

“I Will Make the Treaty”: Breaking the Executive Branch’s Monopoly over Foreign Policy through Constructive Use of Dissent

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I. INTRODUCTION

Thousands of lives, the national treasury, and the continuation of a years-long war hung in the balance when, in 1848, Nicholas Trist, the United States Deputy Secretary of State, sat across the negotiating table from his Mexican counterparts.¹ President James K. Polk had ordered Trist to return home from Mexico five months earlier.² But Trist disobeyed, and instead continued to negotiate with the Mexican representatives.³ Because of Trist’s decision to remain, the Mexican-American War ended by way of peaceful agreement in early 1848.⁴ More than a century and a half later, in February 2003, an American diplomat named John Brady Kiesling resigned by protest letter—and widely published editorial—in opposition to America’s unilateral action in the run-up to the Iraq War.⁵ A few months after that, another American diplomat, Joseph Wilson, shed light on potential inaccuracies in the Bush Administration’s justification for the Iraq War, also through an opinion editorial.⁶ These three individuals—

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1. *See generally* ROBERT W. DREXLER, *GUILTY OF MAKING PEACE: A BIOGRAPHY OF NICHOLAS P. TRIST* (1991).

2. *Id.*

3. *Id.*

4. *Id.*

5. Letter from John Brady Kiesling, U.S. Diplomat, to Colin Powell, U.S. Sec’y of State (Feb. 27, 2003), *available at* <http://www.nytimes.com/2003/02/27/international/27WEB-TNAT.html>.

6. Joseph C. Wilson, IV, *What I Didn’t Find in Africa*, N.Y. TIMES, July 6, 2003, *available at* <http://www.nytimes.com/2003/07/06/opinion/what-i-didn-t-find-in-africa.html?pagewanted=all&src=pm>.

Trist, Kiesling, and Wilson—stand as stark examples of dissenters in American foreign policy.⁷ In modern foreign relations, the stakes are often just as high as those that were involved in the Mexican-American War peace negotiations.⁸

Foreign relations and treaty making are essential functions of any legitimate government.⁹ The President has the authority to make international agreements on behalf of the United States,¹⁰ and the Senate or Congress as a whole must approve any treaties.¹¹ But those with the most knowledge of the subject—the officials sitting at the negotiating table or working in the foreign embassy—do not have the ultimate say in whether a foreign relations policy or treaty is presented to Congress for consideration; that power lies exclusively with the President.¹² In response to increasingly vocal dissent by Foreign Service officers during the Vietnam War, the Department of State designed a process that purported to give those officers a voice to oppose decisions by their superiors called the Dissent Channel.¹³

7. For a discussion on the history of dissent in the United States Foreign Service in the twentieth century, see HANNAH GURMAN, *THE DISSENT PAPERS: THE VOICES OF DIPLOMATS IN THE COLD WAR AND BEYOND* (2012).

8. For a listing of some issues facing President Barack Obama and his administration during his second term, including nuclear proliferation, global crisis hotspots, and international trade, see Chaesung Chun et al., *Global Advice for Obama's Second Term*, COUNCIL ON FOREIGN RELATIONS (Feb. 7, 2013), <http://www.cfr.org/united-states/global-advice-obamas-second-term/p29940>.

9. See THE FEDERALIST NO. 42 (James Madison) (asserting the power to make treaties is part of a wider class of powers that “forms an obvious and essential branch of the federal administration”); THE FEDERALIST NO. 64 (John Jay) (“The power of making treaties is an important one . . .”); THE FEDERALIST NO. 75 (Alexander Hamilton) (describing the practicalities of the exercise of the treaty-making power).

10. U.S. CONST. art. II, § 2, cl. 2.

11. *Id.* See also Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1255 (2008).

12. 11 U.S. DEP'T OF STATE FOREIGN AFFAIRS MANUAL 720, §§ 724.1, 724.7 (2006), available at <http://www.state.gov/documents/organization/88317.pdf> (Only the Secretary of State can authorize the initiation of an international negotiation and certify the final form of the agreement when the negotiators are done.); 11 U.S. DEP'T OF STATE FOREIGN AFFAIRS MANUAL 720, § 723.2-1 (2006) (Treaties are submitted to Congress by the President, not by negotiators.); 1 U.S.C. § 112b(a) (2014) (The Secretary of State, not negotiators, presents all international agreements, other than treaties, to Congress.). The Department of State's organizational structure also reflects this hierarchy. *Department Organization Chart*, U.S. DEP'T OF ST. (May 2012), <http://www.state.gov/r/pa/ei/rls/dos/99494.htm>.

13. U.S. DEP'T OF STATE, FOREIGN AFF. MANUAL VOL. 2, NO. 070, DISSENT CHANNEL §§ 071.1(a), 073(b), 074.1(b) (2011), available at <http://www.state.gov/documents/>

Today, through the Dissent Channel, Foreign Service officers can send dissenting memoranda directly to their superiors.¹⁴

But the Dissent Channel can also be used to neutralize opposition by quarantining dissent within the bureaucracy.¹⁵ The recent revelations by former National Security Agency (NSA) contractor Edward Snowden have demonstrated the impact any government employee with access to sensitive information can have when the employee lacks a constructive outlet for dissent within the bureaucratic structure.¹⁶

This Note addresses the structural allocation of power over foreign policy in the United States’ federalist system and suggests that the current allocation, which heavily favors the President, can be balanced pragmatically only through a robust political check combined with a reinvigorated legislative check, both of which would require a publicized dissent mechanism and protections for dissenters.

The federal government should undergo significant bureaucratic reform to improve modern American diplomacy while maintaining political uniformity.¹⁷ Because the President assumes almost exclusive control over foreign policy,¹⁸ diplomats on the ground should have a method through which they can check a President who ignores their advice.¹⁹ Part II of this Note discusses the history of

organization/84374.pdf [hereinafter FOREIGN AFF. MANUAL]; GURMAN, *supra* note 7, at 171.

14. FOREIGN AFF. MANUAL, *supra* note 13, §§ 071.1(a), 073(b), 074.1(b).

15. GURMAN, *supra* note 7, at 189.

16. Although Edward Snowden’s motives for leaking sensitive material are up for debate, his claim that he had no one to go to with his misgivings is cause for deliberation. See Laura Poitras, *NSA Whistleblower Edward Snowden: “I Don’t Want to Live in a Society that Does these Sort of Things,”* YOUTUBE (June 9, 2013), <http://www.youtube.com/watch?v=5yB3n9fu-rM>.

17. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322–23 (2006).

18. The President can negotiate executive agreements without congressional consent. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003). The President can also effectively fire diplomats at will. *Shurtleff v. United States*, 189 U.S. 311, 314–15 (1903). Additionally, the Constitution is not clear about the delegations of foreign policy authority. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 237–43 (2001). This ambiguity, in conjunction with the President’s wide powers, gives the President significant leverage over the direction of foreign policy.

19. One option is to create a legislatively-imposed requirement for the President to consult with relevant agencies prior to taking action. See Katyal, *supra* note 17, at 2327.

United States foreign policy power and its related federalist structure. Part III illustrates an early example of the exercise of foreign relations power during the Mexican-American War. Part IV discusses modern developments in foreign policy, focusing on new bureaucratic dissent mechanisms. These modern mechanisms are illustrated in Parts V and VI, using two examples from the Iraq War. Part VII discusses the potential consequences of maintaining the status quo, as illustrated by the recent and ongoing revelations of former NSA employee Edward Snowden. Part VIII proceeds to analyze the current balance of power in the federalist system and the potential for dissent to check the executive. Finally, this Note concludes in Part IX by recommending a robust dissent mechanism that can be integrated into the federalist system to balance the power over foreign relations.

II. FOREIGN RELATIONS POWER IN THE UNITED STATES

A. *Treaties*

The United States federal system is built on checks and balances. Thus, one branch of government often needs the cooperation of another to make policy.²⁰ In the area of foreign policy, the Constitution nominally limits the President's power to make international treaties by requiring the Senate's consent.²¹ Additionally, the President's power to appoint the Secretary of State and ambassadors is limited by similar constitutional requirements of Senate approval.²²

The Founders debated the role the President and Congress should have in completing international treaties.²³ Some framers wanted the

20. THE FEDERALIST NO. 51 (James Madison).

21. U.S. CONST. art. II, § 2, cl. 2. In pertinent part, the Constitution provides the President "shall have Power, by and with the Advice of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.*

22. *Id.* The Constitution continues by giving the President the power to "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." *Id.*

23. THE FEDERALIST NO. 75 (Alexander Hamilton).

power to be vested solely in the President.²⁴ Others proposed the Senate should be the only body involved in treaty making.²⁵ A third faction argued the Senate and House should both be involved in the decision.²⁶ Alexander Hamilton responded to all of these concerns in *The Federalist No. 75*. According to Hamilton, the treaty-making power contains both legislative and executive components: legislative in that binding treaties apply as law over the American people, and executive in that treaties are like contracts between two sovereigns.²⁷ The dual nature of the treaty-making power led to the final language used in the Constitution: the President may make treaties “by and with the Advice and Consent of the Senate.”²⁸ Two-thirds of the Senate must approve a treaty before it becomes binding.²⁹

Although the Founders placed the treaty-making power in the hands of the President and the Senate, Presidents have used other procedures to enact international agreements. One of these procedures, called the Congressional-Executive agreement, allows the President to enact international agreements by involving the House of Representatives.³⁰ These agreements are “concluded by the President and either authorized in advance or approved after the fact through the same process used for ordinary federal legislation.”³¹ They must be approved by a majority of both the House of Representatives and the Senate,³² rather than by two-thirds of the Senate as required under the Treaty Clause.³³

Alternatively, the President can package international agreements as sole executive agreements.³⁴ These agreements are either a byproduct of a prior treaty obligation or are completed pursuant to the President’s constitutional powers; they go into effect without the

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. U.S. CONST. art. II, § 2, cl. 2.

29. *Id.*

30. Hathaway, *supra* note 11, at 1244–46.

31. *Id.* at 1255.

32. U.S. CONST. art. I, § 7, cl. 2; Hathaway, *supra* note 11, at 1238–39.

33. U.S. CONST. art. II, § 2, cl. 2; Hathaway, *supra* note 11, at 1238–39.

34. Hathaway, *supra* note 11, at 1255.

need for congressional approval.³⁵ The earliest sole executive agreements were narrow in scope, and Presidents would use them under an enumerated power reserved for the President.³⁶ This practice has been found constitutional.³⁷ The Supreme Court held “the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic.”³⁸

Today, the distinction that once existed between treaties and agreements has been lost.³⁹ Some commentators and courts have sought to decipher the original distinction by referring to past international law theorists, most notably Emerich de Vattel.⁴⁰ The Supreme Court in *Holmes v. Jennison* noted that de Vattel defined “treaty” as “a compact made with a view to the public welfare, by the superior power, either for perpetuity, or for a considerable time.”⁴¹ The Court also cited de Vattel’s definition of “agreements” as “compacts which have temporary matters for their objects.”⁴² Thus, one possible distinction between treaties and agreements is their intended longevity, and this distinction could inform the proper uses of the two instruments.⁴³ However, the terms “treaty” and “agreement” were conflated early in the history of the United States, and modern commentators and courts have not come to a consensus on their proper uses.⁴⁴

35. *Id.*

36. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1584 (2007).

37. *Am. Ins. Ass’n*, 539 U.S. at 415.

38. *Id.* The Court held that a California state law impermissibly conflicted with an executive agreement settling Holocaust-related insurance claims. *Id.* at 407–09, 411–13, 420. The Court’s ruling thus reinforced the principle that executive agreements not subject to congressional approval can preempt state laws, just as treaties do. *See id.* at 415–17.

39. Clark, *supra* note 36, at 1593–94.

40. *Id.* at 1592.

41. *Holmes v. Jennison*, 30 U.S. 540, 572 (1840).

42. *Id.*

43. Clark, *supra* note 36, at 1592–93. Clark notes longer lasting treaties may have been used mostly in the areas of peace and commerce, while agreements were meant to cover international boundary settlements.

44. *Id.* at 1594. *See also* U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 463 (1978).

B. Personnel

The President also has wide power to fire government employees.⁴⁵ In *Shurtleff v. United States*,⁴⁶ the Supreme Court found “the President can, by virtue of his general power of appointment, remove an officer, even though appointed by and with the advice and consent of the Senate.”⁴⁷ The Court supported an expansive presidential authority over personnel decisions, stating, “[I]t must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed.”⁴⁸ This assumption effectively provides the President with “the right . . . to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient,” even if the relevant statute only provides for dismissal under certain circumstances.⁴⁹ The President has virtual plenary power to terminate executive personnel, including diplomats.

III. NICHOLAS TRIST AND THE MEXICAN-AMERICAN WAR: 1845–1848

The treaty-making and appointment powers played crucial roles during the Mexican-American War. President James K. Polk, who assumed the presidency in 1845, made clear he would fully support the annexation of Texas on the day of his inauguration.⁵⁰ When this

45. See *Shurtleff v. United States*, 189 U.S. 311, 314–15 (1903).

46. 189 U.S. 311 (1903).

47. *Id.* at 315.

48. *Id.* at 317.

49. *Id.* As an example, the Court noted the Constitution’s Article II listing of permissible reasons for removal of civil officers:

By the 4th section of article 2 of the Constitution it is provided that all civil officers shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. No one has ever supposed that the effect of this section was to prevent their removal for other causes deemed sufficient by the President. No such inference could be reasonably drawn from such language.

Id.

50. James K. Polk, *Address by James K. Polk, 1845*, JOINT CONG. COMM. ON INAUGURAL CEREMONIES, <http://www.inaugural.senate.gov/swearing-in/address/address-by-james-k-polk-1845> (last visited Feb. 11, 2013).

agenda clashed with Mexico's intent to retain Texas, the United States and Mexico went to war.⁵¹ Polk eventually sent "Mr. N. P. Trist, the chief clerk of the Department of State," to negotiate a peace treaty.⁵²

Trist took many precautions to keep his journey to Mexico secret, but they were all in vain; Trist's mission was published in numerous American newspapers by the time he was sailing in the Gulf of Mexico.⁵³ The trip from Washington, D.C., to Veracruz, Mexico, took Trist twenty-one days to complete.⁵⁴ Within a day of his landing, Trist learned the political instability in Mexico would complicate his mission.⁵⁵ First, there was effectively no functioning government in Mexico to negotiate with at the time.⁵⁶ Second, the remaining members of the Mexican government who did retain some authority had decreed official negotiations with American representatives to be criminal.⁵⁷ In late August 1847, just over three months after Trist's arrival, United States forces camped outside Mexico City in preparation to take the capital; peace negotiations began in earnest.⁵⁸

During the course of negotiations, Trist received intelligence that Mexican leadership was unhappy with the draft treaty.⁵⁹ In early September, Mexican negotiators demanded treaty revisions, and Trist sent the revised treaty back to Washington.⁶⁰ Days later, while awaiting word from Washington, fighting resumed, and United States troops occupied Mexico City.⁶¹

51. MATT M. MATTHEWS, *THE U.S. ARMY ON THE MEXICAN BORDER: A HISTORICAL PERSPECTIVE* 17 (2007), available at http://permanent.access.gpo.gov/LPS109781/LPS109781_Matthews_op22.pdf.

52. 2 JAMES K. POLK, *THE DIARY OF JAMES K. POLK 466-67* (Milo Milton Quaife ed., 8th ed. 1910).

53. WALLACE OHRT, *DEFIANT PEACEMAKER: NICHOLAS TRIST IN THE MEXICAN WAR 106-07* (1997).

54. *Id.* at 106-08.

55. *Id.* at 111.

56. *Id.*

57. *Id.*

58. DREXLER, *supra* note 1, at 87-88.

59. *Id.* at 96.

60. *Id.* at 96-99, 101.

61. *Id.* at 101.

On October 6, shortly after receiving the treaty proposal that included the Mexican revisions, Secretary of State Buchanan sent a letter to Trist recalling him to Washington.⁶² Trist would not receive that letter until more than a month later, on November 16.⁶³ In the meantime, the occupation of Mexico City empowered a faction in the Mexican government seeking to end the war to reopen negotiations, and Trist made great strides negotiating a peaceful end to the conflict.⁶⁴

But when Buchanan recalled Trist, Trist had to return home. He planned to leave on December 5 with the next outgoing supply train.⁶⁵ On December 4, his plans suddenly changed.⁶⁶ James Freaner, a war correspondent for the *New Orleans Delta*, was reporting on the United States' military effort from the front line.⁶⁷ He had bonded with Trist and had become one of his most reliable sources of intelligence.⁶⁸ The day before Trist was scheduled to leave Mexico, Freaner visited the U.S. negotiator and convinced him to stay and complete the treaty.⁶⁹ At that moment, when Trist chose to ignore a direct order from his superior, the Secretary of State, he became a dissenter.

Trist completed the Treaty of Peace, Friendship, Limits and Settlements on February 2, 1848.⁷⁰ Trist handed the treaty to Freaner,

62. *Id.* at 105.

63. *Id.* at 108.

64. *Id.* at 107–08. The Mexican government had selected new peace commissioners more committed to negotiation. *Id.* at 110.

65. *Id.* at 111.

66. *Id.* at 112.

67. Mitchell Roth, *Role of the Media: War Correspondents*, PBS, http://www.pbs.org/keramexicanwar/war/war_correspondents.html (last visited Feb. 11, 2013).

68. Thomas J. Farnham, *Nicholas Trist & James Freaner and the Mission to Mexico*, 11 *ARIZ. & W.* 247, 252–53 (1969).

69. DREXLER, *supra* note 1, at 113. Freaner implored, “Make the Treaty, Sir! It is now in your power to do your country a greater service than any living man can render her. . . . You are bound to do it. Instructions or no instructions, you are bound to do it.” Trist responded, “I will make the Treaty and . . . you stay here to carry it home.” *Id.*

70. *Id.* at 124. The treaty is commonly known today as the Treaty of Guadalupe-Hidalgo. See The Avalon Project, *Treaty of Guadalupe Hidalgo; February 2, 1848*, YALE L. SCH., http://avalon.law.yale.edu/19th_century/guadhida.asp (last visited Feb. 17, 2014).

who then raced to deliver it to Washington.⁷¹ Freaner travelled from the heart of Mexico to the White House in just seventeen days.⁷²

The pressures of domestic politics prevented Polk from burying the treaty.⁷³ Polk's Democratic Party was divided over the war:⁷⁴ one faction opposed taking Mexican land below the Nueces River on moral grounds;⁷⁵ and a second group of Democrats, pandering to a vocal group of Americans intent on taking all of Mexico, wanted more land.⁷⁶ Secretary of State Buchanan found his political ambitions served by the latter group.⁷⁷

Polk's Cabinet eventually approved the treaty with some modifications, mostly out of concern that Congress would cut off funding for the war in order to end the conflict.⁷⁸ The treaty went to the Senate. After a contentious debate about the legality of a treaty negotiated by a recalled diplomat, the Senate approved the treaty on March 10, 1848.⁷⁹

71. *Id.*

72. *Id.*

73. The war was unpopular, and President Polk was unwilling to give the Whigs political fodder. OHRT, *supra* note 53, at 148–49.

74. Robert A. Brent, *Reaction in the United States to Nicholas Trist's Mission to Mexico, 1847–48*, 35/36 REVISTA DE HISTORIA DE AMÉRICA 105, 110 (1953). The other major political party, the Whigs, opposed the annexation of any more land, because of their opposition to slavery and to the Democratic Party. *Id.* at 110.

75. *Id.*

76. *Id.*; OHRT, *supra* note 53, at 147.

77. Polk wrote about Buchanan's changing views as the war dragged on.

Mr. Buchanan seems to have changed his views upon the subject. Until recently he had expressed his opinion against acquiring any other territory than the Californias & New Mexico. He did not positively express a distinct opinion today; but it was pretty clearly to be inferred from what he did say that he was now for more territ[o]ry; and that he would favour the policy of acquiring, in addition to the Californias & New Mexico, the Province of Tamaulipas and the country East of the Sierra madre mountains, and withdrawing our troops to that line. . . . Since he has considered himself as a candidate for the Presidency it is probably he looks at the subject with different considerations in view from those which he entertained before that time.

3 JAMES K. POLK, THE DIARY OF JAMES K. POLK 217 (Milo Milton Quaife ed., 8th ed. 1910).

78. DREXLER, *supra* note 1, at 127.

79. *Id.* at 127–28.

IV. COMPARISON OF MODERN TREATY MAKING TO THE MEXICAN-AMERICAN WAR TREATY PROCESS

Today, the treaty-making procedure is codified in *Circular 175*.⁸⁰ State Department officers “seeking authority to negotiate, conclude, amend, extend, or terminate an international agreement” must make a *Circular 175* request from a high-ranking State Department official.⁸¹ One of the purposes of the *Circular 175* procedure is to unify the nation’s foreign policy.⁸² The Secretary of State is the leader of the Department,⁸³ and the Secretary serves at the pleasure of the President,⁸⁴ giving the President great authority in directing United States foreign policy.⁸⁵

80. *Circular 175* was originally published by the U.S. Department of State as a Department Circular in 1955, and has since been included in 22 C.F.R. § 181.4 (2013). *Circular 175 Procedure*, U.S. DEP’T OF ST., <https://web.archive.org/web/20130624134821/http://www.state.gov/s/l/treaty/c175> (last visited Nov. 9, 2012).

81. *Id.* The *Circular 175* procedure also requires each request to be accompanied by a memorandum describing the proposed agreement, its expected effects, and the manner in which it will be completed. This “action memorandum” must be submitted with a separate Memorandum of Law detailing whether the proposal is a treaty or executive agreement, under what legal authority the agreement could be made, and whether domestic laws may complicate the proposal’s implementation. *Id.*

82. *Id.* According to the State Department, “the Circular 175 procedure has provided an efficient vehicle for achieving a coordinated and coherent U.S. policy with respect to the negotiation and conclusion of treaties and international agreements.” *Id.*

83. *Department Organization Chart*, *supra* note 12; see *Secretary of State John F. Kerry*, U.S. DEP’T OF ST., <http://www.state.gov/secretary/index.htm> (last visited Jan. 26, 2014). The Secretary also has power over the Department’s personnel: “The Secretary of State may prescribe duties for the Assistant Secretaries and the clerks of bureaus, as well as for all the other employees in the department, and may make changes and transfers therein when, in his judgment, it becomes necessary.” 22 U.S.C. § 2664 (2012).

84. *Secretary of State John F. Kerry*, *supra* note 83.

85. One of the primary indicators of strong presidential authority is the President’s exercise of the removal power. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1458 (1997). Calabresi and Yoo’s analysis concludes that Presidents have historically asserted their power over policy in part by removing officers with whom they disagreed. *Id.* at 1459–60.

A. *Technology and Foreign Policy*

Communication technology has the potential to play a large role in foreign policy and dissent.⁸⁶ In Trist's day, even with long transmission times,⁸⁷ newspapers spread the word quickly.⁸⁸ Newspaper editorials generally praised the treaty negotiated by Trist,⁸⁹ helping legitimize Trist's dissent by providing the anti-war faction at home with a tangible, public rallying point: a peace treaty.⁹⁰

Today, the potential to dissent using communications technology is far greater than in Trist's day. *The Pentagon Papers*, classified documents analyzing United States involvement in Vietnam and leaked by Daniel Ellsberg to the press in 1971, incited widespread controversy through high profile newspapers with large readerships.⁹¹ More recently, the WikiLeaks and Edward Snowden episodes, which involved the leaking of troves of classified government documents, demonstrated the potential for modern technology to increase the ease and magnitude of modern dissent.⁹² Now, with just a few clicks

86. Congress has found technology to be important enough in this process to codify its findings. 22 U.S.C. § 2656a (2012). In the Code:

The Congress finds that—

(1) the consequences of modern scientific and technological advances are of such major significance in United States foreign policy that understanding and appropriate knowledge of modern science and technology by officers and employees of the United States Government are essential in the conduct of modern diplomacy;

(2) many problems and opportunities for development in modern diplomacy lie in scientific and technological fields

Id.

87. For example, the letter recalling Trist was sent on October 6, 1847. DREXLER, *supra* note 1, at 105. The letter reached Trist on November 16. *Id.* at 108.

88. See OHRT, *supra* note 53, at 106–07.

89. Brent, *supra* note 74, at 110–12.

90. See Michael Bezilla, *U.S.-Mexican War Legitimized Anti-War Movement*, *Historian Says*, PENN. ST. UNIV. (Nov. 14, 2012), <http://live.psu.edu/story/62724>.

91. *Pentagon Papers*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/450326/Pentagon-Papers> (last visited Jan 26, 2013). See also Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, June 13, 1971, available at <http://www.nytimes.com/books/97/04/13/reviews/papers-overview.html>.

92. See GURMAN, *supra* note 7, at 197 (discussing WikiLeaks); Barton Gellman & Ashkan Soltani, *NSA Infiltrates Links to Yahoo, Google Data Centers Worldwide, Snowden*

on a computer, disgruntled dissenters can quickly make their positions public, often with major political and economic consequences.

B. Modern Bureaucratic Dissent: The Dissent Channel

A bureaucratic dissent mechanism could be an effective way to encourage the President to consider the voices of Foreign Service officers on the ground when making policy decisions.⁹³ This is the stated idea behind the State Department’s Dissent Channel, a communication pathway that allows Foreign Service officers to register dissent to their superiors.⁹⁴

The Dissent Channel is “reserved only for consideration of responsible dissenting and alternative views on substantive foreign policy issues that cannot be communicated in a full and timely manner through regular operating channels or procedures.”⁹⁵ The Channel is intended as a last resort when traditional and more collaborative means are either unavailable or ineffective.⁹⁶ All communications through the Dissent Channel go directly to the Secretary’s Policy Planning Staff (“S/P”), at which point they are distributed to “the Secretary, the Deputy Secretary, the Deputy Secretary for Management and Resources, the Under Secretary for Political Affairs, the Executive Secretary, and the Chair of the Secretary’s Open Forum.”⁹⁷

Documents Say, WASH. POST, Oct. 30, 2013, available at http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html (discussing Snowden); see also John F. Burns & Ravi Somaiya, *WikiLeaks Founder Gets Support in Rebuking U.S. on Whistle-Blowers*, N.Y. TIMES, Oct. 23, 2010, available at http://www.nytimes.com/2010/10/24/world/24_london.html?ref=pentagonpapers&r=0.

93. See Katyal, *supra* note 17, at 2329.

94. FOREIGN AFF. MANUAL, *supra* note 13, § 071.1(b). The listed purpose of the Dissent Channel is “to allow its users the opportunity to bring dissenting or alternative views on substantive foreign policy issues, when such views cannot be communicated in a full and timely manner through regular operating channels or procedures, to the attention of the Secretary of State and other senior State Department officials in a manner which protects the author from any penalty, reprisal, or recrimination.” *Id.*

95. *Id.* § 072(a).

96. See *id.* § 072(b)-(d).

97. *Id.* § 074.1(a)-(b).

The Dissent Channel, in effect, keeps dissenting opinions within the bureaucratic machine.⁹⁸ The impetus for creating the Dissent Channel was the increasingly vocal dissent sounded by Foreign Service officers during the Vietnam War.⁹⁹ The Channel “allow[ed] internal dissenters to let off steam,” while avoiding the impact of public debate.¹⁰⁰ The Channel “made it possible for the State Department to formally encourage dissent, while at the same time deflating the most serious threat posed by internal dissenters.”¹⁰¹ It proved “dissent could be tolerated so long as it remained inside the bureaucracy.”¹⁰²

The Channel also made it possible for presidential administrations to more easily identify dissenting Foreign Service members. The first Dissent Channel message resulted in a reshuffling of staff at the consulate in Dhaka, Bangladesh, in 1971.¹⁰³ Not long after, the State Department reassigned a Foreign Service officer who used the Dissent Channel to warn about impending violence in Cyprus.¹⁰⁴ This latter incident, known as the Boyatt Affair, became part of a wider congressional inquiry.¹⁰⁵ Here was an opportunity for Congress to assert oversight authority over the executive branch in the realm of foreign policy. But Secretary of State Henry Kissinger was quick to prevent such an outcome.¹⁰⁶ Kissinger argued releasing the dissent memorandums to Congress would cause a second coming of McCarthyism, by which Congress would be able to target specific Foreign Service officers because of their policy opinions.¹⁰⁷ According to Kissinger, dissenters’ identities and opinions had to be kept within the Department, lest some member of Congress embark on a crusade against a specific ideology or strategy.¹⁰⁸

98. GURMAN, *supra* note 7, at 189.

99. *Id.* at 171.

100. *Id.* at 190.

101. *Id.* at 189.

102. *Id.*

103. *Id.* at 177–78.

104. *Id.* at 180–81.

105. *Id.* at 186–87.

106. *Id.* at 181.

107. *Id.* at 181–82.

108. *Id.* at 181.

But prohibiting Congress from reviewing the dissent memorandums in their original format allowed the State Department to distort and conceal the dissenters’ messages, significantly limiting the potential for dissent to incite congressional action.¹⁰⁹ Congress would have oversight authority in name only. The State Department released Thomas Boyatt’s dissent paper to Congress, but it was spliced and strewn into an “amalgamation” of dissenting opinions.¹¹⁰ Boyatt could not effectively register his dissent through such a medium and later commented, “[The] memorandum was cut into pieces, and those pieces were interspersed with other drivel made up by S/P [Policy Planning] designed to disguise what was the Boyatt memorandum.”¹¹¹

With the State Department in control of dissenters’ messages, there was a risk the Secretary of State would selectively seek retribution against specific dissenters. Most dissenters were not punished as a result of their opinions.¹¹² The pertinent regulation in effect today prohibits reprisals for using the Dissent Channel.¹¹³ Still, some dissenters were fired, and some were reassigned to different positions by department superiors.¹¹⁴ But many were rewarded or given more desirable positions by the Department.¹¹⁵ The State Department had to provide an incentive for dissenters to keep their dissent internal. As became apparent to the Department, “in the age of mass media, to be a dissenter is to be a potential leaker to the press of one’s conflict with the White House.”¹¹⁶ After Vietnam, the last thing Presidents wanted was a crisis of confidence and an administration at the center of controversy.¹¹⁷

109. *Id.* at 188.

110. *Id.* at 183–84, 188.

111. *Id.* at 188.

112. *Id.* at 189–90.

113. FOREIGN AFF. MANUAL, *supra* note 13, § 071.1(b).

114. GURMAN, *supra* note 7, at 189–90.

115. *Id.*

116. *Id.* at 175.

117. *Id.* at 171; *40 Years After Leak, Weighing the Impact of the Pentagon Papers*, PBS (June 13, 2011), http://www.pbs.org/newshour/bb/military-jan-june11-pentagonpapers_06-13/ (discussing how the information about the Vietnam War released in the Pentagon Papers strengthened the position of the dissenter and how President Nixon’s response led to Watergate).

V. JOSEPH WILSON AND THE IRAQ WAR

The Dissent Channel could not keep dissent within the Department forever, especially in light of technological advancement. One scholar recently noted, “In the digital age, when leaks inevitably go viral on the Internet, the State Department will have an increasingly difficult time preventing the public from gaining access to diplomatic dissent writing.”¹¹⁸ Such was the case with Joseph Wilson, the former diplomat asked by the Bush Administration in February 2002 to investigate a suspected Iraqi nuclear program linked to Niger.¹¹⁹ According to Wilson, the CIA informed him that Vice President Dick Cheney’s office was seeking additional intelligence on a reported sale of uranium yellowcake by Niger to Iraq.¹²⁰ Wilson consulted with the State Department, travelled to Niger, spoke with the U.S. ambassador there, investigated the uranium mining industry, and reported the sale likely never occurred.¹²¹ Shortly afterwards, when the Administration used the Niger connection as part of its justification for war with Iraq, Wilson contacted the State Department to remind officials of his findings.¹²² But Wilson’s efforts were in vain.

In March 2003, American and coalition forces began bombing Baghdad.¹²³ In July 2003, the *New York Times* published an op-ed authored by Joseph Wilson describing his investigation, conclusions, and interaction with the Administration.¹²⁴ The op-ed ended with a call for an investigation into the Administration’s justification for war.¹²⁵ Whether the reader believed Wilson’s version of events or not, Wilson’s op-ed was undeniably a dissent paper, written for a popular audience and published in an internationally circulated

118. *Id.* at 197.

119. Wilson, *supra* note 6.

120. *Id.*

121. *Id.*

122. *Id.*

123. Jesse Singal et al., *Seven Years in Iraq: An Iraq War Timeline*, TIME, Mar. 19, 2010, available at http://www.time.com/time/specials/packages/article/0,28804,1967340_1967342_1967398,00.html.

124. Wilson, *supra* note 6.

125. *Id.*

newspaper.¹²⁶ Although he was not employed in the Foreign Service at the time, he discussed his attempts to address his concerns through the State Department in his op-ed.¹²⁷ In the end, he went to the press.¹²⁸

Wilson highlighted the structural imbalance in foreign relations power when he noted, "Congress, which authorized the use of military force at the president's behest, should want to know if the assertions about Iraq were warranted."¹²⁹ The congressional authorization of military force provided much discretion to the President, but it also required the President to submit reports to Congress explaining why military action was required.¹³⁰ From Wilson's perspective, his dissent was ignored by the Administration, and the executive branch was effectively unaccountable to congressional oversight.

When Wilson's concerns went unaddressed, he resorted to influencing public opinion. His dissent record was not written like a standard diplomatic memorandum.¹³¹ Instead, Wilson's dissent record read like a story. The author personalized himself, described his thoughts, illustrated his efforts with descriptive language, and concluded with a moral imperative.¹³² This form of dissent, whereby the author takes a message outside of the bureaucracy and to the public, inserted the political check where it formerly did not exist.¹³³

But if the political check was to be effective, reprisals by the Administration against a dissenter should have been prohibited, and many observers believed the Wilson case ended in reprisal.¹³⁴ Eight

126. See GURMAN, *supra* note 7, at 191.

127. Wilson, *supra* note 6.

128. *Id.*

129. *Id.* See also H.R.J. Res. 114, 107th Cong. (2002).

130. H.R.J. Res. 114, 107th Cong. § 3(b) (2002).

131. See FOREIGN AFF. MANUAL, *supra* note 13, § 073.

132. Wilson, *supra* note 6.

133. For a discussion of the political check, see D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L. Q. 779, 787 (1982).

134. Bruce Wilson, *Valerie Plame & Joe Wilson Furious as CA Democrats Snub Leader Fighting Theocratic Takeover of Military*, HUFFINGTON POST (May 29, 2010), http://www.huffingtonpost.com/bruce-wilson/valerie-plame-joe-wilson_b_594382.html (stating that the "outing of Plame's identity was widely perceived as ultimately partisan, anti-patriotic payback"); James B. Stewart, *Dangers of Giving In to Impulse for Revenge*, N.Y. TIMES, Jan.

days after Wilson's op-ed was published, columnist Robert Novak wrote a piece identifying Valerie Plame Wilson, Joseph Wilson's wife, as a CIA operative.¹³⁵ "Wilson never worked for the CIA," wrote Novak, "but his wife, Valerie Plame, is an agency operative on weapons of mass destruction."¹³⁶ Novak cited "[t]wo senior administration officials" as sources.¹³⁷ Novak's disclosure led to an investigation into his and eventually other reporters' sources, especially Vice President Dick Cheney's Chief of Staff, I. Lewis "Scooter" Libby.¹³⁸ These sources were investigated for disclosing Valerie Plame Wilson's identity as a CIA operative, which was classified information.¹³⁹ Libby was eventually convicted of obstructing justice and perjury.¹⁴⁰ Although Libby was the only Administration official to be indicted and convicted, the evidence implicated Libby's superiors in the leak.¹⁴¹ A few months after Libby's conviction, President George W. Bush commuted Libby's thirty-month prison sentence,¹⁴² preventing Libby from serving any time.¹⁴³

The Wilson episode, although not a conclusive demonstration of executive power used to discredit dissenters, does elucidate some of the powers a President can have over dissent. The Department of

17, 2014, available at <http://www.nytimes.com/2014/01/18/business/the-dangers-of-giving-in-to-the-revenge-impulse.html?r=0> (describing Plame's outing as retaliation against Wilson).

135. Robert D. Novak, *Mission to Niger*, WASH. POST, July 14, 2003, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102000874.html>.

136. *Id.*

137. *Id.*

138. Dan Eggen, *Background on the CIA Leak Case*, WASH. POST, Oct. 28, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/28/AR2005102800818.html>. See also Matthew Cooper, *Bob Novak, Valerie Plame, and Me*, ATLANTIC, Aug. 18, 2009, available at <http://www.theatlantic.com/politics/archive/2009/08/bob-novak-valerie-plame-and-me/23460/>.

139. *Id.*

140. *Jurors Convict Libby on Four of Five Charges*, NBC NEWS & NEWS SERVS. (Mar. 6, 2007), <http://www.msnbc.msn.com/id/17479718/ns/politics/t/jurors-convict-libby-four-five-charges/#.UP16die1eAg>.

141. *Id.*

142. Amy Goldstein, *Bush Commutes Libby's Prison Sentence*, WASH. POST, July 3, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070200825.html>.

143. *Id.*

Justice can pressure the press.¹⁴⁴ The country’s intelligence apparatus can discredit and injure the livelihood of a dissenter’s family.¹⁴⁵ And the President’s clemency power can protect the Administration’s “fall guy.”¹⁴⁶

A. Role of the Judiciary

To protect their ability to dissent, individuals like Joseph Wilson might try to enlist federal prosecutors within the Department of Justice to check the President’s power if a law appears to have been violated. But with the Department of Justice under the control of the executive, such attempts may be in vain. A private cause of action could be a potent mechanism to protect dissenters. But this avenue may be unavailable to targets of potential reprisal; the Wilsons’ private suit against Administration leakers, *Wilson v. Libby*,¹⁴⁷ was in fact dismissed by the D.C. Court of Appeals.¹⁴⁸ In *Wilson v. Libby*, the Wilsons alleged both constitutional and tortious violations of their privacy.¹⁴⁹ Their constitutional claims fell under the Privacy Act, a federal law that “provides for criminal penalties against federal officials who willfully disclose a record in violation of the Act.”¹⁵⁰

The court noted the Act intentionally excludes the Offices of the President and Vice President from criminal liability.¹⁵¹ The court dismissed the Wilsons’ constitutional claims against the Administration’s major decision makers for two reasons. First, the court held that where Congress has intentionally withheld a remedy, the court will not make one available for the plaintiff.¹⁵² It did not matter that this finding would effectively immunize the Offices of the

144. Cooper, *supra* note 138.

145. See Richard Leiby, *Valerie Plame, the Spy Who Got Shoved Out Into the Cold*, WASH. POST, Oct. 29, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/28/AR2005102801172.html>.

146. See *Jurors Convict Libby on Four of Five Charges*, *supra* note 140.

147. 535 F.3d 697 (D.C. Cir. 2008).

148. *Id.* at 701.

149. *Id.* at 702–03.

150. *Id.* at 707. For the Privacy Act, see 5 U.S.C. § 552a (2012).

151. *Wilson*, 535 F.3d at 701.

152. *Id.* at 709–10.

President and Vice President from suit. Second, the court was concerned about the sensitive nature of the case and the potential for national security information to become central to the proceedings.¹⁵³ The court also dismissed the Wilsons' tort claim after finding the Wilsons had not exhausted their administrative remedies.¹⁵⁴ The Wilsons' suit in its entirety was dismissed.¹⁵⁵

VI. JOHN BRADY KIESLING AND THE IRAQ WAR

Another instance of dissent going public occurred shortly before the Wilson episode.¹⁵⁶ John Brady Kiesling was a career diplomat serving in the U.S. embassy in Athens who opposed the Administration's unilateral approach to the Iraq War.¹⁵⁷ In February 2003, Kiesling submitted his resignation through the Dissent Channel and media.¹⁵⁸ Like Wilson's op-ed, Kiesling's dissent record did not follow the traditional form of the Dissent Channel memorandum.¹⁵⁹ Kiesling started his letter by personalizing himself and expressing his faith in the United States.¹⁶⁰ He then criticized the Administration for its unilateral approach to foreign policy because the strategy, he argued, alienated U.S. allies.¹⁶¹ Even though the resignation letter was addressed to Secretary of State Colin Powell, it was easily comprehended by a wider audience.¹⁶² The letter itself, although submitted through the Dissent Channel, ended up in the congressional record and was published in the *New York Times*, indicating a purposeful release of the letter to the public.¹⁶³

153. *Id.* at 710.

154. *Id.* at 711–12.

155. *Id.* at 713.

156. Kiesling, *supra* note 5.

157. *Id.*

158. GURMAN, *supra* note 7, at 192.

159. See FOREIGN AFF. MANUAL, *supra* note 13, § 073.

160. Kiesling, *supra* note 5.

161. *Id.*

162. *Id.*

163. *Id.*; 149 CONG. REC. E363-64 (statement of Rep. Stark).

Kiesling, along with other diplomats, would later state he resigned because it was “the only honorable way open to us.”¹⁶⁴ After resigning, Kiesling and his band of dissenters were relegated to the sidelines: Ann Wright, who had worked in Afghanistan, became an “anti-war activist” and author;¹⁶⁵ John Brown, who had worked primarily in Eastern Europe, went into academia;¹⁶⁶ and Kiesling himself settled in Greece, where he worked as an author.¹⁶⁷

Although these diplomats suffered an initial loss of work, their later employment prospects—as with the Wilsons’—indicates a potential drawback to protecting dissenting diplomats: the sensationalization of dissent. Indeed, a book deal gave Kiesling a personal financial interest in keeping his name in the news.¹⁶⁸ Both Joseph and Valerie Plame Wilson wrote books in the aftermath of the leak controversy,¹⁶⁹ and, in 2010, those books were made into a movie.¹⁷⁰ The opportunity for lucrative exploitation of dissent could weaken the prospect for public dissent to be a robust check on executive power.

VII. THE CONSEQUENCES OF INACTION: THE NSA LEAK

The recent revelations of Edward Snowden demonstrate how whistleblowing continues to have substantial implications for the bureaucratic system. Although he was not a diplomat, Snowden’s case reveals the potential consequences dissent can have for the United States. One of the NSA’s missions is to “[c]ollect (including

164. Ann Wright, John Brown & Brady Kiesling, *Why We Said No: Three Diplomats’ Duty*, HUFFINGTON POST (Mar. 20, 2008), http://www.huffingtonpost.com/john-brady-kiesling/why-we-said-no-three-dipl_b_92488.html.

165. *Id.*

166. *Id.*

167. *Id.*

168. Associated Press, *Wilson Signs Book Deal on Life and Leak*, FOX NEWS (Oct. 8, 2003), <http://www.foxnews.com/story/2003/10/08/wilson-signs-book-deal-on-life-and-leak/>; see JOHN BRADY KIESLING, *DIPLOMACY LESSONS: REALISM FOR AN UNLOVED SUPERPOWER* (2006).

169. JOSEPH WILSON, *THE POLITICS OF TRUTH* (2004); VALERIE PLAME WILSON, *FAIR GAME* (2007).

170. A.O. Scott, *Marital Strife and C.I.A. Obligations*, N.Y. TIMES, Nov. 4, 2010, available at <http://www.nytimes.com/2010/11/05/movies/05fair.html?pagewanted=all&r=0>.

through clandestine means), process, analyze, produce, and disseminate signals intelligence information and data” for the United States and its allies.¹⁷¹ While working as a government contractor for the NSA in the spring of 2013, Snowden copied and removed classified intelligence documents.¹⁷² A few weeks later, two major newspapers, the *Washington Post* and the *Guardian*, published the first NSA secrets.¹⁷³ Snowden’s leak revealed that the NSA manages a large-scale data collection operation that includes the covert collection of personal data stored by major online firms, such as Google and Yahoo.¹⁷⁴ Snowden later distributed documents showing the United States spied on many countries, including China,¹⁷⁵ India,¹⁷⁶ Mexico,¹⁷⁷ Brazil,¹⁷⁸ France,¹⁷⁹ Germany,¹⁸⁰ Spain,¹⁸¹ Indonesia,¹⁸² and the Vatican.¹⁸³

171. *Mission*, NAT’L SEC. AGENCY/CENT. SEC. SERV. (Apr. 15, 2011), <http://www.nsa.gov/about/mission/index.shtml>.

172. Michael Kelly & Mike Nudelman, *The Snowden Saga: Here’s Everything We Know about the NSA’s Nightmare Leak*, BUSINESS INSIDER (Nov. 14, 2013), <http://www.businessinsider.com/everything-we-know-about-snowden-leaks-2013-11>.

173. *A Timeline of Edward Snowden’s Life*, WASH. POST, available at <http://apps.washingtonpost.com/g/page/politics/a-timeline-of-edward-snowdens-life/235/> (last visited Nov. 22, 2013).

174. Gellman & Soltani, *supra* note 92.

175. Mark Clayton, *NSA Cyber Spying on China Not a Surprise, but It’s Not Ho-Hum, Either*, CHRISTIAN SCI. MONITOR, June 14, 2013, available at <http://www.csmonitor.com/layout/set/r14/USA/Foreign-Policy/2013/0614/NSA-cyber-spying-on-China-not-a-surprise-but-it-s-not-ho-hum-either-video>.

176. Glenn Greenwald & Shobhan Saxena, *India Among Top Targets of Spying by NSA*, HINDU (Sept. 23, 2013), <http://www.thehindu.com/news/national/india-among-top-targets-of-spying-by-nsa/article5157526.ece>.

177. Jens Glüsing et al., *Fresh Leak on US Spying: NSA Accessed Mexican President’s Email*, SPIEGEL (Oct. 20, 2013), <http://www.spiegel.de/international/world/nsa-hacked-email-account-of-mexican-president-a-928817.html>.

178. *Id.*

179. Jacques Follorou & Glenn Greenwald, *France in the NSA’s Crosshair: Phone Networks Under Surveillance*, LE MONDE, Oct. 21, 2013, available at http://www.lemonde.fr/technologies/article/2013/10/21/france-in-the-nsa-s-crosshair-phone-networks-under-surveillance_3499741_651865.html.

180. Mark Mazzetti & David E. Sanger, *Tap on Merkel Provides Peek at Vast Spy Net*, N.Y. TIMES, Oct. 30, 2013, available at <http://www.nytimes.com/2013/10/31/world/europe/tap-on-merkel-provides-peek-at-vast-spy-net.html?pagewanted=1&r=0>.

181. Miguel González, *NSA Revelations: Spain Also a Victim of US Espionage*, EL PAÍS (Oct. 25, 2013), http://elpais.com/elpais/2013/10/25/inenglish/1382703360_329586.html.

182. Ewen MacAskill & Lenore Taylor, *NSA: Australia and US Used Climate Change Conference to Spy on Indonesia*, GUARDIAN, Nov. 2, 2013, available at <http://www.theguardian.com/world/2013/nov/02/nsa-australia-bali-conference-spy-indonesia>.

Soon after the initial leak, Snowden revealed his motivation to go public. In a video interview with Glenn Greenwald of the *Guardian*, Snowden said that in his position with the NSA, he was exposed to “disturbing” information about the scope of the NSA’s surveillance programs.¹⁸⁴ He indicated he told others in the NSA about his concerns but that he was ignored.¹⁸⁵ He said:

[O]ver time, that awareness of wrongdoing sort of builds up, and you feel compelled to talk about it, and the more you talk about it, the more you’re ignored, the more you’re told it’s not a problem until eventually you realize that these things need to be determined by the public, not by somebody who was simply hired by the government.¹⁸⁶

Snowden claimed he had nowhere to turn, in an organization where the perceived abuses of power were part of “the normal state of business.”¹⁸⁷ Snowden looked outside the organization, finding members of the media who were willing to publish the documents he had taken.

Snowden now resides in Russia, although the details of his living situation are unknown.¹⁸⁸ He has continued to leak information about NSA spying programs to media outlets.¹⁸⁹

Snowden’s leaks have had economic and political ramifications. Some major American technology firms are expecting lower profits because of increased distrust in emerging markets.¹⁹⁰ Countries

183. Agence France-Presse, *NSA Spied on Vatican in Run-Up to Conclave, Says Italian Magazine*, AL JAZEERA AM. (Oct. 30, 2013), <http://america.aljazeera.com/articles/2013/10/30/us-spied-on-vaticaninrunuptoconclaveitalianmagazineclaims.html>. For a timeline of Snowden’s revelations, see Joshua Eaton, *Timeline of Edward Snowden’s Revelations*, AL JAZEERA AM., <http://america.aljazeera.com/articles/multimedia/timeline-edward-snowden-revelations.html> (last visited Nov. 23, 2013).

184. Poitras, *supra* note 16.

185. *Id.*

186. *Id.*

187. *Id.*

188. Alice Speri, *Mystery Surrounds Snowden’s Secret Moscow Life*, AL JAZEERA AM. (Nov. 21, 2013), <http://america.aljazeera.com/articles/2013/11/21/mystery-surroundssnowdenssecretmoscowlife.html>.

189. Eaton, *supra* note 183.

190. Matthew Miller, *Spy Scandal Weighs on U.S. Tech Firms in China, Cisco Takes Hit*, REUTERS (Nov. 14, 2013), <http://www.reuters.com/article/2013/11/14/us-china-cisco-idUSBR E9AD0J420131114>; Yves Smith, *Wolf Richter: NSA Spying Crushes US Tech Companies in*

around the world are rethinking their reliance on the United States for Internet services, and the potential fracturing of the Internet into multiple regional networks could greatly hinder economic integration and slow innovation.¹⁹¹ In the United States, Congress held hearings on NSA activities as part of an ongoing investigation and reassessment of national security operations.¹⁹² A legal challenge to NSA activities is also ongoing; the American Civil Liberties Union is challenging part of the NSA surveillance of U.S. citizens and is seeking a preliminary injunction to prevent the NSA from continuing these practices.¹⁹³ In a separate suit brought by two American citizens seeking an injunction against the NSA, a judge ruled the NSA surveillance activities likely violated the Fourth Amendment, although he did not reach the merits of the case.¹⁹⁴

If Snowden did report his concerns about NSA surveillance to his superiors and his superiors did nothing, then Snowden's example makes the most compelling call for change in managing government employees' dissent. At a time when so much information is stored electronically, even a low-level employee like Snowden can wreak havoc on U.S. government programs. If there is no mechanism to effectively deal with cases of internal dissent, employees are more likely to publicly dissent and leak classified information. Snowden is one of a long line of dissenters who went public, and, unless U.S. dissent policy changes, he will not be the last.

Emerging Markets ("An Industry Phenomenon," Says Cisco's Chambers), NAKED CAPITALISM (Nov. 15, 2013), <http://www.nakedcapitalism.com/2013/11/wolf-richter-nsa-spying-crushes-us-tech-companies-in-emerging-markets-an-industry-phenomenon-says-ciscos-chambers.html>.

191. Matthew Taylor et al., *NSA Surveillance May Cause Breakup of Internet, Warn Experts*, GUARDIAN, Nov. 1, 2013, available at <http://www.theguardian.com/world/2013/nov/01/nsa-surveillance-cause-internet-breakup-edward-snowden>.

192. Tabassum Zakaria & Deborah Charles, *NSA Chief Defends Agency Amid U.S. Spy Rift with Europe*, REUTERS (Oct. 29, 2013), <http://www.reuters.com/article/2013/10/29/us-usa-security-nsa-idUSBRE99S03N20131029>.

193. Mark Hamblett, *Judge Hears ACLU Challenge to Phone Monitoring by NSA*, N.Y. L.J. Nov. 25, 2013, available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202629385845&Judge_Hears_ACLU_Challenge_to_Phone_Monitoring_by_NSA&slreturn=20131024164130.

194. *Klayman v. Obama*, No. 13-0881, 2013 WL 6598728, at *24 (D.C. Cir. Dec. 16, 2013).

VIII. ANALYSIS

The President holds significant power over international relations. This power stems from the President’s authority to appoint and remove the Secretary of State and other diplomats,¹⁹⁵ as well as the President’s ability to propose official treaties and bypass Congress through executive agreements.¹⁹⁶ The Founders’ intention to base American governance on checks and balances has been eroded over time in the area of foreign policy.¹⁹⁷ International agreements, which can have significant impacts on domestic governance and individual rights,¹⁹⁸ no longer need the consent of the legislature to go into effect.¹⁹⁹

This is not a new development. During the Mexican-American War, this erosion of checks and balances was already apparent. President Polk’s monopoly over foreign policy likely enabled him to incite a war.²⁰⁰ And he would have been able to continue it, were it not for the resistance of his diplomat, Nicholas Trist.

On the morning of December 4, the day Trist was scheduled to leave Mexico, he began writing a letter to his wife detailing his trip home.²⁰¹ In a postscript to the letter, Trist revealed his mind had changed over the course of the day.

Knowing it to be the very last chance and impressed with the dreadful consequences to our country which cannot fail to attend the loss of that chance, I will make a treaty if it can be

195. U.S. CONST. art. II, § 2, cl. 2; *Shurtleff v. United States*, 189 U.S. 311, 314–15 (1903).

196. U.S. CONST. art. II, § 2, cl. 2; *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003).

197. See *supra* notes 28–38 and accompanying text.

198. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 396–97 (1998).

199. See Hathaway, *supra* note 11, at 1244–46, 1255.

200. The annexation of Texas in 1845, completed by President John Tyler immediately before Polk’s inauguration, was a direct challenge to Mexican claims to Texas. MATTHEWS, *supra* note 51, at 12–13. Just months after Polk took office, he unilaterally ordered U.S. troops into the most disputed Texas territory at the border with Mexico. *Id.* U.S. soldiers eventually were ordered so deep into Mexican territory that they raised an American flag on the north bank of the Rio Grande. *Id.* at 13–15, 17. Violence, and an official declaration of war, followed shortly thereafter. *U.S.-Mexican War: Timeline Map*, PBS, http://www.pbs.org/kera/usmexicanwar/timeline_flash.html (last visited Nov. 9, 2012).

201. DREXLER, *supra* note 1, at 112.

done on the basis of the Bravo [Rio Grande], by the 32° [of latitude], giving \$15 million This determination I came to this day at 12 o'clock.²⁰²

Trist's individual initiative, triggered by his personal moral concerns, checked the President's power to control foreign relations.

Trist's way of countering the President involved more than just the courage of one diplomat. It required a complex cadre of actors, all willing to challenge executive power and the resultant specter of congressional action. President Polk had to consider Congress's power over appropriations and the accompanying power to defund the war when he received Trist's treaty.²⁰³ Competing political factions within Congress also prevented the President from burying the treaty.²⁰⁴ By inadvertently making Congress a factor, Trist was able to counter a powerful President.

However, just because the President can exercise the power to quash a diplomat's proposal does not mean the President will. Much of the debate on executive power involves how much of the President's power should be explicitly checked—procedurally or by a different branch²⁰⁵—and how much should be implicitly checked, politically.²⁰⁶ The debate on the legality of the Affordable Care Act, for example, raised questions about whether Congress could mandate citizen purchases of broccoli under the Commerce Clause of the Constitution.²⁰⁷ Should such a power be explicitly limited by a Supreme Court interpretation or implicitly limited by political

202. *Id.*

203. *Id.* at 127.

204. OHRT, *supra* note 53, at 148–49.

205. Congress can be used, even in the area of foreign policy where the President has traditionally held much power, to regulate executive power. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994).

206. The political check is “simply the impact of national policy on private activity and the imposition on the administrative and financial costs of enforcing national policies on the national electorate.” La Pierre, *supra* note 133, at 1052.

207. See James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, June 13, 2012, available at <http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-the-health-care-debate.html?pagewanted=all>.

accountability?²⁰⁸ Is the “political necessity of placating constituents”²⁰⁹ a sufficient check in itself, making branch-to-branch checks and balances unnecessary? Different mechanisms of checking power can be more or less effective given the context of a particular decision.

A. Legislative Check

One way to check executive power over foreign policy would be to enable diplomats to use Congress. Essentially, a dissenting diplomat would have to trigger congressional review.²¹⁰ A conflict between the President and Congress would have one of three potential outcomes: the President could defuse conflict with Congress and tailor the treaty through negotiation and compromise, eventually sending it to Congress for approval;²¹¹ the President could be adamant about the treaty’s language and act unilaterally, but the President would then face an uphill battle because of Congress’s control over appropriations;²¹² or the President could not act at all, allowing the treaty to die. This latter option could be overridden by Congress by trying to pass the proposal as it would a bill, potentially over the President’s veto.²¹³ Congress could be a diplomat’s ultimate tool to counter the President’s power, especially given that Congress was designed, in part, to check the President.²¹⁴

208. *See id.*

209. *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1532 (1992).

210. Congress needs a way to influence the President. This may most easily be met through the Constitution’s spending clause, which provides Congress with the power over the purse. U.S. CONST. art. I, § 8, cl. 1; *see* Peter M. Shane, *When Inter-branch Norms Break Down: Of Arms-for-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups,”* 12 CORNELL J.L. & PUB. POL’Y 503, 519–20 (2003). Additionally, the Constitution requires the President receive Senate approval to enact treaties. U.S. CONST. art. II, § 2, cl. 2. However, this requirement can be bypassed. *See* Hathaway, *supra* note 11, at 1244–46, 1255.

211. The proposal could be approved either as a treaty by the Senate or as a Congressional-Executive agreement. *See* Hathaway, *supra* note 11, at 1244–46, 1255.

212. U.S. CONST. art. I, § 8, cl. 1; *see* Shane, *supra* note 210.

213. An adamant President would have veto power over this procedure, but Congress could overturn the veto with a supermajority vote. U.S. CONST. art. I, § 7, cl. 2.

214. *See* THE FEDERALIST NO. 51 (James Madison).

However, political realities make a direct appeal to Congress less attractive. Congress is susceptible to political intrigue and the resulting deadlock.²¹⁵ The presidential veto is also a major obstacle.²¹⁶ The daunting challenge of convincing a supermajority of both the House and Senate to override the President has contributed to Congress's complacency in the area of foreign policy.²¹⁷ Adding to the challenge, multiple decisions by the Supreme Court have provided the executive branch much legal deference in interpreting grants of power and determining appropriate conduct,²¹⁸ and have limited the procedures Congress can use to check the President.²¹⁹

B. Judicial Check

Another potential check to balance the executive's power over foreign policy might be through the judiciary. But the Constitution explicitly leaves the judiciary out of the treaty-making process.²²⁰ Judicial doctrine has also weakened Congress's ability to check the President.²²¹ However, the courts could be used to support a private right of action for dissenters, providing protection for them from reprisal. When faced with that situation, the D.C. Circuit Court denied such protections for dissenters, instead choosing to protect the executive from the consequences of seeking reprisal, bolstering the President's power over foreign policy.²²² Even in the wake of judicial

215. For a recent example concerning the deadlock over the "fiscal cliff," see Richard Cowan & Jeff Mason, *Obama Promotes Tax Agenda, Congress in Stand-off*, REUTERS (Nov. 27, 2012), <http://www.reuters.com/article/2012/11/27/us-usa-fiscal-idUSBRE8A80WV20121127>. Congressional deadlock is not only a challenge of the modern era. See *The Great Senate Deadlock of 1881*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Senate_Deadlock_1881.htm (last visited Jan. 26, 2013).

216. Katyal, *supra* note 17, at 2320–21.

217. *Id.*

218. *Id.* at 2321.

219. *Id.* at 2320. Specifically, the nondelegation doctrine, which has been generally interpreted to provide the executive branch with great discretion in the administrative area, and the invalidation of the legislative veto, which had allowed one chamber of Congress to veto certain executive actions, have increased executive power in relation to congressional power. See *id.*

220. U.S. CONST. art. 2, § 2, cl. 2.

221. Katyal, *supra* note 17, at 190–91.

222. *Wilson v. Libby*, 535 F.3d 697, 701 (D.C. Cir. 2008).

abdication, “[t]he political and administrative processes may serve as substitutes for private lawsuits to deter arbitrary government action.”²²³ In *Wilson v. Libby*, the court did not foreclose an administrative remedy for those claiming to have suffered from reprisal.²²⁴

C. Administrative Check and Deliberation Requirements

The power of executive agencies leaves open the door to an administrative check on the President through the executive branch itself.²²⁵ “[B]ureaucratic overlap, civil-service protections, internal adjudication, and reporting requirements” could be means to check a President’s power, including in the area of foreign policy.²²⁶ But the President retains a large amount of power over the makeup of the executive branch,²²⁷ and particular Presidents will be more or less keen on limiting their power and the speed at which their orders can be enacted due to the imposition of a more deliberative process.²²⁸ Even in the absence of total presidential cooperation, the judicial or legislative branches could impose deliberation requirements on the President, essentially imposing internal checks within the executive branch as a substitute for external checks the other branches have failed to impose.²²⁹ But the courts have not imposed such checks, and Congress is still susceptible to deadlock. Acting alone, these two branches have each failed to check the President at crucial moments in matters of foreign policy.²³⁰

223. Krent, *supra* note 209, at 1532.

224. 535 F.3d at 711–12.

225. See Katyal, *supra* note 17, at 2322.

226. *Id.* at 2348–49.

227. See *supra* notes 45–49 and accompanying text.

228. Katyal, *supra* note 17, at 2340. For a comparison between the different preferences of two Presidents, Franklin D. Roosevelt and Dwight D. Eisenhower, see *id.* at 2325–26.

229. *Id.* at 2340–41.

230. See *id.*

D. Political Check

Dissent reporting requirements could give Congress the evidence it needs to leverage the political check and balance executive power.²³¹ Although Congress is not currently positioned to check the President in foreign policy, and the judicial branch has generally refrained from restraining the executive, the Administration is still susceptible to the influence of public opinion.²³² By harnessing public opinion, Congress might have a way of checking the President in a “nontraditional” manner, bypassing the constitutional requirement of majoritarian consensus by empowering individual members of Congress through mass media.²³³ The political check, especially through the use of media outlets, may thus be the most realistic mechanism available to diplomats today.²³⁴ Trist, Wilson, and Kiesling all made use of the political check and media.

Although all three of these diplomats helped inform and shape debate, none were protected from reprisal. President Polk fired Trist and refused to pay him, leaving Trist to struggle to support his family for most of the remainder of his life.²³⁵ The Wilsons were likely targets of a smear campaign.²³⁶ And while Kiesling has not been the victim of overt reprisal, today, he can only comment from the outside looking in.²³⁷

For the political check to be effective, dissenters must be protected from reprisal. Otherwise, the threat of being ostracized might prevent many dissenters from speaking out. Because of the

231. *See id.* at 2342.

232. *See The President's Role in the Legislative Process*, 125 HARV. L. REV. 2068, 2085 (2012), available at <http://www.harvardlawreview.org/issues/125/june12/index.php>.

233. *Id.* at 2088–89.

234. Thomas Jefferson once wrote that “the only security of all, is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure.” THOMAS JEFFERSON, *Letter to the Marquis De La Fayette*, in 3 THOMAS JEFFERSON, MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 393, 393 (Thomas Jefferson Rudolph ed., 1829). The media was meant to play an important role in the federalist system by enabling the political check.

235. OHRT, *supra* note 53, at 155–62.

236. Wilson, *supra* note 134; Stewart, *supra* note 134.

237. *See* Wright, Brown & Kiesling, *supra* note 164.

inefficacy of the current internal dissent mechanism, these protections should not only apply to those who maintain their dissent within the bureaucracy.²³⁸ Dissenters who go outside of the Dissent Channel and seek to activate the political check need real protections as well.

If dissent is protected, we must also have a mechanism to check dissenters. Dissenters have a duty to represent the American people, acting as their advocate on the international stage. A check on dissenters is important, because there is a risk the diplomat or government employee may ultimately associate with a counter-party country due to interpersonal ties or long-term exposure.²³⁹ For example, Trist's personal feelings played a meaningful role in the negotiation of the treaty ending the Mexican-American War.²⁴⁰

This check on dissenters could exist in the form of procedure. Dissenters seeking protection could be required to demonstrate they did all they could to keep dissent within the bureaucracy, but urgency or inefficacy proved these efforts futile and public dissent

238. See *supra* notes 119–28 and accompanying text.

239. For a critical discussion of how a diplomat can inadvertently become an advocate for a notion of the common good and thus compromise the negotiation process, see FRED CHARLES IKLE, *HOW NATIONS NEGOTIATE* 146 (1964). Ikle touches on a second concern in giving a diplomat wide authority. Oftentimes, a completed agreement can act as a *fait accompli* and may have a much greater motivating effect on Congress than if the agreement had simply been offered as an uncompleted proposal. *Id.* at 134–35.

240. When Trist was sixty-three and his family near destitute, Trist's wife, Virginia, sent a letter to a man who was known to be politically influential. In the letter, Virginia Trist wrote:

But, said [Nicholas Trist] to us in relating it, "Could those Mexicans have seen into my heart at that moment, they would have known that my feeling of shame as an American was far stronger than theirs could be as Mexicans. For although it would not have done for me to say so there, that was a thing for every right-minded American to be ashamed of, and I was ashamed of it, most cordially & intensely ashamed of it. This had been my feeling at all our conferences, and especially at moments when I had felt it necessary to insist upon things which they were averse to. Had my course at such moments been governed by my conscience as a man, and my sense of justice as an individual American, I should have yielded in every instance. . . . My object, throughout was, not to obtain all I could, but on the contrary to make the treaty as little exacting as possible from Mexico, as was compatible with its being accepted at home."

Letter from Virginia Trist to Mr. Tuckerman (Aug. 23, 1863, as an enclosure to a letter dated July 8, 1864) (on file with the University of North Carolina Wilson Library under Nicholas Philip Trist Papers 1765–1903, Collection No. 02104, folder 225), *available at* http://www2.lib.unc.edu/mss/inv/t/Trist,Nicholas_Philip.html# folder_225#1 (Folder 225, Scan 10-27, 20).

necessary.²⁴¹ If dissenters receive no protection, the current dissent mechanisms will continue to be ineffective, and the President will maintain what is essentially a monopoly power over the country's foreign policy.

E. Designing an Effective Dissent Process

Ultimately, the U.S. government should use the passion of dissenters to improve policy. Dissenters will not have to go outside the internal bureaucracy if the process allows dissenters to effectively voice their concerns. A collaborative approach to designing a complaint process could potentially improve upon the current system by involving diverse and experienced stakeholders.²⁴² Because the current process fails to address workers' concerns, whether these workers are diplomats or lower-level technicians, a carefully designed process could proactively address disputes by giving disgruntled workers a "safe space" to raise issues and the confidence that their views will be heard.²⁴³

The most essential step in creating a new process for dissent will be identifying the proper stakeholders.²⁴⁴ Process designers need to be creative to deal with the complexity of dissent, and must involve many stakeholders from every branch of government. Indeed, involving stakeholders from every branch might spur proposals for more cross-branch dissent mechanisms.

One proposal, for example, allows dissenters in the executive branch to seek access to Congress or the courts if their voices are neglected within their agencies. A dissenter could simply have the formalized and protected option of going to Congress or a court with a dissent paper confidentially. This option would strengthen the

241. For example, the whistleblowing provision of Sarbanes-Oxley requires claimants to exhaust administrative remedies through the Occupational Safety and Health Administration before seeking court review. Beverley H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 3, 40-43 (2007). Congress or agencies could develop a mechanism based on the same principles for foreign policy dissenters.

242. NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES 132-35 (2013).

243. *Id.* at 123-25.

244. *Id.* at 70-73.

Dissent Channel process now in action. Foreign Service superiors would know dissent ignored within the Department could quickly be transmitted to another branch with the ability to check executive power. If the executive refused to submit to this check, a congressional committee could release the dissent document to the media, or, under specific circumstances, a court could publish its opinion, activating a political check. The government could design a process that uses confidentiality and openness appropriately to improve the balance of foreign relations power in the federalist system.²⁴⁵

IX. CONCLUSION

The United States system of government was based on shared responsibility, where the interests of one branch would be countered by another.²⁴⁶ As the Republic has aged, the President, insufficiently checked by Congress and the courts, has consolidated power over foreign policy. Bureaucratic reforms could improve the system in place today by imposing checks from within the executive branch, but the President maintains much control over the components of the Administration, and those with power are often reluctant to give up power. To balance the terms of engagement between the coordinate branches of government in this era, Congress and dissenters, together, must turn to the political check, exploiting the political accountability of the President to curb the office’s power.

The government should design a new process through which employees can safely register dissent. By including the option for dissenters to go outside the executive branch, executive branch leaders will have a greater incentive to create a collaborative work environment that addresses dissent proactively and uses it constructively. Even with a better dissent process, not everyone will agree on every issue. But an effective dissent process will subject leaders to external checks from the other branches of government *and* from the people when those leaders abuse their power or are unwilling to justify policies that affect the American people.

245. *See id.* at 180–85.

246. THE FEDERALIST NO. 51 (James Madison).

When acting alone, Congress, courts, and dissenters have each been unable to check the executive. Congress and the courts have authorized wide presidential discretion amidst the backdrop of political deadlock, and dissenters can only get so far as media outlets can propel them. In short, Congress has the political power but lacks a cohesive message, and dissenters have a cohesive message but little political power. The federal power generated by either the legislative or judicial branch, in combination with dissenters—providing political or legal backing to a compelling criticism of executive power—could be sufficient to constructively challenge the executive and return balance to the Republic.