Introduction to Issues in Researching U.S. Nuclear Sharing

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Introduction

Secrecy seems at first sight to be antithetical to law. Law and its study require a clear view of which rules are in force and which procedures are relied upon. A lack of clarity, through contradictory, vague or secret norms, can of course also arise purposefully through coordinated government action. The resort to secrecy in governmental conduct can be regulated and defined through measures of classification, or it can happen in a spontaneous, extra-legal or even illegal manner. Though classification and other secretive measures protect sensitive information, they are also a very sharp double-edged sword capable of stifling public debate and protecting governments from scrutiny.[1]

This 'executive secrecy' perfectly dovetails with an executive's foreign affairs powers, in turn affecting international legal relationships. Foreign affairs have historically and logically been the plaything of the executive branch. Though parliamentary scrutiny and (in some countries and to very differing extents) judicial scrutiny are often guaranteed in (constitutional) law, the practices of executives both in the past and present can limit such scrutiny. The governments of liberal constitutional states can limit such institutionalised scrutiny and broader democratic engagement by instating special procedures for sensitive information, by keeping information from their parliaments and populations, or by making secret treaties, all in the name of a more flexible foreign policy. Despite article 102 UNC and article 80 VCLT, secret treaties and secretive executive agreements persist.[2]

A specific case study of the dovetailing of unilateral executive action in foreign affairs and executive secrecy (and, arguably, the *summum* of historical secrecy) presents itself in the practice of nuclear sharing. Beginning in the 1950s the United States 'shared' its nuclear weapons with allied countries around the globe through a host of agreements that remain understudied.[3]

The problem and its relevance

Since the war in Ukraine, Poland and Belarus have made statements and legal changes indicating that they might soon want to host the US' or Russia's nuclear weapons respectively.[4] Such 'nuclear sharing' is not

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[1] Oona A. Hathaway, 'Secrecy's End' (2021) 106 Minnesota law review 691.

[2] Megan Donaldson, 'The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order' (2017) 111 American Journal of International Law 575.

[3] Julian Schofield, 'Sharing Within the Western Alliance' in *Strategic nuclear sharing* (Palgrave Macmillan 2014).

[4] See e.g.: Nikolai N Sokov, 'Russia-Belarus nuclear sharing would mirror NATO's—and worsen Europe's security' Bulletin of the Atomic Scientists <https://thebulletin.org/2022/07/russia-belarus-nuclear-sharing-would-mirror-natos-and-worsen-europe-security/> accessed 12/05/2023; Gabriela Rosa Hernández, 'Poland reignites Nuclear Sharing Conversation' Arms Control Today <https://www.armscontrol.org/act/2022-11/news/poland-reignites-nuclear-sharing-conversation> accessed 16/05/2023.

new and has existed in Europe for over 60 years, under extreme secrecy at the start of its existence.[5] Currently, Belgium, Germany, Italy, the Netherlands and Turkey are hosting US nuclear weapons.[6] Encompassing both international public law and constitutional law, the **legal framework enabling nuclear sharing** today consists of roughly the same treaties, executive agreements and laws as some 60 years ago. Yet it has never been extensively studied. At present, a lot of new archival material has been released and many documents are no longer officially secret, but these remain understudied due to a residual aura of secrecy (dubbed 'postsecrecy'). These **secrecy practices** themselves trigger a whole set of legal questions that are also at the nexus of international law and constitutional law.

Secrecy?

For any research in this field, secrecy presents itself both as an obstacle (*are there enough accessible materials?*) and as an object of study (*how is secrecy a tool of governance?*).

Secrecy as an obstacle - Opposed to what many outside observers might think, secrecy is not all-encompassing in this field. DE GOEDE offers important methodological guidance in conceptualising secrecy and studying topics in an environment of '**postsecrecy'**.[7] She conceptualises the notion of 'postsecrecy', where Cold War era secrecy followed by partial declassification and archival research results in a contemporary situation where the lines between classified and declassified are blurred. This translates into the reality that materials that are technically *accessible* might not be readily *available*, because they retain an 'aura' of secrecy for government institutions and researchers alike. The former might still refuse access or deny that declassification took place.[8] The latter might avoid engaging with this topic due to the appearance of secrecy rather than the presence of actual secrecy which bars access to sources. The aura of secrecy still surrounding nuclear weapons has discouraged research efforts on the question. Furthermore, it is not uncommon for government institutions to refuse to release or grant access to documents that have been declassified and are available in other archives, often making ease of access rather than official secrecy the problem when conducting research in this field.[9]

Secrecy as an object of study - Literature surrounding secrecy in law and democracies is amply available, including many legal perspectives on national security, questions of secrecy from the executive branch and the 'secrecy dilemma' in constitutional liberal democracies.[10] Though much of this previous research was done in the context of revelations through the WikiLeaks scandal and extraordinary renditions in the wake of 9/11, its structure and methodology can be applied to nuclear sharing as well. Important to

[5] Schofield (n3).
[6] Hans M Kristensen and Matt Korda, 'World nuclear forces' in *SIPRI Yearbook 2023* (Stockholm International Peace Research Institute 2023) 248, 251, 268.
[7] Marieke de Goede, Esmé Bosma and Polly Pallister-Wilkins (eds), *Secrecy and methods in security research: a guide to qualitative fieldwork* (Routledge 2020).
[8] See e.g. William Burr, 'The Fifty-Year Rule: Its Use and Misuse' <https://unredacted.com/2017/08/15/the-fifty-year-rule-its-use-and-misuse/> accessed 12/05/2023.
[9] Ibid.
[10] See e.g.: Michael P. Colaresi, *Democracy declassified: the secrecy dilemma in national security* (Oxford University Press 2014); Sudha N. Setty, *National security secrecy: comparative effects on democracy and the rule of law* (Cambridge University Press 2017).

this topic also are works concerning secrecy practices in treaty-making (e.g. through executive agreements) and secrecy as a tool of executive governance, through the practice of 'selective declassification'.[11]

Goals and Methods

This research project seeks to answer the following central research question: How was US nuclear sharing implemented in Belgium, Germany, Italy and the Netherlands, and how did this implementation impact the use of secrecy, the separation of powers and respect for the Rule of Law in these constitutional democracies? This overarching question is made operational through four sets of sub-questions.

> SQ1 – Descriptive: How was nuclear sharing implemented in the selected countries? What are the legal obligations enshrined in final nuclear sharing agreements? Concerning decision-making procedures, when an agreement in principle on nuclear sharing was reached, how were the international agreements allowing them 1) drafted, 2) agreed to and 3) ratified in the national legal orders?
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> SQ2 – Comparative: Was there one blueprint for all of these agreements or were they unique to the host country? What are similarities and differences in the nuclear sharing agreements in these countries?
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> SQ3 – Evaluative: How did nuclear sharing impact (1) host states' resort to secrecy, (2) tensions surrounding the separation of powers in foreign affairs and (3) respect for the Rule of Law?
>
> SQ4 – Theory building: How can nuclear sharing function as a case study of the tensions between Secrecy – Law – Democracy?

This project proposes archival methods, doctrinal descriptive work and comparative methodology to excavate the legal framework enabling nuclear sharing in Belgium, Germany, Italy and the Netherlands (WP1-2). In a second stage, it aims to analyse how secrecy functioned within this framework and how this impacted respect for the Rule of Law and the separation of powers (WP3). Finally, this project is embedded into existing broader legal debates on secrecy as a tool of governance in liberal constitutional democracies and the effectiveness of law (WP4).

Almost like a legal methodology smorgasbord, this project relies on foreign affairs law, international law and legal history methods. To combat issues of access raised by postsecrecy in WP1-2, this project includes research in three overlapping types of archives. The project looks at institutional materials (reports from council of ministers, parliamentary commission reports, …), individual materials (private archives from leaders of government, ministers of defence and ministers of foreign affairs) and US national security archives. When it comes to comparative methodology, the *tertium comparationis* is the implementation of

[11] Sasha Dudding, 'Spinning secrets: The dangers of selective declassification' (2021) 130 Yale Law Journal 708.

nuclear sharing. Selected systems are Belgium, Germany, Italy and the Netherlands. Turkey is excluded for practical (language, available materials) and conceptual reasons (no liberal constitutional democratic history). To account for fluctuations in available materials, this project is designed with a lot of modulation in mind. In practice, if the gathering of documents yields too many materials, Italy might be left from analysis.

Open Questions

A set of open questions relating to this project were discussed at the symposium. These included methodological questions surrounding 'postsecrecy': how should research plan for 'known unknowns' and even 'unknown unknowns'? What place is there for intuition to test hypotheses? Another set of questions deals with the involvement of officials through potential use of interviews. A third set of questions deals with archival research strategies, seeing as methodological guidance on this front seems to be lacking. Finally, several comparative pitfalls were raised.

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