can enhance deliberative democracy by promoting accountability, the exchange of information, and reason-giving.[275] In other words, the "turf battles" maligned by those who fear bureaucratic sluggishness also can play a positive role in producing more thoughtful and balanced executive policies. Looking beyond the interagency process, White House involvement in national security policy can introduce additional political expertise and oversight against abuses.[276]

In the area of secret commitments, these inter-agency checks can expand the universe of actors who bring their expertise, ethics, and legal knowledge to the discussion.[277] Specifically, the Case Act attempts to ensure that the

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274. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006) (describing "executive v. executive" as a second-best method of checks and balances); Pozen, *supra* note 4, at 269, 333 (describing "tremendous diversity of actors" within federal agencies who can create "internal friction, competition, and moderation"); Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 640 n.34 (2016) ("[I]nternal-executive branch checks (emanating from offices of general counsel, compliance chiefs, and various civil liberties-focused bodies) all have important, ongoing roles to play in the complex undertaking of intelligence oversight.").

275. Cass R. Sunstein, *Deliberative Democracy in the Trenches*, 146 DAEDALUS 129, 129–31 (2017).

276. *See* Rascoff, *supra* note 274, at 639–40 ("Ever since the 1970s-era reforms, the assumption . . . has been that the main task of intelligence oversight is to detect and deter illegality and abuse. Presidential intelligence takes that foundation as a given and seeks to add to it mechanisms designed to promote strategically sound intelligence collection.").

277. Cass Sunstein notes that "[d]iverse people, with different knowledge and perspectives, are frequently involved." Sunstein, *supra* note 275, at 131; *see also id.* at 132 (describing a "surprising level of heterogeneity and disagreement that has to be worked through, typically as a

DOS reviews all international commitments, even if the agency concluding the commitment does not believe that it rises to the level of a legal agreement. The statute provides that "the Secretary of State shall determine for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of this section."[278] This means that agencies should share all of their commitments with the DOS, so that the DOS can assess whether the commitment falls within the Case Act's coverage. The statute also requires any department or agency of the U.S. Government that enters into an international agreement on behalf of the United States to transmit the text of such agreement to the DOS not later than twenty days after such agreement has been signed.[279]

Before the DOS authorizes any official to negotiate an international agreement, actors within the Office of the Legal Adviser, the Bureau of Legislative Affairs, other bureaus with substantive equities in the subject of the negotiations, and other agencies with a substantial interest in the matter review the draft text.[280] The Legal Adviser's Office prepares a memorandum of law in support of the authority to conclude the agreement,[281] and the Secretary of State reviews the text of all international agreements before the United States signs them.[282] Although the purpose of the statute and regulations is to ensure that a single agency serves as a collection point for all international agreements and harmonizes the Executive's interpretation of which commitments constitute international agreements, the DOS's involvement also provides a substantive check on the secret international agreements that other agencies seek to negotiate.

The White House also helps to check the Executive's conclusion of secret agreements. Like Congress, the President almost always will have more information about and provide greater oversight over those secret commitments that have more formal trappings and are legally binding. The President personally signs the packages by which the Executive transmits Article II treaties to the Senate for advice and consent, so these agreements naturally garner the most attention in the White House.[283] Where the

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result of substantive exchanges that place a high premium on acquisition of relevant information"); Pozen, *supra* note 4, at 333 (identifying that the diversity of actors in the executive branch can create "internal friction, competition, and moderation" in the realm of secret keeping).

278. 1 U.S.C. § 112b(e)(1) (2012).

279. *Id.* § 112b(a). These requirements are facilitated by the Circular 175 process, under which the State Department approves the negotiation and conclusion of all international agreements to which the U.S. becomes a party. 11 FAM 724 (codifying the Circular 175 process).

280. *See* 11 FAM 724.3.

281. *Id.* at 724.3(h).

282. *Id.* at 724.7.

283. *See* S. COMM. ON FOREIGN RELATIONS, 106TH CONG., *supra* note 271, at 219.

Executive plans to transmit a classified agreement to the relevant congressional committees, the Case Act requires the President's involvement as well. The Act provides that

> any such agreement the immediate public disclosure of which would, in the opinion *of the President*, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice *from the President*.[284]

By implication, the President must be made aware of classified executive agreements in order to invoke the classified transmittal process.

Far less clear is the extent to which the inter-agency process imposes any significant constraints on the conclusion by individual agencies of classified international *arrangements*. It seems likely either that national security agencies such as the CIA and DOD have obtained blanket permission from the DOS to conclude certain arrangements of a general type,[285] or that the agencies make the determination on their own (notwithstanding the Case Act) that the arrangements they are negotiating contain no legally binding language. In these cases, it is unlikely that the President, the National Security Council, or the DOS reviews—or even is aware of—these arrangements.[286] This raises an important challenge to democratic participation and oversight, one considered in the next section.

C. Intra-agency Checks

If a specific agency is unwilling to share the contents of its international arrangements with actors from any other agency and the White House is unwilling to insist that they do so, how can anyone review or contest what that agency is doing? Different executive agencies represent different interests and constituencies among the broader public, but single agencies appear—at least at first glance—to have a unitary mission and thus offer little possibility as a check on themselves. This suggests that secret arrangements

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284. 1 U.S.C. § 112b(a) (2012) (emphasis added).

285. *See* 11 FAM 724.5 (indicating that blanket authorizations may be appropriate under certain circumstances).

286. *See generally* Stephen B. Slick, *Comment on Presidential Intelligence*, 129 HARV. L. REV. F. 110, 111, 113 (2016) (discussing Rascoff's conclusion that the President and his senior staff engage on intelligence issues most extensively in the context of analytic and briefing support and while steering covert actions, and focus less on collection efforts).

that are developed within a single agency are the most problematic from a democratic legitimacy perspective.

This story is incomplete, however. Even within a single agency, various actors can provide useful checks and balances on decision-making and advance some of the same democratic principles promoted by our system of inter-branch checks. Jon Michaels has identified one set of competing actors within a single agency: politically appointed agency heads and politically insulated civil servants.[287] He argues that this division helps shape agency administration,[288] but he does not address the fact that it also can help shape policy outcomes. Likewise, Elizabeth McGill and Adrian Vermeule have considered the ways in which administrative law empowers different types of professionals at different levels within a given agency.[289] They separate individuals within agencies along three major dimensions: the nature of their selection and tenure; their professional training and orientation (including lawyers, scientists, and politicians); and their place in the agency's hierarchy.[290] However, their project does not explicitly engage with the opportunities for checks and balances offered by the multi-dimensional nature of individual agencies.

Yet that opportunity for checking surely exists. The more varied the experiences, training, and external interlocutors a set of agency officials has, the more likely that agency is to bring together that messy set of experiences to produce a more democratically representative outcome.[291] One factor that might affect a particular agency's diversity is the extent to which an agency's employees had a broad spectrum of jobs or training before being hired. For instance, many people employed at the Justice Department have similar (legal) training, whereas people employed at the DOS include political scientists, lawyers, foreign relations experts, intelligence officials, and former Peace Corps volunteers.

The unity or diversity of the agency's mission also will vary: the CIA's mission is relatively unitary (involving information collection and analysis, plus covert action), whereas the Defense Department's mission is

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287. Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 229 (2016).

288. *Id.* at 231–32.

289. Elizabeth McGill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011).

290. *Id.* at 1036–37; *see also* Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1031 (2013) (examining role of inspectors general as advocates for individual rights within agencies).

291. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551–55 (2000) (describing a wide variety of interactions between government officials and private actors).

surprisingly diverse (war-fighting, training foreign forces, undertaking humanitarian missions, fostering foreign civil society, serving as military attachés to U.S. ambassadors). Further, the ability of an agency's employees to rotate among different jobs during their employment will widen each employee's perspective. In the DOS, foreign and civil service officers often rotate through a variety of overseas posts, international organizations, and the Department's headquarters in Washington. Many DOD employees also rotate frequently, expanding their geographic and experiential ranges. Further, officials in some agencies engage with a large number of external interlocutors, including not just other agencies within the Executive but also industry members, foreign governments, congressional staff, federal judges, and non-governmental organizations. In short, the diversity of the players involved in making a decision within an agency can ensure that a wider range of viewpoints are taken into account in decision-making, keep a narrow set of actors from accruing undue power, and promote government legitimacy.[292]

In the non-classified realm, examples abound in which a single agency has manifested diverse viewpoints about legal or policy questions.[293] For example, DOJ's Solicitor General's Office and the Office of Legal Counsel had different views about the constitutionality of the D.C. voting rights bill, which would have given the District voting representation in Congress.[294] The Office of Legal Counsel advised that the bill was unconstitutional, but the Office of the Solicitor General concluded that it could defend the bill in court if it were challenged after being enacted.[295] The two offices thus provided different input to the Attorney General, allowing him to reach a decision with a broader range of views before him. Different elements in DOJ also have different standards by which they approach legal questions: OLC tries to

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292. Ashley S. Deeks, *Checks and Balances from Abroad*, 83 U. CHI. L. REV. 65, 76 (2016). For a discussion of the ways in which a diversity of views can improve decision-making, see generally SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2007); JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS (1st ed. 2004).

293. *See* Alan Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. (forthcoming 2018) (manuscript at 48), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935321 ("In reality, every agency has multiple competing goals, in particular 'secondary mandates' that are subordinate to the agency's primary responsibilities but are still important. For example, law enforcement agencies like the FBI and DHS are mandated to safeguard privacy, though these mandates are secondary to their law-enforcement and public-safety responsibilities.").

294. Carrie Johnson, *Some in Justice Department See D.C. Vote in House as Unconstitutional*, WASH. POST (Apr. 1, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html.

295. *Id.*

provide the best understanding of what the law requires, whereas line prosecutors may analyze a legal question through the lens of which arguments they think they can persuade a court to accept.[296] In short, the more varied the experiences and training of the individuals concluding secret arrangements for an agency, the less we might worry about the quality, legality, and democracy deficits of the arrangement.

D. Foreign Checks

A further check on the misuse of secret arrangements to pursue goals that would violate the Charter or international law emerges from actors serving the foreign state on the other side of the arrangement. I have argued elsewhere that the nature of intelligence community relationships can lead to second-order effects that result in one state's intelligence agencies being constrained not only by their own domestic laws and rules but also by the laws and legal interpretations of their partners.[297] Although not a failsafe against illegality, the fact that two different states must agree to the terms of a given commitment can result in highest-common-denominator protections for individual rights in intelligence operations.[298]

Another aspect of secret arrangements serves as an inherent check against illegal conduct: the not-insignificant chance of leaks. Leaks of classified government information happen with some regularity in the United States, where by definition the source of the leak comes from within the U.S. government. It stands to reason that, all things being equal, classified bilateral arrangements are more likely to leak than classified activities within a single state. Not only are two sets of officials given access to the arrangement, but any one official may have a wider range of incentives to publicize the arrangement, perhaps because the official may disapprove of the policies or officials of the partner state. Although leaking is not a predictable method by which to protect against secret arrangements that may contemplate troubling conduct, it lurks in the background of secret negotiations. Longtime CIA lawyer Robert Eatinger noted that his "legal evaluations include[d] what he calls 'The Washington Post test,' which reminded him and his director to think about whether the action would look proper to the American people if

296. Memorandum from David J. Barron, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Best Practices for OLC Legal Advice and Written Opinions to Attorneys of the Office of Legal Counsel (July 16, 2010), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf.

297. Deeks, *supra* note 140, at 5.

298. *Id.* at 11.

it were leaked to the media."[299] The threat of leaks (and the embarrassment and litigation that may follow) serves as a modest check against abuses of secret arrangements.

E. Enhancing Oversight of Secret Commitments

1. Expanding Congressional Oversight of Secret Arrangements

One obvious way to increase the democratic pedigree of secret commitments is to require the Executive to provide to Congress not only all of the secret *agreements* it concludes—as it must under the Case Act—but also all of its secret *arrangements*. Even if the Executive shared its secret arrangements only with a limited set of congressional committees (such as the Senate and House foreign relations, armed services, or intelligence committees), this sharing would foster the opportunity for *ex post* oversight, including questions and critiques, by another branch of government.[300]

It seems likely that the Executive today might already share certain intelligence arrangements with its congressional overseers in the context of general reporting to the committees, even if the Case Act does not mandate the transmission of these arrangements. The Case Act's conference committee report states,

> It is the understanding of the committee of conference that intelligence liaison agreements between U.S. intelligence agencies and foreign governments are also subject to the oversight of the intelligence committees of the House and Senate. Therefore, those committees, in addition to the House Committee on International Relations and the Senate Committee on Foreign Relations, will continue to examine such agreements within the context of their respective jurisdictions.[301]

Assuming this remains current practice, members of relevant congressional committees might consider exploring more systematically the

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299. *Under Heavy Scrutiny, Intelligence Agency Lawyers Defend Surveillance Activities*, AM. B. ASS'N, (Nov. 5, 2013), http://www.americanbar.org/news/abanews/aba-news-archives/2013/11/under_heavy_scrutiny.html.

300. For a discussion of the process by which the CIA historically transmitted classified international agreements to the Senate and House foreign relations committees, see Memorandum from Douglas J. Bennet, Jr., Assistant Sec'y for Cong. Relations, Cent. Intelligence Agency, to Chairman John J. Sparkman, Comm. on Foreign Relations, U.S. Senate (Sept. 14, 1977), https://www.cia.gov/library/readingroom/docs/CIA-RDP90-00610R000200080042-2.pdf.

301. H.R. REP. NO. 95-1535, at 64 (1978) (Conf. Rep.) (legislative history of the Case Act).

breadth and depth of the secret arrangements concluded by the national security agencies.

Mandating this sharing by statute might raise constitutional concerns, however. The Executive surely would resist a statutory requirement to provide congressional committees with all military and intelligence arrangements, regardless of their sensitivity or modesty, as both unconstitutional and very difficult to implement. One can find historical resistance to similar requests by Congress. Before Congress enacted the Case Act, the Church Committee noted, "[I]n some highly important areas of its investigation, the Committee has been refused access to files or documents. These involve, among others, the arrangements and agreements between the intelligence agencies and their informers and sources, including other intelligence agencies and governments."[302] When State Department Legal Adviser John Stevenson testified about the draft Case Act, he recalled that "differences have occurred in the past between the executive and legislative branches concerning transmittal to Congress of information regarding certain very sensitive executive agreements."[303] Professor Alexander Bickel acknowledged that the President might be on "sound constitutional ground in invoking executive privilege and withholding . . . from Congress" an agreement whose disclosure would adversely affect the safety of troops.[304] Further, the intelligence committees may lack the staff to handle the volume of these secret arrangements. In short, the Executive is likely to resist robustly a legal requirement that it share all secret arrangements with appropriate congressional committees.

Nevertheless, as a more general matter, parliamentary involvement in—or at least awareness of—secret arrangements concluded by its Executive can help address one of the most potent concerns about those arrangements: the lack of democratic scrutiny that often accompanies them. If some members of the most representative body within a state have the opportunity to consider an arrangement, those members can assess whether the arrangement, on balance, advances the state's interests and protects its sovereignty in a way that the citizens would or should support—or at least understand. The

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302. S. REP. NO. 94-755, at 7–8 (1976); *see also id.* at 459 ("Because of the importance of intelligence liaison agreements to national security, the committee is concerned that such agreements have not been systematically reviewed by the Congress in any fashion.").

303. *Hearings*, *supra* note 27, at 60 (statement of John Stevenson, Legal Adviser, United States Department of State); *see also id.* at 62 (statement of Sen. Sparkman, Member, S. Comm. on Foreign Relations) (referring to the State Department's unwillingness as a matter of law to submit certain executive agreements).

304. *Id.* at 27 (statement of Alexander Bickel, Professor, Yale Law School); *see also id.* at 31–32 ("Congress cannot require to know, has no business knowing about something that it couldn't do anything about.").

involvement of some members of the legislature also would force the executive actors to articulate the legal and policy rationales behind and purposes for the arrangements in a way that they might avoid having to do if a second branch of government were not involved. Systemically, legislative involvement helps shift secret commitments from a state of deep secrecy to one of more shallow secrecy, where more people know more about the existence of a secret, even if the contents are not made public.

2. Enhancing Inter-agency Checks

As discussed above, a statutory process already exists by which the DOS is supposed to receive and review secret arrangements, to be able to assure itself that the arrangements are not actually legally-binding commitments. One way to improve the functionality of this check is for the relevant agency heads—or even the relevant general counsels—to renew their commitment to the Case Act by insisting that their agencies provide DOS with copies of all secret arrangements. This would ensure the inclusion of both another agency and another set of lawyers to consider the arrangement and identify problems.

As with an increased exposure of secret commitments to Congress, increasing the number of executive branch officials who are aware of a commitment may increase the chance that the commitment will leak.[305] This is both a feature and a bug. The goal of the proposal to expand the range of executive actors that considers a secret commitment is not to argue in favor of leaks; to that extent, then, leaks are an unfortunate side effect of an increase in the number of actors who are aware of the secret commitment. But the increased *possibility* of leaks may have a favorable effect on agency decision-making, even if actual leaks of secret commitments do not occur. That is, awareness among executive officials that there is an elevated chance that a commitment might come to light publicly may have the desirable effect of increasing the care with which executive actors consider the commitment *ex ante*, even if the commitment does not leak *ex post*.[306]

3. Diversifying Intra-agency Checks

In the secret arrangements context, exposing an arrangement to a diversity of actors, even within a single agency, should produce the same types of

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305. SHULSKY, *supra* note 239, at 146 ("In general, the risk of a leak varies with the number of people with access to the information.").

306. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 828, 861 (2013).

advantages that redound to agency decisions that include people with different training, positions, and missions. Assume that the CIA and DOD produce a variety of secret arrangements that establish means and methods of cooperation with their foreign counterparts. Exposing the contents of those arrangements to various bureaus within the given agency introduces a wider range of considerations than if a single office negotiates, concludes, approves, and operationalizes the arrangement.[307] Thus, agencies concluding these secret arrangements should ensure that a balance of offices, including the general counsel's office, reviews the arrangement, whether it is in writing or concluded orally.[308] Further, ensuring that these actors are exposed to the basic international law obligations of the United States can reduce the chance that these unilateral-agency commitments inadvertently run afoul of those obligations.

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In sum, states could make several changes to enhance the democratic legitimacy and substantive quality of their secret commitments, including by making their legislatures (or select legislative committees) aware of such commitments. Where the executive branch believes that a commitment is sufficiently sensitive that it is unwilling to share the commitment with the legislature, it should establish an inter-agency process that improves decisional quality and checks illegal or unwise commitments. And when a single agency's arrangements are so highly classified that exposing those arrangements to the review of other agencies would endanger the functioning of an important arrangement, that individual agency should ensure that actors with a diverse set of training and mandates have access to the arrangement, as a third-best alternative to intra-branch or inter-agency checks. Finally, there are some checks inherent in the conclusion of secret commitments with other states, in light of the enhanced possibility of leaks and the unsettled loyalties that bilateral commitments may engender.

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307. *Cf.* Memorandum from David J. Barron, *supra* note 296, at 4 (describing OLC's "two deputy rule" for review of legal opinions).

308. DOD reportedly memorializes its bilateral MOUs in writing, whereas CIA may conclude many of its arrangements orally and memorialize them unilaterally. *See* Wolf v. C.I.A., 569 F. Supp. 2d 1, 8 (D.D.C. 2008) (describing CIA officer's declaration about the National Clandestine Service's operational files, "which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services"). An Air Force Instruction provides some support for the view that DOD takes a legalistic and formal approach to the conclusion of MOUs. *See generally* DEP'T OF THE AIR FORCE, AIR FORCE INSTRUCTION 14-102, at 2 (2013), https://fas.org/irp/doddir/usaf/afi14-102.pdf (discussing role for deputy chief of staff in approving classification level of international intelligence agreements).

IV. INFORMING THE LITERATURE

The fact of, reasons for, and content of secret commitments are worth studying in their own right. But their existence also shed lights on various bodies of existing legal scholarship that have not, to date, taken secret commitments into account, including literature about executive power and lawmaking, government secrecy, and treaty-making and compliance. The inattention in the literature to secret commitments is not surprising: states that conclude these commitments intentionally conceal them, and the documents that do emerge often appear only in incomplete form. However, the more complete understanding of secret commitments set forth in the first Parts of this article can shed new light on some of the debates or conclusions within these bodies of literature. This Part begins to tease out some of these insights, though it does not purport to cover the waterfront.

A. Executive Power

Much of the national security-inflected executive power literature explores, descriptively and normatively, how much authority the executive branch does or should have in making security and intelligence decisions. Part of this literature also engages with related questions about the extent to which the Executive is and can be constrained by the other branches of government and by law more generally. As a descriptive matter, calculating the full measure of Executive power requires a recognition that the Executive can and does use secret commitments to expand the geographic range of its national security operations and multiply its military and intelligence powers.[309] That is, secret commitments are force multipliers for the Executive; studies about the scope of executive power should—but rarely do—take those commitments into account.

One ongoing debate in particular could benefit by factoring in the phenomenon of secret U.S. commitments. The fact that the secret commitments discussed in Parts II and III largely respect the limits of international and domestic law sheds light on the debate about the extent to which the Executive is bound—and perceives itself to be bound—by law in the national security realm. Scholars such as Eric Posner and Adrian Vermeule have argued that the Executive is and should be largely unbound

309. For a general discussion of executive self-empowerment, see Jon Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435 (2010); *see also* Deeks, *supra* note 292, at 68 ("[T]here undoubtedly are cases in which cooperation with foreign states bolsters executive branch authority instead of constraining it.").

by law.[310] To the extent that the Executive's actions are fettered by any constraints, they submit that those fetters flow largely from politics.[311] Bruce Ackerman and Peter Shane agree with Posner and Vermeule that the Executive is unbound, but see this as a normatively problematic development. Indeed, Ackerman, Shane, and others view the breadth of today's executive power as a threat to democracy.[312] A third group of scholars suggest that the Executive views itself as constrained by law and acts accordingly, even if the other two branches cannot impose significant constraints on the Executive directly.[313]

The study of secret commitments sheds light on this debate. The secret commitments examined herein are largely consistent with U.S. and international law, even though the President's expectation in concluding them was that the public would not become aware of them. To the extent that Posner and Vermeule claim that it is politics and public opinion rather than law that constrain the Executive, the secret commitments' overall consistency with legal norms suggests that something other than public opinion must help structure and modulate executive actions. Further, the fact that the Executive willingly stays within these fetters when concluding secret commitments

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310. *See generally* ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010).

311. *Id.* at 15–16; *see also* ANDREW T. GUZMÁN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 17 (2007) (declining to assume that decision-makers have internalized norms of compliance with international law); POSNER & VERMEULE, *supra* note 310, at 5 (arguing that "politics and public opinion at least block the most lurid forms of executive abuse").

312. *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 32 (2010) (referring to the Executive as a "demagogue, asserting extraconstitutional authority"); PETER SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY, at vii (2009) (bemoaning a loss of traditional checks and balances that produced "a virtually unchecked presidency, nurtured too often in its political aggressiveness by a feckless Congress and obsequious courts"); *see also* Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2677–78 (2005) (noting the inefficacy of separation of powers and judicial review mechanisms to regulate the exercise of Executive power in response to national security threats); Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 978 (2012) (reviewing ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC) (referring to the "Despotic Executive" thesis).

313. JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 48 (2012); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 33 (2007) (contending that the Office of Legal Counsel can act as a check on the Executive); Manik Suri, *Reorienting the Principal-Agent Frame: Adopting the "Hartian" Assumption in Understanding and Shaping Legal Constraints on the Executive*, 7 HARV. L. & POL'Y REV. 443, 445 (2013) (discussing the power of internalized norms to constrain the Executive, including a commitment to the law); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1388 (2012) (book review); Prakash & Ramsey, *supra* note 312, at 974.

suggests that, contrary to Posner's and Vermeule's claims, the Executive does not perceive itself to be *unduly* fettered.[314] If the Executive perceived these legal structures to be overly constraining, it would try to evade those constraints when it thought that no other domestic actor would be able to observe it doing so.

Equally, the fact that the secret commitments discussed in this article are largely reasonable and lawful offers evidence against the "despotic Executive" thesis proffered by Ackerman and Shane. If the actions that the Executive takes behind closed doors are generally consistent with law and contain the types of secrets that Congress and the public have accepted as legitimately classified in the domestic sphere, this refutes the idea that the Executive runs wild when unsupervised by the other branches and the public.

Although more work would need to be done to establish this conclusively, one might extrapolate that it is the norms internalized by executive actors and perhaps pressure from foreign allies that impose the constraints here. This is consistent with Prakash's and Ramsey's assertion that the Executive believes it is constrained by law.[315] It also aligns with Richard Pildes's conclusion that the Executive acts consistent with self-constraints.[316] In Pildes's story, however, the Executive does so to signal to other actors that the Executive is using its discretion in an acceptable way.[317] The content of the secret commitments evaluated here suggests that Pildes has the first part of the story correct but that the explanatory power of his signaling argument is weaker. That is, in the secret commitment realm, the Executive acts as though it is constrained, but not because it is trying to signal something to an audience that will evaluate the Executive's reliability. Other explanations must be in play. In short, incorporating secret commitments into the study of executive power suggests the relevance and influence of factors such as the habituation to law-compliance of various executive actors or their perceptions that there are instrumental or ethical reasons to conduct one's actions within a legal framework.

B. Secrecy

A growing body of literature on government secrecy critiques the use of secrecy by the Executive, Congress, and the courts to shape domestic rules

314. Prakash & Ramsey, *supra* note 312, at 979–80.
315. *Id.* at 985.
316. Pildes, *supra* note 313, at 1388.
317. *Id.*

out of the view of the public.[318] Two recurrent themes in this criticism are that government secrecy is contrary to norms of democratic accountability and that secrecy is subject to excessive use and abuse. One particular driver of the democratic accountability critique is that Congress—the actor best positioned to check the abuse of secrecy by the Executive—only has access to secret information that the Executive decides to share.[319] As Britt Snider has written, Congress "remains at the forbearance of the executive in terms of the intelligence it is given" because it "cannot request information it does not know exists."[320] Therefore, the concern is that many of the activities that the Executive conducts in secret are unseen by (and therefore unconstrained by) any other actor.

It is true that, in the domestic U.S. system, the Executive exerts maximal knowledge of and control over classified information related to military, law enforcement, and intelligence operations. However, the literature's dominant focus on Congress as the key actor in checking the Executive's use of secrecy tends to overlook that certain uses of secrecy—particularly inter-state secrecy—allow a checking role for other actors.[321] In the context of U.S. secret international commitments, foreign partners have knowledge of and control over the secrets associated with those commitments.

Sometimes this can make a secret activity seem even more troubling, as where both states employ secrecy to avoid one or both parties' domestic and international legal constraints.[322] But there are at least two ways in which this international sharing of secrets can reduce concerns about the lack of checks on the Executive's national security actions. First, the simple fact that there are at least two different parties to the secret means that in most cases *more* people will know that secret, and a wider *variety* of people will know it. As David Pozen argues, how many and what sorts of people know a secret affect the secret's depth: when more and different people know something, the secret becomes more shallow and ultimately more easy to learn or at least to challenge.[323]

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318. *See* sources cited *supra* note 11.

319. SAGAR, *supra* note 11, at 80.

320. L. Britt Snider, *Sharing Secrets with Lawmakers: Congress as a User of Intelligence*, CENT. INTELLIGENCE AGENCY LIBR. (Mar. 19, 1997), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/sharing-secrets-with-lawmakers-congress-as-a-user-of-intelligence/6.htm.

321. For instance, interstate secrecy multiplies the chance for leaks compared to secrecy within a single government. *See* discussion *supra* Part III.

322. *See* Deeks, *supra* note 37, at 27–28 (listing examples of foreign states engaging in activities that evade or ignore host states' domestic laws).

323. Pozen, *supra* note 4, at 269–70.

Second, and perhaps more importantly, this inter-relationship between U.S. and foreign militaries or intelligence services can perform an important checking function. In some circumstances, one state's military or intelligence service can condition its cooperation on compliance by its partner with certain legal constraints that bind the first state. I have elsewhere termed these "peer constraints," and have argued that these constraints can affect how a state conducts detention, interrogation, targeted killings, and other operations.[324] In the context of secret commitments, these peer constraints serve as an external limiting factor on the breadth of action that the United States may take pursuant to those commitments. For example, when the CIA concludes a secret arrangement for bilateral cooperation on a covert operation with its equivalent in the United Kingdom, the United States likely will have to comply not just with U.S. constitutional law and statutes, but also indirectly with U.K. laws—which might include aspects of the European Convention on Human Rights.[325] A newfound focus on the importance of Article 16 of the Draft Articles on State Responsibility, which articulates when one state might be liable for aiding or assisting in the commission of a wrongful act, means states are more attuned to ensuring that the partners with whom they are cooperating are acting consistent with international law.[326]

Peer constraints do not only arise in secret contexts, but can serve a particularly important function there. Yet the secrecy literature remains focused on a limited set of domestic actors who can check executive secrecy, even though a significant amount of secret U.S. activity occurs in cooperation with foreign allies.[327] Taking into account external forces in these contexts can inform how we think about the costs of and checks to secrecy.

C. Treaty-Making and Compliance

Scholars have long considered why states conclude international commitments, why they comply with them, and how the binding or non-binding nature of those commitments influences the extent to which states adhere to them. The scholarship on reputational drivers of compliance and on

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324. Deeks, *supra* note 140, at 4.

325. *See* Ashley S. Deeks, *Intelligence Communities and International Law: A Comparative Approach*, *in* COMPARATIVE INTERNATIONAL LAW (A. Roberts et al. eds., forthcoming 2017) (manuscript at 8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2700900 (describing United Kingdom's assertions that its intelligence activities are consistent with international law).

326. *See, e.g.*, Brian Finucane, *Partners and Legal Pitfalls*, 92 INT'L L. STUD. 407, 416–17 (2016).

327. *See* Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 STAN. J. INT'L L. 1, 3 (2013); Deeks, *supra* note 292, at 66.

the choice between legal and political commitments is worth considering through the secret commitment lens.

1. Reputation-Driven Compliance

Some of the literature on international agreements that explores reasons for compliance focuses on states' interests in preserving their reputations as reliable international partners. One common argument is that a state's historical compliance with its international obligations gives other states information about that state's willingness to comply with future obligations it may assume.[328] A state that generally complies with its international obligations is more likely to attract partners when it seeks to enter into new international commitments.[329] States therefore have reputational reasons to comply with their existing commitments.[330]

Secret commitments offer an opportunity to test just how important reputational concerns are as an explanatory factor for compliance. Non-compliance with a secret commitment inflicts fewer reputational costs than non-compliance with a public commitment. In the latter case, many states are able to learn of a state's non-compliance, even if the commitment involves only two states. In the former case, often only one state will know of the violating state's non-compliance. We might therefore predict that, all other things being equal, states will comply less rigorously with secret commitments because the reputational costs they will incur from non-compliance are smaller.

More work would need to be done to evaluate whether it is empirically true that there is lower compliance with secret commitments, and, if not, whether there is something unique about secret commitments (in their nature or their content) that stimulates compliance. It might be, for instance, that notwithstanding lower reputational costs for non-compliance in secret, the

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328. JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 90, 101 (2005); GUZMÁN, *supra* note 311, at 34–36, 71–118 (2008); ROBERT SCOTT & PAUL STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 118–22 (2006); Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation, and Human Rights Treaties*, 106 MICH. L. REV. 1129, 1130, 1132 (2008) (reviewing ANDREW T. GUZMÁN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2007)) ("[T]he willingness to enter into treaties is itself dependent on a state's belief that other states will comply with their treaty obligations.").

329. GUZMÁN, *supra* note 311, at 34 (noting that a state's reputation for conforming to international agreements enhances the likelihood that other states will be willing to cooperate with that state in the future).

330. *Id.* at 194.

sub-set of actors within each state that is aware of the commitment cares significantly about its reputation in that bilateral relationship. Intelligence agents might be compelled by particularly strong professional norms,[331] or may believe that intelligence cooperation is an issue area that warrants particularly strong adherence to commitments.[332] It may also be the case that some intelligence agencies consistently share reputational information with each other about a third state's intelligence agencies. This means that a variety of states may become aware of one state's bilateral violations. Although one would need more information about compliance with secret commitments to test these propositions, these commitments offer a fruitful realm in which to revisit existing assumptions about international law compliance.

2. Power of Political Commitments

The literature that examines the distinctions between legal and political commitments generally discusses only *public* legal and political commitments. Since states appear to conclude many of their intelligence commitments as secret arrangements, this set of commitments allows scholars to explore an additional set of conditions under which states prefer to use political rather than legal commitments.

Further, secret arrangements offer a new area in which to evaluate how durable political commitments may be. Scholars such as Charles Lipson have assessed the benefits and costs of using informal, political commitments rather than binding agreements. Lipson notes that political commitments usually garner greater adherence when high-level officials conclude them.[333] He argues that political commitments offer speed of conclusion and ease of amendment, and allow states to conclude transactions that are less complete and often do not spell out remedies.[334] Lipson notes that the diplomatic flexibility and less public nature of informal commitments come with a cost: it is easy for states to abandon them.[335] Thus, his work would predict that the

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331. Sepper, *supra* note 48, at 153–54.

332. *See, e.g.*, George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S109–12 (2002) (arguing that states have many different reputations over a host of issue areas).

333. Lipson, *supra* note 1, at 296 ("In important matters, commitments by lower-level bureaucracies are less effective in binding national policy."); *see also* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000) (describing characteristics of hard and soft international law).

334. Lipson, *supra* note 1, at 297 n.8.

335. *Id.* at 299.

types of political commitments discussed here—non-public arrangements generally concluded by lower-level officials—are chimerical and insubstantial.[336] More recent work by scholars such as Kenneth Abbott and Duncan Snidal suggests that soft law commitments are less credible than hard law commitments, have less legitimacy, are harder to enforce, and tend to be less specific.[337]

However, some of the secret political commitments discussed herein appear to involve relatively intricate terms and significant financial investment by one or both sides, which suggests that the parties to the commitments are willing to rely on it to their detriment. Further, as discussed in Part I.B.2, there is some evidence that there may be only very limited differences between states' perceptions of what it means to be legally or politically binding in the secret commitment context. These conclusions challenge some of the findings of Abbott and Snidal, and also engage the work of Kal Raustiala, who argues that the line between binding and non-binding commitments is a binary one.[338] More work remains to be done to examine the conditions under which a state chooses to rely quite heavily on a political commitment by another state as a basis on which to expend resources and share valuable intelligence.

V. CONCLUSION

Secret commitments deserve more attention than they have received to date. Notwithstanding their fraught history, states continue to use them with some frequency as potent tools of foreign policy. And despite a widespread perception that states use secrecy to conceal problematic policies, there are a number of legitimate reasons that states conclude secret commitments; further, the commitments reviewed in this article appear to be generally consistent with key interstate norms found in the U.N. Charter.

Secret commitments thus provide a new body of state practice from which we can draw to deepen our understandings of government secrecy, executive compliance with law in the face of a low probability of enforcement, and the choices states make between legally and politically binding instruments. A key goal of this article was to begin to map the secret commitment ecosystem, to enable us to look with fresh eyes at tools—secret agreements and arrangements—that are very familiar to us in their public guises. As

336. *Id.* at 330.

337. Abbott & Snidal, *supra* note 333, at 426–33.

338. Raustiala, *supra* note 1, at 586 ("[L]egality is best understood as a binary, rather than a continuous, attribute.").

challenging as they are to research, they shape foreign relations in important and possibly yet-unknown ways, and therefore deserve further study.