ARTICLE

THE SIGNIFICANCE OF A JUDICIAL POWER TO IDENTIFY MAJOR QUESTIONS AND SHIELD STATE SECRETS FOR THE FUTURE OF FOREIGN AFFAIRS AND NATIONAL SECURITY GOVERNANCE

Karen C. Sokol[*]

ABSTRACT

Foreign relations and national security law scholars devote significant attention to the expansion of executive power resulting from broad delegations of statutory authority or inaction by Congress and from the considerable deference that courts often afford the executive in cases challenging its actions in the spheres of foreign affairs and national security. Recent decisions of the Roberts Court, however, make clear that scholars should pay just as much—and in some respects perhaps more—attention to the expansion of judicial power. In this essay, I show why by comparing the Court's statutory analyses in two cases from the first full term of the current six-justice conservative majority and explicating the larger jurisprudential shift that they portend and its import for the future of statutory foreign affairs and national security governance in the 21st century. The vision of the distribution of federal powers that the Court telegraphs in these two decisions—one involving a grant of executive authority in the Clean Air Act and the other a check on executive authority in the Foreign Intelligence Surveillance Act—does not bode well for statutory foreign affairs governance in a democracy and in an increasingly complex global landscape. I use my critique of the Court's "structural" constitutional avoidance reasoning in statutory interpretation—that is, based on federal separation of powers—to provide a fresh perspective on the role of the Court in foreign affairs and national security governance.

CONTENTS

[*] Legislative Attorney, Congressional Research Service (CRS). The views expressed in this Article are those of the author and are not presented as those of CRS or the Library of Congress. I completed this Article before I began my employment at CRS.

INTRODUCTION

Historically, courts have frequently justified treating cases involving executive actions in the areas of foreign affairs and national security differently from those challenging domestic actions—often called foreign affairs and national security "exceptionalism"[1]—based on reasoning that emphasizes the need for dispatch, unity, and secrecy to which the presidency is well-suited, and the judiciary antithetical. In such cases, courts decline to weigh in more frequently, and, when they do, often accord the executive more deference than they do in cases involving challenges to executive actions in the domestic arena.[2] One important manifestation of this executive "deference differential" is courts' framing of the relative roles of Congress and the executive in policymaking and of the judiciary and the executive in statutory interpretation. Emblematic of this is the Supreme Court's 1936 opinion in *United States v. Curtiss-Wright Export Corp.*,[3] in which the Court declined to extend the restrictions that it had placed on Congress's power to delegate authority to the executive in two cases decided just the previous year on the ground that, unlike *Curtiss-Wright*, those cases involved only domestic powers, and did not implicate "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[4]

Although the Court soon significantly relaxed the limitations on congressional authority to delegate domestic powers and began according

---

[1] *See* Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COL. L. REV. 1089, 1096 (1999) (coining the phrase "foreign affairs exceptionalism" and defining it as "the view the federal power over external affairs [is] in origin and essential character different from that over internal affairs"); *see also* Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 157 (2017) (documenting how "courts have similarly treated national security secrecy claims as procedurally exceptional over a variety of legal contexts). *But see* Aziz Huq, *Against National Security Exceptionalism*, 2009 S. CT. REV. 225, 226 (2009) ("argu[ing] that 'national security exceptionalism' finds no empirical support in at least one important class of post-9/11 cases: challenges to emergency detention policies").

[2] *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VIR. L. REV. 649, 663 (2000) (identifying "various categories of deference" and concluding that they "amount to a very deferential approach by United States courts in the foreign affairs area," and that "[c]ertainly the approach seems more deferential to the Executive, on average, than the approach in cases conventionally labeled as 'domestic' in nature").

[3] 299 U.S. 304 (1936).

[4] *Id.* at 319.

considerable deference to the executive's interpretations of its domestic authority,[5] overall there has remained a judicial deference differential between assertions of executive authority in the domestic and foreign spheres.[6] Some scholars have begun to ask whether that might change, however, in light of the shift in administrative law currently being driven[7] by the current Supreme Court majority's suspicion of the administrative state.

The Court kicked its administrative law shift into high gear in *West Virginia v. EPA*,[8] a case involving a challenge to an Environmental Protection Agency (EPA) regulation limiting carbon dioxide emissions from power plants pursuant to the agency's Clean Air Act authority.[9] The majority held that the statute did not give the EPA the authority it asserted, dispensing with the deference traditionally afforded to reasonable agency interpretations of ambiguous statutory provisions and adopting a separation-of-powers-based presumption that Congress does not delegate authority to agencies to determine "major questions of economic or political significance"—a presumption the Court calls the "major questions doctrine" (MQD).[10] Even on these vague terms, it makes sense to ask about the fate of the greater deference courts tend to give executive actions in foreign affairs and national security. After all, such actions are typically taken pursuant to broadly worded statutes[11] and are often even more economically and politically consequential than domestic actions. Some scholars have posited that *West Virginia* will likely not impact the deference applied in cases involving foreign and national

---

[5] *See* Loving v. United States, 517 U.S. 748, 771 (1996) ("Though in 1935 we struck down two delegations . . . we have since upheld, without exception, delegations under standards phrased in sweeping terms.") (citing A.LA. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)).

[6] *See* Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. 322, 328 (2015) (arguing that some recent Supreme Court decisions suggesting a greater willingness to approach foreign affairs cases on a more equal footing with domestic cases do not yet represent a significant change, as "foreign affairs exceptionalism is still the norm . . . outside the Supreme Court," and the Court has demonstrated an "unwillingness" to intervene in those lower court decisions through "*systematic* denials of certiorari"); Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORD. L. REV. 827, 829 (2013) ("One of the core tenets of national security doctrine is that courts play a deeply modest role in shaping and adjudicating the executive's national security decisions. In most cases, courts use abstention doctrines and other tools to decline to hear such cases on the merits. When courts do hear these cases, they often issue decisions that are highly deferential to executive choices.").

[7] *See* Blake Emerson, *The Binary Executive*, 132 YALE L.J. F. 756, 756–57 (2022) ("The old administrative law is ailing, and the new is not mature enough to take its place . . . The Court has greatly intensified its own scrutiny of administrative policymaking, abandoning deference on questions of law and at times taking a steel-hard look at questions of policy and fact as well.").

[8] 597 U.S. 697 (2022).

[9] *Id*. at 706–707.

[10] *See infra* Section I.A.

[11] *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 45 (1990) ("The vast majority of the foreign affairs powers the president exercises daily are not inherent constitutional powers, but rather, powers that Congress has expressly or implicitly delegated to him by statute.").

security policies, pointing to qualifications in recent cases involving delegations of domestic authority and to majority opinions sanctioning sweeping assertions of executive authority in foreign affairs and national security pursuant to broad statutory delegations based on reasoning akin to that in *Curtiss-Wright*.[12] Others have predicted that, because a distinction between the domestic and foreign is increasingly less viable in a globalized economy, the MQD could very well restrict the executive's authorities related to foreign affairs and national security.[13] In this article, I show that, somewhat paradoxically, it appears that both positions will be right and also that the picture is more complex in at least two respects.

Initially, a much less high-profile but equally significant decision handed down the same year as *West Virginia* that has not been discussed in this context—*FBI v. Fazaga*[14]—suggests not only that a deference differential will remain, but that it could be even sharper than at the time of *Curtiss-Wright*, at least between domestic areas and those that the Court considers to be within the traditional domain of foreign affairs and national security. In *Fazaga*, a case involving a challenge to an FBI surveillance operation, the Court appears to have changed one of its long-standing approaches to statutory interpretation in a way that favors broad executive power in these areas.[15] Second, at the same time, the MQD ushered in by *West Virginia* significantly constrains the executive's foreign policy discretion given that domestic legal protections are required both to comply with many obligations under modern international law and to respond to global threats. Indeed, climate change is poised to be one of the central foreign policy issues impacting countries' global political credibility and thus their ability to effectively engage with international law and governance across myriad areas and venues—particularly high-emitting countries such as the United States. *West Virginia* itself thus had significant foreign policy implications for the Biden administration.

At first blush, it may seem that *West Virginia* and *Fazaga* are unrelated. Indeed, although the scholarship on *West Virginia* continues to mount, the Court's

---

[12] *See* Elena Chacko, *Toward Regulatory Isolationism*? *The International Elements of Agency Power*, 57 U.C. DAVIS L. REV. 57, 91–93 (2023); Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1137–38 (2021).

[13] *See* Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 61, 72–78 (2023) (arguing that because a globalized economy has made it effective to deploy "a wide range of economic measures designed to punish, cripple and deter American enemies" that are implemented by agencies pursuant to broad grants of statutory authority and that "have foreign and domestic components," such measures "would likely become unavailable or would be substantially curtailed in terms of their usefulness should the MQD be applied to them"); Chacko, *supra* note 12, at 46–47 (arguing that agencies may be able to consider a wide range of "international factors" in decision-making that has domestic impacts without triggering the MQD, but that it will likely result in limitations in some cases); Mariano-Florentino Cuéllar & Aziz Z. Huq, *The Hidden Judicial Springs of U.S. Foreign Policy*, 2022 S. CT. REV. 243, 264–65 (2022) ("[T]he likely future effect of the new major questions doctrine will be to disable the federal government from action on many important policy questions with geopolitical implications.").

[14] 595 U.S. 344 (2022).

[15] *See infra* Part II.

statutory analysis in the case has not been compared with that in *Fazaga*.[16] In comparing the analyses, I show that their similarities and differences provide important insights about the future of statutory foreign affairs and national security governance. Certainly, the full impact of the cases remains to be seen as they are invoked by litigants, applied by lower courts, and revisited by the Supreme Court in other contexts. But at least four things are clear.

First, on the one hand, the Supreme Court has further enhanced the power of the executive to act unilaterally in areas related to national security and the military with a robust state secrets privilege—one which the Court has suggested Congress would be hard-pressed to limit even with sufficiently clear statutory language and might be constitutionally prohibited from limiting at all. Second, on the other hand and based on similar reasoning, the Court has significantly curtailed the foreign policy discretion of the president in areas that will become increasingly important in addressing global threats and in which compliance with international law requires strong domestic regulation. Here again, the Court strongly suggested that Congress would be hard-pressed to delegate with sufficiently clear language, and perhaps would be constitutionally prohibited from doing so at all.

Third, both in diminishing executive authority in some areas, such as climate, public health, and human rights, which are highly important in modern cross-cutting foreign policies, and buttressing it in what the Court undoubtedly perceives as "true" foreign matters—namely, those that are related to national security and the military and that are often abused—the Court has significantly limited the ability of Congress both to empower and to limit the executive in ways essential to the workability of foreign affairs and national security governance. In both *West Virginia* and *Fazaga*, the Court quietly departed from long-standing precedent in applying what I call "structural" constitutional avoidance reasoning in statutory interpretation—that is, reasoning based on the distribution of the powers of the federal government. The Court uses this reasoning to require a level of clarity by Congress that would render an effective policymaking dynamic between the two branches impossible.

Finally, in doing all three of these things, the Court thereby arrogated significant foreign and national security policymaking power to itself—albeit in the thinly veiled guise of merely calling "balls and strikes"[17] in the game played between Congress and the executive.

---

[16] *Cf.* Shirin Sinnar, *A Label Covering a "Multitude of Sins": The Harm of National Security Deference*, 136 HARV. L. REV. F. 59, 72–73 (2022) (powerfully critiquing *Fazaga* and other decisions in which the Court has invoked national security to dismiss suits against the government and contrasting them broadly with the Court's striking down of agency actions taken in response to climate change and the COVID-19 pandemic, but not comparing the Court's reasoning in each case or addressing their foreign policy consequences).

[17] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong., at 56 (GPO, Sept. 12–15, 2005), https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-

This article proceeds in four parts. The first section of Part I explains the MQD—which the Court applied as such for the first time in *West Virginia v. EPA*—with a focus on the Court's structural constitutional avoidance reasoning in its statutory analysis. Section B then explicates the considerable foreign policy import of *West Virginia* and the MQD given that many modern international laws regulate states' domestic actions and that compliance with these laws is an increasingly important component of a state's ability to influence international law and governance. This is particularly so with respect to climate change, which has implications for the meaning of multiple international laws and which states are increasingly incorporating into their foreign and national security policies. It is a particularly critical foreign policy issue for the United States as the highest historical emitter and a country that seeks to present itself as a leader in protecting international peace and security.

Part II turns to *FBI v. Fazaga***,** beginning with a section that parallels Section A of Part I to show that, as in *West Virginia*, the Court in *Fazaga* omits long-standing precedent without explanation and uses structural constitutional avoidance reasoning in its statutory interpretation to reach the polar opposite result that it did in *West Virginia*: namely, according virtually complete deference—if not outright control—to the executive. I argue that in doing so, the Court not only, as some scholars have maintained, expands executive power, but also judicial power. Section B then explains the deleterious implications of *Fazaga* for national security and foreign affairs governance.

The first section of Part III distinguishes between structural constitutional avoidance—that is, adoption of a statutory interpretation on the ground that it avoids a potential separation-of-powers violation—and "rights" constitutional avoidance—that is, adoption of a statutory interpretation on the ground that it avoids a potential rights violation. While both variants may present the risk of judicial overreach, the risk is much higher in the case of structural avoidance because of the judiciary's important constitutional role in rights protection. Section B then shows how this heightened risk of structural avoidance is starkly illustrated in *Fazaga*, *West Virginia*, and *Biden v. Nebraska*,[18] the Court's latest MQD case in which it struck down the Biden administration's student debt relief program. In light of the allocation of authority among the federal branches of government that the Court outlines in the cases, it appears that the deference differential between executive actions that the Court sees as related to national security and foreign affairs, on the one hand, and to domestic actions, on the other, could be even more extreme than at the time of *Curtiss-Wright*. In contrast to the 1930s, however, the restrictions on the executive's domestic authority are much more likely to also limit increasingly critical aspects of the executive's discretion in foreign policy and

---

ROBERTS.pdf [https://perma.cc/8ZJN-ZNZV] (opening statement of Chief Justice John Roberts) (". . . I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

[18] 143 S. Ct. 2355 (2023).

security, such as that related to climate change, public health, and other human rights protections.

Part IV highlights the different perspective on the role of the judicial power in foreign affairs and national security governance that the foregoing analysis provides for thinking both about past decisions using "exceptionalism" reasoning to defer to the executive and about the likely domestic constitutional as well as international impact of the Roberts Court going forward.

I. WEST VIRGINIA V. EPA

A. The Power to Identify Major Questions

A majority of the Supreme Court applied the "major questions doctrine" as such for the first time in *West Virginia v. EPA*[19]—a case brought by a coalition of coal companies and states challenging an Environmental Protection Agency (EPA) regulation limiting carbon dioxide emissions from power plants issued at the end of the Obama administration's second term.[20] Even though the majority acknowledged that the Clean Air Act provision at issue provided the EPA with "a colorable textual basis" for the authority to issue the rule,[21] the majority did not apply (or even mention) *Chevron v. Natural Resources Defense Council*,[22] a 1984 case in which the Court held that it would defer to agencies' reasonable interpretations of the authority delegated to them in statutes that they administer.[23] The *West Virginia* case, the majority concluded, "call[ed] for a different approach" because it was one in which "the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[24] In such circumstances, "a merely plausible textual basis" for the agency's authority is not enough: "The agency instead must point to clear

[19] 597 U.S. 697 (2022); *see* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 275 (2022) ("The EPA case marked the first occasion that the Court stated that it was applying what it referred to as the 'major questions doctrine.'"). The Court's grant of certiorari was curious, to say the least, given that the Obama administration regulation had never been implemented, and the Biden administration stated that it had no intention of ever doing so and instead planned to propose a new rule. *See West Virginia*, 597 U.S. at 715; *see also* Karen C. Sokol, *The Supreme Court's Plan to Block Climate Action We Haven't Even Taken Yet*, SLATE, Jan. 25, 2022, https://slate.com/news-and-politics/2022/01/supreme-court-wv-epa-climate-doom.html [https://perma.cc/3RJF-V2MU] (explaining the history of the rule).

[20] 597 U.S. at 714.

[21] *Id.* at 722.

[22] 467 U.S. 837 (1984).

[23] *Id.* at 843–44 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[24] *West Virginia*, 597 U.S. at 721 (internal quotations and citations omitted and second alteration in original).

congressional authorization for the power it claims."[25] Thus, once a court has determined that the asserted authority implicates a major question, the agency is all but certain to lose.[26]

Scholarship attempting to discern the basis of this "different approach" in "major questions" cases continues to mount,[27] as clear statements in the majority's reasoning are few and far between.[28] According to the Court, "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there."[29] In his concurrence, Justice Neil Gorsuch emphasized the separation-of-powers aspect of the MQD: "Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear statement rules, Article I's Vesting Clause[30] has its own: the major questions doctrine."[31] That is, the major questions doctrine amounts to a canon of constitutional avoidance—specifically, the avoidance of a nondelegation problem.[32] Gorsuch made this clear in another concurrence in a 2022 case in which the Court issued an emergency stay of the Occupational Safety and Health Administration's (OSHA) COVID-19 rule mandating that employers require employees to either get vaccinated or test and wear masks at work.[33] "[I]f the

---

[25] *Id.* at 723 (internal quotations omitted).

[26] *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VIR. L. REV. 1009, 1088 (2023) (explaining why "[t]he major questions doctrine . . . seems to embed deregulatory preferences in the Court's methods of statutory interpretation").

[27] *See, e.g.*, *id.* at 1041 (arguing that the MQD operates as a "'substantive' canon of [statutory] interpretation . . . not keyed to the meaning of the statute but rather to broader values" in contrast to "semantic canons that focus on the text or rules of grammar to interpret language no matter the subject area or design of the statute"); Sohoni, *supra* note 19, at 314–16 (arguing that the MQD is a "clear statement rule" that the Court has failed to clearly identify the contours of and the justifications for, which amounts to "a type of exertion of [judicial] power" at the expense of the political branches); Beau Baumann, *Administrative Americana*, 111 GEO. L.J. 465, 471–72, 498–506 (2022) (arguing that the MQD represents "a massive shift in interpretive authority from agencies to the Supreme Court" driven by "cynical or declinist views of Congress" by the courts and the academy).

[28] *See* Sohoni, *supra* note 19, at 264 ("There's no small irony in the fact that the major questions quartet made this shift in the methodology of deference—a matter of 'vast economic and political significance' if ever there was one—without *clearly stating* it was doing so.").

[29] *West Virginia*, 597 U.S. at 723 (internal quotations omitted).

[30] "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

[31] *West Virginia*, 597 U.S. at 723 (Gorsuch, J., concurring, joined by Alito, J).

[32] As Professor John Manning has explained, the nondelegation "doctrine bars Congress from delegating its powers to the executive," and the Court "has matter-of-factly attributed that principle to the constitutional separation of powers and, more particularly, to the fact that Article I of the Constitution vests all legislative powers in Congress." John F. Manning, *The Nondelegation Doctrine As a Canon of Avoidance*, 2000 S. CT. REV. 223, 238 (2000); *see also id.* at 242–45 (arguing that the Court's use of "major questions" reasoning in some early cases in effect amounted to the application of a canon of constitutional avoidance based on the separation of powers).

[33] NFIB v. OHSA, 595 U.S. 109, 112–13 (2022) (Gorsuch, J., concurring, joined by Thomas, J. & Alito, J.).

statutory subsection the agency cites really *did* endow OSHA with the power it asserts," Gorsuch stated, then "that law would likely constitute an unconstitutional delegation of legislative authority."[34] Three of the other justices in the *West Virginia* majority have signed on to such reasoning by Gorsuch in this and other recent opinions.[35] But even the more ambiguous version of the MQD applied by the majority at the very least "operates" as a canon of constitutional avoidance that allows a majority of the Court to enforce its vision of the proper allocation of executive and legislative authority through determining what a statute means.[36]

Yet the constitutional avoidance reasoning of the MQD is in tension with the standard that the Court has long used to determine when a statutory grant of authority amounts to an unconstitutional delegation; namely, that Congress must provide agencies with "an intelligible principle"—and not a clear statement—to guide their decision-making.[37] It appears, then, that the MQD operates as another *de facto* nondelegation rule that can effectively trump the intelligible-principle rule—albeit obliquely through constitutional avoidance reasoning in statutory interpretation. Further, rather than being content-neutral like the intelligible-principle rule, the MQD by its terms automatically calls into question any delegation pursuant to broad statutory authority to regulate economically and politically powerful actors.[38] Such a rule is highly problematic in statutory governance—whether domestic, foreign, or, as is increasingly the case, both.

---

[34] *Id.* at 126 (Gorsuch, J., concurring); *see also* Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J. & Thomas, J.) ("Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.").

[35] *See supra* notes 31, 33, & 34.

[36] *See* Deacon & Litman, *supra* note 26, at 26–27; *see also* Patrick J. Sobkowski, *Of Major Questions and Nondelegation*, NOTICE & COMM., July 3, 2023, https://www.yalejreg.com/nc/of-major-questions-and-nondelegation-by-patrick-j-sobkowski/ [https://perma.cc/244S-JFKJ] ("[T]he MQD as currently formulated is an exercise in 'strategic ambiguity', by which I mean that the Court's formulation of the doctrine is deliberately vague . . . . It allows the Court to seemingly constrain itself to statutory—rather than constitutional—interpretation."). In a concurrence in *Biden v. Nebraska*, a subsequent MQD decision discussed *infra*, Section III.B, Justice Barrett maintained that the MQD should not be understood as a "substantive" canon of constitutional avoidance but rather as a "commonsense" approach to statutory interpretation that takes "context" into account. 123 S. Ct. at 512–15. But since the "context" for purposes of the MQD is still, according to Barrett, "the Constitution's structure," *id.* at 515, such an interpretive tool still would seem to at least operate as a canon of constitutional avoidance.

[37] *See, e.g.*, *Loving*, 517 U.S. at 71 ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes."); J.W. Hampton v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the [agency] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

[38] *Cf.* Deacon & Litman, *supra* note 26, at 38 ("[T]he Court's attention to whether an agency rule is politically controversial allows ideological opponents of particular policies to effectively unmake portions of a statute delegating authority to an agency.").

B. West Virginia*'s Foreign Policy and National Security Fallout*

In modern international law, domestic regulation is often necessary to fulfill obligations that are important to garnering legitimacy and influence in international politics. This has been the case with human rights since the end of World War II,[39] and it is now clear that climate change will be increasingly prominent throughout myriad areas of international law[40] and in states' national security and foreign policies.[41] President Biden made its foreign policy significance

---

[39] *See* Mary L. Dudziak, *Desegregation As a Cold War Imperative*, 41 STAN. L. REV. 61, 65 (1988) ("Federal government policy on civil rights issues during the Truman Administration was framed with the international implications of U.S. racial problems in mind. And through a series of amicus briefs detailing the effect of racial segregation on U.S. foreign policy interests, the Administration impressed upon the Supreme Court the necessity for world peace and national security of upholding black civil rights at home."); *see also generally* Jean Galbraith & David Zaring, *Soft Law As Foreign Relations Law*, 99 CORNELL L. REV. 735, 748 (2014) (describing the "sharp increase in the regulation of domestic behavior" by treaties and other international agreements); *cf. id.* at 740 ("U.S. agencies . . . have become international actors in order to fulfill their own domestic regulatory missions.").

[40] *See, e.g.*, I.C.J. Acts & Docs Press Release, The General Assembly of the United Nations Requests an Advisory Opinion from the Court on the Obligations of States in Respect of Climate Change (Apr. 19, 2023), https://www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf [https://perma.cc/4SYA-YMZJ] (announcing the Court's receipt from the General Assembly of a request for an advisory opinion on state obligations relating to climate change and the consequences of breaching them under multiple sources of international law, including not only international climate treaties, but also the U.N. Charter, the law of the sea, human rights treaties, and customary international law); Security Council Report, *Energy, Climate and Natural Resources*, https://www.securitycouncilreport.org/energy-climate-and-natural-resources/ [https://perma.cc/9V3W-6RM6] (last visited June 15, 2023) (listing Security Council meetings and actions related to climate change); REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE CONTEXT OF CLIMATE CHANGE 1, U.N. Doc. A/77/226 (2022), https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change ("Throughout the world, human rights are being negatively affected and violated as a consequence of climate change."); INT'L L. COMM'N, SEA-LEVEL RISE IN RELATION TO INTERNATIONAL LAW 15–16, U.N. Doc. A/CN.4/L.972 (July 15, 2022), https://legal.un.org/ilc/guide/8_9.shtml [https://perma.cc/24WL-6SYD] (examining the implications of sea level rise resulting from climate change on statehood and protection of affected persons); WORLD TRADE ORG., CLIMATE CHANGE AND INTERNATIONAL TRADE 9 (2022), https://www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf [https://perma.cc/DUS6-C2BL] (reporting on "how international trade might exacerbate climate change, how the consequences of climate change might alter trading patterns and relationships, and how trade could be a force multiplier for the global response to the climate crisis").

[41] *See e.g.*, FEDERAL FOR. OFFICE, INTEGRATED SECURITY FOR GERMANY: NATIONAL SECURITY 16 (2023), https://www.nationalesicherheitsstrategie.de/National-Security-Strategy-EN.pdf [https://perma.cc/R98U-CESQ] ("Curbing the climate crisis and dealing with its consequences is one of the fundamental and most pressing tasks of this century."); PACIFIC ISLANDS FORUM, THE PACIFIC SECURITY OUTLOOK REPORT 2022–2023 5 (2022), https://www.forumsec.org/wp-content/uploads/2023/01/Pacific-Security-Outlook-Report-2022-2023.pdf [https://perma.cc/VYN3-NBQM] (listing climate change and natural disasters as the top two key focus areas, before cybercrime and transnational organized crime); NATO, CLIMATE CHANGE AND SECURITY IMPACT ASSESSMENT 3 (2d ed. 2023), https://www.nato.int/nato_static_fl2014/assets/pdf/2023/7/pdf/230711-climate-security-impact.pdf [https://perma.cc/2WEZ-ZHL3] ("Climate change is a 'threat multiplier' that significantly shapes

clear by reentering the Paris Agreement on his first day in office[42] and declaring that "climate considerations shall be an essential element of United States foreign policy and national security" in one of his first executive orders.[43] The Director of the Office of National Intelligence subsequently published the first National Intelligence Estimate on Climate Change,[44] and climate features prominently in many of the country's diplomatic initiatives and political commitments.[45]

Importantly, climate is one of the highest priorities of the majority of the world's countries, which are located in the so-called Global South.[46] As made clear by the essential role of the General Assembly in the international response to Russia's use of its veto power to prevent Security Council action in response to its

---

the Alliance's strategic environment . . . . The effects of climate change will be felt across NATO's operating domains."); Press Release, White House, Fact Sheet: Prioritizing Climate in Foreign Policy and National Security (Oct. 21, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/21/fact-sheet-prioritizing-climate-in-foreign-policy-and-national-security/ [https://perma.cc/8SHC-MWHB] (announcing the "release[] [of] a suite of analyses from core national security and foreign policy components of the U.S. Government, in coordination with the National Security Council staff, that will serve as a foundation for our critical work on climate and security moving forward").

[42] Press Release, U.S. State Dep't, The United States Officially Rejoins the Paris Agreement (Feb. 19, 2021), https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/ [https://perma.cc/HQ4H-T7Q8].

[43] E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619, 7619 sec. 101 (Jan. 27, 2021), https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf [https://perma.cc/LDK7-GSD9].

[44] NAT'L INTELLIGENCE COUNCIL, CLIMATE CHANGE AND INTERNATIONAL RESPONSES INCREASING CHALLENGES TO US NATIONAL SECURITY THROUGH 2040 (2021), https://www.dni.gov/files/ODNI/documents/assessments/NIE_Climate_Change_and_National_Security.pdf [https://perma.cc/P2PV-2LKF].

[45] *See* U.S. State Dep't, *supra* note 42 ("Climate change and science diplomacy can never again be 'add-ons' in our foreign policy discussions."). Climate is one of the few areas in which the United States has sought to collaborate with China even as tensions between the countries continue to rise. Lisa Friedman, *Kerry Says U.S. Must Set Aside Politics to Tackle Climate Change*, N.Y. TIMES (July 17, 2023), https://www.nytimes.com/2023/07/17/world/asia/john-kerry-china-climate.html [https://perma.cc/542Y-W3L5]. Climate also features prominently in U.S. diplomatic and security initiatives with African countries, *see* Press Release, White House, Fact Sheet: U.S.-Africa Partnership in Supporting Conservation, Climate Adaptation and a Just Energy Transition (Dec. 13, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/13/fact-sheet-u-s-africa-partnership-in-supporting-conservation-climate-adaptation-and-a-just-energy-transition/ [https://perma.cc/4A4G-M444], and Pacific Island states, *see* Press Release, White House, Fact Sheet: Roadmap for a 21st-Century U.S.-Pacific Island Partnership (Sept. 29, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/29/fact-sheet-roadmap-for-a-21st-century-u-s-pacific-island-partnership/ [https://perma.cc/94GZ-T46X] (describing the inaugural U.S.-Pacific Island Summit and pledging, *inter alia*, that "[t]he United States will continue to play a leading role in accelerating global efforts to combat the climate crisis in this decisive decade, recognizing the existential threats this crisis presents to the Pacific Islands").

[46] *See* Shivshankar Menon, *Out of Alignment: What the War in Ukraine Has Revealed about Non-Western Powers*, FOREIGN AFF. (Feb. 9, 2023), https://www.foreignaffairs.com/world/out-alignment-war-in-ukraine-non-western-powers-shivshankar-menon [https://perma.cc/89HE-KQB5].

invasion of Ukraine,[47] the United States must meaningfully engage with countries of the Global South if it wants to effectively engage in international law and governance.[48] Although international climate finance for developing countries is a key part of effective climate foreign policy and will likely not be affected by the MQD,[49] significant emissions reduction is also essential given that the United States is the highest historical emitter and thus the most responsible for the climate impacts currently suffered by communities all over the world.[50] And the MQD by its terms makes regulation to achieve meaningful emissions reduction—which is inevitably "economically and politically significant" in a fossil-fuel based economy—suspect.

The regulation at issue in *West Virginia* was central to the Obama administration's greenhouse gas emission reduction commitment under the Paris Agreement,[51] and the Biden administration's updated Paris commitment also incorporates regulation by multiple agencies that will be vulnerable to MQD challenges.[52] Further, such regulations, along with many other environmental,

---

[47] *See* Rodrigo Saad, *The United Nations in Hindsight: The Security Council, One Year After Russia's Invasion of Ukraine*, JUST SEC. (Jan. 31, 2023), https://www.justsecurity.org/84952/the-united-nations-in-hindsight-the-security-council-one-year-after-russias-invasion-of-ukraine/ [https://perma.cc/WP82-QSDT] ("The [Security Council] gridlock over Ukraine brought renewed energy to the debate over reforming the Security Council, as member states sought avenues for greater cooperation and accountability through the General Assembly.").

[48] *See e.g.*, Aude Darnal, *The U.S. Is Asking the Wrong Questions About the Global South*, WORLD POL. REV. (May 24, 2023), https://www.worldpoliticsreview.com/foreign-policy-us-diplomacy-multilateralism-global-south-biden/ [https://perma.cc/S2XH-VW8Z] ("[F]rom a diplomatic, political and security vantage point, U.S. power cannot function without the Global South . . . . Comprising approximately 70 percent of the United Nations, for example, these countries are essential to building coalitions and passing resolutions in the General Assembly."); Alec Russell, *This Is the Hour of the Global South*, FIN. TIMES (May 19, 2023), https://www.ft.com/content/53d6a7ef-2aa8-4607-a8c6-1c28ffb96c16 [https://perma.cc/XV24-D25T] (noting that the increasing significance of many countries of the Global South in international law and governance throughout the 21st century has been "turbocharged" by the war in Ukraine and that western nations should adjust accordingly by "finally commit[ting] to reforms of the global order and pick[ing] [their] words more carefully").

[49] The process involves presidential budget requests, congressional appropriations, and distribution through bilateral and multilateral mechanisms by the State and Treasury Departments and the U.S. Agency for International Development. *See* CONG. RES. SERV., IF12036, U.S. INTERNATIONAL CLIMATE FINANCE: FY 2024 (Apr. 24, 2023), https://crsreports.congress.gov/product/pdf/IF/IF12036 [https://perma.cc/PYN7-SXY4]. The United States has consistently fallen far short in providing its share of the necessary funding. *See* Joe Thwaites et al., *US International Climate Finance Fails Again to Meet the Moment*, NAT. RES. DEF. COUNCIL EXPERT BLOG (Dec. 21, 2022), https://www.nrdc.org/bio/joe-thwaites/us-international-climate-finance-fails-again-meet-moment [https://perma.cc/4NLG-NYYH].

[50] *See* Simon Evans, *Analysis: Which Countries Are Historically Responsible for Climate Change?*, CARBON BRIEF (Oct. 5, 2021), https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change/ [https://perma.cc/EQ5E-UMKK].

[51] *See* Press Release, White House, Fact Sheet: U.S. Reports Its 2025 Emissions Target to the UNFCC (Mar. 31, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc [https://perma.cc/EW4L-7UY5].

[52] *See* THE UNITED STATES OF AMERICA NATIONALLY DETERMINED CONTRIBUTION 10 (2021), https://unfccc.int/sites/default/files/NDC/2022-

public health, and safety protections, are important to ensuring many international human rights protections.[53] As all such regulations are implemented through statutory delegations and are often contested by economically and politically powerful actors, there is a significant chance that the regulations will be subject to challenge based on the MQD. This alone will likely have a chilling effect on executive actions pursuant to statutory authorities and thereby limit the president's ability to meaningfully engage in international law and governance in an increasingly complex—and hot—global landscape.[54]

It appears, however, that the executive will retain significant leeway in what the Court deems to be traditional national security and foreign affairs matters. In a much less high-profile and unanimous decision issued a few months before and using reasoning with striking parallels to that in *West Virginia*, the Supreme Court sanctioned a considerable assertion of executive power—and did so in the face of a congressional limitation on rather than delegation of authority.

II. *FBI V. FAZAGA*

A. The Power to Shield State Secrets

06/United%20States%20NDC%20April%2021%202021%20Final.pdf [https://perma.cc/DLZ7-QAMM]. Indeed, when the Court struck down the EPA's asserted authority to regulate greenhouse gas emissions in *West Virginia*, the world took notice, expressing concern that United States would not be able to meet its commitments under the Paris Agreement. *See* Ayurella Horn Muller, *'Condemning Everyone Alive': Outrage at US Supreme Court Climate Ruling*, THE GUARDIAN (June 30, 2022), https://www.theguardian.com/law/2022/jun/30/supreme-court-ruling-epa-west-virginia-climate-experts-activists-lawyers [https://perma.cc/ZW7G-G9TQ].

[53] *See, e.g.*, Press Release, Physicians for Hum. Rts., PHR Medical Experts React to Texas Judge's Mifepristone Ruling: "A Profound Breach of Medical Best-Practice and Human Rights (Apr. 7, 2023) (criticizing a federal district court's stay of the Food and Drug Administration's regulation approving a medication used in medication abortions on the ground that "[u]nder international human rights law, health systems are obligated to provide access to essential medicines, including mifepristone"); ENV'T PROTECTION AGENCY, EPA'S ROLE IN PROMOTING INTERNATIONAL HUMAN RIGHTS, RIGHTS OF INDIGENOUS PEOPLES, AND ENVIRONMENTAL JUSTICE (June 15, 2023), https://www.epa.gov/environmentaljustice/epas-role-promoting-international-human-rights-rights-indigenous-peoples-and [https://perma.cc/F8F2-RNG9] (listing various international human rights treaties that implicate environmental protections).

[54] As Lisa Heinzerling trenchantly points out in response to *West Virginia*:

> Any agency that asserts authority over an issue of great economic and political significance could meet a hostile reception in the courts precisely because it has tried to do something big. Many agencies will just avoid taking such actions in the first place, knowing the risk. The obvious result could be a federal government with little ability to tackle many of the biggest issues society faces.

Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, THE ATLANTIC (July 26, 2022) https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/ [https://perma.cc/TB3H-ME4L].

FBI v. Fazaga[55] arose out of one of the many cases brought over the past fifteen years challenging the government's use of its foreign intelligence surveillance authority within the United States.[56] Sheikh Yassir Fazaga is a Muslim resident of Orange County, California,[57] one of the areas in which the Federal Bureau of Investigation (FBI) established a large surveillance program targeting Muslims in the wake of 9/11.[58] The FBI hired Craig Monteihl to covertly surveil Muslim residents and gave him a "standing task order . . . to get as much information as possible on any Muslim [he] came into contact with at the mosques or in the Muslim community."[59] The FBI placed recording devices in Monteihl's phone and key fobs, which he stated he used to "record all day, every moment I worked undercover, regardless who I was meeting or what was discussed," and concealed a camera in the button of his shirt that he used to film inside the mosques and people's homes.[60] Over fourteen months, Monteihl gave the FBI "hundreds of phone numbers; thousands of email addresses; background information on hundreds of individuals; hundreds of hours of video recordings of the interiors of mosques, homes, businesses, and associations; and thousands of hours of audio recordings of conversations, public discussion groups, classes, and lectures."[61]

The operation was upended shortly after Monteihl implemented the FBI's instructions "to begin more pointedly asking questions about jihad and armed conflict and to indicate his willingness to engage in violence," which led a leader at one of the mosques to call the FBI to report Monteihl's statements.[62] Fazaga sued the FBI after Monteihl's identity as an informant was revealed, alleging that the surveillance violated the Foreign Intelligence Surveillance Act (FISA)[63] and his rights under the First, Fourth, and Fifth Amendments.[64]

As in many of the other post-9/11 suits in which victims have challenged and sought redress for the government's surveillance, rendition, and torture, in *Fazaga* the government asserted an expansive version of the "state secrets" privilege that it argued required dismissal of many of Fazaga's claims at the outset of the case on the ground that litigating the case would pose an unacceptable risk

---

[55] 595 U.S. 344 (2022).
[56] *See* Laura K. Donohue, *Surveillance, State Secrets, and the Future of Constitutional Rights*, 2022 S. CT. REV. 351, 354–356 (2022) (noting trend and citing cases).
[57] *Fazaga v. FBI*, 965 F.3d 1015, 1025 (9th Cir. 2020).
[58] The informant hired by the FBI to infiltrate Orange County Muslim communities stated that his FBI handlers told him that "they were building files in areas with the biggest concentrations of Muslim Americans—New York; the Dearborn, Michigan area; and the Orange County/Los Angeles area." Joint Appendix at 94, FBI v. Fazaga, 595 U.S. 344 (2022) (No. 20-828) (declaration of Craig F. Monteihl), https://www.supremecourt.gov/DocketPDF/20/20-828/185460/20210730194627462_20-828ja.pdf [https://perma.cc/5XE2-DHUY].
[59] *Id.* at 19. He further stated that his FBI handlers told him that the "Muslim community was 'saturated' or 'infested' with informants." *Id.* at 58.
[60] *Id.* at 10–11.
[61] *Fazaga*, 916 F.3d at 1213.
[62] *Id.* at 1213–14.
[63] 50 U.S.C. § 1810.
[64] *Fazaga*, 916 F.3d at 1210.

to national security.[65] The state secrets privilege is a federal common law doctrine that the Supreme Court developed to allow the executive to prevent court-ordered disclosure of information that risks endangering national security.[66] As Professor Laura Donohue has documented, in post-9/11 cases the government has sought to expand the privilege to require dismissal of cases rather than tailored exclusions of specific pieces of information in litigation after *in camera* review.[67] In *Fazaga*, the district court largely agreed with the government, dismissing all but one of the plaintiffs' claims.[68] The Ninth Circuit reversed on the ground that the procedures that Congress provided in FISA for cases involving information derived from electronic surveillance[69] displaced the state secrets privilege.[70] Although, as the court pointed out, FISA "is . . . extremely protective of government secrecy," it does not allow for dismissal of claims.[71] The court accordingly reversed the district court's dismissals and remanded for application of the FISA procedures.[72]

The Supreme Court granted the government's petition for certiorari,[73] and, like in *West Virginia*, quietly departed from relevant precedent and used a separation-of-powers-based constitutional avoidance rationale to conclude that FISA does not displace the state secrets privilege. Writing for a unanimous Court, Justice Alito determined that, in order to displace the privilege, Congress had to provide a sufficiently clear statement that the statute "abrogated or limited" the privilege.[74] He provided the principal justification for this clear statement rule in a rather cryptic string citation.

First, Alito cited a case involving the question of whether a federal statute *preempted state* law—and not, as the case at bar, whether a federal statute *displaced*

---

[65] *Id.* at 1215; *see* Donohue, *supra* note 56, at 391–96 (tracing the evolution of the privilege as a result of the government's expansive characterization of it as more information came out about warrantless surveillance programs in the wake of 9/11 and, as a result, more suits challenging surveillance activities were brought).

[66] *See* United States v. Reynolds, 345 U.S. 1, 10 (1953) (stating that recognition of a privilege against disclosure is appropriate if "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged"). As the Ninth Circuit recognized in *Fazaga*, courts have not "precisely delineated what constitutes a state secret," and "the contours of the privilege are perhaps even more difficult to draw in a highly globalized, post-9/11 environment, where the lines between foreign and domestic security interests may be blurred." 916 F.3d at 1227.

[67] *See* Donohue, *supra* note 56, at 380–96; *see also* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 213 (2010) (reviewing state secrets cases filed between 2001 and 2009 across a wide variety of subject matter and concluding that "[t]hey suggest that the shadow of state secrets is much longer than previously realized—indeed, that the state secrets doctrine has expanded well beyond the framing of [the foundational 1953 case of] *Reynolds* to become a powerful litigation tool for both private and public actors").

[68] Fazaga v. FBI, 844 F. Supp. 2d 1022, 1048–49 (C.D. Cal. 2012).

[69] 50 U.S.C. § 1806(f).

[70] *Fazaga*, 916 F.3d at 1234–39.

[71] *Id.* at 1226.

[72] *Id.* at 1216.

[73] FBI v. Fazaga, 141 S. Ct. 2720 (2021).

[74] 595 U.S. at 355.

federal common law. The accompanying parenthetical omits this important distinction, stating simply "presumption against repeal of common law."[75] The problem with the use of a case involving preemption of state law as authority—and the reason much more than a cursory parenthetical by way of explanation is necessary—is that the standard for congressional preemption of state law is much more exacting than that for congressional displacement of federal common law. That is because, as the Court has stated, federal common law is "a necessary expedient" for cases in which a matter requires a federal rule of decision but there is an "absence of an applicable Act of Congress."[76] Thus, "federal common law is subject to the paramount authority of Congress," and "when Congress addresses a question previously governed by federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."[77] Accordingly, the standard for determining displacement is the one that the Ninth Circuit applied: "whether the legislative scheme sp[eaks] directly to a question[, and] not whether Congress had affirmatively proscribed the use of federal common law."[78]

In contrast to the federal common law displacement standard, the Court has stated that there should be a presumption against congressional preemption of *state* law (whether statutory or common-law based) on the ground that states, unlike federal courts, have independent lawmaking authority.[79] The clear statement rule applied by the Supreme Court in *Fazaga*, then, effectively transplants this presumption against state law preemption to federal common law, which traditionally is much easier for Congress to abrogate. Importantly, this distinction reflects the limited lawmaking role of federal courts, ensuring that Congress's authority to make federal law is "paramount."[80] Indeed, the Court has expressly stated that a clear statement rule is improper in the context of displacement for this reason.[81]

---

[75] *Id.* (citing Norfolk Redev't & Housing Auth. v. Chesapeake & Potomac Telephone Co., 464 U.S. 30, 35 (1983)).
[76] Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) (internal quotations omitted).
[77] *Id.*
[78] *Id.* at 315 (internal quotations omitted); *see Fazaga*, 916 F.3d at 1231.
[79] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ([W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").
[80] *Milwaukee*, 451 U.S. at 314 ("Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem.") (internal quotations omitted).
[81] Am. Elec. Power v. Connecticut, 564 U.S. 410, 423, 429 (2011) ("Legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law.") (internal quotations, citations, and alteration omitted). Thus, as the Court has recognized, a federal statute can displace federal common law while leaving state common law in place. *See id.* at 429 (holding that the Clean Air Act displaced the federal common law of nuisance but remanding for consideration of plaintiffs' state common law claims).

The explanation for the *Fazaga* Court's bait and switch apparently lies in the second case in the string citation; namely, one involving the application of the statutory interpretation canon of constitutional avoidance.[82] The accompanying parenthetical states only "canon of constitutional avoidance,"[83] and the Court doesn't otherwise specify the potential constitutional problem that its clear statement rule avoids. Presumably, the problem arises from the possibility that the state secrets privilege is based on the president's Article II authority. As the Court pointed out, that's what the government argued.[84] Even if the Court agreed, however, it still should have clearly explained its departure from the well-established standard in determining whether FISA displaced the privilege. After all, even if animated by Article II, the privilege nevertheless remains a common law doctrine created by federal courts.[85] Accordingly, the concern with judicial encroachment on congressional power that underlies the more lenient displacement standard for federal common law remains,[86] and any change in the standard requires much more than a citation parenthetical.

Applying its new clear statement rule, the Court concluded that Congress did not displace the state secrets privilege in FISA because there is no mention of the privilege in the statute.[87] As the Ninth Circuit noted in applying the federal common law displacement standard, however, Congress did "speak directly" to the question addressed by the state secrets privilege in cases involving a challenge to the legality of electronic surveillance, namely, the question of how to adequately

---

[82] *Fazaga*, 595 U.S. at 355 (citing Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018)).
[83] *Id.*
[84] *Id.* at 1060; *see also* Brief for the Petitioners at 45–46, FBI v. Fazaga, 595 U.S. (2022) (No. 20-828) https://www.supremecourt.gov/DocketPDF/20/20-828/185459/20210730194532883_20-828tsUnitedStates.pdf [https://perma.cc/KW5R-KVXM]. ("Section 1806(f) does not come close to speaking with the clarity that should be required to find that Congress has attempted to displace the state-secrets privilege. Unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs. That approach reflects the judgment that Congress does not bring about a significant change in the Executive Branch's power to protect the national security by happenstance.") (internal quotations and citations omitted).
[85] Donohue, *supra* note 56, at 409; *see also* Robert Chesney, *No Appetite for Change: The Supreme Court Buttresses the State Secrets Privilege, Twice*, 136 HARV. L. REV. 170, 206 (2022) (noting the possibility that courts "created the privilege for reasons that are, themselves, deeply rooted in the constitutional responsibilities assigned to the executive branch under the rubric of Article II").
[86] *Cf.* Chesney, *supra* note 85, at 178 (pointing out that, even if the privilege is based on Article II, "it would not follow *automatically* that Congress could not adjust the metes and bounds of the privilege"). The Ninth Circuit noted that the government made this argument and rejected it. *Fazaga*, 916 F.3d at 1230 ("[The Government maintains, in a vague and short paragraph in its brief, that Congress cannot displace the state secrets evidentiary privilege absent a clear statement, and that, because Plaintiffs cannot point to a clear statement, "principles of constitutional avoidance" require rejecting the conclusion that FISA's procedures displace the dismissal remedy of the state secrets privilege with regard to electronic surveillance.").
[87] *Fazaga*, 595 U.S. at 355. Professor Laura Donohue notes that "[w]hile the Court was right that the statute nowhere explicitly replaced 'state secrets,' the argument sidestepped the fact that at the time of FISA's passage, the term was neither the only nor the most common one employed to describe the evidentiary rule." Donohue, *supra* note 56, at 379.

protect both national security and the judicial process necessary to provide redress for and to deter unlawful surveillance.[88] In light of the exercise in democratic governance and interbranch compromise that FISA represents, the structural constitutional avoidance rationale driving the Court's clear-statement requirement in *Fazaga* is, like that in *West Virginia*, problematic for foreign-affairs and national security governance. By requiring more from Congress with the new clear statement rule, the *Fazaga* Court arrogated to itself the power to strike that balance differently.

B. **Fazaga***'s Foreign Policy and National Security Fallout*

As discussed in Part I, affording the executive discretion is unquestionably necessary for effective foreign affairs and national security policies. But limits are just as important given the risk of abuse inherent in the nature of the executive's now sizeable foreign affairs and national security powers. These powers include the tremendous power to keep information hidden, which, even if justified in some cases, is in deep tension with democratic governance.[89] FISA as originally enacted in 1978 and its subsequent amendments represents a decades-long effort to minimize that tension[90]—even if not an entirely successful one.[91] As Professor Stephen Vladeck has explained:

> Together with the creation of the congressional intelligence committees and a series of other reforms, FISA was part of a larger structural accommodation between the three branches of government: The Executive Branch agreed to have many of its foreign intelligence surveillance activities subjected to far greater legal oversight and accountability, in exchange for which Congress and the courts agreed to provide such oversight and accountability in secret.[92]

---

[88] *See Fazaga*, 965 F.3d at 1047–48 ("FISA . . . represents an effort . . . to 'strik[e] a fair and just balance between protection of national security and protection of personal liberties.'") (quoting S. Rep. No. 95-604, pt. 1 at 7 (1976)); *see also id.* at 1047 ("In striking a careful balance between assuring the national security and protecting against electronic surveillance abuse, Congress carefully considered the role previously played by courts, and concluded that the judiciary had been unable effectively to achieve an appropriate balance through federal common law.").

[89] *See, e.g.*, Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 182 (1999) ("At a minimum, democracy requires that citizens be able to hold officials accountable, and to do that citizens must know what officials are doing and why.").

[90] *Cf.* S. Rep. No. 95-701, at 16 (1978) (stating that "the standards and procedures of [FISA] reconcile national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights").

[91] *See e.g.*, David Ruez, *The Problems With FISA, Secrecy, and Automatically Classified Information*, ELECTRONIC FRONTIER FOUND. (Feb. 26, 2018), https://www.eff.org/deeplinks/2018/02/problems-fisa-secrecy-and-automatically-classified-information [https://perma.cc/9GE9-HKG9] (critiquing the review process of the Foreign Surveillance Intelligence Court established by FISA and the lack of congressional oversight).

[92] Stephen I. Vladeck, *The FISC Court and Article III*, 72 WASH. & LEE L. REV. 1161, 1164 (2015).

Like the state secrets privilege, the procedures of the FISA provision at issue in *Fazaga*—section 1806(f)—govern review of information related to allegedly unlawful surveillance that the government claims would harm national security if disclosed. Importantly, although the FISA procedures are highly deferential to the executive, they are not as deferential as the state secrets privilege. Indeed, they depart in significant ways from the privilege.

First, the FISA procedures do not allow for dismissal, as the state secrets privilege does (and which the district court concluded was warranted in *Fazaga*). Rather, the court "*shall*, *notwithstanding any other law*, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted."[93] Second, the primary question for the court under section 1806(f) is whether the surveillance was lawful. If the court determines that the surveillance was unlawful, the court must either "suppress the evidence which was unlawfully obtained or derived from electronic surveillance" in criminal cases in which the government seeks to use it or grant discovery motions seeking the information in cases challenging the legality of surveillance.[94] In contrast, the question that a court applying the state secrets privilege addresses is whether to accept the government's claim that disclosure would harm national security. If it accepts that claim and determines either that dismissal is warranted or denies discovery, it is quite possible that the legality of the surveillance will never be reviewed.[95] That turns the FISA procedures—designed to prevent the executive from avoiding judicial review of the legality of electronic surveillance—on their head.[96]

The significance of FISA's procedures for enforcing legal limits on surveillance is brought into sharp relief by the facts of *Fazaga*. As Professor Donohue put it, "[t]aking the facts at face value, it would be hard to imagine a more troubling disregard for statutory provisions, as well as constitutional rights enshrined in the First and Fourth Amendments of the Constitution and secured by the Fifth Amendment Due Process Clause."[97] The Supreme Court's decision that the state secrets privilege applies, however, means that the government may never be held to account even if those facts prove to be true—precisely what section 1806(f) procedures are designed to prevent from happening.

---

[93] 50 U.S.C. § 1806(f) (emphasis added).
[94] 50 U.S.C. § 1806(g).
[95] Paradoxically, Alito suggests that these differences mean that FISA and the state secrets privilege are "not incompatible" and support the conclusion that the former doesn't displace the latter. *See Fazaga*, 595 U.S. at 355–359.
[96] *See* Brief for Stephen I. Vladeck as Amicus Curiae in Supporting of Appellant at 18, Wikimedia Found. v. NSA, 14 F.4th 276 (4th Cir. 2021) (No. 20-191) ("Allowing the government to avoid meaningful judicial review in this way would enable the Executive . . . to 'conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it'—exactly what FISA was intended to prevent.") (quoting S. Rep. No. 95-604, at 8 (1976)).
[97] Donohue, *supra* note 56, at 353.

Although *Curtiss-Wright* is often critiqued for its sweeping vision of an executive power associated with extra-constitutional notions of "external sovereignty,"[98] there is a sense in which the above analysis indicates that the *Fazaga* decision could be understood as sweeping even more broadly. That is because Congress *did* authorize the presidential action at issue in *Curtiss-Wright*.[99] As a result, Roosevelt's action would almost certainly have been upheld under the more moderate vision of executive authority articulated in the now well-accepted framework that Justice Jackson later set out in his famous concurrence in *Youngstown v. Sawyer Sheet & Tube Co.*[100] After all, congressional authorization would have placed Roosevelt's authority "at its maximum" under the *Youngstown* framework.[101] In such cases, executive action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion rest[s] heavily upon any who might attack it."[102]

In contrast, the Court's opinion in *Fazaga* suggests that, even in the face of mandatory statutory procedures for review that apply broadly and "notwithstanding *any* other law,"[103] the executive may avoid review—presumably based on the possibility of some ill-defined Article II authority that Congress is unable to check and, importantly, that a *judicially-created* law enforces. Given that FISA's mandates apply to the courts as well as to the executive, this not only represents a significant assertion of executive power, but also of judicial power—and both at the expense of congressional power. Particularly considering the history of abuse that led to Congress's efforts to strike a more constitutionally appropriate power

---

[98] *See Curtiss-Wright*, 299 U.S. at 318–19 (reasoning that because "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution," the president has "the very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"). For powerful critiques of this reasoning, *see*, *e.g.*, MARTIN FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS 95 (2020) ("Nothing better illustrates *Curtiss-Wright*'s tendentious history better than the 'sole organ' language that keeps it famous.") and Edward A. Purcell, Jr., *Understanding* Curtiss-Wright, 31 L. & HIST. REV. 653, 713–14 (2013) (stating that the Court's "historical argument about the foreign affairs power was based on a highly selective use of historical evidence designed to support essentially arbitrary assertions about theoretical abstractions [and] demonstrates the malleability of such sources in the hands of those who wish to confect historical foundations for their current policy preferences").

[99] *See Curtiss-Wright*, 299 U.S. at 312–14.

[100] 343 U.S. 579 (1952).

[101] *Id.* at 635 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

[102] *Id.* at 637. And "[i]f his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power." *Id.* at 636–37. Indeed, Jackson pointed out that *Curtiss-Wright* was such a case: "*Curtiss-Wright* involved not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress." *Id.* at 635 n.2.

[103] 50 U.S.C. § 1806(f) (emphasis added).

balance in FISA,[104] this result is deleterious to national security and foreign policy in a democracy. Indeed, it arguably sanctions the sort of Article II authority that, in the words of Jackson in *Youngstown*, is "at once so conclusive and preclusive [that it] must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[105] The canon of structural constitutional avoidance that the Court applies in *Fazaga*, however, allows the Court to avoid undertaking the careful scrutiny that Jackson called for.

Such evasive reasoning allows the *Fazaga* Court to suggest that the implications of its decision are rather anodyne, emphasizing at the end of its opinion that it merely addressed a "narrow question" of statutory interpretation.[106] However, many other cases in which courts have applied the state secrets privilege in the post-9/11 era make clear that the Court's decision that the Ninth Circuit should apply the state secrets privilege on remand in *Fazaga* is anything but anodyne.[107] This includes another state secrets case decided by the Court in the same term as *Fazaga* in which it upheld the government's assertion of the privilege to prevent a victim of the CIA's torture program from obtaining testimony regarding his treatment from CIA contractors.[108] This is particularly so given that the Court strongly suggested that the privilege is grounded in the executive's "exclusive and preclusive" Article II authority by requiring a seemingly "super

---

[104] The Church Committee report that led to the enactment of FISA detailed numerous abuses and their consequences. *See* S. Rep. No. 95-755, Book II, *Intelligence Activities and the Rights of Americans* 15 (1976), https://www.intelligence.senate.gov/sites/default/files/94755_II.pdf [https://perma.cc/25MK-NQ74] ("The Committee has observed numerous examples of the impact of intelligence operations. Sometimes the harm was readily apparent—destruction of marriages, loss of friends or jobs. Sometimes the attitudes of the public and of Government officials responsible for formulating policy and resolving vital issues were influenced by distorted intelligence. But the most basic harm was to the values of privacy and freedom which our Constitution seeks to protect and which intelligence activity infringed on a broad scale.").

[105] 343 U.S. at 638.

[106] 595 U.S. at 359.

[107] *See* Donohue, *supra* note 56, at 411 ("In case after case, the privilege is being used in new and more expansive ways. Employed in the context of suits challenging the warrantless collection of information on U.S. citizens, question exists as to whether *any* claim will be able to survive—even where, as in *Fazaga*, a significant amount of information in the public domain suggests that the government may be acting outside statutory and constitutional constraints.").

[108] In *United States v. Zubaydah*, 595 U.S. 195 (2022), the Court upheld the government's assertion of the state secrets privilege to prevent a Guantánamo detainee from subpoenaing two former CIA contractors about his treatment at a CIA (then secret) detention site in Poland under a federal statute providing for discovery of evidence for use in a foreign tribunal. *See id.* at 963. Polish officials needed the contractors' testimony to investigate Zubaydah's torture as required by a decision of the European Court of Human Rights. *Id.* at 965. Even though the information Zubaydah sought was already publicly available in a 2014 Senate report, the European Court of Human Right's decision, testimony given by the CIA contractors in another case, and one of the contractor's memoir, *see id.* at 964–65, the government maintained that it was entitled to the privilege because the CIA had not confirmed or denied the existence of the site in Poland. *See id.* at 969. The Court concluded that the assertion of the state secrets privilege was proper and thus held that dismissal was necessary because all the information he sought would "inevitably confirm or deny the existence of such a facility." *Id.* at 971.

clear statement"[109] by Congress that it intended to displace the state secrets privilege—presumably to avoid a potential ruling that displacement would be unconstitutional as a separation-of-powers violation.

As argued in Part I, the MQD at the very least operates as a structural canon of constitutional avoidance—albeit one that, in contrast to *Fazaga*, will restrict rather than expand executive authority. Like in *Fazaga*, however, in *West Virginia* the Court interprets the statute at issue in a way that avoids what the Court suggests it might deem to be a constitutionally impermissible allocation of authority by Congress between itself and the executive. I call this "structural" constitutional avoidance because it presumes to avoid a national separation-of-powers problem rather than, for example, a First Amendment problem or a due process problem.[110] As the following Part explains, the structural version presents the risk of a stealth assertion of judicial power in a way that the other version does not—a risk that has heretofore not factored much into foreign affairs and national security law analyses.

III. THE PERILS OF STRUCTURAL CONSTITUTIONAL AVOIDANCE

Although there is a significant amount of scholarship debating the merits of the canon of constitutional avoidance, there has been little examination of whether the constitutional problem averted matters. Section A briefly summarizes the canon, its justifications, and the questions it raises regarding the balance of judicial and legislative powers. It then explains the "structural" version of the canon and the unique risks it presents for statutory governance generally. Section B then shows why the concerns it raises are particularly acute in the context of statutory foreign affairs and national security governance.

A. The Potential Separation-of-Powers Problem with Interpreting Statutes to "Avoid" Separation-of-Powers Problems

The Supreme Court has long recognized the interpretive canon of constitutional avoidance: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."[111] In a number of cases, courts have operationalized the canon using a clear statement rule such as that applied in *West Virginia* and *Fazaga*.[112] As

---

[109] William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611 (1992)

[110] I borrow this terminology from Aziz Huq, *Structural Constitutionalism As Counterterrorism*, 100 CAL. L. REV. 887, 889 n. 6 (2012) ("us[ing] the term 'structural constitutionalism' in this Article to refer exclusively to inferences drawn from the Separation of Powers [and not] federalism questions").

[111] United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (citing United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)); *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (calling the canon a "cardinal principle" that "has for so long been applied by this Court that it is beyond debate").

[112] *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 940 (1992) (explaining that courts apply clear statement rules "in pursuit of some explicitly

Professor David Shapiro has pointed out, use of clear statement rules can lead to particularly stringent statutory interpretations: "[I]n some instances, they even may lead to rejection of the ordinary meaning of the words used, thus requiring the legislature to produce not only express language but language that is virtually incapable of any other interpretation."[113] The Court justifies the canon on the grounds that it is a prudent restraint of the judicial power to decide constitutional questions and that courts should assume that Congress does not intend to violate the Constitution.[114] As scholars have recognized, though, most cases involve rejecting interpretations that courts determine raise only constitutional "doubts"—that is, courts usually do not determine that there is *in fact* a constitutional problem with the interpretation rejected on constitutional avoidance grounds.[115] Although the canon remains well-entrenched in caselaw, this reality has led to significant scholarly debate about the propriety of the canon.

Some scholars and judges have argued that the "construction of a statute in order to avoid a constitutional doubt amounts to a constitutional decision in its own right—a decision, in fact, that frequently expands the sweep of the relevant constitutional provision beyond its legitimate warrant."[116] Given that the canon does work in statutory analysis only if the rejected interpretation would otherwise

---

stated policy objective," and that such rules include "the requirement of a clear congressional statement to achieve a result that would raise a substantial constitutional question").

[113] *Id.*

[114] *See DeBartolo Corp.*, 485 U.S. at 575 (stating that the constitutional avoidance canon "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears by an oath to uphold the Constitution") (internal citation omitted); *see also* Rust v. Sullivan, 173 U.S. 173, 191 (1991) ("Th[e] canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.").

[115] Many scholars use Professor Adrian Vermuele's formulation distinguishing between "classical" and "modern" constitutional avoidance canons: "The basic difference between classical and modern avoidance is that the former requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional." Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997). The modern doctrine, Professor Vermuele notes, has effectively "supplanted" the classical doctrine. *Id.*

[116] Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1550–51 (2000) (presenting this as a common argument but rejecting it); *see also* United States v. Marshall, 908 F.2d 1312, 1335–36 (1990) (Posner, J., dissenting) ("Courts often do interpretive handsprings to avoid having even to *decide* a constitutional question. In doing so they expand, very questionably in my view, the effective scope of the Constitution, creating a constitutional penumbra in which statutes wither, shrink, are deformed. A better case for flexible interpretation is presented when the alternative is to nullify Congress's action: when in other words there is not merely a constitutional question about, but a constitutional barrier to, the statute when interpreted literally."); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 S. CT. REV. 181, 188–89 (2009) ("[T]hough modern legislation scholars see the avoidance canon as sometimes playing an important role in Supreme Court adjudication and its relation with Congress, there seems to be consensus that the canon's use signals a Court that is actively engaged in shaping law and policy, not acting modestly.").

be the better one using other tools of statutory construction,[117] these scholars reason, application of the canon in cases of doubt risks frustrating congressional intent by an unjustified exercise of judicial power to "say" what the law may—or may not—be.[118] Others have argued, however, that application of the canon allows courts to legitimately imbue interpretations of ambiguous statutes with constitutional values[119] and "to give certain constitutionally protected interests an added measure of breathing space."[120]

Although some scholars have argued that the application has a particularly salutary or deleterious impact in cases in which the doubt-raising constitutional problem is the protection of individual rights,[121] there has been much less examination of whether the type of constitutional problem averted matters.[122] When constitutional avoidance is applied in the context of statutory construction with clear statement rules as in *West Virginia* and *Fazaga*, the concerns raised about the doctrine generally have particular salience in the context of federal separation-of-powers issues. Conversely, the justifications given for the canon have more force in the context of avoiding potential infringements of rights for two related reasons.

---

[117] Young, *supra* note 116, at 1577–78 ("Avoidance has 'bite,' therefore, only in that set of cases where ordinary sources of statutory meaning would have led the court to come out the other way had the canon not been applied.").

[118] *Cf.* Marbury v. Madison, 5 U.S. 137, 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

[119] *See, e.g.*, Young, *supra* note 116, at 1593 (arguing "that the [constitutional] avoidance canon is best understood as a normative canon of construction protecting a particular substantive value rather than attempting to discern and implement the intent of Congress" and that "constitutional values protected by the avoidance canon are themselves sources of authority that should shape the interpretation of ambiguous statutes").

[120] Shapiro, *supra* note 112, at 941.

[121] *See, e.g.*, Michelle R. Slack, *Avoiding Campaign Finance Reform: Examining the Doctrine of Constitutional Avoidance in Campaign Finance Reform Law in Light of* Citizens United v. Federal Election Commission, 16 CHAP. J. L. & POL'Y 153, 167–68 (2011) (arguing that when the canon is applied to interpret a statute to avoid all constitutional doubt, rather than merely to avoid an interpretation that would amount to a violation, "challengers . . . are protected from what even might ultimately be constitutional readings of the legislation," which "generally leads to overprotection of constitutional rights—a potential constitutional dilemma of its own because it infringes on separation of powers"); Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 CASE WEST. L. REV. 1031, 1040 (2006) ("Direct repudiation by a court, if it perceives clear constitutional problems with legislation . . . is a better way to protect constitutional rights.").

[122] Professors William Eskridge and Philip Frickey highlight the difference, but their focus is on enforcing federalism principles rather than those related to federal separation of powers. *See* Eskridge & Frickey, *supra* note 109, at 597 ("[T]he most striking innovation of the recent [Rehnquist] Court has been its creation of a series of new 'super-strong clear statement rules' protecting constitutional structures, especially structures associated with federalism."). Professor David Shapiro is one of the few other scholars who distinguishes between use of the canon to avoid potential constitutional issues related to individual rights and its use to avoid issue related to distribution of governmental power, but he does not assign any relevance to the difference in arguing that the canon of constitutional avoidance as well as other substantive (versus semantic) canons are generally desirable. *See* Shapiro, *supra* note 112, at 946.

First, federal courts have a distinctive constitutional role in protecting rights as a counter-majoritarian institution.[123] Second, courts regularly enforce rights through constitutional interpretation.[124] Both tend to support the claim that rejecting statutory interpretations that may amount to rights violations shows respect for Congress by assuming that it did not intend such violations, that adopting a plausible alternative interpretation amounts to judicial restraint, and that providing a buffer zone of constitutional protection is desirable. [125]

In contrast to rights, courts "rarely" enforce separation of powers directly through constitutional interpretation.[126] That is in part because courts have long recognized that Congress and the executive both have quite significant roles in enforcing the contours of their powers vis-à-vis one another.[127] There is consequently usually less reason to assume that Congress legislated against a backdrop of caselaw outlining relatively clear separation-of-powers limits than to make that assumption in the context of individual rights.[128] This, in turn, creates a heightened risk that interpreting statutes to avoid running up against constitutional limits—which courts have intentionally left ill-defined in order to avoid interfering with interbranch separation-of-powers dynamics—will amount to a stealth arrogation of congressional law and policymaking power rather than an exercise in judicial restraint.

---

[123] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) ("[The] constitutional theory on which our government rests is not a simple majoritarian theory. The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.").

[124] *See id*.

[125] Moreover, as Aziz Huq has noted: "[A] rights-oriented approach is more defensible than Article II constitutional-avoidance arguments given the political economy of federal legislation. Whereas the executive branch always has an opportunity to raise Article II concerns during the legislative process, individual rights claimants often go unattended by Congress." Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 588 (2017).

[126] Eskridge & Frickey, *supra* note 109, at 633; *see also, e.g.*, Purcell, *supra* note 98, at 713 ("[O]ver the course of two and one quarter centuries the Court has decided precious few cases that establish clear constitutional rules governing the relationship between Congress and the executive in conducting the nation's foreign affairs"); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2051–52 (2005) ("Courts have been understandably reluctant to address the scope of [the president's Article II constitutional authority [as Commander-in-Chief]. Instead, courts have attempted, whenever possible, to decide difficult questions of wartime authority on the basis of what Congress has in fact authorized."); *cf.* Am. For. Serv. Assoc. v. Garfinkel, 490 U.S. 153, 161 (1989) ("Particularly where, as here, a case implicates the fundamental relationship between the (political) Branches, courts should be extremely careful not to issue unnecessary constitutional rulings.").

[127] *See* Zivotofsky v. Clinton, 566 U.S. 189, 219 (2012) ("[I]nsofar as the controversy reflects different foreign policy views among the political branches of Government, those branches have nonjudicial methods of working out their differences.") (Breyer, J., dissenting).

[128] *Cf.* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 33 (1996) ("[A]n important factor in evaluating the Court's use of the avoidance canon is whether the constitutional danger zone is in fact clearly marked by precedent or merely sketched out by dicta.").

Importantly, a principal way that Congress navigates the boundaries between its own and the executive's authority is through enacting legislation.[129] Inflexible clear-statement statutory interpretations based on at best vaguely articulated judicial concepts of legislative and executive constitutional roles risk judicial encroachment on that statutory governance process.[130] Given the concepts of all three branches' constitutional roles that the Roberts Court telegraphs through its use of this approach to statutory interpretation in *West Virginia* and *Fazaga*, this risk appears to be particularly acute in the context of statutory interpretation in the areas of foreign affairs and national security.

B. Stealth Separation-of-Powers Barriers to Good Statutory Foreign Affairs and National Security Governance

The Court's view of executive power differs dramatically depending on whether its structural constitutional avoidance reasoning is based on Article II or nondelegation, but Congress's power is similarly limited in both cases. Below I explain the implications of each variant of structural constitutional avoidance and then address their collective significance for statutory foreign affairs and national security governance.

1. Article II Constitutional Structural Avoidance

Rigid statutory interpretation requiring clear statements based on a structural constitutional rationale is, ironically, in tension with the well-established framework that the Supreme Court recognizes as appropriate for evaluating separation-of-powers questions in foreign affairs and national security matters.[131] In contrast to *Curtiss-Wright* and its domestic counterparts that struck down New Deal era legislation on nondelegation grounds, Justice Jackson's famous *Youngstown* framework is not based on concepts of what is "executive" and what

---

[129] Josh Chafetz has cogently explicated the many other tools available to Congress for this purpose that are commonly overlooked. *See* Josh Chafetz, *Congressional Overspeech*, 80 FORDHAM L. REV. 529 (2020); Josh Chafetz, *Congress's Constitution*, 160 U. PENN. L. REV. 715 (2012); Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083 (2009); *see also* Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VIR. L. REV. 395, 413 (2020) (identifying "a range of mechanisms Congress can and does deploy to manage executive branch decision making[,] includ[ing] agency design[,] administrative procedure requirements[, and] switching the decision maker inside the executive branch" as "process controls" that "permit members of Congress to influence the process and direction of executive branch decision making indirectly, often with a light touch, avoiding many of the pitfalls and political costs members may fear would arise from more direct engagement in foreign policy making").

[130] *Cf.* Manning, *supra* note 32, at 228 ("If the point of the nondelegation doctrine is to ensure that Congress makes important statutory policy, a strategy that requires the judiciary, in effect, to rewrite the terms of a duly enacted statute cannot be said to serve the interests of that doctrine.").

[131] *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. at 10 ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*.") (internal citation omitted).

is "legislative."[132] Indeed, Jackson penned his concurrence in order to reject the more categorical vision adopted by Justice Black in his majority opinion and to instead advance an approach that recognized the fluidity of executive and legislative powers expressed in both the Constitution's text and practice under it over time.[133]

Under the *Youngstown* framework, a court's lodestar in assessing presidential power is not a definition of executive power, but rather what Congress has—or hasn't—said about the matter. Lying at one end of the judicial-review spectrum are cases in which Congress has expressly or impliedly authorized the president's action: presidential power is at its "maximum" and "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[134] At the other end are cases in which Congress has expressly or impliedly prohibited executive action: presidential power "is at its lowest ebb," as it is an assertion of unilateral executive authority "at once so conclusive and preclusive [that it] must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[135] Situated between the two are cases in which Congress has neither authorized nor prohibited executive action—an inscrutable "zone of twilight in which [the president] and Congress may have concurrent authority, or in which its distribution is uncertain," and "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[136]

In *Youngstown*, the Court did not find it necessary to engage in statutory interpretation because President Truman acknowledged that he had not complied with the relevant statutes in taking the action challenged in the case—namely, the seizure of steel mills to ensure the continued production of materiel for the Korean War in the face of threatened strike by the steelworkers' union—and instead relied solely on his unilateral authority under Article II.[137] But if there had been a question

---

[132] *See Curtiss-Wright*, 299 U.S. at 320 (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); *A.L.A. Schechter Poultry*, 295 U.S. at 529 ("The Congress is not permitted to abdicate or to transfer to others *the essential legislative functions* with which it is thus vested.") (emphasis added); *Panama Refining Co.*, 295 U.S. at 421 ("The Congress manifestly is not permitted to abdicate or to transfer to others *the essential legislative functions* with which it is thus vested.") (emphasis added).

[133] *Compare Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."), *with id.* at 587 (majority opinion) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

[134] *Id.* at 637.

[135] *Id.* at 637–38.

[136] *Id.* at 637.

[137] *Id.* at 585. Two statutes provided for governmental taking of property, and the government conceded that "the[ir] conditions were not met." *Id*. Thus, Jackson determined that the action fell

whether a given statute provided Truman with the authority to seize the nation's steel mills or precluded him from doing so, interpreting it using Article II structural constitutional avoidance reasoning would beg the question of presidential authority that courts are supposed to address *after* determining which category of the *Youngstown* framework applies.[138] Put differently, doing so would require a concept of legislative or executive power of the sort that Jackson intended the framework to frame. That, in turn, would allow the reviewing court to effectively enforce its vision of executive and legislative powers through determining the meaning of a statute, a seemingly more mundane task than a direct application of separation-of-powers principles to resolve a question of constitutional authority.[139] Hiding in plain sight is the tremendous arrogation of congressional policymaking power that such an approach represents.

Article II-based structural constitutional avoidance reasoning such as that the *Fazaga* Court used in interpreting FISA is particularly consequential for foreign affairs and national security statutory governance. As explained in Part II, the Court's conclusion that the judicially-created state secrets privilege was not displaced by FISA's section 1806(f) procedures for review of information obtained using electronic surveillance upends the statute's system for ensuring that the executive's electronic surveillance is subject to judicial review—and thereby frustrates the interbranch bargain that the statute embodies.[140] In fact, there is a strong argument that if the privilege had been evaluated under a direct separation-of-powers analysis as an assertion of Article II authority,[141] the Court would have been required to assess that authority with exacting scrutiny under *Youngstown* because it is "incompatible with the express or implied will of Congress."[142] *Fazaga* was thus a relatively rare case involving a clear tension if not inconsistency between the power asserted by the executive and a statute.[143] In light of those stakes, the

---

in the "lowest ebb" category of presidential power, where it is "most vulnerable to attack and in the least favorable of possible constitutional postures." *Id.* at 640.

[138] *Cf.* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1955 (2015) (arguing that *Youngstown* inquiry has two steps: "If at 'step one' the court finds that the executive's action is authorized by the statute, then we move to the constitutional question: does the federal government have the constitutional power to undertake the action? At the other extreme, if the court finds at step one that Congress has forbidden the particular action, then the constitutional question is whether the President has Article II powers that are preclusive.")

[139] *See, e.g.*, *Zivotofsky*, 576 U.S. at 28–30 (applying *Youngstown* framework in holding that the president has exclusive power to recognize foreign states, and thus a statute requiring the president to issue passports "contradict his prior recognition determination" is unconstitutional on separation-of-powers grounds).

[140] *See supra* Section II.B.

[141] As noted *supra* notes 84–85 & accompanying text, the government argued that the privilege is based in Article II, and the Court seemingly sanctioned this understanding with its parenthetical reference to constitutional avoidance.

[142] *Youngstown*, 343 U.S. at 637.

[143] *See* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from "Exceptionalism"*, 128 HARV. L. REV. F. 294, 301 (2015) (noting that cases in which the executive has "disregard[ed] a clear statutory provision" are "unusual").

Court's willingness to deem the statute inapplicable with a cursory reference to constitutional avoidance—and the vision of Article II powers that it thereby implies—are alarming.

Enforcing this sort of control by the executive over judicial review of its national security decisions with a *judicially-created* law that Congress is hard-pressed to change—and suggesting that it perhaps could not do so at all—not only represents an alarming expansion of executive power, but also of judicial power. Moreover, it achieved this result through vague, indirect separation-of-powers reasoning, Indeed, the Court did not even attempt to engage with the Ninth Circuit's careful analysis supporting its determination that section 1806(f) did displace the state secrets privilege.[144] Such evasive reasoning permits courts to avoid fully engaging with—and justifying—their own assertions of power, and thereby constrains the ability of legislatures, policymakers, and the public to evaluate judicial performance. Awareness and forthright engagement with judicial power is particularly critical when, as in *Fazaga*, the Supreme Court exercises that power to weigh in on the proper allocation of powers between the other two branches. Instead of doing that, the Court effectively reads its apparently sweeping vision of unilateral executive power into the statute and obliquely signals that Congress may be powerless to abrogate or alter a judicially-created rule that effectively codifies that power. That's quite a big answer to an ostensibly "narrow question" of statutory interpretation.

2. Nondelegation Constitutional Structural Avoidance

The Court evinces a very different vision of executive and legislative power when interpreting statutes based on MQD structural constitutional avoidance—one that is deeply suspicious of executive power and that significantly limits Congress's ability to delegate, rather than restrict, executive authority. In sharp contrast to *Fazaga*, in *Biden v. Nebraska*[145]—the Court's most recent MQD decision in which it struck down the Biden administration's student debt relief program—the Court denounced "the Executive [for] seizing the power of the Legislature."[146] In addition to further solidifying the MQD in its jurisprudence, the Court demonstrated that its understanding of Article II-based foreign affairs and national security powers of the sort that it suggested in *Fazaga* will not necessarily apply to all situations in which the executive exercises authority pursuant to national security statutes. This is particularly so in those situations, such as pandemics, that will only increase in

---

[144] *See Fazaga*, 916 F.3d at 1230–34. The Court referred to the Ninth Circuit's opinion only one time in its analysis, referencing a single phrase and obscuring its import by isolating it from its context. *See* 595 U.S. at 355–57.

[145] 143 S. Ct. 2355 (2023).

[146] *Id.* at 2373. The majority is also notably derisive of the government's arguments in the case, accusing it of making "a final bid to elide the statutory text." *Id.* at 2372; *cf. West Virginia*, 597 U.S. 697 at 739 (Gorsuch, J., concurring) (arguing that "[p]ermitting Congress to divest its legislative power to the Executive Branch" would mean that "[l]egislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him").

importance to national security but don't fit within traditional paradigms such as foreign intelligence collection.

At issue in *Biden v. Nebraska* was a challenge brought by six states to the Biden administration's student debt relief program, which was promulgated by the Secretary of Education in response to the devastating financial impacts of the COVID-19 pandemic pursuant to a statute giving the Secretary authority to "waive or modify any statutory or regulatory provision applicable to [federal] student financial assistance programs . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency."[147] As in *West Virginia*, the majority determined that the program's economic and political significance raised "separation of powers concerns" and thus triggered a clear statement requirement that the statute failed to meet.[148] That is unsurprising, as once the Court has made the determination that the asserted authority addresses a "major question," it appears that nothing short of a precise instruction to the agency that it may take the specific action will suffice.

That is, to say the least, a much more constricted understanding of executive power than that motivating the Court's statutory interpretation based on structural constitutional avoidance in *Fazaga*. Further, like *Fazaga*, the MQD clear statement rule "require[s] Congress to legislate with a degree of specificity that it could not possibly have anticipated"[149] and signals that even if it had such remarkable prescience, sufficiently clear language may amount to a separation-of-powers violation. In enforcing this vision of the allocation of authority between Congress and the executive with a conclusion that the statute did not provide the executive with the asserted authority based on vague "separation of powers concerns," the Court effectively, as Justice Kagan put it in her *Biden v. Nebraska* dissent, "substitute[d] itself for Congress and the Executive Branch."[150]

As global threats continue to evolve and globalization continues apace, there will inevitably be more cases, such as *Biden v. Nebraska*, that don't fit neatly into traditional "national security/foreign affairs" or "domestic" categories.[151] As discussed in Part I, the MQD will also inevitably limit the executive's foreign policymaking discretion given the fluidity between foreign and domestic policies

---

[147] *Nebraska*, 143 S. Ct. at 2368 (quoting 20 U.S.C. § 1098bb(a)(1)).
[148] *See id.* at 2373 ("The 'economic and political significance' of the Secretary's action is staggering by any measure.").
[149] *Id.*
[150] *Id.* at 2385 (Kagan, J., dissenting). It also bears mention that the majority's determination that it had the authority to hear the case because the plaintiffs had standing is highly questionable, to put it mildly. Indeed, Kagan also dissented to the majority's standing analysis, stating that: "[B]y deciding the case, [the Court] exercises authority it does not have. It violates the Constitution." *Id.* at 2386.
[151] *Cf.* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1672 (1997) ("[A]s the world becomes more interconnected, domestic law and activity increasingly have foreign consequences, and vice versa.").

in the modern system of international law and global governance—including increasingly critical foreign policies related to climate.[152]

IV. JUDICIAL POWER IN FOREIGN AFFAIRS AND NATIONAL SECURITY GOVERNANCE

The Court's Januslike image of the executive that emerges from *Fazaga* and the MQD cases and its increasing proclivity to indirectly dictate the appropriate allocation of authority between Congress and the executive through statutory interpretation could threaten the viability of foreign affairs and national security governance in a constitutional democracy and the modern international system. The tension between the MQD and FISA cases demonstrate how clear statement rules based on structural constitutional avoidance rationales allow the Court to police the lines of authority between the other two branches in the guise of statutory interpretation, positioning itself as "above" separation of powers issues rather than one of the power brokers.[153] That, in turn, arrogates to the Court a significant amount of power to determine policy, raising new questions for how to think about judicial power in foreign affairs and national security governance.

Executive assertions of authority based on claims of superiority to the other two branches are familiar terrain for foreign relations and national security scholars.[154] Such assertions by the judiciary, however, are not so well trodden. Instead, the debate about the role of the judiciary has largely centered around whether it should exercise more power.[155] Although there has been much rich commentary on the extent of scrutiny or restraint appropriate for courts to exercise in reviewing executive action, there has been less attention to the distinctive powers of the Supreme Court and to examination of ways in which it might be aggrandizing

---

[152] Relatedly, as Professor Elena Chachko points out, the MQD might pose some obstacles to agencies' ability to engage in international cooperation in fulfilling their statutory missions. *See* Elena Chacko, *Internationalizing Regulatory Review*, NOTICE & COMMENT (June 29, 2023), https://www.yalejreg.com/nc/internationalizing-regulatory-review-by-elena-chachko/ [https://perma.cc/8224-5MNS].

[153] Michael D. Ramsey, *Courts and Foreign Affairs: "Their Historic Role"*, 35 CONST. COM. 173, 187 (2020) ("The courts are part of a system of separation of powers, not an enforcer that stands above it."); *cf.* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 653 (2023) ("[J]udges at all levels of the federal judiciary have described other political institutions in overwhelmingly derogatory terms, while simultaneously either describing the judiciary in flattering terms or not describing it at all—denying its status as an institution and positioning it as simply a conduit of disembodied law.").

[154] *Cf.* Sitaraman & Wuerth, *supra* note 138, at 1930 ("Executive dominance is the most distinctive and important aspect of U.S. foreign relations law.").

[155] *See* Elena Chachko, *Revisiting Judicial Review in Foreign Affairs*, 43 FORDHAM INT'L L.J. 1273, 1273–74 (2020) (noting that the has been "a longstanding debate among legal scholars and practitioners: should courts intervene in foreign affairs and national security? Can they do so effectively?," and arguing that "[t]his debate has become rather stagnant"); Daniel Adebe & Eric A. Posner, *Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 508, 547 (2011) (stating that the "dominant approach" in the academy "holds that courts should impose more restrictions on the executive than they have in the past," and arguing in support of "the tradition of judicial deference to the executive in matters of foreign affairs").

its own powers across decisions that will impact foreign affairs and national security governance.[156] One way that will likely be increasingly important is interpreting statutes—and "say[ing] what the law is"[157]—based on vague conceptions of executive and legislative powers.[158] Vague from the standpoint of Congress, the executive, and the public, that is. After all, the Court presumably has a relatively clear idea of its vision of the powers of the other branches that it interprets statutes to reflect.

Importantly, the Court made a similar move in *Curtiss-Wright*. As noted above, the language of *Curtiss-Wright* regarding the sweeping independent authority of the president was not necessary to the Court's holding given that Congress had authorized the president to impose an arms embargo.[159] But the *Curtiss-Wright* Court's vision of executive authority—which, as Professor Edward Purcell has pointed out, was "only an amorphous idea of an independent executive foreign affairs power [in] language offering no guidance as to either [its] scope or limits"[160]—has nevertheless had a tremendous staying power in caselaw. It has been regularly cited in briefs and opinions in support of broad assertions of executive authority in foreign affairs and national security since the case was handed down in 1936.[161] Thus, Purcell argues that the "true constitutional significance" of the case "lies not in any guiding doctrine it established but in the lessons it teaches about the possibilities inherent in both the Supreme Court as an institution and the Constitution's structure of separated national powers."[162] The case is in this sense "a doubly troubling precedent, not only proclaiming a sweeping and amorphous de jure power in the executive, but also exemplifying an undefined and discretionary de facto power in the judiciary."[163]

---

[156] Professor Harlan Cohen wrote a prescient article published in 2015 mapping what he saw as the Roberts Court's increasing "distrust" of the executive and Congress in foreign relations cases and arguing that "[t]he question is no longer whether the Court is too willing to defer, but whether it is too eager to intercede." Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 448 (2015). He is, however, primarily focused on the extent to which the Court moved from taking primarily a functionalist approach to one dominated by formal analyses. *See id.* at 384–89.

[157] *Marbury*, 5 U.S. at 177.

[158] *Cf.* Sitaraman & Wuerth, *supra* note 138, at 1946 ("[J]ust as in domestic affairs, virtually every aspect of the executive branch's conduct of foreign affairs and national security is undertaken pursuant to statutory authorities.").

[159] *See supra* text accompanying notes 98–102.

[160] Purcell, *supra* note 98, at 712.

[161] *See* David H. Moore, *Beyond One Voice,* 98 MINN. L. REV. 953, 971–73 (2014) (stating that "[t]he Supreme Court has endorsed [*Curtiss-Wright*'s] line of argument in various cases" and citing several cases); Purcell, *supra* note 98, at 653 ("From the day [*Curtiss-Wright*] was decided, it has stood as a preeminent authority for those who would magnify the constitutional role of the president by proclaiming the independent and unchecked nature of the executive's foreign affairs powers.").

[162] Purcell, *supra* note 98, at 656.

[163] *Id.* at 715.

It bears emphasis that the Court developed both rules that it departed from in *West Virginia* and *Fazaga*—that is, *Chevron* deference and the "speaks directly" displacement test, respectively—in order to provide courts with standards for properly exercising their power. More specifically, the Court openly engaged with its own power in interpreting statutes in light of the powers of the other branches in justifying its approaches to statutory interpretation in certain contexts. The *Chevron* framework that the Court did not apply (or even mention) in *West Virginia* and *Biden v. Nebraska*—under which courts defer to agencies reasonable interpretations of statutes that they administer—was based on a forthright attempt by the Supreme Court to navigate the fluidity between interpretation and policymaking and between legislating and policy implementation.[164] Similarly, the Court has repeatedly emphasized that the relatively lenient standard for congressional displacement of federal common law that the Court did not apply (or even mention) in *Fazaga* is necessary given that the role of federal courts in lawmaking is limited and thus a congressional decision to address the matter must readily trump any law made by federal judges that also addresses the matter.[165]

The Article II avoidance in *FBI v. Fazaga* can be understood as yet another product of the separation-of-powers shift that *Curtiss-Wright* helped to set in motion. The fact that the Court couched it in the much less attention-grabbing terms of statutory interpretation perhaps makes it even more dangerous for foreign affairs and national security governance in a democracy. The MQD constitutional avoidance in *West Virginia v. EPA* and *Biden v. Nebraska* has initiated what will likely be a similarly consequential shift, the impacts of which are only beginning. What the two shifts together portend is that the Court, on the one hand, will continue to empower the executive in what the Court sees as traditional areas of foreign affairs and national security and, on the other, will significantly constrain the executive's power to take many protective measures with international and transnational implications such as those related to climate change and public health. "Negative" rights such as those at stake in *Fazaga* that have long been the concern of foreign affairs and national security scholars and advocates will go unenforced, and the political branches' efforts to protect "positive" rights such as those at issue in *West Virginia v. EPA* and *Biden v. Nebraska* will be undermined.

---

[164] *See Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones: Our Constitution vests such responsibilities in the political branches.") (internal quotations omitted); *cf.* Peter Shane, Chevron *Deference Is Superior to* West Virginia *Skepticism*, NOTICE & COMMENT (July 12, 2023), https://www.yalejreg.com/nc/chevron-deference-is-superior-to-west-virginia-skepticism-by-peter-m-shane/ [https://perma.cc/5BZW-KMAJ] ("In deferring to agency interpretations of law that are well-reasoned and reasonably implemented, it is the *Chevron* paradigm (rather than the MQD) that more fully supports a rich and more compelling vision of democratic governance.").

[165] *See supra* text accompanying notes 75–81.

The combination makes for a foreign affairs and national security governance dynamic that will increase the odds that democracy will erode and that the United States will be a harmful rather than positive force in international law and the global order more broadly. Foreign relations and national security scholars must start thinking about judicial power not just through the lens of its intersection with executive power, but also in its own right.

CONCLUSION

This lens of judicial power—whether wielded to defer to or to closely scrutinize executive power—is valuable in thinking about U.S. foreign affairs and national security governance for at least four reasons. First, it is particularly important now, as the Roberts Court has made clear its willingness not only to dramatically change laws[166] but also to enforce its vision of congressional and executive powers in indirect as well as direct ways.[167] Second, this lens can shed new light on the decisions of prior Supreme Courts such as *Curtiss-Wright*, revealing many instances of the phenomenon of "exceptionalism" as an expansion not only of executive power but also of judicial power. Third, it brings into sharper relief the ways in which the Court can shape foreign affairs and national security governance and their international and transnational implications in an increasingly globalized world. Finally, it provides insight for thinking about the nature of a judicial power that is appropriate for foreign affairs and national security governance in a constitutional democracy and the modern international legal system.

---

[166] *See, e.g.*, Students for Fair Admissions v. Harvard Coll., 143 S. Ct. 2141 (2023); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Citizens United v. Fed. Elec. Comm., 558 U.S. 310 (2010); Dist. of Columbia v. Heller, 554 U.S. 570 (2008). For a trenchant summary of many of the changes, see Linda Greenhouse, *Look at What John Roberts and His Court Have Wrought Over 18 Years*, N.Y. TIMES, July 19, 2023, https://www.nytimes.com/2023/07/09/opinion/supreme-court-conservative-agenda.html [https://perma.cc/U6CS-GFWR].

[167] Indirect ways such as the constitutional avoidance reasoning in statutory interpretation discussed here will likely be more common, but the Court has also indicated a willingness to police separation of powers more directly. *See Zivotofsky*, 566 U.S. at 197 ("The Judicial Branch appropriately exercises th[e] authority [to determine the constitutionality of a statute], including in a case such as this, where the question is whether Congress or the Executive is aggrandizing its power at the expense of another branch.") (internal quotation omitted).