THE ROLE OF PROCESS IN DETERMINING JUDICIAL DEFERENCE TO THE EXECUTIVE'S NATIONAL SECURITY DECISIONS

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INTRODUCTION

Until recently, courts had a longstanding practice of deeming national security issues to be wholly beyond the judiciary's role and competency.[1] This theory of "national security exceptionalism"[2] holds that cases involving matters of national security are unique, and consequently must be analyzed by courts in a manner different from non-national security cases. In practice, courts dismissed national security cases or deferred to the executive branch without conducting a search-

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1. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1902–03 (2015).

2. Ganesh Sitaraman & Ingrid Wuerth, *National Security Exceptionalism and the Travel Ban Litigation*, LAWFARE (Oct. 12, 2017, 3:00 PM), https://www.lawfareblog.com/national-security-exceptionalism-and-travel-ban-litigation.

ing analysis of the legality of the executive's decision.[3] However, in the last twenty years, beginning in the George W. Bush administration, there have been several major national security cases in which the courts have broken traditional practice and reached a decision on the merits of the lawfulness of the executive branch's national security policies.[4] Further, courts have taken the unusual step of evaluating the executive branch's decisionmaking process that led to the challenged national security decision—a factor that courts have not previously considered.

National security exceptionalism dates back to Supreme Court rulings as early as 1920.[5] The theory is most clearly established in the 1936 case *United States v. Curtiss-Wright Exp. Corp.*, in which Justice Sutherland's opinion hinged on an important distinction between the federal government's powers over domestic versus foreign affairs.[6] Justice Sutherland wrote that the President is the "sole organ of the federal government in the field of international relations," and thus, extreme deference should be afforded to executive branch decisionmaking.[7] In the years following *Curtiss-Wright*, "exceptionalism dominated foreign relations law."[8] However, the rationale behind exceptionalism shifted from the President being the "sole organ" to make foreign relations decisions to focus on the idea that national security issues required special expertise, speed, and secrecy that courts simply did not have. Legal scholars Ganesh Sitaraman and Ingrid Wuerth have described the new rationale: "The defining feature of foreign relations law is that it is distinct from domestic law. In foreign relations, the need for speed and secrecy is paramount. In foreign relations, decisions need to be uniform across the country. In foreign relations, the Executive has special expertise compared to courts and Congress."[9] In practice, the idea that courts were not competent to adjudicate national security decisions meant that these decisions were

3. *Id*.

4. Sitaraman & Wuerth, *supra* note 1.

5. *Id.* at 1916 (noting that the Court's 1920 decision in *Missouri v. Holland* held that "the federal government has broader power acting pursuant to the Treaty Power than it does pursuant to the Commerce Clause . . . premised on a sharp distinction between domestic and foreign affairs").

6. *See Curtiss-Wright Exp. Corp.*, 299 U.S. at 315.

7. *Id.* at 320 (internal citations omitted); William N. Eskridge, Jr. & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1100 (2008) (noting that *Curtiss-Wright* demonstrates the court's "super-strong deference to executive department interpretations in matters of foreign affairs and national security").

8. Sitaraman & Wuerth, *supra* note 1, at 1917.

9. *Id.* at 1900.

committed to the executive branch and thus largely unreviewable. In the majority of cases challenging the executive's national security decisions in past decades, federal courts have declined to address the merits of the legality of national security decisions by, for example, reaching a decision on the grounds of lack of justiciability, broad deference to the executive branch, federalism, or the political question doctrine.[10]

The recent case *Bin Ali Jaber v. United States* demonstrates how a court may invoke national security exceptionalism to set aside plaintiffs' allegations that a national security decision was unlawful.[11] In *Bin Ali Jaber*, the petitioners claimed that a U.S. drone strike, which was intended to target two Al Qaeda members, needlessly killed three innocent persons in violation of international law and several statutes.[12] The petitioners stated that the U.S. government had ample opportunity to kill only the two Al Qaeda targets, but instead decided to strike when three innocent persons accompanied the two Al Qaeda targets.[13] The D.C. Circuit Court held that the political question doctrine barred it from considering whether this executive action was lawful: "If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target."[14] The court invoked the basis of national security exceptionalism: "In matters of political and military strategy, courts lack the competence necessary to determine whether the use of force was justified."[15]

However, the historical practice that federal courts have refused to adjudicate national security issues has since shifted.[16] In recent years, and contrary to longstanding practice, courts have not automatically afforded broad deference to the executive whenever a legal issue crops up in the national security context.[17] In addition, courts' recent willingness to adjudicate challenges to the executive's national secur-

10. *Id*.
11. Bin Ali Jaber v. United States, 861 F.3d 241, 247 (D.C. Cir. 2017).
12. *Id.* at 244.
13. *Id.*
14. *Id.* at 246 (internal citations omitted).
15. *Id.* at 247.
16. Sitaraman & Wuerth, *supra* note 1, at 1904.
17. *Id.* However, others have suggested that this is only true on the level of the Supreme Court. *See, e.g.*, Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322, 322 (2015) ("[The Supreme] Court's rulings in foreign relations cases over the past twenty-five years reveals a commitment to substantive judicial decisionmaking radically at odds with the far more deferential approach that characterized the 'foreign relations exceptionalism' . . . .").

ity decisions is accompanied by a greater phenomenon: In response to legal challenges to national security decisions, courts have considered evidence of whether the executive's decisionmaking processes were sufficient to *earn* deference.[18] This type of analysis is especially striking given that national security exceptionalism is in large part based on the principles that the power to conduct foreign affairs is committed to the executive branch, and that it is beyond the role and competency of courts to second-guess the executive branch's decisions. Further, in these national security cases, courts have mimicked domestic law analyses in evaluating intra-executive processes—in direct contrast to the existing legal doctrine that holds that "the defining feature of foreign relations law is that it is distinct from domestic law."[19] For example, in recent cases challenging the Trump administration's national security decisions, courts have engaged in legal analyses resembling Hard Look Doctrine under the Administrative Procedure Act ("APA"),[20] by evaluating whether the executive engaged in comprehensive, well-reasoned decisionmaking.[21] The APA applies to federal agencies in the domestic law context, but generally not in the national security context, and requires courts to evaluate whether an agency made an informed decision supported by evidence.

In this Note, I demonstrate that deference to the executive in the national security context is no longer automatic, and I explore how courts have evaluated executive branch decisionmaking processes related to major national security decisions in the W. Bush, Obama, and Trump administrations. The courts' treatment of legal challenges to the national security decisions of these administrations demonstrates that deference to the executive is afforded on a sliding scale—based on whether there is evidence that the executive came to its decision as the result of an informed, deliberate decisionmaking process.

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18. *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 250 (4th Cir.) (en banc), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018); Hawaii v. Trump, 859 F.3d 741 (9th Cir.) (per curiam), *vacated*, 138 S. Ct. 377 (2017); Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017).

19. Sitaraman & Wuerth, *supra* note 1, at 1900.

20. *See* Administrative Procedure Act, 5 U.S.C. § 706 (2012). Under the APA's "Hard Look Review": "[t]he law has also recognized that it is not so much a particular set of substantive commands but rather it is a *process*, a process of learning through reasoned argument, that is the antithesis of the 'arbitrary.' This means agencies must follow a 'logical and rational' decisionmaking 'process.'" *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 548 (2009) (Breyer, J. dissenting) (citation omitted). Courts thus have struck down agency decisions that are not the result of a reasoned decisionmaking process.

21. *See, e.g.*, *Int'l Refugee Assistance Project*, 883 F.3d at 250; *Hawaii*, 859 F.3d at 755–56; *Aziz*, 234 F. Supp. 3d at 736.

In Part I, I argue that courts have homed in on evidence of intra-executive process in judicial review of national security decisions for two important reasons. First, intra-executive process is a proxy for democratic legitimacy, and thus, courts' demands for evidence of such process ensures that they afford broad deference to the executive only if the executive's decision is democratically legitimate. Second, an extensive intra-executive process includes the voices of various stakeholders with competing incentives. When courts require an adequate level of intra-executive process, it enforces a system of checks and balances within the executive branch.

In Part II, I explore how, during the W. Bush and Obama administrations, courts evaluated process on a superficial level—based on whether the executive made an effort to be transparent with respect to its decisionmaking processes. In keeping with the principles that led to national security exceptionalism, courts usually follow a presumption of regularity: Courts presume a basic level of regularity and competency in the executive branch, and defer to the executive, absent exceptional circumstances.[22] Accordingly, courts have presumed a regular and competent executive branch in the national security challenges to the decisions of the W. Bush and Obama administrations. In evaluating the national security decisions of these administrations, courts considered whether the executive made an effort to be transparent around its national security policies, and took signs of transparency as evidence that the executive followed regular decisionmaking processes. In these cases, even a minimal effort to be transparent with how national security decisions were made created legitimacy sufficient to earn deference to the executive.

However, as I demonstrate in Part III, courts have indicated that there is not the same presumption of competency for the Trump administration.[23] The Trump administration has made a public showing of institutional incompetency and deeply flawed decisionmaking

22. *See* Leah Litman, *Revisiting the Presumption of Regularity*, TAKE CARE (Jan. 28, 2019), https://takecareblog.com/blog/revisiting-the-presumption-of-regularity ("Under [the] presumption [of regularity], courts presume all is regular and orderly in the executive branch; and under the related ideas about deference, courts defer to executive branch determinations (assuming that executive processes are proceeding as normal).").

23. Although the Supreme Court ultimately upheld President Trump's infamous travel ban, which multiple lower courts had ruled against in part due to irregularities in intra-executive process, the Court nevertheless considered evidence of intra-executive process in its analysis. The majority opinion's emphasis on the additional layers of process that led to the third iteration of the travel ban demonstrates that there was no presumption of normal executive processes. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

processes, leading courts to take a closer look at evidence of intra-executive processes. In response to legal challenges to national security decisions of the Trump administration, courts have exalted evidence of intra-executive process in an unprecedented manner, and borrowed principles from the domestic law context, including the APA's Hard Look Doctrine, to determine the validity of a challenged national security decision.

I.
Judicial Review of Intra-Executive Process

In recent decades, courts have looked at evidence of intra-executive process—the process by which the executive branch is internally making decisions—in major national security cases.[24] This is antithetical to national security exceptionalism and the longstanding practice of the courts. In this section, I consider why courts may have taken this unlikely step. First, as I discuss in Section I.A, process is a marker for the legitimacy of a decision, and so, courts use evidence of process to ensure that there is some democratic imprimatur before affording broad deference to the executive. If a process includes relevant stakeholders, for example, if the Attorney General must review a particular decision before its implementation, then the executive branch and its officials are accountable to the public, rendering the decision democratically legitimate. Second, as I discuss in Section I.B, courts may be paying closer attention to the executive branch because Congress is not fulfilling its constitutional role as a check on the executive. Because intra-executive process is a form of checks and balances within

24. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 33 (2010) (relying on executive branch affidavits from the State Department); Boumediene v. Bush, 553 U.S. 723, 783 (2008) (emphasizing the need for courts to meaningfully review the process by which prisoners' "designation[s] as enemy combatants became final"); Hamdan v. Rumsfeld, 548 U.S. 557, 603 (2006) (opinion of Stevens, J.) (requiring the government to "make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war" and finding the government failed to meet that burden); Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) ("Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."); *Int'l Refugee Assistance Project*, 883 F.3d at 353 (explaining that religious animus cannot be part of the executive decisionmaking process); *Hawaii*, 859 F.3d at 770–75 (explaining that the President's Executive Order did not follow statutorily required process); *Aziz*, 234 F. Supp. 3d at 729–31 (relying on the President's public comments); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010) (inquiring into the executive's process for deeming an individual a threat and other military decisions concerning terrorism). I discuss in greater detail below how these cases are evidence of courts' consideration of intra-executive process.

the executive branch, it makes sense that courts require evidence of executive decisionmaking processes to determine the legality of the relevant decisions.

A. Process as a Marker for Democratic Legitimacy

Courts look at evidence of intra-executive process in assessing the legality of national security decisions because public information of a comprehensive decisionmaking process is evidence of deliberate, democratically accountable decisionmaking.[25] For example, if the intra-executive decisionmaking process involves particular stakeholders, then the public can effectively judge the policy decision based on its knowledge of who made the decision, which stakeholders were present or absent, and what kind of information was or was not considered in the decisionmaking process.

The controversy behind how President Obama came to the decision that he did not need congressional authorization for continued military operation in Libya serves as a good example of how evidence of process may create legitimacy, or at the very least, public accountability. The *New York Times* reported that President Obama had accepted the legal determination of the White House Counsel and Department of State Legal Advisor despite contrary advice from the Department of Justice's Office of Legal Counsel (OLC)—an office that is "institutionally best suited to provide relatively detached legal advice to the President as well as the advice most consonant with Executive branch precedents and traditions."[26] Bob Bauer, the White House Counsel at the time, observed that "[a] line of controversy erupted over the internal deliberative process through which this position was developed and adopted" and "[c]ritics of the Administration's stance on the substance of the law saw its deficiencies as integrally related to their view of the irregularity of the process."[27] One critic, a

25. Bob Bauer, *The National Security Lawyer, in Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175, 251 (2018) ("In national security, when the executive is often functioning with little or no judicial oversight, transparency supplies the essential checking mechanism.").

26. Jack Goldsmith, *President Obama Rejected DOJ and DOD Advice, and Sided with Harold Koh, on War Powers Resolution*, LAWFARE (June 17, 2011, 11:38 PM), https://www.lawfareblog.com/president-obama-rejected-doj-and-dod-advice-and-sided-harold-koh-war-powers-resolution; *see also* Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), https://www.nytimes.com/2011/06/18/world/africa/18powers.html.

27. Bob Bauer, *Toward Transparency of Legal Position and Process and a White House Obligation to Disclose*, LAWFARE (Apr. 12, 2017, 1:47 PM), http://www.lawfareblog.com/toward-transparency-legal-position-and-process-and-white-house-obligation-disclose.

former Assistant Attorney General of the Office of Legal Counsel, Jack Goldsmith, stated that adequate intra-executive process was integral to whether the ultimate decision was proper: "The typical (and in my view best) process is for OLC to solicit the views of interested agencies and then offer its interpretation in a written opinion; then the President can, if he wishes, reject that considered OLC interpretation based on his independent judgment."[28] In Goldsmith's view, the president has the power to ultimately make the decision and may refuse OLC's interpretation, but it is important for the decision's legitimacy that the executive branch reaches its decision via regular process.[29] However, the White House stated that its decision was reached after "a full airing of views within the administration and a robust process."[30] The White House sought public support of the decision because the decision was fully informed and included competing perspectives from various stakeholders. Evidence of process thus plays an important role in how the public perceives whether the national security decision was a good—or at least legitimate—policy resulting from reasoned decisionmaking.

This need for transparency, process, and democratic legitimacy in national security decisionmaking in large part explains the role and structure of the National Security Council (NSC)—an agency within the Executive Office of the President, which advises the president on policies related to national security and is composed of officials from various national security agencies, such as the Department of State, Department of Defense, and Department of Homeland Security.[31] The initial creation and subsequent reliance on the NSC demonstrate how coordination across stakeholders in the executive—those who are involved in national security decisionmaking across the various federal agencies—is important to achieve important national security goals.[32] Just before the creation of the NSC, an influential government report

28. Goldsmith, *supra* note 26.

29. *Id.* (noting that the president can use his independent judgment to reject OLC opinion but that OLC is best positioned to make the decision).

30. Savage, *supra* note 26 ("A senior administration official, who spoke on the condition of anonymity to talk about the internal deliberations, said the process was 'legitimate' because 'everyone knew at the end of the day this was a decision the president had to make' and the competing views were given a full airing before Mr. Obama.").

31. *See* National Security Act of 1947, Pub. L. No. 80–253, § 101, 61 Stat. 495, 496–97 (codified as amended at 50 U.S.C.A. § 3021 (West 2018)) (establishing the National Security Council and delineating its functions).

32. David P. Auerswald, *The Evolution of the NSC Process*, *in* THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH 32, 32 (Roger Z. George & Harvey Rishikof eds., 2d ed. 2017).

had explained that "the necessity of integrating all these elements into an alert, smoothly working and efficient machine is more important now than ever before."[33] Further, evidence that the institutionalization of process in national security decisionmaking produces better policies—at least, in the eyes of the executive—lies in the fact that multiple presidents, including Presidents Ford, Carter, Reagan, Bush, and W. Bush, have reduced the number of NSC staff at the beginning of their terms only to add those positions back and ultimately increase the NSC staff size to numbers greater than the previous administration's.[34] Although all presidents have relied on their NSC to different degrees, the NSC structure has consistently been a part of the decisionmaking process of presidential administrations since its creation.[35] The NSC's structure lends an appearance of legitimacy to national security decisions that involve the NSC regardless of whether the president ultimately accepts the National Security Advisor's advice, or if the specific outcomes of the NSC meetings are made public, which they usually are not.[36] The very existence of the NSC structure and commitment to the inclusion of various national security stakeholders can at times provide enough transparency and commitment to process to cure deficiencies in the decisionmaking process itself.[37] Of course, there are instances where executive decisionmakers undercut the

33. *Id.* at 34 (quoting Ferdinand Eberstadt, *Postwar Organization for National Security*, *in* FATEFUL DECISIONS: INSIDE THE NATIONAL SECURITY COUNCIL 17–20 (Karl F. Inderfurth & Loch K. Johnson eds., 2004).

34. *Id.* at 35.

35. *Id.* at 35–49. For example, President Carter relied on informal breakfasts and committee meetings rather than formal NSC meetings, *id.* at 41, while President George H.W. Bush created the modern structure of the NSC that includes four levels of process, *id.* at 43. Further, some presidents ignored the output of the NSC: President Nixon increased his NSC staff from twelve to fifty-five persons halfway into his first term and created nine formal NSC committees, but often ignored the decisions derived from the NSC process, *id.* at 39–40.

36. Recall Jack Goldsmith's argument about President Obama's decision regarding military operation in Libya: The process by which the executive reaches the outcome might weigh more heavily against the outcome than the substance of it. Goldsmith, *supra* note 26.

37. This idea that procedural structures create legitimacy and suggest that the ultimate decision is reasonable is evident in the civil context. For example, evidence that an employer has a procedure in place to address sexual harassment claims is an important factor in relieving employer liability in the Title VII context. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998) (noting that an anti-harassment policy in a workplace is evidence of the first element necessary to make out an affirmative defense, namely that the employer took reasonable steps to prevent and stop sexual harassment). Also, a company's board will likely not be found liable for a breach of the duty of oversight, so long as there was evidence of some procedure in decisionmaking. *See* Palkon v. Holmes, No. 2:14-CV-01234 (SRC), 2014 WL 5341880, at *5, *6 (D.N.J. Oct. 20, 2014).

NSC's role and process, which denigrates the legitimacy of the ultimate decisions. In these instances, the NSC's role remains a useful tool for democratic legitimacy because public awareness of a complete sidestepping of the NSC process may render a particular policy illegitimate. And, as I discuss further in Part III, challenges to the Trump administration's national security decisions demonstrate that an evident break in process may prompt the court to weigh in more heavily and withhold deference to the executive.

B. Enforcing Internal Checks and Balances

Separation of powers is the bedrock of our democracy. The creation of an institutional framework to differentiate between executive and legislative powers was intended to "harness political competition into a system of government that would effectively organize, check, balance, and diffuse power."[38] James Madison had envisioned in *Federalist 51* that such competition would be self-enforcing, relying "on interbranch competition to police institutional boundaries and prevent tyrannical collusion."[39] Contrary to Madison's vision of legislative ambition counteracting executive ambition, the judiciary has, in recent years, played a significant role in ensuring the function of separation of powers.[40]

Traditionally, the courts' role in enforcing separation of powers is outsized in the national security context.[41] In keeping with national security exceptionalism, courts have historically enforced separation of powers principles in national security cases to ensure that Congress, rather than the judiciary, acted as a check on the executive's national security powers. Professors Samuel Issacharoff and Richard Pildes have argued that judicial review of war-time executive branch decisions related to national security issues was restricted to only a separa-

38. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006).

39. *Id.*; *see* THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

40. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2096 (2015). In *Zivotofsky*, the Court adjudicated an interbranch dispute over whether Congress could mandate the executive branch to recognize Jerusalem as the capital of Israel (against the longstanding practice of the executive). *Id.* at 2081. The Court held that the President had the exclusive power "to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds." *Id.* at 2096.

41. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (finding that congressional approval, or perhaps even absence of disapproval, supports the argument that the executive has the authority to act pursuant to an unenumerated power).

tion of powers analysis.[42] In other words, courts narrowly decided war-time national security cases to determine whether or not the executive branch received congressional permission for its challenged actions.[43] Professor Lee Epstein and her colleagues analyzed all civil rights and liberties cases decided by the Supreme Court between 1941 and 2005, and found that the relevant data support the Issacharoff-Pildes theory.[44] Courts, despite their typical hesitancy to step in to adjudicate challenges arising in the national security context, internalized a singular important role: enforcing the democratic political structure.

However, separation of powers today looks different than it did at the time of the country's founding. Modern political reality presents an unprecedented level of congressional gridlock, which is on the rise due to extreme ideological polarization and party loyalty.[45] Professors Daryl Levinson and Richard Pildes explore this topic in *Separation of Parties, Not Powers*:

> The Framers had not anticipated the nature of the democratic competition that would emerge in government and in the electorate. Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather . . . political parties.[46]

Ever-increasing party loyalty and polarization has exacerbated the problems posed by attempting to maintain the separation of powers.[47] Thus, congressional abdication of its role as a check on the ex-

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42. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 2 (2004).

43. *Id.*

44. Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 8-9 (2005).

45. *See* Sarah A. Binder, POLARIZED WE GOVERN? 14 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM_Polarized_figReplacedTextRevTableRev.pdf ("As House and Senate chamber medians diverge in their policy views—regardless of whether party control is unified or split between the chambers—legislative deadlock grows.").

46. Levinson & Pildes, *supra* note 38, at 2313.

47. *See, e.g.*, Levinson & Pildes, *supra* note 38, at 2315, 2329; Julia Azari, Perry Bacon Jr. & Harry Enten, *Even the Biggest Scandals Can't Kill Party Loyalty*, FIVETHIRTYEIGHT (May 16, 2017, 5:31 AM), https://fivethirtyeight.com/features/even-the-biggest-scandals-cant-kill-party-loyalty/; Christopher Hare, Keith T. Poole & Howard Rosenthal, *Polarization in Congress Has Risen Sharply. Where Is It Going Next?*, WASH. POST: MONKEY CAGE (Feb. 13, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/13/polarization-in-congress-has-risen-sharply-where-is-it-going-next/?utm_term=.345a7f5fc0e0; *Political Polarization in Action: Insights into the 2014 Election from the American Trends Panel*, PEW RES. CTR. (Oct.

ecutive branch has made the president increasingly more powerful and without meaningful limitations.[48] The substitution of political parties, rather than competitive branches of government, to serve as a check on power, means that when the executive and legislative branches share a political party, we should not expect Congress to serve as a meaningful check on the executive's power.[49] This flawed system of checks and balances among the branches of government is even more problematic in the context of national security and foreign affairs, where Congress has given up much of its power.[50]

Recent judicial attention to legal issues in national security cases, despite a longstanding practice to the contrary, may indicate that courts are moving toward filling the gap left by Congress. In recent years, courts have had an outsized role in policing the executive branch.[51] In doing so, courts are taking into account evidence of intra-executive process, either by asking whether the executive made an effort to be transparent with respect to its decisionmaking, or by demanding information about the decisionmaking process of a particular policy decision.[52] This is because intra-executive process indicates the existence of a system of checks and balances *within* the executive branch itself. In keeping with this point, Professor Neal Katyal has argued that executive branch bureaucracies, including administrative agencies, should have overlapping roles and jurisdictions to create an "internal separation of powers."[53] As an example of such internal sep-

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17, 2014), http://www.people-press.org/2014/10/17/political-polarization-in-action-insights-into-the-2014-election-from-the-american-trends-panel/.

48. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2310–12 (2001); Levinson & Pildes, *supra* note 38, at 2315.

49. *See* Levinson & Pildes, *supra* note 38, at 2352 ("The President has resolved most of the novel policy and institutional challenges terrorism poses with virtually no input or oversight from the legislative branch.").

50. *See id.* Because the president is largely held accountable to the public for matters of foreign affairs, Congress is not politically incentivized to exercise power in this area. Congress thus has gladly handed over all the power, and subsequent blame and electoral consequences that come with it, to the executive.

51. *See* Margot Sanger-Katz, *For Trump Administration, It Has Been Hard to Follow the Rules on Rules*, N.Y. TIMES: THE UPSHOT (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html (discussing that 30 big rules enacted by the Trump administration have been challenged so far, and that courts have found for the litigants 28 times); *see also* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 250 (4th Cir.) (en banc), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018); Hawaii v. Trump, 859 F.3d 741 (9th Cir.) (per curiam), *vacated*, 138 S. Ct. 377 (2017); Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017).

52. *See supra* note 51.

53. Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006).

aration of powers, President Franklin Delano Roosevelt "used bureaucratic overlaps to produce better policy and information: 'His favorite technique was to keep grants of authority incomplete, jurisdictions uncertain, charters overlapping.'"[54] Similar to the Madisonian vision of competition that self-enforces the balance of powers, intra-executive decisionmaking processes that necessitate the inclusion of various stakeholders allow for the ambitions and goals of one stakeholder to counteract the ambitions and goals of other stakeholders. For example, a national security decision might necessitate the involvement of stakeholders including the Department of State, Department of Defense, National Security Council, and President. The judiciary, by examining evidence of intra-executive process, provides a check on executive power by confirming that the executive is providing an adequate internal check on itself.

II.
The W. Bush and Obama Administrations: A Focus on Transparency

During the W. Bush and Obama administrations, courts worked under the regular presumption that the administrations were competent.[55] Under this presumption, courts sought evidence of intra-executive process on a superficial level: courts did not closely examine the processes behind challenged decisions, but instead sought to determine only whether the administrations were transparent with respect to how the decisionmaking process appeared. As I detail below, national security cases during the Obama administration demonstrate that if an administration projected transparency around its national security decisionmaking processes—as for example when the Obama administration released a policy detailing procedures for when it would invoke the state secrets privilege—courts were more likely to afford broad deference to the executive. In contrast, national security cases during the Bush administration demonstrate that if an administration was decidedly non-transparent, courts were less likely to afford deference.

54. *Id.* at 2326 (internal citation omitted).

55. *See, e.g.*, Bin Ali Jaber v. United States, 861 F.3d 241, 247 (D.C. Cir. 2017); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 48 (D.D.C. 2010) (applying factors from Baker v. Carr, 369 U.S. 186, 217 (1967), which require respect for executive branch decisions).

A. The W. Bush Administration

National security decisions throughout the George W. Bush administration were beleaguered by secrecy and closed-door decision-making. In turn, courts withheld deference to the executive's national security decisions.[56] Journalist Linda Greenhouse described the Bush administration as "defend[ing] its positions categorically: no judicial review, no right to counsel, no public disclosure, no open hearings. Even judges whose every instinct is to defer to plausible claims of national security have recoiled."[57] "[T]he Bush administration consistently asserted independent and unfettered powers that could not constitutionally be interfered with by Congress or even by the federal courts."[58] These assertions of sweeping national security powers coincided with a lack of transparency. The Bush administration determined that it did not need to justify its national security decisions to Congress or the public because the expansive authority to determine what was in the best interest of the nation's security rested within the executive alone.[59] For example, the Bush administration concluded that it had the authority to torture military detainees, notwithstanding congressional disapproval, in a series of internal memos on torture and other subjects that "were kept hidden from the public and ultimately were revealed only through government leaks."[60]

The following cases demonstrate that the public appearance of secrecy in the Bush administration influenced the Supreme Court's analyses of national security challenges and led the Court to withhold deference where it otherwise may have broadly deferred to the

56. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 729 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 593 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

57. Linda Greenhouse, *War of Secrets: Judicial Restraint; The Imperial Presidency vs. the Imperial Judiciary*, N.Y. TIMES (Sept. 8, 2002), https://www.nytimes.com/2002/09/08/weekinreview/war-secrets-judicial-restraint-imperial-presidency-vs-imperial-judiciary.html.

58. Gordon Silverstein, *The Law: Bush, Cheney, and the Separation of Powers: A Lasting Legal Legacy?*, 39 PRESIDENTIAL STUD. Q. 878, 883 (2009).

59. *See* Jeffrey Rosen, *Power of One*, NEW REPUBLIC, July 24, 2006, at 8, 10 ("The Bush administration's most dramatic expansion of the unitary executive theory came in memos drafted by [David] Addington and John Yoo at the OLC concerning the war on terrorism. An OLC memo drafted by Yoo two weeks after the September 11 attacks insisted the president, rather than Congress, had 'plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001.' Another memo, influenced by Addington, claimed that there were essentially no legal limits on the CIA's treatment of foreign prisoners held outside the United States.").

60. Dawn Johnsen, *Different Kinds of Wrong*, SLATE (July 5, 2011, 6:17 PM), https://slate.com/news-and-politics/2011/07/obama-s-libya-policy-wrong-but-not-as-wrong-as-bush-s-torture-policy.html.

executive.[61] In *Hamdi v. Rumsfeld*,[62] *Hamdan v. Rumsfeld*,[63] and *Boumediene v. Bush*,[64] the Supreme Court reacted to the Bush administration's lack of transparency by reasserting the role of federal courts in national security cases and demonstrating that the executive's lack of transparency would cut against any judicial impulse toward deference. The Court demonstrated in *Hamdi* that there is a category of cases in which the executive is not due deference, namely cases in which federal courts have an established constitutional role to review executive decisions such as habeas cases.[65] Because there is an established constitutional responsibility for habeas review in *Hamdi*, the Court made clear that it expected transparency of evidentiary support for detainment and rejected the executive's demand for deference without such a showing.[66] In *Hamdan* and *Boumediene*, the Court did not have the same constitutionally established role as it did in *Hamdi*. The Court, however, explained that it had a responsibility to exact greater accountability from the executive in these cases because of the nature of the executive's actions.[67] In these cases, because the Court observed that it did not know what safeguards were in place to protect the detainees, it raised the bar for scrutiny of the executive's national security decisions and demanded additional protections for Hamdan, Boumediene, and others similarly situated.[68]

In *Hamdi*, petitioner Yaser Hamdi, an American citizen whom the government classified as an enemy combatant and detained in South Carolina, sought a writ of habeas corpus to challenge his detention.[69] The Court held not only that the government did not afford adequate procedures to the U.S. citizen-enemy combatant sufficient to meet the right to due process, but also rejected the government's argument that the Court must defer to a determination by the executive without scrutinizing the underlying facts.[70] The government's argument relied on a declaration from Michael Mobbs, the Special Advisor to the Under Secretary of Defense for Policy, as the "sole evidentiary support that the government has provided to the courts for Hamdi's detention."[71] The government argued that the Court should "assume

61. Sitaraman & Wuerth, *supra* note 1, at 1902–03.
62. 542 U.S. 507, 535–36 (2004).
63. 548 U.S. 557, 593 (2006).
64. 553 U.S. 723, 732–33 (2008).
65. *See Hamdi*, 542 U.S. at 536.
66. *See id.* at 536–37.
67. *See Hamdan*, 548 U.S. at 634; *Boumediene*, 553 U.S. at 779.
68. *See Hamdan*, 548 U.S. at 594–95; *Boumediene*, 553 U.S. at 729.
69. *Hamdi*, 542 U.S. at 509.
70. *Id.* at 535–36.
71. *Id.* at 512.

the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one."[72] The district court had previously called the affidavit "little more than the government's 'say-so,'"[73] and ordered the government to turn over for *in camera* review a comprehensive set of documents.[74] The district court explained that such *in camera* review was necessary for "meaningful judicial review" because the executive did not deserve broad deference in this matter.[75] The Supreme Court agreed in part that the government's affidavit should not be afforded full and blind deference, but held that it did have some evidentiary weight.[76] In the absence of a transparent process of executive decisionmaking, the Court intervened to ensure that there was an adequate process for an enemy combatant to challenge his or her detention.[77] The Court also expressed distrust of the executive, and that it was necessary in this case to restrain the level of deference usually afforded to the executive in matters of national security.[78]

In both *Hamdan* and *Boumediene*, the Supreme Court rejected the government's position that the executive has unreviewable authority in the national security context, and the Court determined that the procedures provided by the government for detainees did not meet due process requirements. In *Hamdan*, a Guantanamo Bay detainee filed petitions for writs of habeas corpus and mandamus to challenge the executive branch's decision to prosecute him in a military commission.[79] The Court held that "the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions."[80] In *Boumediene*, the government argued that noncitizens who are designated as enemy combatants and detained at Guan-

72. *Id.* at 527–28.
73. *Id.* at 513 (citation omitted).
74. *Id.* at 514. These documents included: "copies of all of Hamdi's statements and the notes taken from interviews with him that related to his reasons for going to Afghanistan and his activities therein; a list of all interrogators who had questioned Hamdi and their names and addresses; statements by members of the Northern Alliance regarding Hamdi's surrender and capture; a list of the dates and locations of his capture and subsequent detentions; and the names and titles of the United States Government officials who made the determinations that Hamdi was an enemy combatant and that he should be moved to a naval brig." *Id.* at 513–14.
75. *Id.* at 514.
76. *See id.* at 538–39.
77. *Id.* at 533.
78. *Id.* at 535–36.
79. Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).
80. *Id.*

tanamo Bay do not have a constitutional right to habeas corpus; however, the Court held that the government failed to provide the "constitutionally required" procedures.[81] The Court explicitly stated that the executive's unaccountable decision created cause for skepticism, and required accountability in the form of a "collateral," "independen[t]," and "meaningful" review of the executive's "cause for detention and . . . power to detain."[82] This language indicates a judicial distrust of the executive because the executive did not make transparent a process that safeguards detainees' constitutional rights. Consequently, the Court withheld deference to the executive.

B. The Obama Administration

In contrast, the Obama administration publicly embraced transparency goals in an attempt to reverse course from the Bush administration's reputation of secrecy, leading courts to defer more broadly to the Obama administration's national security decisions.[83] Although the Obama administration was criticized for non-transparency in many aspects of national security decisionmaking,[84] the administration projected transparency to the public and established methods of accountability.[85] For example, President Obama issued a memorandum on transparency and open government the day after his first inauguration.[86] President Obama also published a memorandum detailing steps to increase transparency related to the military and national security, which stated: "We have attempted to explain, consistent with our national security and the proper functioning of the executive branch, when and why the United States conducts such operations [use of military force], the legal basis and policy parameters for such operations, and how such operations have unfolded, so that the American people can better understand them."[87] Cases involving legal challenges to na-

81. Boumediene v. Bush, 553 U.S. 723, 739, 788–89 (2008).

82. *Id.* at 783.

83. *See* Presidential Memorandum on Transparency and Open Government, 74 Fed. Reg. 4,685 (Jan. 21, 2009).

84. *See* AM. CIV. LIBERTIES UNION, ESTABLISHING A NEW NORMAL: NATIONAL SECURITY, CIVIL LIBERTIES, AND HUMAN RIGHTS UNDER THE OBAMA ADMINISTRATION 2 (2010) ("[T]he administration's record on issues related to civil liberties and national security has been, at best, mixed.").

85. *See* Steps for Increased Legal and Policy Transparency Concerning the United States Use of Military Force and Related National Security Operations, 81 Fed. Reg. 94,213, 94,213 (Dec. 5, 2016).

86. Presidential Memorandum on Transparency and Open Government, 74 Fed. Reg. at 4,685–86.

87. Steps for Increased Legal and Policy Transparency Concerning the United States Use of Military Force and Related National Security Operations, 81 Fed. Reg. at 94,213.

tional security decisions during the Obama administration, such as *Holder v. Humanitarian Law Project*[88] and *United States v. Al-Aulaqi*,[89] indicate that courts responded favorably to the executive's public commitment to and respect for transparency and accountability, and in response, afforded broader deference to the executive's national security decisions.

The Supreme Court's decision in *Holder* stands in stark contrast with the Bush-era decisions in *Hamdi*, *Hamdan*, and *Boumediene*, and this distinction demonstrates the Court's willingness to defer to the executive when it identifies a commitment to transparency in national security decisionmaking.[90] In *Humanitarian Law Project*, petitioners challenged the material-support statute that prohibited their organization from providing support for the lawful activities of organizations that had been designated foreign terrorist organizations.[91] The government asserted that material support for the lawful activities of a designated foreign terrorist organization violated the material-support statute because: "the plaintiffs' support for these organizations is 'fungible' in the same sense as other forms of banned support," and, "[b]eing fungible, the plaintiffs' support could, for example, free up other resources, which the organization might put to terrorist ends."[92] The Court's majority deferred to the executive's explanation despite there being, according to the dissent, "no empirical information [from the government] that might convincingly support this claim."[93] The majority asserted: "[W]hen it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part

88. *See* 561 U.S. 1, 30–31 (2010) (illustrating executive transparency by quoting executive affidavit explaining how terrorist organizations operate under the guise of social and political activities).

89. *See* 727 F. Supp. 2d 1, 52 (D.D.C. 2010) (arguing that the Constitution places military decisionmaking "in the hands of those who are . . . most politically accountable for making them") (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004)).

90. The dissent in *Humanitarian Law Project* recognizes this disparity and cites *Hamdi* in its conclusion. *Humanitarian Law Project*, 561 U.S. at 61 ("In sum, these cases require us to consider how to apply the First Amendment where national security interests are at stake. When deciding such cases, courts are aware and must respect the fact that the Constitution entrusts to the Executive and Legislative Branches the power to provide for the national defense, and that it grants particular authority to the President in matters of foreign affairs. Nonetheless, this Court has also made clear that authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals.").

91. *Id.* at 8 (challenging the statute on First and Fifth Amendment grounds).

92. *Id.* at 47 (Breyer, J., dissenting).

93. *Id.* at 47.

of the courts is marked,' and respect for the Government's conclusions is appropriate."[94]

The dissenting justices, however, determined that deference to the executive should be less broad. They wrote: "[T]he Court has failed to examine the Government's justifications with sufficient care. It has failed to insist upon specific evidence, rather than general assertion."[95] The majority's decision to not engage in fact-finding and defer to the executive is in direct contrast with the Court's decision in *Hamdi*, where the Court found that a general assertion by the executive did not receive deference. In *Humanitarian Law Project*, the Court rejected the dissenting justices' demand to "point[ ] to any specific facts" to legitimize the government's assertion about fungibility,[96] and did not decide "whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment."[97] The majority held that "[i]n this context, conclusions must often be based on informed judgment rather than concrete evidence."[98] Here, the Court stated that it would not demand evidence to evaluate the executive's decision, but demonstrated comfort in broadly deferring to the executive because the executive's decisionmaking appeared to be "informed."[99] And, the Obama administration's transparency efforts, as described above, enabled this perception of "informed judgment."[100]

In *Al-Aulaqi*, the District Court for the District of Columbia ("D.C. District Court") emphasized the significance of the Obama administration's actions that established transparency of intra-executive process, despite that the executive was unable to be fully transparent with respect to its ultimate decision. The D.C. District Court favorably considered the executive's affirmative steps toward transparency and treated such transparency and accountability as a partial cure to an otherwise secretive executive action.

The court did not address the merits of the plaintiff's challenge of the executive's authorization of a targeted killing of his son, Anwar Al-Aulaqi. Rather, the court held that the question was a political one and was thus non-justiciable: "[T]he questions posed in this case . . . require both 'expertise beyond the capacity of the Judiciary' and the

94. *Id*. at 34 (majority opinion) (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)).
95. *Id.* at 62 (Breyer, J., dissenting).
96. *Id.* at 34 (majority opinion).
97. *Id.* at 55 (internal citations omitted).
98. *Id*. at 34–35.
99. *Id.*
100. *Id*.

need for 'unquestioning adherence to a political decision by the Executive.'"[101] Because the court dismissed the case on political question grounds, the court did not need to reach the state secrets claim that the defendants invoked as a basis to dismiss the plaintiff's complaint.[102] However, the court noted that the state secrets determination leaned on evidence that the Obama administration had transparently established "detailed procedures" for reviewing the state secrets privilege:

> Indeed, last year *the Attorney General promulgated a policy* confirming that the state secrets privilege will only be invoked in limited circumstances involving a significant risk of harm to national security and after *detailed procedures are followed (including personal approval of the Attorney General)*. And here, defendants have confirmed that the privilege has been invoked only after that *careful review and adherence to the mandated procedures under the Attorney General's policy*. Under the circumstances, and particularly given both the extraordinary nature of this case and the other clear grounds for resolving it, the Court will not reach defendants' state secrets privilege claim.[103]

In noting that the Attorney General promulgated a policy with detailed procedures concerning when state secrets privilege will be invoked, and a promise that the Attorney General will personally approve these invocations, the court explains why the executive is deserving of broad deference here. It is striking that the court identified the executive's process and transparency as factors that weighed on its decision to not review the state secrets privilege claim, especially because the political question analysis provided sufficient grounds to dismiss the suit. The court's explicit and gratuitous discussion of the executive's state secrets policy suggests that the court intended to consider transparency around national security decisionmaking in future lawsuits that are adjudicated on the merits.

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101. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 50 (D.D.C. 2010). In making this determination, the court relied heavily on another Obama-era case in the national security context, *El-Shifa Pharm. Indus. Co. v. United States*, which held that the court could not review the legality of an American cruise missile attack on a Sudanese pharmaceutical plant. El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 837–38 (D.C. Cir. 2010) (en banc).

102. *See Al-Aulaqi*, 727 F. Supp. 2d at 53 (noting that the "state secrets privilege" should not be invoked unnecessarily where the issue is resolvable on other grounds).

103. *Id.* at 53–54 (internal citations omitted) (emphasis added).

III.
The Trump Administration: A Hard Look at Intra-Executive Process

In response to legal challenges to the Trump administration's national security decisions, courts have responded to the very public breakdown of process with a harder look at evidence of intra-executive process.[104] The Trump administration has demonstrated persistently slipshod decisionmaking, leading courts to evaluate, rather than presume, the executive's competence.[105] In response to legal challenges to President Trump's executive orders banning individuals from majority-Muslim countries from entering the United States, a group of former national security officials, writing as amici curiae, argued that courts should withhold the usual deference to the executive because the executive orders "did not emerge from the sort of careful interagency legal and policy review that would compel judicial deference."[106] They explained that courts previously deferred to the executive on issues of national security *because* the executive's decisions were the result of "considered national security *judgment*—based on process, evidence, findings, and careful interagency deliberation conducted by experienced national security professionals."[107] The absence of evidence of "considered judgment" in President Trump's national security decisions has led courts to take a harder look at the processes that drove these decisions.[108]

In legal challenges to President Trump's national security decisions—including the travel bans and transgender military service member ban—courts have closely tracked the executive's decisionmaking processes and determined that significant flaws in the intra-executive processes weigh against the validity of the government's national security decisions.[109] This analysis is different from courts' more superficial analysis of national security decisions in the W. Bush

104. *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 250 (4th Cir.) (en banc), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018); Hawaii v. Trump, 859 F.3d 741 (9th Cir.) (per curiam), *vacated*, 138 S. Ct. 377 (2017); Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017).

105. Kathy Frankovic, *Americans See Decision Making in the White House as Impulsive*, YouGov (Mar. 7, 2018, 2:30 PM), https://today.yougov.com/topics/politics/articles-reports/2018/03/07/americans-see-decisionmaking-white-house-impulsiv.

106. Brief of *Amici Curiae* Former Nat'l Sec. Officials in Support of Respondents at 2, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965).

107. *Id.* at 4.

108. *See, e.g.*, *Int'l Refugee Assistance Project*, 883 F.3d at 266–69; *Hawaii*, 859 F.3d at 769–74; *Aziz*, 234 F. Supp. 3d at 736.

109. *See, e.g.*, *Int'l Refugee Assistance Project*, 883 F.3d at 266–69 (examining the motives behind the travel ban); *Hawaii*, 859 F.3d at 769–74 (finding that the decision-

and Obama administrations, in which courts looked only at whether the administration was transparent around its national security decisionmaking, and not whether the decisionmaking process itself was adequate. Because courts are evaluating evidence of the Trump administration's intra-executive process to an unprecedented degree, they are looking to domestic law principles, such as the APA's Hard Look Doctrine, to guide their analyses.[110] As discussed above, the courts' use of domestic law legal principles is particularly striking because national security exceptionalism previously had hinged on an understanding that national security issues were unique from domestic law issues. Lawyers W. Neil Eggleston, who served as the White House Counsel for President Obama, and Amanda Elbogen have written that "the Trump Administration has departed dramatically from almost every norm of intra-executive process," and this breakdown of intra-executive process has increased the Trump administration's vulnerability across both national security and domestic policies.[111] Importantly, the executive branch's domestic policy decisions are generally governed by the APA, and thus the usual course of judicial analysis is to determine whether the intra-executive processes that led to these decisions were adequate; however, now, courts are utilizing this analytical framework to judge national security decisions, which are not governed by the APA.[112]

A. Transgender Military Service Members Ban

In reviewing the transgender military service member ban cases, courts closely examined the executive's decisionmaking process, and raised the bar for the executive to receive deference. On August 25, 2017, President Trump issued a memorandum that effectively prohibited transgender persons from participating in military service.[113] A full month prior, President Trump posted that same decision on Twitter: "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow

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making behind the travel ban was not up to the statutory mandate); *Aziz*, 234 F. Supp. 3d at 736 (evaluating executive decisionmaking behind the travel ban).

110. *See, e.g.*, Doe v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017), *vacated sub nom. per curiam*, *Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309, at *1 (D.C. Cir. Jan. 4, 2019).

111. W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE. L.J. F. 825, 829 (2018).

112. *See* 5 U.S.C. § 701 (2012).

113. Military Service by Transgender Individuals, 82 Fed. Reg. 41,319 (Aug. 25, 2017). President Trump revoked this Memorandum once the Secretaries submitted the required reports. Military Service by Transgender Individuals, 83 Fed. Reg. 13,367 (Mar. 23, 2018).

. . . Transgender individuals to serve in any capacity in the U.S. Military."[114] Current and aspiring military service members who are transgender asked multiple district courts to enjoin the directives issued in the Presidential Memorandum because it violated various constitutional rights.[115]

Judge Colleen Kollar-Kotelly of the D.C. District Court held that the plaintiffs were likely to succeed on their Fifth Amendment claim that the policy memorandum violated their due process rights, and in part granted the plaintiffs' motion for a preliminary injunction.[116] The D.C. District Court reached this decision by considering a number of factors, including: "the sheer breadth of the exclusion ordered by the directives, the unusual circumstances surrounding the President's announcement of them, the fact that the reasons given for them do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself."[117] In its analysis, the D.C. District Court first detailed the military's historical policies toward transgender service, emphasizing the comprehensive process by which the Obama administration developed policies that impacted transgender persons in the military.[118] The court described at length the steps taken by the Obama administration, including:

- issuing a Department of Defense regulation that "eliminated a DoD-wide list of conditions that would disqualify persons from retention in military service, including the categorical ban on open service by transgender persons";
- creating a working group under the Undersecretary of Defense for Personnel and Readiness, which "sought to identify any possible issues related to open military service of transgender individuals";
- "establishing a policy, assigning responsibilities, and prescribing procedures for 'the retention, accession, separation, in-service transition and medical coverage for transgender personnel serving in the Military Services' ";
- and, publishing an " 'implementation handbook' [which was] 'the product of broad collaboration among the Services' . . . intended

114. Donald J. Trump (@realDonaldTrump), TWITTER (Jul. 26, 2017, 8:55 AM), https://twitter.com/realDonaldTrump/status/890193981585444864; Donald J. Trump (@realDonaldTrump), TWITTER (Jul. 26, 2017, 9:04 AM), https://twitter.com/realDonaldTrump/status/890196164313833472.

115. *See e.g.*, *Doe*, 275 F. Supp. 3d at 175–76; *Stone v. Trump*, 280 F. Supp. 3d 747, 754 (D. Md. 2017).

116. *Doe*, 275 F. Supp. at 177.

117. *Id*.

118. *Id*. at 177–85.

> to serve as a 'practical day-to-day guide' to assist Service members and commanders to understand and implement the policy of open transgender military service. The handbook is a lengthy, exhaustive document, providing an explanation of the basics of what it means to be transgender and to undergo gender transition . . . includes extensive question-and-answer and hypothetical scenario sections, as well as a 'roadmap' for gender transition for military personnel."[119]

Following the court's exhaustive description of the Obama administration's approach to transgender military policy, the opinion included pictures of Trump's three tweets announcing the ban on transgender military service members.[120] This juxtaposition makes it is abundantly clear that the court compared the comprehensive intra-executive decisionmaking process of the Obama administration with the Trump administration's policy instigated by a few impulsive tweets, and found that latter did not meet a threshold level of process and evidence. The court also referenced Trump's subsequent Presidential Memorandum, which stated that "the previous Administration failed to identify a sufficient basis" to support the decision—an allegation which, following the detailed discussion of the Obama administration's extensive decisionmaking process, is immediately rebutted.[121]

As discussed above, the APA does not generally apply to the executive branch's national security decisions; however, the D.C. District Court's opinion reads like an analysis of whether an administrative agency's action violated "arbitrary and capricious review" under the APA's Hard Look Doctrine.[122] Under "arbitrary and capricious review," courts have consistently found that an administrative agency must provide an explanation for disregarding the "facts and circumstances that underlay" the original rule as well as "give reasoned explanations for those changes and 'address [the] prior factual findings.' "[123] Consistent with this analytical framework, the D.C. District Court's review of the transgender military service member ban emphasized that "all of the reasons proffered by President Trump for excluding transgender individuals from the military in this case were not merely unsupported, but were actually contradicted by the

119. *Id*. at 178, 179, 180, 181–82 (internal citations omitted).
120. *Id*. at 183.
121. *Id*.
122. *See* 5 U.S.C. §706(2)(A).
123. State v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017) (citing Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 966 (9th Cir. 2015)); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009).

studies, conclusions and judgment of the military itself."[124] The court thus made clear that the "facts and circumstances that underlay" the original Obama administration policies were carefully researched, discussed, and decided, and yet, the Trump administration did not address these original memoranda or findings in its impulsive rescission of the Obama-era regulations.[125] The court thus suggested that the Trump policy was likely to be rendered invalid because it was the product of inadequate intra-executive process, and was, in effect, arbitrary and capricious.[126]

Further, in its analysis, the D.C. District Court described the reasoning provided by the executive as "hypothetical and extremely overbroad."[127] The court pulled language from the significant Equal Protection Clause cases *Romer v. Evans*[128] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[129] to demonstrate that courts have historically relied on evidence of process in the analysis of an executive's actions: "[The] *sheer breadth is so discontinuous with the reasons offered for it* that [it] seems inexplicable by anything but animus toward the class it affects"[130] and "'[t]he specific sequence of events leading up the challenged decision . . . may shed some light on the decisionmaker's purposes' and '*[d]epartures from the normal procedural sequence* also might afford evidence that improper purposes are playing a role.'"[131] This language describing policy that is "discontinuous with the reasons offered for it" and a result of "[d]epartures from the normal procedural sequence" emphasizes the role of evidence of intra-executive process in judicial analyses of national security decisions.[132]

The D.C. District Court also explicitly considered the Trump administration's lack of "formality or deliberative process."[133] The court

124. *Doe*, 275 F. Supp. 3d at 212.
125. *Fox Television Stations Inc.*, 556 U.S. at 516; *U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d at 1123 (citing Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 966 (9th Cir. 2015)).
126. *Doe*, 275 F. Supp. 3d at 213.
127. *Id.* at 212 ("For instance, Defendants cite concerns that 'some' transgender individuals 'could' suffer from medical conditions that impede their duties . . . . As an initial matter, these hypothetical concerns could be raised about any service members. Moreover, these concerns do not explain the need to discharge and deny accession to all transgender people who meet the relevant physical, mental and medical standards for service.").
128. Romer v. Evans, 517 U.S. 620 (1996).
129. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).
130. *Romer*, 517 U.S. at 633 (emphasis added).
131. *Vill. of Arlington Heights*, 429 U.S. at 267 (emphasis added).
132. *Romer*, 517 U.S. at 633; *Vill. of Arlington Heights*, 429 U.S. at 267.
133. *Doe*, 275 F. Supp. 3d at 213.

concluded that "the military concerns purportedly underlying the President's decision had been studied and rejected by the military itself," and thus, the present case was distinct from a case cited in the government's brief in which "the court deferred to a decision that was based on the 'considered professional judgment of the Air Force.'"[134] This perceived procedural flaw in the decisionmaking, in which relevant stakeholders were both absent from the process and reached opposite conclusions in their research, led the court to determine that the executive was not due deference. In reaching its decision, the court heavily and explicitly relied on evidence of intra-executive process:

> *[A]fter a lengthy review process by senior military personnel*, the military had *recently determined that permitting transgender individuals to serve would not have adverse effects on the military* and had announced that such individuals were free to serve openly. Many transgender service members identified themselves to their commanding officers in reliance on that pronouncement. Then, the President *abruptly announced, via Twitter—without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes that will gravely affect the lives of many Americans*—that all transgender individuals would be precluded from participating in the military in any capacity.[135]

The court's decision thus stated that Trump's policy on transgender service members in the military likely violated the Fifth Amendment due to its analysis of the "circumstances surrounding the announcement of the President's policy" and lack of "formality or deliberative process"—further magnified by its comparison to the Obama administration's thoughtful, deliberative process.[136]

In a later hearing on the merits of the D.C. District Court's case, the Trump administration refused to provide information about the generals and military experts Trump claimed to have consulted in enacting the policy.[137] In the hearing, Judge Kollar-Kotelly "discussed the possibility of the department turning over a log detailing the relevant meetings and conversations not the content of the communications, just the fact of their existence—for her to review in an effort to determine if the privilege applies," yet, the Department of Justice re-

134. *Id*. (citing Goldman v. Weinberger, 475 U.S. 503, 508 (1986)).
135. *Id*. (emphasis added).
136. *Id*.
137. Chris Geidner, *The Trump Administration Is Arguing It Can Keep Information About the Trans Military Ban Secret*, BUZZFEED NEWS (Feb. 16, 2018, 9:14 AM), https://www.buzzfeed.com/chrisgeidner/the-trump-administration-is-arguing-it-can-keep-information?utm_term=.EqQRvYkLY#.ypwa5vjRv.

fused.[138] Kollar-Kotelly responded: "I will figure out how I want to proceed with this, but this is not a good way to go about this."[139] Although litigation around the transgender military service member ban is currently ongoing, it is clear that intra-executive process will remain a focus in the courts' analyses.[140]

A second federal judge, Judge Marvin Garbis of the District of Maryland ("District Court of Maryland"), heard a challenge to Trump's transgender military service member ban and took a different analytical approach in arriving at a decision that also favored the plaintiffs. The District Court of Maryland decided that the plaintiffs had provided enough evidence to withstand a motion to dismiss in their stated claim that the policy violated equal protection and substantive due process.[141] Substantive due process claims "deal with the reasonableness, or arbitrariness, of the governmental decision" but have a high threshold in which a violation exists "only when the official action is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[142] The court held that the transgender ban may be considered shocking: "A capricious, arbitrary, and unqualified tweet of new policy does not trump the methodical and systematic review by military stakeholders qualified to understand the ramifications of policy changes."[143] Here, the court explicitly employed the language of the APA's arbitrary and capricious standard in its substantive due process analysis. Similar to the D.C. District Court's analysis above, the District Court of Maryland emphasized the administration's insufficient intra-executive process: "President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence

138. *Id.*

139. *Id*.

140. In the latest ruling at the time of this Note's publication, in January 2019, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit lifted Kollar-Kotelly's injunction. *Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309, at *1 (D.C. Cir. Jan. 4, 2019) (per curiam). The Supreme Court lifted the injunctions of other federal courts that had ruled against the ban while the litigation continues in the lower courts. The two outstanding cases come from California and Washington state. *See* David Welna, *Supreme Court Revives Trump's Ban On Transgender Military Personnel, For Now*, NPR (Jan. 22, 2019), https://www.npr.org/2019/01/22/687368145/supreme-court-revives-trumps-ban-on-transgender-military-personnel-for-now.

141. Stone v. Trump, 280 F. Supp. 3d 747, 754 (D. Md. 2017).

142. *Id*. at 770 (citing Kerr v. Marshall Univ. Bd. Of Governors, 824 F.3d 62, 80 (4th Cir. 2016)).

143. *Id*. at 771.

demonstrating that the revocation of transgender rights was necessary for any legitimate national interest."[144]

B. Travel Ban

In the travel ban cases, courts also evaluated the Trump administration's intra-executive process and determined that insufficient process tainted the validity of the executive's national security decision. In early 2017, the Trump administration abruptly issued a proclamation to prohibit persons from six Muslim-majority countries from entering the United States (hereinafter "travel ban").[145] The prevailing notion that this was an impulsive decision devoid of a genuine decisionmaking process was not simply the perception of the American public, but was the general sense within the Trump administration as well.[146] In fact, Solicitor General Noel Francisco wrote in filings to the Supreme Court that the third iteration of the travel ban should be allowed to go into effect because "the process leading to the proclamation was more deliberate than those that had led to earlier bans . . . . Those orders were temporary measures . . . while the [third] proclamation was the product of extensive study and deliberation."[147] And federal courts generally agreed with Francisco's implicit admission that the initial travel ban proclamations were not the result of adequately deliberate processes. The first iteration of the travel ban was "apparently issued without . . . interagency *legal* process" and "the White House reportedly never asked the Department of Homeland Security for legal review in advance of the Order being promulgated, so '[t]he Department . . . was left making a legal analysis on the order *after* [President] Trump signed it.'"[148] Changes to immigration policies in every other recent administration instead "followed an interagency review process" that "allows . . . security professionals to ensure that all relevant uncertainties are addressed by policy and legal experts, appropriate preparations are made for implementation, and any potential

144. *Id*. at 768.

145. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

146. Evan Perez, Pamela Brown & Kevin Liptak, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN, https://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html (last updated Jan. 30, 2017, 11:29 AM) ("Administration officials weren't immediately sure which countries' citizens would be barred from entering the United States. The Department of Homeland Security was left making a legal analysis on the order after Trump signed it.").

147. Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html.

148. Brief of *Amici Curiae* Former Nat'l Sec. Officials, *supra* note 106, at 25.

risks are effectively . . . mitigated."[149] Further, the Department of Homeland Security research completed between iterations of the travel bans demonstrated that the experts did not believe that the country-based approach advocated for in the third travel ban would ameliorate any threats to national security.[150]

The government argued that the executive order implementing the travel ban should be effectively unreviewable because of the executive's interest and authority in national security.[151] A handful of federal district courts and courts of appeal heard challenges to multiple iterations of the travel ban. In a span of two months, the Fourth Circuit and the Ninth Circuit both found that the third iteration of the travel ban was likely to be found unconstitutional;[152] however, in June 2018, the Supreme Court upheld the third iteration of the travel ban.[153] The question of whether the travel ban was unconstitutional hinged on whether anti-Muslim animus was behind the policy decision. The decisions in the district courts and courts of appeal found that insufficient intra-executive process in such a high stakes national security decision may indicate unlawful animus in that decision.[154]

The courts emphasized the lack of "deliberative process" that was discussed in the transgender military service member ban decisions. Judge Brinkema of the Eastern District of Virginia wrote:

> The "specific sequence of events" leading to the adoption of the EO [Executive Order] bolsters the Commonwealth's argument that the EO was not motivated by rational national security concerns. As the declaration from the national security experts states, *ordinarily an executive order prioritizing national security is based "on cleared views from expert agencies with broad experience on the*

149. *Id.* at 22.

150. *Id.* at 10 (discussing the U.S. Department of Homeland Security's draft report, obtained by AP News, which concluded that citizenship is not a reliable indicator of whether a person is a terrorist threat); *see also* Matt Zapotosky, *DHS Report Casts Doubt on Need for Trump Travel Ban*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/world/national-security/dhs-report-casts-doubt-on-need-for-trump-travel-ban/2017/02/24/2a9992e4-fadc-11e6-9845-576c69081518_story.html?noredirect=on&utm_term=.A3dc8dd07432.

151. The centrality of the arguments is about President's broad immigration authority. But here, I focus on how talk of terrorism and national security are used by the government to assert that they are entitled to broad deference.

152. *See* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 256–57 (4th Cir.) (en banc), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018); Hawaii v. Trump, 859 F.3d 741 (9th Cir.) (per curiam), *vacated*, 138 S. Ct. 377 (2017).

153. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

154. *See, e.g.*, *Int'l Refugee Assistance Project*, 883 F.3d at 256–57; *Hawaii*, 859 F.3d at 761; Aziz v. Trump, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (internal citations omitted).

> *matters presented to [the president].” But here there is no evidence that such a deliberative process took place. To the contrary, there is evidence that the president’s senior national security officials were taken by surprise*.[155]

In February 2018, the Fourth Circuit similarly emphasized the lack of “deliberative process,” noting in the first paragraph of the 285-page opinion that:

> The President’s national security officials were taken by surprise by EO-1. See J.A. 172–74 (describing confusion in the cabinet after EO-1); 455 (declaration of Former National Security Officials, stating that EO-1 did not undergo the usual deliberative process); 786 (statements of Acting Attorney General Sally Yates, explaining that she was deliberately not consulted prior to EO-1).[156]

Here, the Fourth Circuit’s majority explicitly stated that the Trump administration’s neglect to consult with, or even inform, key stakeholders in the national security context factored into the court’s analysis of whether the policy decision was valid. The Fourth Circuit considered this as part of its *Arlington Heights* “examin[ation of] the ‘historical context’ of the government action and the ‘specific sequence of events’ leading to the government action” in an effort to determine whether there was unconstitutional religious animus.[157] Although an interagency review was eventually conducted before the third iteration of the travel ban, the court explained that this did not cure the deficiencies of the flawed initial intra-executive process. First, the government did not make its review publicly available, and second, the alleged contents of the review were at odds with the executive order’s contents.[158]

In a dissenting opinion, Judge Traxler expressed that whether the intra-executive process was adequate was dispositive of the decision’s validity.[159] Judge Traxler wrote:

> I must now view [the relevant factors of the first two travel bans] in the context of the investigation and analysis that agencies acting on the President’s behalf have completed, the consultation that has

155. *Aziz*, 234 F. Supp. 3d at 736 (emphasis added).
156. *Int’l Refugee Assistance Project*, 883 F.3d at 250 (emphasis added).
157. *Id.* at 266.
158. *Id.* at 268–69, 269 n.17 (noting several examples, including: “For example, although the Proclamation acknowledges that the review showed that Somalia, a majority-Muslim country, satisfied ‘the information-sharing requirements of the baseline,’ Somalian citizens are subject to entry restrictions.”). The court noted that they pointed this out “only to assess whether the Proclamation persuasively establishes that the primary purpose of the travel ban is no longer religious animus,” and not to evaluate the merits of the policy. *Id.* at 269.
159. *Id.* at 377–78 (Traxler, J., dissenting).

> taken place between the President and his advisors, and the logical conclusions and rationale for the Proclamation that are documented therein.[160]

He added: "In light of the extreme deference that courts must always give the President in matters of foreign policy and national security, as well as the additional information before the court, I believe the balance of the equities no longer favors the plaintiffs."[161] Judge Traxler's dissent clearly suggests that the incorporation of an improved process tilted the scale in the government's favor: the additional intra-executive consultation and reviews in the third iteration of the travel ban bolstered its legal validity.

The Fourth Circuit's travel ban decision not only considered intra-executive process in an *Arlington Heights* analysis of the "specific sequence of events"[162] and "[d]epartures from the normal procedural sequence,"[163] but the concurring opinion also invoked a new legal rule to demand improved intra-executive process.[164] In Judge Barbara Keenan's concurrence, she explained that the executive branch is constitutionally required to exercise its power with "a deliberative and reflective process" when Congress delegates that power to the executive.[165] This is because Congress "delineate[d] the boundaries of the authority delegated . . . to the executive branch of government . . . [with a] process [that reflects] 'the result of a deliberative and reflective process engaging both of the political branches.'"[166] As a result, Judge Keenan found that "[t]he President may not thereafter exercise his delegated authority in a manner incompatible with the result of this deliberative process."[167]

In June 2018, the Supreme Court reversed the grant of the preliminary injunction as an abuse of discretion, deciding that the plaintiffs were not likely to succeed on the merits.[168] One point of disagreement between Chief Justice John Robert's majority opinion and Justice Sonia Sotomayor's dissenting opinion was the conclusion

160. *Id.* at 378.
161. *Id.*
162. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).
163. *Id.*
164. *Int'l Refugee Assistance Project*, 883 F.3d at 319 (Keenan, J. concurring).
165. *Id*. (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring in part)).
166. *Id*.
167. *Id.*
168. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

of an evaluation of intra-executive process.[169] This disagreement seemed to hinge on the presumed competency of the Trump administration: The majority of justices took the Trump administration's claims of a review process at its word, while the dissenting justices demanded greater evidence of the executive's process.[170] In one example from the case, the Department of Justice had claimed that it had a "'robust' waiver process [that] would allow citizens from the blacklisted countries to enter the United States if they met certain reasonable criteria," and this point was taken by Chief Justice Roberts as support for "the government's claim of a legitimate national security interest."[171] Justice Sotomayor, however, advocated for a harder look at intra-executive process, stating that the waiver process was instead a "sham."[172]

The majority noted the perceived adequacy of intra-executive process, stating that there was a "worldwide review process undertaken by multiple Cabinet officials and their agencies" and that the travel ban executive order "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions."[173] The majority emphasized that the executive had a deliberative process that arrived at the final order, and, a dozen times, emphasized the review process—describing it repeatedly as a "worldwide review process," "multi-agency review process," or "worldwide, multi-agency review process."[174] In a dissenting opinion, Justice Sotomayor explained that the "multiagency review process could not have been very thorough" because the government report following its review process was "a mere 17 pages," and this lack of comprehen-

169. *Compare id*. at 2409 (holding that the Supreme Court would apply rational basis review to the Presidential Proclamation) *with id*. at 2441 (Sotomayor, J., dissenting) (holding that the use of rational basis review is perplexing and a more stringent standard of review is appropriate).

170. *Compare id*. at 2421 ("The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies.") *and id*. at 2442 (questioning majority's view on the review process because "at least one of the individuals involved in that process may have exhibited bias against Muslims" and "the worldwide review does little to break the clear connection between the Proclamation and the President's anti-Muslim statements").

171. Betsy Fisher and Samantha Power, *The Trump Administration Is Making a Mockery of the Supreme Court*, N.Y. TIMES (Jan. 27, 2019), https://www.nytimes.com/2019/01/27/opinion/trump-travel-ban-waiver.html.

172. *Hawaii*, 138 S. Ct. at 2445 (Sotomayor, J., dissenting). Months later, it became evident that the waiver process was in fact a sham. "The waiver process is opaque, arbitrary and unreasonably harsh, and it has not mitigated the ban's effects on thousands of families in dire circumstances. It makes a mockery of the rule of law." Fisher & Power, *supra* note 171.

173. *Hawaii*, 138 S. Ct. at 2421, 2409 (majority opinion).

174. *Id*. at 2421, 2412, 2408.

siveness "raise[d] serious questions about the legitimacy of the President's proclaimed national-security rationale."[175] Further, Justice Sotomayor observed that the Court could not know how thorough the review process was because the government "refuse[d] to disclose to the public" its "administrative review process."[176] Justice Sotomayor also used what information she had about the intra-executive process to evaluate the legitimacy of the decision. The Justice questioned the travel ban's validity based on evidence relating to the character of one of the policy's crafters: "[T]here is some evidence that at least one of the individuals involved in that process may have exhibited bias against Muslims. . . . [T]he Trump administration appointed Frank Wuco [who purportedly made several public statements about Islam] to help enforce the President's travel bans and lead the multi-agency review process."[177] While not affording the Trump administration the same presumption of competency as the majority did, Justice Sotomayor's close examination of intra-executive process led her to conclude that insufficient process rendered the decision unworthy of deference to the executive.[178]

CONCLUSION

The examples of national security cases from the W. Bush, Obama, and Trump administrations demonstrate that courts have afforded deference to the executive branch on a sliding scale based on an evaluation of intra-executive process. Challenges to the W. Bush administration's national security decisions demonstrate that a lack of transparency around decisionmaking processes cut against any judicial impulse toward deference. Meanwhile, courts found Obama-era transparency efforts around national security decisionmaking processes to be sufficient to defer to the executive's judgment. Finally, courts have recently applied a more stringent standard for the executive to earn deference in legal challenges to the Trump administration's national security decisions. Because the Trump administration has displayed a deeply flawed process in making many of its national security decisions, courts are taking a hard look at evidence of intra-executive process. This unprecedented examination of the executive's national security decisionmaking process has led courts to turn to domestic law

175. *Id*. at 2443 (Sotomayor, J., dissenting).
176. *Id*.
177. *Id*. at 2442.
178. *See id*. at 2445 ("In sum, none of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest.").

principles to guide their analyses—the very thing that many scholars and the courts themselves had claimed that courts could not do. Thus, while courts remain inclined to defer to the executive branch in matters of national security,[179] such deference is no longer automatic.

179. *Id*. at 2421–2 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 33–34 (2010)).