

# Washington University Law Review

---

Volume 98 | Issue 4

---

2021

## Delegating National Security

Robert Knowles

*University of Baltimore School of Law*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Administrative Law Commons](#), [National Security Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Robert Knowles, *Delegating National Security*, 98 WASH. U. L. REV. 1117 (2021).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol98/iss4/7](https://openscholarship.wustl.edu/law_lawreview/vol98/iss4/7)

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# DELEGATING NATIONAL SECURITY

ROBERT KNOWLES\*

## ABSTRACT

*Conservative scholars and a Supreme Court majority support reviving the nondelegation doctrine as a way to downsize the administrative state. But proposals from these scholars and Justices inevitably maintain there should be an exception for national security.*

*This Article explains why a national security exception defeats the nondelegation doctrine's goals of preserving the separation of powers and individual liberty. In doing so, this Article charts the ways the national security state regulates and accounts for its immunity from the harshest attacks on the administrative state. This Article also predicts how this dynamic would affect a nondelegation revival.*

*This Article begins by offering a new model depicting agency lawmaking in national security. It draws on insights from military-industrial complex theory, which has received scant attention from legal scholars. What I call the military-administrative complex uses threat-inflation to obtain increased regulatory authority over individuals, including American civilians. As its reach expands, the boundary between domestic and national security regulation fades.*

*Next, this Article describes why presidential control theory—which grounds the legitimacy of delegation in the President's political accountability and oversight—cannot justify a national security exception. The military-administrative complex is so entrenched and insulated that even the President must delegate vast discretion to agencies within it.*

*Finally, this Article scrutinizes the sources the Justices themselves cite to support their nondelegation arguments. If the Court adopted the reasoning in these sources, this Article predicts, a revived nondelegation doctrine with a national security exception would be inherently unstable. Ever-expanding definitions of “national security” could allow the exception to swallow the rule.*

---

\* Associate Professor, University of Baltimore School of Law. I'm grateful for generous feedback from Jon Michaels, Peter Margulies, Mark Graber, Max Stearns, Bill Araiza, Jon Hafetz, Maryam Jamshidi, Harlan Cohen, Seema Kakade, Audrey McFarlane, Colin Starger, John Dehn, Jeremy Telman, and participants in workshops at the University of Maryland, the University of Florida, the University of Baltimore, Barry University, and Loyola University Chicago. I also thank Celia Feldman and David Matchen for their outstanding research support.

## TABLE OF CONTENTS

INTRODUCTION.....	1118
I. NONDELEGATION AND LIBERTARIAN CONSTITUTIONAL LAW.....	1127
A. <i>Libertarian Constitutionalism</i> .....	1128
B. <i>The Nondelegation Doctrine and Libertarian Constitutionalism</i> .....	1129
II. NATIONAL SECURITY DELEGATION.....	1140
A. <i>Maximal Discretion</i> .....	1141
B. <i>Minimal Scrutiny</i> .....	1145
III. THE MILITARY-ADMINISTRATIVE COMPLEX.....	1151
A. <i>The Military-Industrial Complex as Theory</i> .....	1152
B. <i>The Myth of Presidential Control</i> .....	1155
C. <i>From a Military-Industrial to a Military-Administrative Complex</i> .....	1158
D. <i>The Vicious Cycle of the Military-Administrative Complex</i> .....	1160
1. <i>Threat Inflation</i> .....	1161
2. <i>Increased Regulatory Authority</i> .....	1163
3. <i>Pressure to Use Authority and Its Use</i> .....	1168
4. <i>Intelligence Validating the Use of Legal Authority and Resulting Threat Inflation</i> .....	1171
5. <i>Militarization of Other Regulatory Domains</i> .....	1172
IV. THE MILITARY-ADMINISTRATIVE COMPLEX AND LIBERTARIAN CONSTITUTIONALISM.....	1176
CONCLUSION.....	1180

## INTRODUCTION

The United States government’s national security activities should raise profound nondelegation concerns.<sup>1</sup> Congress gives agencies in that realm

---

1. Under the nondelegation doctrine, Congress violates the Constitution when it delegates rulemaking authority to agencies without an “intelligible principle” to guide the exercise of discretion. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); see also *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001) (construing the text of a delegation to place constitutionally-adequate “limits on the EPA’s discretion”). Delegation of adjudicatory power can also raise nondelegation concerns. See Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1961–64 (2018). So can delegation to private entities. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 580–86 (2000).

maximal discretion and minimal scrutiny.<sup>2</sup> On this permissive legal armature has grown the world's largest bureaucracy.<sup>3</sup>

That bureaucracy engages in profuse rulemaking and adjudication—the meat and drink of administrative agencies.<sup>4</sup> It works hand in glove with a vast network of private contractors who perform many critical national security functions. And it increasingly regulates individuals, including American civilians.<sup>5</sup>

I call the combination of this bureaucracy and its private contractors the *military-administrative complex* (MAC).<sup>6</sup> Although there is a rich literature on presidential authority in national security,<sup>7</sup> the independent behavior of regulating agencies in that space has just begun to receive attention from legal scholars.<sup>8</sup> And there has been no comprehensive assessment of

---

2. See *infra* Part II; see also Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?* (Yale L. Sch. Pub. L. Rsch. Paper, 2020), <http://dx.doi.org/10.2139/ssrn.3530588> [<https://perma.cc/Y2LF-ECXX>].

3. See, e.g., Craig Whitlock & Bob Woodward, *Pentagon Buries Evidence of \$125 Billion in Bureaucratic Waste*, WASH. POST (Dec. 5, 2016), [https://www.washingtonpost.com/investigations/pentagon-buries-evidence-of-125-billion-in-bureaucratic-waste/2016/12/05/e0668c76-9af6-11e6-a0ed-ab0774c1eaa5\\_story.html](https://www.washingtonpost.com/investigations/pentagon-buries-evidence-of-125-billion-in-bureaucratic-waste/2016/12/05/e0668c76-9af6-11e6-a0ed-ab0774c1eaa5_story.html) [<https://perma.cc/L5H7-ENEV>].

4. See generally Robert Knowles, *Warfare as Regulation*, 74 WASH. & LEE L. REV. 1953 (2017) [hereinafter Knowles, *Warfare*] (modeling U.S. national security activities as forms of regulation and applying administrative law principles); cf. Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 92–95 (2016) (describing “panvasive” surveillance as regulation). See also *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (“Agencies make rules (‘Private cattle may be grazed on public lands X, Y, and Z subject to certain conditions’) and conduct adjudications (‘This rancher’s grazing permit is revoked for violation of the conditions’) and have done so since the beginning of the Republic.”).

5. See *infra* Part II.A; see also William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633, 1634 (2010).

6. The term is, of course, adapted from “military-industrial complex.” See *infra* Part III.A; see also Dwight D. Eisenhower, *Military-Industrial Complex Speech* (1961) [hereinafter *Farewell Address*], in THE AVALON PROJECT, [http://avalon.law.yale.edu/20th\\_century/eisenhower001.asp](http://avalon.law.yale.edu/20th_century/eisenhower001.asp) [<https://perma.cc/R8YV-LKE7>].

7. See generally, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183 (2018); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996).

8. See, e.g., Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063 (2020) (describing certain national security activities aimed at individuals as forms of administrative adjudication); Knowles, *Warfare*, *supra* note 4, at 1965. Other scholars have identified a family resemblance between the military and intelligence communities and the rest of the administrative state. See Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 799 (2012) (“[T]he modern military in many ways enjoys the functional advantages, now long embraced, of administrative agencies.”); Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 637–38 (2016) (“[T]here is a lot to recommend the analogy between the intelligence apparatus and the administrative state.”).

national security's significance for recent debates about the constitutionality of the administrative state as a whole.<sup>9</sup>

This Article supplies such an assessment, which is long overdue. The near absence of national security from the debate so far is striking. For one thing, the MAC is immense and growing. Its public side includes the Departments of Defense, State, and Homeland Security; the National Security Council; the Central Intelligence Agency (CIA); and more than a thousand other sub-agencies.<sup>10</sup> These entities employ millions.<sup>11</sup> Their activities account for more than half of all federal discretionary spending.<sup>12</sup>

Moreover, the rise of this regulatory behemoth represents an expansion of the administrative state even as other parts of it are under siege.<sup>13</sup> Deregulatory fervor, budget cuts, and public mistrust of government have weakened agency authority.<sup>14</sup> Trump appointees set out to “deconstruct[] the administrative state.”<sup>15</sup> And a Supreme Court majority seems prepared to revive the nondelegation doctrine, putting much of that state in legal jeopardy.<sup>16</sup>

---

9. See *infra* Part II.A. Harlan Cohen, *The National Security Delegation Conundrum*, JUST SECURITY (July 17, 2019), <https://www.justsecurity.org/64946/the-national-security-delegation-conundrum/> [<https://perma.cc/PEC4-UXXS>]. The exception is the immigration space, where some scholars have observed that immigrant advocates share with libertarian constitutionalists a common concern about administrative overreach. See, e.g., Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 99–100 (2017).

10. See, e.g., DANA PRIEST & WILLIAM M. ARKIN, *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* 86 (2011) (reporting that 1074 federal government organizations and nearly 2000 private companies work on programs related to counterterrorism, homeland security, and intelligence in at least 17,000 locations across the United States). The Department of Justice and the White House Office of Legal Counsel (OLC) also play prominent roles in providing justifying legal authority for national security activities. See, e.g., Hathaway, *supra* note 2.

11. See, e.g., MICHAEL J. GLENNON, *NATIONAL SECURITY AND DOUBLE GOVERNMENT* 16 (2014).

12. See, e.g., CONG. BUDGET OFF., *AN ANALYSIS OF THE PRESIDENT'S 2020 BUDGET* 9 (2019) (noting that the president's 2020 budget allocates \$750 billion for defense discretionary spending and \$584 billion for nondefense discretionary spending).

13. See Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017) [hereinafter Metzger, *1930s Redux*].

14. See JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* 86–101 (2017) [hereinafter MICHAELS, *CONSTITUTIONAL COUP*].

15. See Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 13–14 (2018).

16. See *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment); *id.* at 2131 (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”) (emphasis omitted); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1970 (2017) (“In determining the constitutional validity of the modern administrative state, the nondelegation doctrine is the big one.”); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 3) (on file with author).

Those who challenge the administrative state's constitutionality—I will refer to them as *constitutional libertarians*<sup>17</sup>—should be disturbed by the rise of the military-administrative complex. And yet, for the most part, they are not. Constitutional libertarians do not regard very broad delegations of national security power as problematic.<sup>18</sup> The textual rationale for carving out this exception is that, as Justice Gorsuch put it, “[the President] enjoys his own inherent Article II powers” in foreign affairs.<sup>19</sup> A delegation of these Article II powers to agencies, then, cannot be a delegation of “legislative” power, no matter how legislative-seeming the nature of those powers.<sup>20</sup>

This highly formalist logic does little actual work, however.<sup>21</sup> Beneath it lie functional assumptions springing from a core belief that national security is a separate and unique sphere of governance.<sup>22</sup> This Article seeks to demonstrate that these assumptions are idealized and obsolete; they fail to account for the vast scope and changing nature of the government's national

---

17. See *infra* Part IV; Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 394–95 (2015) [hereinafter Sunstein & Vermeule, *Libertarian Administrative Law*]; cf. Metzger, *1930s Redux*, *supra* note 13, at 1 (referring to them as “anti-administrativists”). Use of the term “libertarian” is not entirely fair to the many self-described libertarians who express concern about the reach of the U.S. government's national security activities. See, e.g., Veronique de Rugy, *Cutting the Pentagon Budget*, REASON (July 2010), <http://reason.com/archives/2010/06/11/cutting-the-pentagon-budget> [https://perma.cc/4JYT-ZXN9].

18. See *Gundy*, 139 S. Ct. at 2143–44 (Gorsuch, J., dissenting); Michael B. Rappaport, *A Two Tiered and Categorical Approach to the Nondelegation Doctrine* 6 (San Diego Legal Stud. Paper No. 20-471, 2020), <https://ssrn.com/abstract=3710048> [https://perma.cc/UMD8-847C] (arguing that the Constitution “places no limits or weaker limits on the delegation of policymaking discretion” in “traditional areas of executive responsibility, such as foreign and military affairs, spending, and the management of government property”).

19. *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).

20. See *id.* at 2137 (“So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if ‘the discretion is to be exercised over matters already within the scope of executive power.’”) (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985) [hereinafter Schoenbrod, *The Delegation Doctrine*]).

21. Schoenbrod, *The Delegation Doctrine*, *supra* note 20, at 1261. Professor Schoenbrod's article was the *only* secondary authority Justice Gorsuch cited (and quoted) in explaining the foreign affairs exception, and he frequently cited Professor Schoenbrod's work in setting forth his broader argument for reviving the nondelegation doctrine. See, e.g., *Gundy*, 139 S. Ct. at 2137 n.43 (Gorsuch, J., dissenting); *id.* at 2134 (Gorsuch, J., dissenting) (citing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 29 (1993) [hereinafter SCHOENBROD, *POWER WITHOUT RESPONSIBILITY*]).

22. See *infra* Part III.C.

security activities.<sup>23</sup> Nor do they acknowledge the serious threat to individual liberty those activities increasingly present.<sup>24</sup>

In addition, by maintaining that national security should be exempt from the nondelegation doctrine, libertarian constitutionalists undermine their own project. They would place on the President's shoulders the burden of both providing clear principles to guide agency discretion *and* performing most oversight functions Congress and the courts ordinarily would. This burden is an impossible one.<sup>25</sup> The President, too, must delegate very broad regulatory authority to the national security bureaucracy.<sup>26</sup>

No one understood this reality better than Dwight Eisenhower. His famous 1961 warning about the threat to “democratic processes” presented by the “military-industrial complex” was in some ways a cry for help.<sup>27</sup> Throughout his career—as military officer, defense bureaucrat, Supreme Allied Commander in World War II, and President—he grappled with the problem of how to manage the military and its contractors,<sup>28</sup> which he came to see as interest groups.<sup>29</sup> He clashed with them over numerous policies—even Cold War grand strategy.<sup>30</sup> In his Farewell Address, he described the

---

23. See, e.g., U.S. DEP'T OF DEF., DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 150 (2020) (defining “national security” as “encompassing both national defense and foreign relations of the United States with the purpose of gaining: a. A military or defense advantage over any foreign nation or group of nations; b. A favorable foreign relations position; or c. A defense posture capable of successfully resisting hostile or destructive action”); see generally ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON (2016).

24. Compare *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) (recognizing a foreign-affairs exception to the nondelegation doctrine but also contending that a statute giving “the Attorney General the authority to ‘prescrib[e] the rules by which the duties and rights’ of citizens are determined” is a “quintessentially legislative power”) (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossier ed., 1961)), with Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1678 (2009) (observing that “every government action is redistributive; the 9/11 response had different effects on Muslim Americans and on other Americans”).

25. See, e.g., GLENNON, *supra* note 11; Chachko, *supra* note 8. But see Rascoff, *supra* note 8, at 636–37 (arguing that the President exercised meaningful oversight of much of the intelligence community during the Obama administration).

26. See, e.g., Exec. Order No. 12,333, § 1.7, 46 Fed. Reg. 59,941 (Dec. 4, 1981), amended in 50 U.S.C. § 3001 (2018) (authorizing the NSA to “[c]ollect (including through clandestine means), process, analyze, produce, and disseminate signals intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions”).

27. See Farewell Address, *supra* note 6. I discuss the evolution of the term in Part III.A. See also Alex Roland, *The Military-Industrial Complex: Lobby and Trope*, in THE LONG WAR: A NEW HISTORY OF U.S. NATIONAL SECURITY POLICY SINCE WORLD WAR II 335–37 (Andrew J. Bacevich ed., 2007).

28. I use the term “contractor” broadly to refer to any private entity that supplies the government with weapons, equipment, or services, regardless of whether the private entity is performing a traditional military function as a result of outsourcing. See LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS 9 (2011).

29. See, e.g., JAMES LEDBETTER, UNWARRANTED INFLUENCE: DWIGHT D. EISENHOWER AND THE MILITARY INDUSTRIAL COMPLEX 45–131 (2011).

30. See, e.g., HELEN BURY, EISENHOWER AND THE COLD WAR ARMS RACE: ‘OPEN SKIES’ AND THE MILITARY-INDUSTRIAL COMPLEX 5–6 (2014).

“military-industrial complex” as a symbiotic relationship between the defense bureaucrats and private firms, who worked together to bend national policy toward militarism and extend their domains of influence.<sup>31</sup>

Today, empowered by expanding definitions of national security and the individualization of warfare and foreign policy,<sup>32</sup> the military-industrial complex has evolved into a regulating administrative state—the military-administrative complex (MAC).<sup>33</sup> Take the National Security Agency (NSA), for example.<sup>34</sup> A Department of Defense (DoD) component led by a general who also heads the U.S. Cyber Command, the NSA conducts warrantless mass surveillance of American citizens.<sup>35</sup> It works with thousands of contractors. And it regulates. It renders an individualized determination—adjudication—when it identifies targets for surveillance.<sup>36</sup> It produces broadly-applicable policies—rulemaking—when it prescribes how Americans’ personal data may be collected and used.<sup>37</sup> Even after Congress scaled back the NSA’s formal surveillance authority, moreover, the agency has managed to *expand* its actual regulatory power by obtaining data from other agencies and buying it from private brokers.<sup>38</sup> The national security bureaucracy has long experience adjusting regulatory strategies and

31. See Farewell Address, *supra* note 6.

32. See *infra* Part III.C. See also Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1523 (2013) (observing the shift from the traditional war practice of defining an enemy by a group-based judgment to the current practice, requiring individuation of enemy responsibility before military force is justified).

33. In using this acronym, I follow the practice of political scientists, who abbreviate the Military-Industrial Complex as the “MIC.” See LEDBETTER, *supra* note 29, at 6.

34. See *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 65 (2d Cir. 2009) (“The NSA . . . is charged with, among other tasks, collecting, processing, and disseminating signals intelligence (“SIGINT”) information for national foreign intelligence purposes.”).

35. See, e.g., FISA Amendments Act of 2008 § 702, 50 U.S.C. § 1881a; Elizabeth Goitein, *ODNI’s 2019 Statistical Transparency Report: The FBI Violates FISA...Again*, JUST SECURITY (May 1, 2020), <https://www.justsecurity.org/69972/odnis-2019-statistical-transparency-report-the-fbi-violates-fisaagain/> (discussing NSA authority to conduct warrantless “backdoor” searches and the abuse of that authority) [<https://perma.cc/3LCK-FBT4>]; Margaret Hu, *Bulk Biometric Metadata Collection*, 96 N.C. L. REV. 1425, 1436 n.38 (2018) (observing that surveillance has become “a tool of governance”); Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2297 (2014) (“Governments can target for control or surveillance many different aspects of the digital infrastructure that people use to communicate . . .”).

36. See, e.g., Hu, *supra* note 35, at 1431–32 (explaining the ways the NSA identifies targets).

37. These types of rules are known throughout the intelligence community as “minimization procedures.” See, e.g., NAT’L SEC. AGENCY, UNITED STATES SIGNALS INTELLIGENCE DIRECTIVE SP0018: LEGAL COMPLIANCE AND U.S. PERSONS MINIMIZATION PROCEDURES (Jan. 25, 2011), <https://www.dni.gov/files/documents/1118/CLEANEDFinal%20USSID%20SP0018.pdf> [<https://perma.cc/EXT3-678F>]; Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 904–05 (2014) [hereinafter Knowles, *National Security Rulemaking*].

38. See, e.g., Niva Elkin-Koren & Michal S. Gal, *The Chilling Effect of Governance-by-Data on Data Markets*, 86 U. CHI. L. REV. 403, 411–12 (2019); Sharon Weinberger, Opinion, *Private Surveillance Is a Lethal Weapon Anybody Can Buy*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/opinion/private-surveillance-industry.html> [<https://perma.cc/ZU93-6GLE>].



using private entities to enhance its authority.<sup>39</sup> And that authority collides more and more often with liberty interests.<sup>40</sup>

This Article considers how agencies regulate in the national security space, why their regulating remains largely immune from the constitutional libertarians' attack on other areas of administrative action, and the effect of this dynamic on the entire administrative state. A comprehensive survey of the legal authority for agency regulation in the national security realm would exceed the space available here. Nor is it possible in this assessment to enumerate all the exercises of agency discretion in that realm. But this Article seeks to provide enough examples to demonstrate how broad and deep a national security exception to the nondelegation doctrine really is. Such an exception injects profound instability into the nondelegation doctrine and, along with it, the libertarian constitutionalist reform project.

Part I provides an overview of the non-delegation doctrine and the constitutional libertarian project which has a revival of the doctrine as its centerpiece. I emphasize the importance of what one might call the penumbral aspect of the nondelegation doctrine: although, as a formal matter, the doctrine prohibits delegations lacking “intelligible principles” to guide agency discretion, the true function of the nondelegation doctrine is more fundamental—to constrain the *amount* of its power Congress conveys to the Executive Branch.

Part II charts key legal frameworks constituting the MAC. Congress, through vague delegations, gives agencies sweeping national security rulemaking and adjudicatory authority.<sup>41</sup> At the same time, agencies regulate free of most procedural requirements ordinarily imposed on them by statutes and executive orders.<sup>42</sup> Agency lawmaking occurs with little public accountability, often in secret, and with only sporadic judicial review. And even as courts are deferring less to agencies regulating in other areas, they are, on balance, deferring more to agencies performing national security functions.<sup>43</sup>

Part III explores how agencies behave within this uniquely permissive legal regime. When legal constraints are weak, it is especially important to understand how agencies are influenced by the “thick political surround” in which they operate.<sup>44</sup> I draw from the political science literature on the military-*industrial* complex (MIC), which has received scant attention from

---

39. See DICKINSON, *supra* note 28, at 9; AMY ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 23* (1999).

40. See *infra* Part III.C.

41. See *infra* Part II.A.

42. See *infra* Part II.B.

43. See *infra* notes 112–26 and accompanying text.

44. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346, 354 (2016).

legal scholars. MIC theory offers a number of important insights for understanding the relevant political and institutional context.<sup>45</sup>

Using these MIC theory insights, I construct a model of the military-administrative complex as a vicious cycle of overregulation.<sup>46</sup> The cycle is driven by what scholars of domestic regulation would identify as bureaucratic empire-building,<sup>47</sup> rent-seeking by private interests,<sup>48</sup> and agency capture.<sup>49</sup> The vicious cycle begins when contractors' and bureaucrats' rational incentives combine to inflate threats, driving the creation of new national security regulatory authority and pressure to use it.<sup>50</sup> The use of that authority creates a market for intelligence validating it.<sup>51</sup> The validating intelligence enables more threat inflation, starting the cycle again, and often justifying the expansion of the MAC to encompass traditionally-domestic domains.<sup>52</sup>

MIC theory's insights also call into question one commonly-held justification for the administrative state—the influential “presidential administration” approach, which views the President as a politically-accountable actor whose supervision and control legitimizes agency lawmaking.<sup>53</sup> A libertarian constitutionalist might draw on presidential

45. See LEDBETTER, *supra* note 29, at 6–12 (charting MIC theory's major critiques of governance).

46. This echoes Justice Breyer's early 1990s description of over-regulation in the domestic sphere. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 9–11 (1993) (describing quality-of-life regulators' tendency to overregulate high-profile, low-probability risks).

47. See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 39 (1971) [hereinafter NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT*]. For a sophisticated and comprehensive study of bureaucratic incentives, see JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 68, 173 (1991) [hereinafter WILSON, *BUREAUCRACY*].

48. One form of rent-seeking involves an interest group gaining from redistribution caused by government regulation without contributing anything in return. See generally, e.g., Robert D. Tollison, *The Economic Theory of Rent Seeking*, 152 *PUB. CHOICE* 73 (2012).

49. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *COLUM. L. REV.* 1260, 1263 (2006) (describing an early version of capture theory focusing on public interest group alignment with over-regulating agencies); Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2279 (2001) (“Proponents of [Reagan's executive review process] stressed the need . . . to guard against regulatory failures—in particular, excessive regulatory costs imposed by single-mission agencies with ties to special interest groups and congressional committees.”).

50. Threat inflation is “the attempt by elites to create concern for a threat that goes beyond the scope and urgency that a disinterested analysis would justify.” Jane K. Cramer & A. Trevor Thrall, *Understanding Threat Inflation*, in *AMERICAN FOREIGN POLICY AND THE POLITICS OF FEAR: THREAT INFLATION SINCE 9/11* (A. Trevor Thrall & Jane K. Cramer eds., 2009). I assume that the participants' incentives are rational—both because it simplifies the model and because, in this context, rational choice explains policy distortions. See, e.g., GLENNON, *supra* note 11, at 19–21 (concluding that a rational bureaucrat in the national security space would inflate threats).

51. See *infra* Part III.D.4.

52. Cf. Hathaway, *supra* note 2, at 9 (describing how executive branch legal advisors in national security “arrived at decisions that, at times, stretched existing legal constraints to their breaking point”).

53. See generally, e.g., Kagan, *supra* note 49.

administration theory as a practical backstop to their formalist argument that national security authority—no matter how “legislative” it may appear—is *per se* Article II authority. But military-industrial complex theory indicates just how problematic this move would be. In contrast to most other parts of the federal bureaucracy, the MAC is so large, entrenched, and insulated that even the President must accommodate its interests much of the time.<sup>54</sup> Presidential administration cannot, by itself, legitimize a national security exception to the nondelegation doctrine.<sup>55</sup>

Part IV plumbs the MAC model’s significance for constitutional libertarianism more generally. This Part makes a novel contribution by identifying major weaknesses in libertarian constitutional law as a legal reform project. There are striking similarities between MIC theory and the functionalist critiques of domestic regulation that undergird much of libertarian constitutional law. In carving out a national security exception, however, libertarian constitutionalists selectively ignore the functional insights giving their critique its greatest force.<sup>56</sup>

And ironically, if the libertarian constitutionalists succeed in reviving the nondelegation doctrine with a national security exception embedded in it, the result could be more of what they fear—diminishment of economic liberty.<sup>57</sup> As the model in Part III predicts, unless the vicious cycle is broken, the MAC will continue to expand its regulatory authority even further into areas not traditionally associated with national security. Meanwhile, Congress and the Executive Branch will be tempted to elude the nondelegation doctrine’s reach by redefining agency mandates in national security terms.<sup>58</sup> In fact, the Court’s inability to police the line between “national security” and “domestic” cases during the World War II years arguably led to the nondelegation doctrine’s exile in the first place.<sup>59</sup>

To be clear, this Article does not offer prescriptions for how constitutional libertarians could mend the disjuncture between their anti-

---

54. See *infra* Part III.B.

55. See Chachko, *supra* note 8 (making this observation without reference to MIC Theory).

56. See *infra* Part III.B. Cf. Mortenson & Bagley, *supra* note 16, at 15 (contending that Justice Gorsuch’s *Gundy* dissent urging a nondelegation doctrine revival derives its “rhetorical force,” not from originalism, but “from the invocation of modern thinkers who argue that delegation threatens liberty and erodes accountability”).

57. For example, President Trump’s invocation of “national security” as a rationale for imposing tariffs is, in a globalized world, a demonstration of how national security powers can be leveraged to regulate the domestic economy. See *infra* notes 408–409 and accompanying text.

58. See, e.g., Priscilla Alvarez, *Customs and Border Protection Now Considered a ‘Security Agency’ Like FBI and Secret Service*, CNN (Feb. 6, 2020), <https://www.cnn.com/2020/02/06/politics/cb-p-security-agency-fbi-secret-service/index.html> [<https://perma.cc/QZ22-DJEH>].

59. See *infra* notes 38 and accompanying text.

administrativism and national security exceptionalism.<sup>60</sup> Nor does this Article explore the implications of the MAC model for the administrative state's other critics and defenders. Those are projects for another day. I focus on libertarian constitutionalism because that seems to be the position around which a Supreme Court majority is coalescing. In any event, the observations and predictions are offered here with the hope that they will be useful—regardless of the reader's views on the nondelegation doctrine's originalist pedigree or on the desirable size of the administrative state.

Nonetheless, two implications seem inescapable. The first is that, once the U.S. administrative state's national security activities are taken into account, it enjoys a much stronger position than either its critics or defenders typically assume. Second, the nondelegation revival the Supreme Court seems prepared to begin would, ironically, further empower the parts of the administrative state that are least democratically accountable and exercise the highest degree of coercive power over the individual.

#### I. NONDELEGATION AND LIBERTARIAN CONSTITUTIONAL LAW

This Part briefly describes libertarian constitutional law as a reform effort and the importance of the nondelegation doctrine to that effort. My focus here is necessarily a narrow one—I address the aspect troubled by, and anxious to reverse, the delegation of sweeping authority and broad discretion to agencies.<sup>61</sup>

This hard skepticism of administrative lawmaking that is the hallmark of libertarian constitutionalism has been expressed by a majority of Supreme Court Justices and advocated for in the scholarship on which the Justices rely.<sup>62</sup> If fully realized in the caselaw, this approach could lead to a radical downsizing of the administrative state.<sup>63</sup> At the same time, however, these libertarian constitutionalists recognize an exception for the government's national security activities, supporting otherwise impermissibly broad

---

60. I do not address the numerous and thoughtful analyses proposing softer versions of the nondelegation doctrine and more incremental ways of constraining agency authority. *See, e.g.*, William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, 3 AM. CONST. SOC'Y SUP. CT. REV. 211, 213–14 (2020) (arguing for a stricter nondelegation doctrine that would support progressive policies); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317–18 (2000); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 977 (2018).

61. For Professors Cass Sunstein and Adrian Vermeule, this view is a component of “libertarian administrative law,” which seeks to achieve libertarian constitutionalist goals by pushing both constitutional and sub-constitutional administrative law doctrine in ways that preserve the market baseline. *See* Sunstein & Vermeule, *supra* note 17, at 398–400.

62. *See* Mortenson & Bagley, *supra* note 16, at 2–3.

63. *See, e.g.*, Nicholas Bagley, Opinion, *Most of Government Is Unconstitutional*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html> [<https://perma.cc/6DZX-DLHZ>].

delegations of authority and strong judicial deference in that realm.<sup>64</sup> As I will explain in Part IV, this national security exception—what in practice operates as a substantive exception to a structural principle—would undermine the doctrine’s goals, make its application indeterminate and unstable, and ultimately leave a revival vulnerable to encroachment by the national security state.

In this Part, I also emphasize that today’s enthusiasm for reviving the nondelegation doctrine is only loosely linked to formalism or originalism. It owes most of its force to influential contemporary theories about bureaucratic empire-building, rent-seeking, and agency capture. Later, in Part IV, I will explore the similarities between these theories and the critiques of the national security state advanced by military-industrial complex theory.

#### *A. Libertarian Constitutionalism*

“Libertarian Constitutional Law” can be defined in many ways.<sup>65</sup> But its most commonly-invoked form is a comprehensive critique of modern jurisprudence, contending that much of the original constitutional order has been “lost” or “exiled.”<sup>66</sup> Libertarian constitutionalists argue that the courts have allowed economic and property rights in particular to be trampled by the titanic regulatory power of Congress and agencies.<sup>67</sup> Many scholars and jurists in this movement see the Lochner Era—from roughly the 1890s to the 1930s—as a golden age, even if they are reluctant to invoke it by name.<sup>68</sup>

---

64. See, e.g., Rappaport, *supra* note 18.

65. See, e.g., David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 LAW & CONTEMP. PROBS. 43, 43 (2014) (“On a number of important issues, modern Supreme Court doctrine and liberal constitutional thought have been significantly influenced by pre-New Deal libertarian (or ‘classical liberal’) ideas, even if the influence is often overlooked by observers or unknown to those influenced.”).

66. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014). The term “Constitution-in-exile” was coined by D.C. Circuit Judge Douglas Ginsburg. See Douglas H. Ginsburg, *Delegation Running Riot*, 1 REGULATION 83, 84 (1995) [hereinafter Ginsburg, *Delegation Running Riot*] (book review). Judge Ginsburg has also argued that the President can and ought to play a crucial role in constraining agency authority. See, e.g., Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082 (1986) (expressing concern about agency tendencies toward overregulation and arguing that, through Office of Management and Budget review, the President can implement “a broad view of the nation’s economic interest”).

67. See, e.g., BARNETT, *supra* note 66, at 32–52.

68. See, e.g., Morton J. Horowitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987) (“[T]he Supreme Court maintained an astonishingly constant underlying vision during its first 150 years. The first sharp break, I would submit, occurs only after 1937.”).

Supreme Court opinions of that period frequently sounded in economic liberty and free-market principles.<sup>69</sup>

Today's libertarian constitutionalists have won some legal victories, persuading the Court to recognize corporations' First Amendment Free Speech and Free Exercise rights—a new textual vehicle for reviving the anti-regulatory spirit of the *Lochner* Era.<sup>70</sup> With respect to administrative agencies, libertarian constitutionalists seek to revive or strengthen doctrines that limit agency discretion and to scrap those that empower it.<sup>71</sup> They argue for abandoning *Chevron* and other doctrines requiring judicial deference to many agency legal interpretations.<sup>72</sup>

But reviving the nondelegation doctrine is at the heart of the libertarian constitutionalists' anti-agency project.<sup>73</sup> The doctrine elevates the authority of, and puts faith in, the wisdom of judges. It is judicially-created and especially attractive to those who see the courts as the proper entity to more aggressively police the structural separation of powers.

### *B. The Nondelegation Doctrine and Libertarian Constitutionalism*

The nondelegation doctrine prohibits Congress from delegating legislative power to the Executive—full stop. From a strictly formal perspective, the basis for the doctrine is elegant: Article I of the Constitution

---

The Era's named for *Lochner v. New York*, 198 U.S. 45, 53 (1905), in which the Court struck down a statute prohibiting the employment of an individual for more than sixty hours a week, holding that the "general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." The *Lochner* Era ended less than thirty years later when the Court reversed course and held that economic and social welfare legislation would receive a strong presumption of rationality. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–94 (1937).

69. See Sunstein & Vermeule, *Libertarian Administrative Law*, *supra* note 17, at 399 ("Before and during the New Deal era, federal judges deployed doctrinal principles to cabin agency power, and many of the relevant decisions had an unmistakable libertarian tilt.")

70. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (recognizing religious beliefs of a closely held for-profit corporation); *Citizens United v. FEC*, 558 U.S. 310 (2010) (affirming and strengthening corporations' First Amendment rights of speech and corresponding rights to participate directly in elections); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133.

71. See generally, e.g., Metzger, *1930s Redux*, *supra* note 13.

72. The *Chevron* doctrine requires that a court defer to a reasonable interpretation of an ambiguous statutory provision offered by the agency charged with its implementation. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1615 (2019) ("*Chevron's* foundations are cracking.") [hereinafter Sunstein, *Chevron*]. The same reformers would also scrap the *Auer* doctrine, which requires giving deference to agency interpretations of their own regulations. See *Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., dissenting) (contending that the majority decision to retain the doctrine while narrowing its applicability was merely a "stay of execution").

73. See Heinzerling, *supra* note 16, at 1970.

vests all legislative powers in Congress and nowhere else.<sup>74</sup> If we could all agree on what “legislative power” means, courts would have no difficulty in identifying legislation that violates the doctrine. But courts have had great difficulty deciding what it means—at least where nondelegation is concerned.<sup>75</sup> The traditional test is that, to avoid running afoul of the doctrine, Congress must provide the Executive Branch with an “intelligible principle” when delegating to agencies the authority to make law. But the Court has evinced very little interest in second-guessing congressional delegations. They have had so little interest, in fact, that the Supreme Court has relied on the doctrine to strike down legislation only perhaps a half-dozen times, most recently in 1935, the apotheosis of the *Lochner* Era.<sup>76</sup>

Since 1935, the Supreme Court has declined the opportunity, again and again, to wield the doctrine to rein in delegations of power, and it has rebuked lower courts that have ventured to do so.<sup>77</sup> Some scholars argue that this history does not mean that the nondelegation doctrine is moribund. Professor Cary Coglianese contends, convincingly, that “the nondelegation doctrine, properly understood, concerns both the degree of discretion afforded to the holder of lawmaking power and the extent of the underlying power itself.”<sup>78</sup>

In practice, Coglianese observes, courts applying the doctrine tend to find delegations constitutionally problematic when a statute (1) “authorizes an agency to make binding law”; (2) regulate a wide range of targets across the economy; (3) regulate a wide range of activities; (4) impose “severe

---

74. Because the Constitution itself can be said to have delegated all legislative powers to Congress, some scholars now refer to it as the “subdelegation doctrine.” See, e.g., Gary Lawson, “*I’m Leavin’ It (All) up to You*”: Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine, 2018-2019 CATO SUP. CT. REV. 31, 31-32 [hereinafter Lawson, Gundy].

75. See Nicholas R. Parrillo, *Supplemental Paper to: “A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s”* 9 (C. Boyden Gray Ctr. for the Study of the Admin. State, Research Paper No. 20-17 Supplement, 2020) [hereinafter Parrillo, *Supplemental Paper*], <https://ssrn.com/abstract=3696902> (“[T]he difficulty of specifying and applying the nondelegation doctrine is a powerful and long-established justification for judges who believe in the doctrine at an abstract level to refrain from enforcing it.”).

76. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935). Earlier decisions include *United States v. L. Cohen Grocery Store Co.*, 255 U.S. 81, 86 (1921) (holding unconstitutional a statute prohibiting “unjust or unreasonable” charges for any “necessaries”); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (holding unconstitutional statutes applying state workmen’s compensation laws to admiralty cases); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924) (same); see also Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 383 (2017) (arguing that “[t]here was no golden age in which the courts enforced a robust nondelegation doctrine” and “[t]he federal courts never posed a significant obstacle to the development of the administrative state and the delegation of extensive policymaking authority”).

77. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001).

78. Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019) (emphasis omitted).

penalties” directly on “individuals and businesses”; (5) regulate according to a broad principle; and (6) dispense with “normal administrative procedures” or their equivalent.<sup>79</sup>

With this thicker, penumbral conception of the nondelegation doctrine in mind, one can argue, as Professor Coglianese and others do, that courts have not yet again found legislation that violates the doctrine because Congress has been careful not to delegate too much discretion and too much power, even when the legislation in question may appear to lack an “intelligible principle.”<sup>80</sup>

But libertarian constitutionalists have not given up on the courts making it a regular practice of striking down legislation on nondelegation grounds.<sup>81</sup> And they seem to have won over a Supreme Court majority. Five conservative Justices—Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh—have already expressed both skepticism of *Chevron*’s continuing validity and an interest in wielding the nondelegation doctrine to strike down legislation when the right opportunity arrives.<sup>82</sup>

Scholars have uncovered some evidence linking a version of the nondelegation doctrine to the Founding and early history of the United States.<sup>83</sup> Indeed, Professor Ilan Wurman has observed, influential members of the Founding generation argued against the constitutionality of even some delegations of foreign-affairs authority.<sup>84</sup> On the other hand, as Professors Julian Davis Mortenson, Nicholas Bagley, and Nicholas Parrillo have pointed out, such protestations seem to lie, for the most part, on the fringes of the critical debates of the period. In the bigger picture, Professors Mortenson and Bagley conclude, “the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to

---

79. *See id.* at 1864–68.

80. *See id.* at 1849 (“The nondelegation doctrine has mattered more in U.S. constitutional history for what courts have *not* done with it than for what they have.”); *see also* Lawson, Gundy, *supra* note 74, at 31–32; Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1310 (2003); Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (“We still regularly rein in Congress’s efforts to delegate legislative power; we just call what we’re doing by different names.”).

81. *See, e.g.*, Lawson, Gundy, *supra* note 74, at 33.

82. *See supra* note 16; Sunstein, *Chevron*, *supra* note 72; Lawson, Gundy, *supra* note 74.

83. *See, e.g.*, Alexander & Prakash, *supra* note 80, at 1310; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. (forthcoming 2021) [hereinafter Wurman, *Nondelegation*]; Aaron Gordon, Note, *Nondelegation*, 12 N.Y.U. J. L. & LIBERTY 718, 744–50 (2019).

84. *See, e.g.*, Wurman, *Nondelegation*, *supra* note 83 (manuscript at 20–21) (discussing James Madison’s nondelegation-based arguments against the Alien Friends Acts).



congressional oversight and control.”<sup>85</sup> In any event, the question of whether there is originalist support for the doctrine is only now being fully engaged. And a Supreme Court majority seems already to have made up its mind. The originalists are very late to the party.

Instead, functionalism—what a leading libertarian constitutionalist, Professor David Schoenbrod, called “necessity”—has played the dominant role in the development of libertarian constitutionalism and its growing influence.<sup>86</sup> The pragmatic groundwork for the current wave of libertarian constitutionalism was laid by law and economics-oriented criticism of domestic regulation, which moved from the fringe to prominence in academic and public discourse during the 1970s.<sup>87</sup> These critiques of the regulatory process overthrew the New Deal consensus that agencies were populated by technocrats who used their knowledge and wisdom to identify the correct solution to policy challenges and generally regulated in the public interest.<sup>88</sup>

The authors of these critiques typically asserted that bureaucrats’ incentives drove them to overregulate.<sup>89</sup> The public choice field that emerged from their work, not surprisingly, had an anti-regulatory predisposition.<sup>90</sup> Professor William Niskanen, in a much-cited 1971 study, hypothesized that bureaucrats seek to maximize their own utility by increasing their agencies’ budgets.<sup>91</sup> Larger budgets meant increases in

---

85. Mortenson & Bagley, *supra* note 16, at 4; *see also* Christine Kexel Chabot, The Lost History of Delegation at the Founding (July 17, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3654564>; Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 *YALE L.J.* (forthcoming 2021) (manuscript at 11), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3696860](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696860) (arguing that the direct tax legislation of 1798 demonstrates that Congress delegated rulemaking authority that was both “coercive and domestic”); Harold J. Krent, *Delegation and Its Discontents*, 94 *COLUM. L. REV.* 710, 738 (1994) (reviewing SCHOENBROD, *POWER WITHOUT RESPONSIBILITY*, *supra* note 21) (“[T]he early history of the republic furnishes scant support for vigorous enforcement of a nondelegation doctrine.”).

86. *See* Mortenson & Bagley, *supra* note 16, at 15 (observing that the “rhetorical force” of Justice Gorsuch’s *Gundy* dissent “comes from the invocation of modern thinkers who argue that delegation threatens liberty and erodes accountability”); *infra* notes 138–141 and accompanying text.

87. *See* Roger Pilon, *On the Origins of the Modern Libertarian Legal Movement*, 16 *CHAP. L. REV.* 255, 268 (2013) (discussing the close relationship between “libertarian legal theory,” which has deep roots in the common law, and “modern law and economics”); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 90–135 (2008); *see also* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 2–8 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (tracing the development of economic public choice theory from its inception to present day).

88. *See* JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 3–4 (1997).

89. *See* Bagley & Revesz, *supra* note 49, at 1263.

90. *See id.* at 1261–62.

91. *See generally* NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT*, *supra* note 47.

“salary, perquisites of the office, public reputation, power, patronage, [and the] output of the bureau . . . .”<sup>92</sup>

These scholars also argued that regulated entities hijacked the regulatory process for their own benefit—they engaged in rent-seeking.<sup>93</sup> And the agencies became “captured” by outside forces, which drove them to overregulate. Delegation of broad authority to agencies abetted these practices.<sup>94</sup>

When Ronald Reagan became President, these critics of regulation—quite a few current or future libertarian constitutionalists among them—saw the presidency as a means of checking the overreaching domestic administrative state.<sup>95</sup> Douglas Ginsburg, whom Reagan would appoint to the D.C. Circuit in 1986, and who later coined the phrase “Constitution-in-exile,” served as OIRA Administrator in Reagan’s first term and helped lead the deregulatory charge.<sup>96</sup> In 1993, then-Judge Stephen Breyer made his own contribution to the literature, observing that bureaucrats tend to overregulate concerning rare, high-profile risks.<sup>97</sup>

The more-or-less consistent trend since the 1970s has involved both the loosening of regulations to let the free market function and outsourcing government functions to private firms.<sup>98</sup> Americans’ trust in government has never really recovered from its dramatic decline in the 1970s, even if they do rely on it to provide them with essential services.<sup>99</sup>

But constitutional libertarians, inspired by these free market critiques, do not generally extend their skepticism to the federal government’s national security activities. Indeed, they would continue the tradition of exempting “foreign affairs” and “national security” matters from delegation constraints. They sidestep nondelegation questions in national security by pointing to the President’s independent Article II powers.<sup>100</sup> When Congress delegates power that, under the Constitution, belongs to both political branches or the President alone, the reasoning goes, nondelegation problems are not presented because the executive branch already has at least

---

92. *Id.* at 38.

93. *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (arguing that “regulation is acquired by the industry and is designed and operated primarily for its benefit”).

94. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 93 (2d ed. 1979) (“Delegation of power provides the legal basis for rendering a statute tentative enough to keep the political process in good working order all the way down . . .”).

95. *See, e.g.*, Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 142–43 (2016).

96. *See generally* DeMuth & Ginsburg, *supra* note 66.

97. *See* BREYER, *supra* note 46, at 9–11.

98. *See* MICHAELS, *supra* note 14, at 86.

99. *See id.*

100. *See* *Gundy v. United States*, 139 S. Ct. 2116, 2143–44 (2019) (Gorsuch, J., dissenting).

some of the delegated power. For example, Congress's power to declare war mixes with the President's authority as Commander-in-Chief, justifying very broad congressional delegations of lawmaking authority in wartime.<sup>101</sup>

The importance of the distinction between "foreign affairs" and domestic delegations of lawmaking power was made clear by the Supreme Court in 1936—a year after the two occasions it actually deployed the nondelegation doctrine to strike down legislation.<sup>102</sup> In *United States v. Curtiss-Wright Export Corp.*, the Court rejected a nondelegation challenge to a joint resolution empowering the President to enforce a criminal prohibition on the sale of arms in the United States to countries engaged in a war in South America.<sup>103</sup> The resolution was narrow in scope, but gave the President extremely broad discretion—he could choose when to impose the embargo and when to end it, and could make exceptions to its implementation, or set limits to its terms, without congressional approval.<sup>104</sup>

The majority opinion in *Curtiss-Wright* was written by Justice George Sutherland, a proto-libertarian constitutionalist who caused trouble for the New Deal as one of the "Four Horsemen" hostile to expansive federal power.<sup>105</sup> In this opinion, Sutherland went out of his way—and then some—to draw a razor-sharp distinction between foreign and domestic affairs in constitutional law, even wandering at points into a fringe theory of extra-constitutional powers.<sup>106</sup> But his paean to the practical importance of an executive-centered constitutional foreign affairs framework became a mantra for executive branch lawyers and the Court itself.<sup>107</sup>

Anticipating *Curtiss-Wright*'s reliance on a foreign-domestic distinction were cases upholding broad delegations of legislative power in the overlapping domains of immigration and foreign trade.<sup>108</sup> Professor Sarah Cleveland traced the *Lochner* Era foreign-domestic distinction to nineteenth-century conceptions of inherent sovereign authority, which the

---

101. See Schoenbrod, *The Delegation Doctrine*, *supra* note 21, at 1260–61; see also *Lichter v. United States*, 334 U.S. 742, 782 (1948) ("The war powers of Congress and the President are only those which are to be derived from the Constitution but . . . the primary implication of a war power is that it shall be an effective power to wage the war successfully."); SCHOENBROD, *POWER WITHOUT RESPONSIBILITY*, *supra* note 21, at 40.

102. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935).

103. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 312 (1936).

104. See *id.*

105. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 5–6 (1999).

106. See, e.g., KOH, *supra* note 7, at 94 (describing "withering criticism" of *Curtiss-Wright*).

107. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (describing the post-*Curtiss-Wright* "historical gloss on the 'executive Power'" of Article II, which confers on the President the "vast share of responsibility for the conduct of our foreign relations" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring))).

108. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 6–7 (2002).

Court developed to justify power over “Indians, aliens, and territories.”<sup>109</sup> Relatedly, Professor Mila Sohoni sees the distinction reflecting a belief in America’s economic liberty as a single sovereign, which matched the citizen’s individual liberty in a “fractal” way.<sup>110</sup> Like the citizen, the nation may choose whom to contract with: it may protect its domestic market from external distortions caused by influxes of cheap labor or cheap goods.<sup>111</sup>

What is important about these cases for today’s libertarian constitutional revival is how often they implicated individual rights, including economic rights. *Curtiss-Wright*, after all, upheld a delegation of power to interfere, to the point of imposing criminal penalties, with a citizen’s liberty to engage in commerce. The executive branch’s trade policy often interferes with an individual liberty to contract, and the Court’s plenary power doctrine justifies infringements on the immigrant’s freedom to contract for labor, among other fundamental rights.

Nonetheless, today’s libertarian constitutionalists remain committed to *Curtiss-Wright*-type exceptionalism. They support vast delegations of lawmaking authority to the executive in foreign affairs, trade, and immigration—all of which today fall under the “national security” umbrella.<sup>112</sup> Even as libertarian constitutionalists urge that deference doctrines such as *Chevron* be abandoned, they also argue that courts are ill-suited to question the administrative state’s national security factfinding or legal interpretations.<sup>113</sup> They have also argued for robust application of the political question doctrine in foreign affairs, which further limits judicial review.<sup>114</sup> Indeed, the Supreme Court’s early adapters of libertarian constitutional law, Chief Justice Rehnquist and Justices Scalia and Thomas, routinely deferred to national security administrative determinations<sup>115</sup> and

---

109. *Id.* at 14.

110. Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1336–37 (2019).

111. This is a simplified version of Prof. Sohoni’s analysis, which also traces immigration exceptionalism to the rights-privilege distinction, among other influences. *See id.*

112. *See, e.g.*, Rappaport, *supra* note 18; *Dept. of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1248 & n.5 (2015) (Thomas, J., concurring) (“The 1794 embargo statute involved the external relations of the United States, so the determination it authorized the President to make arguably did not involve an exercise of core legislative power.” (citing, *inter alia*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 324 (1936))); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL’Y 147, 157 (2017); *infra* Part III.

113. *See, e.g.*, Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 391 (2008) (arguing that the Bush administration NSA’s warrantless bulk surveillance programs were constitutional, regardless of congressional authorization).

114. *See, e.g.*, Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 941 (2004).

115. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 674 (2006) (Scalia, J., dissenting, joined by Justices Thomas and Alito) (declaring that “[i]t is not clear where the Court derives the authority—or the audacity—to contradict” the President’s determination regarding what constituted a military necessity); *Haig v. Agee*, 453 U.S. 280, 291 (1981) (“[A] consistent administrative construction of [The

expressed somewhat Lochnerian views concerning the rights of immigrants and foreign nationals.<sup>116</sup>

In any event, it seems clear the national security exception would remain firmly embedded in a revived nondelegation doctrine. Justice Gorsuch, whose *Gundy* dissent was joined by the Chief Justice and Justice Thomas—and whose nondelegation views could soon enjoy majority support—explicitly recognized the continuing validity of a “foreign affairs” exception.<sup>117</sup> Justice Gorsuch observed that “Congress’s legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.”<sup>118</sup> And when a “foreign-affairs-related” statute is under review, he reasoned, no nondelegation problem “may arise” when “the discretion is to be exercised over matters already within the scope of executive power.”<sup>119</sup> For these propositions, Justice Gorsuch cited four opinions—including Sutherland’s *Curtiss-Wright* majority and two others dealing with national security, Justice Kennedy’s opinion in *Loving v. United States*,<sup>120</sup> and Justice Jackson’s famous concurrence in *Youngstown*.<sup>121</sup> In the fourth case, *The Cargo of the Brig Aurora v. United States*, from 1813, the Court had upheld President James Madison’s order

---

Passport Act] must be followed by the courts ‘unless there are compelling indications that it is wrong.’ This is especially so in the areas of foreign policy and national security, where congressional silence is not to be equated with congressional disapproval.” (citation omitted). See also Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 49–53 (describing Justice Scalia as “a pioneer in” invoking “tyranny prevention” in setting “legal limitations on the administrative state,” and discussing Justice Thomas’s strong constitutional libertarian views).

116. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 841 (2008) (Scalia, J., dissenting, joined by C.J. Roberts and Justices Thomas and Alito) (“There is simply no support for the Court’s assertion that constitutional rights extend to aliens held outside U.S. sovereign territory . . . and . . . the privilege of habeas corpus does not extend to aliens abroad.”); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (Rehnquist, C.J.) (interpreting previous cases as providing “only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”).

117. *Gundy v. United States*, 139 S. Ct. 2116, 2143 (2019) (Gorsuch, J., dissenting) (arguing that a provision of a statute establishing registration and notice requirements regarding sex offenders was an unconstitutional delegation of legislative authority because it gave “the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders”).

118. *Id.* at 2137.

119. *Id.* (citing Schoenbrod, *The Delegation Doctrine*, *supra* note 20, at 1260). I discuss the influence of this article and Professor Schoenbrod’s work more generally below. See *infra* notes 131–42 and accompanying text.

120. *Loving v. United States*, 517 U.S. 748, 768 (1996) (concluding that “it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority” over courts martial).

121. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (observing that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress” and that, “[w]hen 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” (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936))).

barring trade with Great Britain against a nondelegation challenge on the ground that the President was enforcing a statute rather than engaging in lawmaking.<sup>122</sup> Justice Gorsuch observed, however, that, even if the order did involve “lawmaking” of a sort, it could have been upheld as an exercise of the President’s Article II foreign affairs authority.<sup>123</sup>

Justice Gorsuch went on to conclude that the statute under review in *Gundy* did not delegate any executive power because it “gives the Attorney General the authority to ‘prescrib[e] the rules by which the duties and rights’ of citizens are determined, a quintessentially legislative power.”<sup>124</sup> Justice Gorsuch’s assumptions seem to be that (1) no constitutional delegation of foreign affairs authority could have the effect of empowering the executive to determine citizens’ rights and that (2) there is a clear, discernable line between domestic and foreign affairs.<sup>125</sup>

These assumptions are inaccurate for several reasons. First, as I discussed above, even during the Lochner Era, the Court, in trade cases and in *Curtiss-Wright* itself, previously upheld delegations to the President of foreign-affairs-related authority to prescribe the rules by which the duties and rights—economic and otherwise—of citizens are determined.<sup>126</sup> And in the *Aurora* case, the plaintiff was an American citizen seeking to recover what he contended was his seized property: the only reason the case did not wind up involving a direct exercise of foreign affairs authority to determine the private rights of an American citizen was that the plaintiff failed to present any evidence that he actually owned the property in question.<sup>127</sup>

The modern Court has continued to bless the subordination of citizens’ property and due process rights to delegated executive foreign affairs authority. Libertarian constitutionalist Justice William Rehnquist, in 1981, wrote an opinion for the Court approving delegations of broad emergency economic power to the President that enable the creation, through sole

---

122. *The Cargo of the Brig Aurora v. United States (The Aurora)*, 11 U.S. (7 Cranch) 382, 388–89 (1813).

123. *See Gundy v. United States*, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting); *see also* SCHOENBROD, *POWER WITHOUT RESPONSIBILITY*, *supra* note 21, at 31.

124. *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossier ed., 1961)).

125. Professor Schoenbrod, whose work seems to have provided the blueprint for the nondelegation views Justice Gorsuch expressed in his opinion, also describes “lawmaking” and the President’s Article II authority over “foreign affairs” and “national defense” as mutually exclusive. *See* SCHOENBROD, *POWER WITHOUT RESPONSIBILITY*, *supra* note 21, at 106, 186. *See also id.* at 186 (“Whatever the appropriate scope of executive powers in matters of war and foreign affairs, granting such powers can be reconciled with forbidding the delegation to the executive of the power to make rules regulating domestic conduct. The Framers sought to create a government whose efficiency in dealing with foreign powers was sufficient to protect the commonwealth and whose efficiency in dealing with its own citizens was tempered because of concern for their liberty.”).

126. *See supra* notes 102–116 and accompanying text.

127. *See The Aurora*, 11 U.S. at 388.

executive agreements, of a legal regime regulating citizens' property rights and even their ability to sue for compensation in U.S. courts when their property has been confiscated by a foreign government.<sup>128</sup> And in 2020, the Court declined to hear an appeal from a decision rejecting a nondelegation challenge to statutes authorizing the President to impose tariffs and quotas on imports that he determined would "threaten to impair the national security."<sup>129</sup> And these are situations where the courts actually evaluated the exercise of authority; in many more situations, the courts play no role. As I discuss in Part II, because judicial review of foreign affairs matters is sporadic and highly deferential, agencies are often the last word on the determination of those rights.<sup>130</sup>

But the second and more important difficulty for Justice Gorsuch's reasoning is that the foreign-domestic distinction has become increasingly blurred, and therefore much more challenging to delineate in any particular case.<sup>131</sup> And yet a revival of the nondelegation doctrine with a national security exception *depends* for its success on the courts' policing that distinction, with the legislation's constitutionality hanging in the balance. This is more than your typical boundary problem. To begin with, the Constitution's allocation of powers between the executive and the legislature more generally remains a hotly-contested issue, even among originalists.<sup>132</sup> Moreover, for courts to determine whether a legal issue belongs in the realm of the foreign or the domestic, they must delve into the very thickets of national security fact and policy that they frequently assert they lack the expertise to evaluate.<sup>133</sup>

The enormous challenges of this discernment were recognized by none other than Professor David Schoenbrod, a prominent academic figure in

---

128. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (upholding, as valid exercises of statutory and constitutional power, "various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal"). The opinion is not clear whether the authority to suspend citizens' legal claims derived from Article II, from authority delegated by Congress, or some combination of the two.

129. Petition for a Writ of Certiorari at 2, *Am. Inst. For Int'l Steel, Inc. v. United States*, 806 F. App'x 982 (Fed. Cir.), *cert. denied*, No. 2019-1727, 2020 WL 3405872 (U.S. June 22, 2020).

130. See *infra* Part II.

131. See Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1258 (2007) (observing that "the explosion of international lawmaking, economic globalization, transnational flows of people, and transborder information flows occasioned by the transformation of communications technology" "have radically increased the number of cases [in U.S. courts] that directly implicate foreign relations").

132. See *id.* at 1259; D. A. Jeremy Telman, *All That Is Liquidated Melts into Air: Five Meta-Interpretive Issues*, 24 BARRY L. REV. 1, 15 (2019).

133. See, e.g., *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (Reiterating that, in weighing the military's expressed interest against environmental or other interests, the courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986))).

libertarian constitutional law.<sup>134</sup> Professor Schoenbrod published a seminal text, *Power Without Responsibility*,<sup>135</sup> in 1993, which inspired Judge Douglas Ginsburg, in reviewing it, to coin the term “Constitution-in-exile.”<sup>136</sup> And Justice Gorsuch, when describing the “foreign affairs” exception to the nondelegation doctrine in his *Gundy* dissent, relied on an earlier article by Professor Schoenbrod as his sole secondary source.<sup>137</sup>

In the article relied on by Justice Gorsuch, Professor Schoenbrod set forth the textualist and structural justifications for a foreign affairs exception: it was rooted in the delegation of executive, rather than legislative, power.<sup>138</sup> But unlike Justice Gorsuch, Professor Schoenbrod went on to acknowledge the difficulty of articulating a definition of “executive power” in the foreign affairs context that does not sometimes encompass “the allocation of rights and duties within the nation.”<sup>139</sup> He began with the outmoded observation that “the primary issue in foreign affairs is, in theory, not allocation of rights and duties within the nation but competition between this nation and others.”<sup>140</sup> He then offered the possibility that delegating to the President power over domestic rights and duties could be justified if it was “incidental to the international aspects” of the delegated power. In the end, however, he concluded that “[t]reating the Executive’s war and treaty powers as nonlegislative can be justified *solely* on grounds of national necessity”—citing, for support, the World War II Japanese Internment cases.<sup>141</sup>

A national security exception whose endpoint is *Korematsu*—an anticanonical case repudiated by the same Roberts Court now looking at a nondelegation revival—requires serious rethinking. In any event, as I will discuss in Part III, advancing globalization and changing methods of warfare make drawing a consistent line between foreign and domestic cases far more challenging today than in 1985, when Professor Schoenbrod offered his proposal for reviving a strict nondelegation doctrine.<sup>142</sup> Treating all national security delegations as delegations of executive power—no matter how vague the grant of authority and no matter its potential to

---

134. See, e.g., Brian J. Glenn, *Conservatives and American Political Development*, 125 POL. SCI. Q. 611, 623 (Winter 2010–11).

135. See SCHOENBROD, *POWER WITHOUT RESPONSIBILITY*, *supra* note 21.

136. See Ginsburg, *Delegation Running Riot*, *supra* note 66.

137. See *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) (citing Schoenbrod, *The Delegation Doctrine*, *supra* note 21, at 1260).

138. See Schoenbrod, *The Delegation Doctrine*, *supra* note 21, at 1261–62.

139. *Id.* at 1261.

140. *Id.*

141. *Id.* (emphasis added) (citing *Korematsu v. United States*, 323 U.S. 214, 224 (1944) and *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943)). He added that “[t]his power does not, however, go so far as to suspend the Bill of Rights.” *Id.* at 1261 n.207.

142. See *infra* Part III.C.



determine the rights and privileges of citizens—would be to recognize an exception that could swallow the nondelegation rule. I discuss this possibility in Part IV.

The only way for courts to avoid this outcome would be to apply the doctrine relatively equally to all delegations of lawmaking power. This would require courts to change their approach to evaluating national security delegation, which I discuss in Part II.

## II. NATIONAL SECURITY DELEGATION

Administrative law both empowers agency action and constrains agency behavior.<sup>143</sup> Congress, the courts, and the President have delegated maximal discretion to agencies operating in the national security space while subjecting them to minimal scrutiny. From this permissive framework emerged the MAC—an opaque regulatory state intertwined with influential private contractors and largely insulated from oversight, public participation, and accountability.<sup>144</sup>

It is true that many delegations of national security authority comply with the formal requirements of the nondelegation doctrine. A statute that provides for the triggering of certain consequences upon a specific presidential finding, for example.<sup>145</sup>

But many more delegations of national security authority—if they were not national security-related—*would* likely run afoul of the nondelegation doctrine. These delegations often lack “intelligible principles” to guide agency discretion. And even those that arguably provide such principles nonetheless delegate to agencies an enormous amount of power—vast discretion, authority to issue binding rules, and the ability to bring highly intrusive enforcement actions. This delegated authority extends to nearly every aspect of American life and to every individual and corporation. The exercise of these authorities may result in the death, imprisonment, or exile of the targeted individual.<sup>146</sup>

In addition, with these legal features, the MAC fails to meet the standards by which many legal scholars would test the administrative state’s

---

143. See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1470 (2010) (“[A]dministrative law both constitutes and empowers administrative action at the same time that it structures and constrains administrative behavior . . .”).

144. Cf. ZEGART, *supra* note 39, at 23.

145. See generally Shalev Roisman, *Presidential Factfinding*, 72 *VAND. L. REV.* 825 (2019).

146. Cary Coglianese has identified, in addition to the “intelligible principle” test, five additional factors courts use in determining whether a delegation is so extensive in “size and shape” that it qualifies as “legislative” power and is therefore unconstitutional. See generally Coglianese, *supra* note 78.

legitimacy.<sup>147</sup> But these features should trouble the libertarian constitutionalist most of all.

### A. *Maximal Discretion*

Congress created much of the modern national security state through the National Security Act at the same time it established the modern administrative law regime through the Administrative Procedure Act (APA).<sup>148</sup> These two statutes, enacted a year apart, reflect the conflicting concerns occupying legislators, the Truman Administration, and American society. Drafted and debated in the years just after World War II, they together embody a perceived need to contend with totalitarian regimes on their own terms abroad while—somehow—preserving liberty at home.<sup>149</sup> It was widely believed that national security therefore demanded a closed, militarized, and centralized process—just the opposite of the transparency, public participation, and judicial oversight that were enshrined in the APA to boost Americans’ confidence in the administrative state.<sup>150</sup>

The organic statutes establishing “domestic” agencies, such as the FCC and the SEC, defined their mandates in very broad terms—much to the

---

147. In an earlier article, I argued that the lack of notice-and-comment requirements for most forms of national security rulemaking is constitutionally suspect and undermines the democratic legitimacy of the resulting rules. See generally Knowles, *National Security Rulemaking*, *supra* note 37. Although I lack the space here to offer an assessment of how the MAC would fare under various justifications for the administrative state, its unique features make it problematic under most. See, e.g., Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 159 (2011) (“[W]hen Congress delegates lawmaking authority to administrative agencies, structural due process requires that agency lawmakers be subject to meaningful political accountability and that persons adversely affected by agency action have an opportunity to test the constitutional adequacy of Congress’s delegation through judicial review.”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (arguing that a theory of civic republicanism, based on participation and deliberation, best justifies the bureaucratic state); Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012) (arguing for an alternative model of administrative legitimacy based on expertise, deliberation, and reason-giving). *But see*, e.g., Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 616 (2020) (arguing that reason-giving enables even secret lawmaking to constrain decisionmakers and legitimizes their decisions).

148. See MARIANO-FLORENTINO CUÉLLAR, *GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES* 10–12 (2013); Knowles, *National Security Rulemaking*, *supra* note 37, at 910–20 (assessing congressional and executive branch discussion about national security during the long legislative history of the APA).

149. See DOUGLAS T. STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* 41–42, 70–71 (2008) (describing how the U.S. government’s organizational failures prior to, and during, World War II influenced the design of the National Security Act); *see also* AARON L. FRIEDBERG, *IN THE SHADOW OF THE GARRISON STATE: AMERICA’S ANTI-STATISM AND ITS COLD WAR GRAND STRATEGY* 3–4 (2000) (arguing that the U.S. largely succeeded at that mission during the Cold War).

150. See Knowles, *National Security Rulemaking*, *supra* note 37, at 910.

chagrin of libertarian constitutionalists.<sup>151</sup> But the National Security Act of 1947 is the vaguest organic statute of them all.<sup>152</sup> It restructured institutions and created new ones in an attempt to centralize national security decisionmaking.<sup>153</sup> But it gave the CIA, the NSA, and the National Security Council (NSC) vague mandates to gather intelligence for national security purposes.<sup>154</sup> The Federal Bureau of Investigation (FBI), which has long performed many crucial national security functions, had no statutory mandate to do so for most of its history.<sup>155</sup>

Congress imposed very few explicit restrictions on, or judicial supervision of, these agencies' national security activities until the mid-1970s.<sup>156</sup> And that post-Vietnam, post-Watergate period was an aberration: Congress has since legislated more often to increase and centralize national security authority than to restrain or disperse it.<sup>157</sup> The Foreign Intelligence Surveillance Act of 1978 did restrict domestic surveillance and required approval from a newly-created Foreign Intelligence Surveillance Court for certain methods and targets.<sup>158</sup> But post-9/11 statutes largely expanded the government's surveillance authority.<sup>159</sup>

Congress also restructured the military so that its operational components have broader policymaking power, greater discretion, and less

---

151. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (quoting Lawson, *supra* note 83, at 340). See also *infra* Part III.A.

152. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.); see also STUART, *supra* note 149, at 110–11.

153. See STUART, *supra* note 149, at 41–42.

154. See Rascoff, *supra* note 8, at 699 (“[T]he CIA’s organic law is breathtakingly short on detail . . .”).

155. See *id.* (“[T]he FBI lacks a basic legislative charter altogether . . .”); Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59, 70–71.

156. Zachary K. Goldman & Samuel J. Rascoff, *Introduction: The New Intelligence Oversight*, in *GLOBAL INTELLIGENCE OVERSIGHT: GOVERNING SECURITY IN THE TWENTY-FIRST CENTURY* (Zachary K. Goldman & Samuel J. Rascoff eds., 2016).

157. See, e.g., Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004) (codified as amended in scattered sections of 50 U.S.C.) (among other things, creating the Office of the Director of National Intelligence (ODNI) and restructuring the intelligence community to increase coordination and centralization of intelligence-gathering).

158. Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801–1855).

159. See, e.g., USA FREEDOM Act of 2015, Pub. L. No. 114–23, 129 Stat. 268 (2015) (codified in scattered sections of the U.S. Code) (imposing some new limits on the bulk collection of telecommunication metadata on U.S. citizens by American intelligence agencies); 50 U.S.C. § 1842(c) (lowering the standard for obtaining internet metadata so that the FBI need only certify to the Foreign Intelligence Surveillance Court (FISC) that the information likely to be obtained is “relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities”); 50 U.S.C. § 1861 (the so-called “business records” provision); 50 U.S.C. § 1881(a) (allowing the government to acquire foreign intelligence by obtaining the content of communications by non-U.S. persons “reasonably believed” to be outside U.S. borders, and interpreted to authorize the collection of phone and Internet content of Americans in the process).

scrutiny of their activities.<sup>160</sup> The 1986 Goldwater-Nichols Act revamped the military chain of command so that combatant commanders—who lead military operations—report directly to the Secretary of Defense, reducing the authority of the Secretary’s civilian subordinates.<sup>161</sup> The combatant commanders have since played an outsize role in conducting and even shaping foreign policy.<sup>162</sup> At the same time, Goldwater-Nichols established a separate chain of command for the military components performing non-operations functions—such as equipping, training, and housing personnel and “staffing” them to the combatant commands.<sup>163</sup> Congress focuses its budgeting and oversight attention primarily on these non-operations functions—especially weapons programs—which leaves the operational military with enormous discretion and little oversight.<sup>164</sup>

Moreover, when the national security state engages in the use of force, the source and scope of its mandate to do so has typically been even murkier.<sup>165</sup> The President may order the use of force in some circumstances without specific statutory authorization and with minimal congressional involvement.<sup>166</sup> Even when Congress explicitly authorizes the use of military force by statute, it typically grants authority in broad, vague terms.<sup>167</sup> The Uniform Code of Military Justice, with certain important exceptions, concerns the internal governance of the military bureaucracy, rather than the ways in which the military regulates externally.<sup>168</sup>

In general, then, the national security bureaucracy has very broad discretion to regulate with the use of force as it sees fit, so long as it complies with the President’s relevant orders and its own interpretations of

---

160. See Mark Patrick Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 927 (2019).

161. See, e.g., 10 U.S.C. § 162 (altering the power and roles of several operational military actors); see also Nevitt, *supra* note 160, at 926–32.

162. See Nevitt, *supra* note 160, at 907–08; Derek S. Reveron & Michelle D. Gavin, *America’s Viceroys*, in *AMERICA’S VICEROYS: THE MILITARY AND U.S. FOREIGN POLICY* 1, 2 (Derek S. Reveron ed., 2004).

163. See, e.g., 10 U.S.C. § 5013.

164. See Nevitt, *supra* note 160, at 913–14.

165. See Curtis A. Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 693 (2016) (observing that the interrelated development of the international and domestic legal regimes governing the use of force has been practice-based).

166. See, e.g., *id.* at 691.

167. See Scott M. Sullivan, *Interpreting Force Authorization*, 43 FLA. ST. U. L. REV. 241, 242 (2015) (“[AUMFs] explode into the legal landscape with supernova intensity, briefly outshine the broader legal constellation and, at their birth, are bound only by the functional concerns surrounding armed conflict.”).

168. See, e.g., Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 761 (2014) (detailing how accountability and punishment operate under the Uniform Code of Military Justice).

international law.<sup>169</sup> Similarly, as Professor Kathleen Claussen has explained, the U.S. trade bureaucracy, centered in the powerful Office of the U.S. Trade Representative, develops rules with vast discretion and very limited judicial oversight.<sup>170</sup>

After 9/11, Congress gave a tremendous boost to the MAC's interest in expanding its domain to include traditionally nonmilitary government functions. In 2004, The Homeland Security Act created the Department of Homeland Security (DHS)—an administrative goliath that “melded the functions of twenty-two previously existing agencies, from Treasury’s Customs Service, to Agriculture’s Plum Island Animal Disease Center, to the previously independent Federal Emergency Management Agency (FEMA).”<sup>171</sup> The new agency had “come to encompass functions ranging from international child labor investigations to marine fuel leaks . . . .”<sup>172</sup> Congress’s goal in creating such a heterogeneous and far-flung agency was to unite “under a single department those elements within the government whose primary responsibility is to secure the United States homeland.”<sup>173</sup> The statutory mandate of DHS was to “prevent terrorist attacks.”<sup>174</sup>

By yoking hundreds of traditionally nonmilitary regulatory domains to a single counterterrorism mandate, Congress imported large swaths of the federal bureaucracy—the regulation of passenger screening, chemical safety, and immigration enforcement, for example—into the national security state. Not surprisingly, then, DHS’s counterterrorism mission—which from 2002 until 2018 was the centerpiece of America’s national defense strategy—has come to supplant the previous missions of its component parts.<sup>175</sup> A clear example of this is in immigration enforcement, where two DHS sub-agencies, Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), have begun conducting what is essentially a domestic counter-insurgency operation using many of the same methods, equipment, strategies, and contractors as the DoD.<sup>176</sup>

---

169. *Id.* at 763 (“[T]he process [of targeted killing] is unaccountable because the killings are beyond the reach of courts, making Executive Branch officials ‘judge, jury[,] and executioner.’”).

170. See Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. (forthcoming 2021).

171. Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Wingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 676 (2006).

172. *Id.* at 696.

173. H.R. REP. NO. 107-609, pt. 1, at 63 (2002).

174. 6 U.S.C. § 111(b)(1)(A).

175. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 103 (2014) (concluding from a study of the DHS’s Office of Civil Rights and Civil Liberties that it is inherently difficult to induce agencies to execute both a primary mission and constraints on that mission).

176. See Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WIS. L. REV. 819, 823–28 (noting the migration of counterinsurgency strategy from its use abroad to its use in the United States and the resulting militarization of enforcement methods used by ICE and CBP). For a

Even before immigration enforcement agencies became part of the national security state, they already operated in a regulatory space in which Congress has delegated broad discretion to agencies, and the President's Article II authority is believed to provide constitutional support for that delegation.<sup>177</sup> Although *ex ante* enforcement is governed by a prolix statutory framework, *ex post* enforcement is not. Congress, by periodically expanding the ways in which immigrants are eligible for removal and stripping them of their procedural rights, has left the executive branch with vast authority over *ex post* enforcement, which, due to the large numbers of undocumented immigrants, has an immense impact in determining the composition of the immigrant population.<sup>178</sup>

### B. Minimal Scrutiny

Three major features of national security law insulate agencies in the that space from scrutiny—secrecy, procedural exceptionalism, and judicial deference.

Much of administrative law regarding national security is rendered in secret.<sup>179</sup> This aspect has only become more pronounced over time. By 2009, 1,074 U.S. government organizations worked on programs at the top secret level alone.<sup>180</sup> The number of agencies and employees working on merely “secret” level programs is surely much larger.<sup>181</sup> Agencies with national security missions and even many without—such as the Drug Enforcement Administration (DEA)—rely on Freedom of Information Act

---

comprehensive survey of recent trends in immigration enforcement, see generally SHOBA SIVAPRASAD WADHIA, *BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP* (2019).

177. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 133–35 (2015).

178. See *id.* at 131–35.

179. See Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 *HARV. NAT'L SEC. J.* 241, 249–50 (2015) (describing congressional processes that produce secret legislation); see generally GEOFFREY R. STONE, *TOP SECRET: WHEN OUR GOVERNMENT KEEPS US IN THE DARK* 5–44 (2007). Examples of statutes that authorize secret rulemaking include 50 U.S.C. §§ 831–832 (providing limitations and guidelines on who has access to classified information at the NSA); § 3024(g) (holding the Director of National Intelligence accountable for safeguarding intelligence information from disclosure); § 3161 (governing the process of classifying information and accessing classified information); § 3365 (limiting the dissemination of privileged information); § 3121 (punishing individuals who reveal the identity of undercover agents and classified information); and § 3142 (allowing operational files of the National Geospatial-Intelligence Agency to be kept secret from the public).

180. PRIEST & ARKIN, *supra* note 10, at 86.

181. See *id.* at 86–87 (describing the expansion of government organizations at the secret level post-9/11).

(FOIA) exemptions to withhold information and issue *Glomar* responses, neither confirming nor denying the information's existence.<sup>182</sup>

Secret government activities, by their very nature, cannot involve the broad participation and corresponding accountability—either to the public or Congress—that are frequently invoked to legitimize the administrative state and give it constitutional validity.<sup>183</sup> The fundamental dilemma is that secrecy simultaneously serves two purposes: it protects sensitive information from the enemy, but it also conceals lawbreaking, policy failures, and, as I discuss below, agency expansions of their own authority.<sup>184</sup> In general, the entire bureaucracy is incentivized to keep its decisions as secret as possible.<sup>185</sup>

Moreover, procedural frameworks designed to expose agency action to stronger public scrutiny, presidential control, and judicial review have almost always contained exceptions for national security activities.<sup>186</sup> The APA, the “constitution of the administrative state,”<sup>187</sup> exempts “foreign affairs” and “military” functions from its critical adjudication and notice-and-comment rulemaking requirements.<sup>188</sup> And none of its requirements apply to military commissions, courts martial, or to “military authority

---

182. See Benjamin W. Cramer, *Old Love for New Snoops: How Exemption 3 of the Freedom of Information Act Enables an Irrebuttable Presumption of Surveillance Secrecy*, 23 COMM. L. & POL'Y 91, 92 (2018); see, e.g., *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 64–65 (2d Cir. 2009) (holding that the NSA may issue a *Glomar* response to FOIA requests).

183. See, e.g., Douglas Cox & Ramzi Kassem, *Off the Record: The National Security Council, Drone Killings, and Historical Accountability*, 31 YALE J. ON REGUL. 363, 364–65 (2014) (“Uncertainty over the legal standards for the drone killing program and a lack of transparency highlight the need for thorough documentation as a prerequisite for meaningful oversight and accountability.”); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010) [hereinafter Metzger, *Ordinary Administrative Law*] (explaining the constitutional importance of the hard-look review); Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 YALE L.J. 952, 958–59 (2007) (arguing that *Cheney*'s requirement of contemporaneous reason-giving plays a crucial role in keeping agency action within constitutional limits).

184. See *infra* notes 349–58 and accompanying text.

185. See, e.g., Jack Serle, *Obama Drone Casualty Numbers a Fraction of Those Recorded by the Bureau*, BUREAU OF INVESTIGATIVE JOURNALISM (July 1, 2016), <https://www.thebureauinvestigates.com/2016/07/01/obama-drone-casualty-numbers-fraction-recorded-bureau/> [<https://perma.cc/XM8K-PV TN>] (noting the impetus to keep drone strike information secret because leaked government records indicated the United States was sometimes unaware of the identities of people they were killing, which would reflect negatively on drone operations).

186. Cf. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (charting “black” and “grey” holes in U.S. administrative law enabling the exercise of broad discretion during emergencies).

187. Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 66 (2020).

188. See 5 U.S.C. § 553(a)(1) (rulemaking exemption); 5 U.S.C. § 554(a)(4) (adjudication exemption). Formal rulemaking as defined by the APA has become quite rare. See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 107 (2003). But informal adjudication in the national security space is also very light on procedural requirements. See Chachko, *supra* note 8.

exercised in the field in time of war or in occupied territory.”<sup>189</sup> Likewise, Executive Order 12,866, which establishes, over all U.S. government agency rulemaking, centralized review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), echoes the APA by exempting “[r]egulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services.”<sup>190</sup>

In addition, by virtue of the exceptions in the APA and Executive Order 12,866, national security rulemaking is also exempt from other statutory and regulatory requirements designed to hold agencies accountable to the public and policymakers. For example, many national security rules are not published in the “Unified Agenda,” which is intended to be a central database of current agency rulemaking throughout the U.S. government.<sup>191</sup> Nor are agencies required to conduct periodic review of existing national security regulations under the Regulatory Flexibility Act or conduct cost-benefit analyses when they engage in national security rulemaking.<sup>192</sup>

The APA also exempts the President from the definition of “agency.”<sup>193</sup> This is not ordinarily problematic under the “presidential administration” view because she is believed to be a politically accountable actor who exercises substantial control over agency lawmaking.<sup>194</sup> But, as Part II explains, the President lacks the capacity to exercise nearly the same level of control over agency action in the national security space.<sup>195</sup>

Both the APA’s drafters and most of the administrative state’s defenders extol judicial review as crucial for enforcing statutory and constitutional

---

189. See 5 U.S.C. §§ 551(1)(F)–(G).

190. Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted as amended in* 5 U.S.C. § 601.

191. The Unified Agenda is maintained by the Regulatory Information Center in the OIRA. See Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 77 Fed. Reg. 7664, 7665 (Feb. 13, 2012) (“Executive Order 12866 does not require agencies to include [in the Unified Agenda] regulations concerning military or foreign affairs functions or regulations related to agency organization, management, or personnel matters.”). The Unified Agenda is available at <http://www.reginfo.gov/public/do/eAgendaMain> [<https://perma.cc/U9VY-7B5B>].

192. These requirements are only triggered by the notice-and-comment process. See, e.g., Airports of Entry or Departure for Flights to and from Cuba, 76 Fed. Reg. 5058, 5060 (Jan. 28, 2011) (codified as amended in 8 C.F.R. § 234, 19 C.F.R. § 122) (observing that, because the national security exception relieved the Commerce Department from conducting notice-and-comment, “the Department does not consider this document to be subject to the provisions of the Regulatory Flexibility Act”).

193. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–706); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (“As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements.”).

194. See Kagan, *supra* note 49, at 2331–32.

195. See *infra* Part II.B; see also Kovacs, *supra* note 187, at 67 (“A President who acts pursuant to a congressional delegation of authority should be subject to the same constraints as any other statutory delegate.”).



limits on agency discretion.<sup>196</sup> But federal courts have remained largely reluctant to review the government's national security activities.<sup>197</sup> They have traditionally relied on several doctrines—political question,<sup>198</sup> standing,<sup>199</sup> immunity,<sup>200</sup> and the state secrets privilege,<sup>201</sup> among others—to avoid reviewing exercises of agency discretion. When courts have engaged in review, they have typically given exceptional deference to the national security state on matters of both fact and law.<sup>202</sup> It is a well-established legal trope that even the most complex and technically obscure domestic regulatory subject is more comprehensible to outside observers, and susceptible to second-guessing, than foreign relations and national security matters.<sup>203</sup>

Although immigration is a distinct regulatory space with a distinct legal framework, it bears a strong resemblance to national security—a resemblance made even closer by Congress's recontextualization of immigration as a national security function after 9/11.<sup>204</sup> Congressional grants of broad discretion leave much immigration lawmaking to the executive, making it largely a creature of administrative law.<sup>205</sup> Congress revamps the immigration code once in a generation at most.<sup>206</sup> Meanwhile, agencies shape immigration law through their interpretations and practices.<sup>207</sup>

---

196. See Metzger, *Ordinary Administrative Law*, *supra* note 183, at 525; Stack, *supra* note 183, at 955.

197. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 329 (1936) (prescribing exceptional deference to executive branch claims in foreign affairs); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1362 (2009) (discussing the weight of “factual judgments” in national security claims); Hathaway, *supra* note 2. *But see* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1901 (2015) (arguing that this form of exceptionalism is fading).

198. See Nzelibe, *supra* note 114, at 945–50 (citing and discussing cases).

199. See, e.g., *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013) (holding that a group of U.S. reporters, attorneys, activists, and workers lacked standing to challenge the constitutionality of § 702 of FISA).

200. See Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to Bivens*, 28 A.B.A. NAT'L SEC. L. REP. 1, 4 (2006).

201. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9th Cir. 2010) (en banc) (dismissing, under the state secrets doctrine, foreign nationals' claims of harm caused by the CIA's extraordinary rendition program).

202. See Chesney, *supra* note 197, at 1366–85 (detailing numerous instances of national security fact deference in judicial decisions post-9/11); Hathaway, *supra* note 2.

203. See Chesney, *supra* note 197, at 1366–85.

204. See *supra* notes 175–178 and accompanying text.

205. See Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 567 (2012).

206. See generally DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* (2002) (describing the passage of major immigration reform measures in American history).

207. See Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 96, 101 (2017).

Moreover, courts give agency action in immigration a wide berth.<sup>208</sup> The courts have often hewed to a “plenary power doctrine” under which they defer to congressional and executive authority over immigration, particularly in matters concerning the admission or removal of noncitizens.<sup>209</sup> Although the plenary power doctrine is often articulated in ways that conflate the political branches’ authority, long stretches of congressional silence on the substance of immigration law have enabled the President and, even more so, the bureaucracy to benefit the most from the plenary power doctrine and other forms of immigration exceptionalism.<sup>210</sup>

To be sure, conservative Justices on the Supreme Court have in recent years rejected some executive branch interpretations of foreign affairs law.<sup>211</sup> And majorities of the Court declined to defer to executive fact-finding and legal interpretation in the Guantánamo cases, insisting that habeas corpus applies to claims by noncitizens detained at the naval base.<sup>212</sup>

But in most recent decisions, the Roberts Court’s conservative majority has followed the tradition of limiting scrutiny of national security-related decisionmaking. For example, it refused to recognize a *Bivens* action against officials for post-9/11 detention abuses on the ground that it would call into question high-level government policies following the attacks,<sup>213</sup> or against a CBP agent for the cross-border killing of a Mexican national because doing so would affect foreign relations and “implicates . . . national security”,<sup>214</sup> and it declined to interrogate the process leading to President Trump’s ban on immigration from several predominantly-Muslim countries.<sup>215</sup>

---

208. See David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584–85 (2017) (“The Supreme Court’s [immigration law] jurisprudence is littered with special . . . doctrines that depart from mainstream constitutional norms.”).

209. See, e.g., LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 31 (1995).

210. See Kim, *supra* note 207, at 101 (“[T]he power to promulgate national immigration policy is increasingly exercised less by Congress, and more by the officials populating our nation’s administrative agencies.”).

211. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 526 (2008) (rejecting the President’s attempts to enforce a treaty provision against state governments and rejecting his interpretation that the treaty was self-executing).

212. See *Boumediene v. Bush*, 553 U.S. 723, 730 (2008) (holding that Congress’s attempt to eliminate habeas corpus for accused non-citizen enemy combatants at Guantánamo Bay was unconstitutional); *Hamdan v. Rumsfeld*, 548 U.S. 557, 624 (2006) (declaring unlawful the military commissions established to try certain enemy combatants for war crimes); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that citizen-detainees possessed the right to challenge their detention using habeas); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that alien detainees at Guantánamo had a statutory right to invoke habeas jurisdiction).

213. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017).

214. See *Hernandez v. Mesa*, 140 S. Ct. 735, 745–46 (2020).

215. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

Relatedly, when lower courts enjoined, pending appeal, the implementation of restrictions on immigrant rights and the redirection of appropriated funds to finance a border wall, the Court took the unusual step of intervening to lift the injunctions. The reasoning behind these interventions is presumably that, at least with respect to national security matters, any pause in implementation of government policy causes it irreparable harm.<sup>216</sup>

The judiciary's reluctance to scrutinize the national security state's activities has produced a body of national security administrative law that is unusually tractable. Lack of judicial interpretation allows rules to morph over time into standards—they “resist particularization.”<sup>217</sup> The perceived need for a particular national security authority creates a market for legal interpretation justifying it.

In conclusion, the legal frameworks empowering agencies as lawmakers and insulating them from searching judicial review are even more pro-agency in the national security space. These unique qualities of national security law are mutually reinforcing. Congress gives agencies conducting national security activities broad and vague mandates, while also exempting much of those activities from the procedural requirements imposed on the rest of the administrative state. The national security bureaucracy, operating in secret and rarely burdened by the APA's procedural requirements—which were designed to ensure deliberation and public participation in regulatory activities—need not, and does not, produce a record suitable for meaningful judicial review.<sup>218</sup> The courts, without clear statutory principles against which to evaluate the legality of agency action or a useful record, and believing in the unique expertise of national security bureaucrats, shy away from reviewing agency decision-making altogether in the national security realm. And the national security bureaucrats, in turn, without significant judicial (or congressional) scrutiny, have few incentives to alter their regulatory processes to make them accessible or susceptible to judicial review. And so on.

---

216. See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 126–27 (2019).

217. See Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141, 2173 (2016).

218. See generally Stack, *supra* note 183 (arguing that agencies' contemporaneous reason giving provides the administrative state with constitutional legitimacy); Stephen F. Williams, “Hybrid Rulemaking” Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 456 (1975) (“[Courts] may demand that agencies develop a record that enables a reviewing court to find an intelligible answer for each substantial challenge posed.”).

## III. THE MILITARY-ADMINISTRATIVE COMPLEX

This Part introduces a model of how agencies regulate within the uniquely permissive national security legal regime charted in Part II. This Part begins by describing the institutional and political environment in which these agencies operate, drawing on military-industrial complex (MIC) theory—a still-vibrant political science literature that has received scant attention from legal scholars.<sup>219</sup>

What is especially interesting is that MIC theory made, in the national security context, many of the same observations about bureaucracy and the influence of private firms that, when identified in the domestic context, would serve as the functional foundation for libertarian administrative law: much of what MIC theory essentially depicts are bureaucratic empire building, regulatory capture, and rent-seeking.<sup>220</sup> The most elegant and useful MIC analyses assume that the participants in the process have rational incentives rather than being corrupt, regularly engaged in unlawful behavior, or even infected by “hawkish biases.”<sup>221</sup> In fact, these models are compelling *because* they explain the pathologies that rational incentives produce in the MIC’s institutional and political settings.<sup>222</sup>

Moreover, as I discuss in the second subpart, MIC theory offers a crucial insight: the President has a limited ability to control and monitor the MIC process and, therefore, a limited ability to supervise the national security bureaucracy in a way that would endow the process with democratic legitimacy.<sup>223</sup>

---

219. See LEDBETTER, *supra* note 29, at 6–12 (describing the major strains of MIC theory). For recent contributions to the literature that address post-9/11 developments, see, e.g., ISMAEL HOSSEIN-ZADEH, *THE POLITICAL ECONOMY OF U.S. MILITARISM* (2006); Robert Pollin & Heidi Garrett-Peltier, *The U.S. Employment Effects of Military and Domestic Spending Priorities: An Updated Analysis*, POL. ECON. RSCH. INST. (Oct. 2009), [https://www.peri.umass.edu/fileadmin/pdf/published\\_study/spending\\_priorities\\_PERI.pdf](https://www.peri.umass.edu/fileadmin/pdf/published_study/spending_priorities_PERI.pdf) [<https://perma.cc/EEC2-PHB8>]; REBECCA U. THORPE, *THE AMERICAN WARFARE STATE: THE DOMESTIC POLITICS OF MILITARY SPENDING* (2014).

220. For an introduction to these concepts, see RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 87, at 2–8. For a survey of MIC theory in its early 70s heyday that offers insights similar to these theories, see generally Charles C. Moskos, Jr., *The Concept of the Military-Industrial Complex: Radical Critique or Liberal Bogey*, 21 SOC. PROBS. 498 (1973) (surveying political science literature assigning primary influence to either the military, the contractors, or the bureaucrats).

221. See, e.g., Daniel Kahneman & Jonathan Renshon, *Hawkish Biases*, in *AMERICAN FOREIGN POLICY AND THE POLITICS OF FEAR: THREAT INFLATION SINCE 9/11*, *supra* note 50, at 87.

222. See GLENNON, *supra* note 11, at 19–20 (concluding that a rational actor in the national security bureaucracy would inflate risks).

223. See Kagan, *supra* note 49, at 2331–32 (contending that presidential control bestows legitimacy on agency action).

The third subpart adapts these insights to an expanding national security space transformed by globalization and technological change.<sup>224</sup> Warfare has become individualized,<sup>225</sup> and elastic definitions of “national security” have led to a convergence among the MIC and other regulatory domains. This convergence has driven the militarization of foreign policy, immigration enforcement, and policing.

The fourth subpart introduces a descriptive model of the MAC, which takes the form of a vicious cycle comprising six stages—(1) threat inflation leading to (2) new authority; (3) pressure to use that authority leading to (4) use of that authority; and (5) pressure to find intelligence validating the use of authority, which returns the cycle back to the beginning with (1) new threat inflation that sometimes leads to (6) expansion of the MAC’s regulatory domain. I describe how the six stages of the cycle play out across a range of regulatory activities at home and abroad.

What emerges is a counter-model to the one subscribed to by most libertarian constitutionalists: it is not the President, but the bureaucrats and contractors who typically dominate the regulatory process in national security; and political and institutional incentives play a larger role than pure technocratic expertise. In other words, the MAC functions more or less the way libertarian constitutionalists believe domestic agencies do.

#### *A. The Military-Industrial Complex as Theory*

Eisenhower’s 1961 Farewell Address is his most famous speech because he invoked the “military-industrial complex.”<sup>226</sup> The President and his speechwriters did not coin the phrase, but they chose it with care and gave it a prominent, enduring place in the American lexicon.<sup>227</sup> Its use served to synthesize a family of theories lurking in public and academic discourse for decades. The term “military-industrial complex” later became so popular it devolved into a trope, losing its distinctiveness.<sup>228</sup> Scholars began to employ

---

224. See Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 890 (2012) (“A large gap exists between the ideal-type branches imagined in eighteenth-century structural constitutional theory and observable realities on the twenty-first-century ground.”).

225. See Issacharoff & Pildes, *supra* note 32, at 1523.

226. See Farewell Address, *supra* note 6.

227. See LEDBETTER, *supra* note 29, at 4–5.

228. See, e.g., *id.* at 5 (describing the phrase’s current meaning as a “rhetorical Rorschach blot”).

other terms—such as “national security state”—to describe and critique the same phenomenon.<sup>229</sup> But the original MIC theory remains quite salient.<sup>230</sup>

From the 1960s through the 1990s, the term “military-industrial complex” signified both a model and critique of U.S. government lawmaking. Because the descriptive and normative theories are so closely linked, the term is almost always used pejoratively.<sup>231</sup> As a descriptive matter, it portrays the military,<sup>232</sup> its contractors, and the intelligence community<sup>233</sup> working together to advocate for increased military spending, the development of new military technology, hawkish foreign relations, and, more generally, militarized solutions to public policy challenges.<sup>234</sup> Sometimes these entities were collectively described as a “power elite” imposing their will on the rest of America.<sup>235</sup>

The interests of the MIC’s major players are not identical, but they are aligned. The military and intelligence communities seek increased prestige, budgets, and authority,<sup>236</sup> while the contractors seek profit and expanding markets.<sup>237</sup> Their respective interests are blurred by their mutual dependence and a revolving door between government and the contractors: individual bureaucrats have an incentive to “expand the market demand for services they would be providing when they exit the government”;<sup>238</sup> and contractors have an incentive to “tell the agency chiefs what they want to hear” to ensure their status as “‘go-to’ contractors.”<sup>239</sup>

---

229. See generally David T. Smith, *From the Military-Industrial Complex to the National Security State*, 50 AUSTL. J. POL. SCI. 576 (2015) (reviewing several recent books); see also Roland, *supra* note 27, at 335–37.

230. See generally MICHAEL A. COHEN & MICAH ZENKO, *CLEAR AND PRESENT SAFETY: THE WORLD HAS NEVER BEEN BETTER AND WHY THAT MATTERS TO AMERICANS* (2019); LEDBETTER, *supra* note 29, at 188–210.

231. For a rare exception, see generally JOHN STANLEY BAUMGARTNER, *THE LONELY WARRIORS: CASE FOR THE MILITARY-INDUSTRIAL COMPLEX* (1970).

232. See C. WRIGHT MILLS, *THE POWER ELITE* 16–18 (1956) (identifying the military as an elite playing a leading role in setting government policy).

233. The Intelligence Community today officially consists of seventeen organizations, but they have numerous agencies nested within them, and many other departments and agencies have intelligence-collection arms. See *Members of the IC*, OFF. DIR. NAT’L INTEL., <https://www.dni.gov/index.php/what-we-do/members-of-the-ic> [<https://perma.cc/8K6B-HKVV>] (noting that the intelligence community is composed of two independent agencies, eight Department of Defense elements, and seven elements of other federal departments and agencies).

234. See LEDBETTER, *supra* note 29, at 182.

235. See generally MILLS, *supra* note 232.

236. See SEYMOUR MELMAN, *PENTAGON CAPITALISM: THE POLITICAL ECONOMY OF WAR* 4 (1970) (describing the governmental elites in the MIC as propelled by an “institutionalized power-lust”).

237. See generally PAUL A. BARAN & PAUL M. SWEEZY, *MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER* (1966) (arguing that the huge American military machine serves the capitalist purposes of maintaining prosperity at home while fighting socialism abroad).

238. Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1269 (2015).

239. Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 748–49 (2010) [hereinafter Michaels, *Privatization’s Pretensions*] (discussing contractors’ motivations to maximize remuneration and prestige).

The term “military-industrial complex” also signified a set of critiques—the identification of several pathologies resulting from the shared interests and close working relationship between the national security state and contractors.<sup>240</sup> The fundamental indictment is threefold—that the MIC (1) inflates threats to U.S. national security,<sup>241</sup> which enables it to (2) obtain and use new armaments and (3) expand its domain to include traditionally non-military government functions.<sup>242</sup> More specifically, the MIC warps public policy in several ways. It causes trillions to be spent on unnecessary armaments and programs, crowding out spending on social welfare.<sup>243</sup> It encourages the commingling of public and private spending in ways not traditionally permitted in other areas of U.S. federal policy.<sup>244</sup> It distorts every aspect of the economy—influencing the type and location of manufacturing centers and jobs, as well as trade policy.<sup>245</sup> It also distorts the goals of academia, bending universities’ research priorities toward military ends.<sup>246</sup> It encourages a growing culture of secrecy.<sup>247</sup> And it erodes civil liberties.<sup>248</sup>

The traditional MIC descriptive model comes in many varieties,<sup>249</sup> but it is best depicted as a vicious cycle,<sup>250</sup> in which the incentives of contractors, the military, and the intelligence community combine to inflate threats to U.S. national security.<sup>251</sup> Inflated threats are difficult for outsiders to deny: the military and intelligence communities enjoy high levels of trust and prestige, and they operate in a cocoon of secrecy formed by rampant overclassification.<sup>252</sup> An inflated threat assessment, which is the first stage of the vicious cycle, provides rationales for (2) seeking more money from

---

240. See LEDBETTER, *supra* note 29, at 7–14.

241. See GLENNON, *supra* note 11, at 19 (“The resulting incentive structure encourages the exaggeration of existing threats . . .”).

242. One measure political scientists have used to determine the reach of the MIC is the degree with which traditionally-nonmilitary government functions have been performed by the military. See LEDBETTER, *supra* note 29, at 182.

243. See HOSSEIN-ZADEH, *supra* note 219, at 80–82.

244. See LEDBETTER, *supra* note 29, at 9.

245. See generally, e.g., ANN MARKUSEN ET AL., THE RISE OF THE GUNBELT: THE MILITARY REMAPPING OF INDUSTRIAL AMERICA (1991); see also *id.* at 242 (depicting Congress “as a protector and reinforcer of existing military economies rather than as a causal force”).

246. See CLARK KERR, THE USES OF THE UNIVERSITY 93 (5th ed. 2001) (“Intellect has also become an instrument of national purpose, a component part of the ‘military-industrial complex.’”).

247. See, e.g., DEREK LEEBAERT, THE FIFTY-YEAR WOUND: THE TRUE PRICE OF AMERICA’S COLD WAR VICTORY xiii (2002).

248. See LEDBETTER, *supra* note 29, at 11.

249. See generally Moskos, *supra* note 220.

250. I’m not aware of an MIC-theory-based analysis that describes the MIC as a vicious cycle *per se*.

251. See generally Jonathan F. Galloway, *Multinational Corporations and Military-Industrial Linkages*, in TESTING THE THEORY OF THE MILITARY INDUSTRIAL COMPLEX (Steven Rosen ed., 1973); Cramer & Thrall, *supra* note 50 (analyzing the causes and effects of threat inflation).

252. See, e.g., COHEN & ZENKO, *supra* note 230, at 5–10.

Congress; (3) buying more of the same arms and developing more advanced arms; (4) using the arms the military possesses; (5) validating the use of those arms afterward; and (6) expanding the military domain into traditionally civilian areas.<sup>253</sup>

Many depictions of the MIC also include Congress. As I discussed above, Congress appropriates huge amounts for intelligence gathering and military operations but conducts little actual oversight of those activities.<sup>254</sup> Instead, Congress focuses most of its attention on the military components involved in weapons development, staffing, and training—which answer to a separate chain of command from the operational components.<sup>255</sup> Congress may, at the urging of the contractors, appropriate more for certain budget items even than the military requests.<sup>256</sup> Although war is not always popular, the military itself is.<sup>257</sup> A member of Congress can typically make a successful case to her constituents for increased defense spending, especially when it yields jobs in her state or district.<sup>258</sup> But even if she cannot, she may depend more for reelection on contributions from the defense lobby than on persuading her constituents. An “iron triangle” forms, in which defense appropriators in Congress become integrated with the military and the contractors—their interests essentially aligned.<sup>259</sup> But in any event, Congress usually gives the MIC what it asks for, and sometimes more.<sup>260</sup>

### *B. The Myth of Presidential Control*

Perhaps the most important insight MIC Theory provides for assessments of the administrative state is the limited ability of the President to alter this vicious cycle. Administrative law scholarship places a great deal

---

253. This is my own assessment constructed from insights in several sources, including, among others, HOSSEIN-ZADEH, *supra* note 219; LEDBETTER, *supra* note 29; Moskos, *supra* note 220; MARKUSEN, *supra* note 245; and Roland, *supra* note 27.

254. See *supra* notes 160–64 and accompanying text.

255. See *supra* notes 160–64 and accompanying text.

256. See WILLIAM D. HARTUNG, *PROPHETS OF WAR: LOCKHEED MARTIN AND THE MAKING OF THE MILITARY-INDUSTRIAL COMPLEX* 2–12 (2011).

257. See Lee Rainie, Scott Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RSCH. CTR. (July 22, 2019), <https://www.people-press.org/2019/07/22/trust-and-distrust-in-america/#fn-20070758-2> [<https://perma.cc/QZ-N4-M8FX>] (finding that the military is among the most trusted institutions in America).

258. See ROBERT HIGGS, *DEPRESSION, WAR, AND COLD WAR: STUDIES IN POLITICAL ECONOMY* 195–207 (2006).

259. See, e.g., GORDON ADAMS, *THE POLITICS OF DEFENSE CONTRACTING: THE IRON TRIANGLE* 24–26 (1981) (asserting that key national security policy decisions are made by a close-knit and exclusive group of federal bureaucrats, key members of Congress, and private business officials).

260. Congress has gone so far as to bail out major contractors, such as the mammoth Lockheed Aircraft, and the Navy took ownership of one of its contractors to avoid having it go into bankruptcy. See LEDBETTER, *supra* note 29, at 180–81.



of weight on presidential control. Because the President is answerable to a nationwide political constituency, the theory goes, “presidential administration” legitimizes the administrative state, even in the absence of other legitimating factors, such as public participation, judicial review, or congressional oversight.<sup>261</sup>

And yet, as Dwight Eisenhower understood, even the President, who has far better access to secret information and expert advice than members of Congress, has a limited ability to influence the trajectory of national security policies already in place.<sup>262</sup> The President appoints only several hundred civilian officials to oversee a national security bureaucracy that, with contractors included, employs millions.<sup>263</sup> The lion’s share of national security decisionmaking—including decisions concerning fundamental liberty interests, and life and death—must occur at lower levels.

In addition, if the President seeks to rein in any particular mode of regulation by the MAC, she must contend with public and private bureaucracies heavily invested in that mode of regulation. Within the MAC, there are strong incentives to bury or ignore policy failures—from continuing to pay for expensive weapons that do not work<sup>264</sup> to undercounting collateral deaths from the use of force<sup>265</sup> to conducting missions “off the books.”<sup>266</sup> Scaling back the level of regulation is rarely

---

261. See Kagan, *supra* note 49, at 2331–32 (describing increased presidential coordination of agency decisionmaking and concluding that it enhances transparency and responsiveness to the public). This presidential-control model has been highly influential in administrative law scholarship. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 53 (2006); Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 47–49 (2017).

262. See GLENNON, *supra* note 11, at 58–59 (discussing the President’s weaknesses in forging national security policy); Theodore C. Sorensen, *But You Get to Walk to Work*, N.Y. TIMES MAG. (Mar. 19, 1967) (“Presidents rarely, if ever, make decisions—particularly in foreign affairs—in the sense of writing their conclusions large on a clean slate. . . . [T]he basic decisions, which confine their choices, have all too often been previously made. . . .”).

263. GLENNON, *supra* note 11, at 16.

264. See ANDREW COCKBURN, *KILL CHAIN: THE RISE OF THE HIGH-TECH ASSASSINS* 168–88 (2015) (describing massive spending on expensive and ineffective equipment for targeting operations).

265. See Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> [<https://perma.cc/FD4D-XR2Z>].

266. See, e.g., Amanda Sperber, *Inside the Secretive US Air Campaign in Somalia*, THE NATION (Feb. 7, 2019), <https://www.thenation.com/article/archive/somalia-secret-air-campaign/>; Andrew deGrandpre & Shawn Snow, *The U.S. Military’s Stats on Deadly Airstrikes Are Wrong. Thousands Have Gone Unreported*, MIL. TIMES (Feb. 5, 2017), <https://www.militarytimes.com/news/your-military/2017/02/05/the-u-s-military-s-stats-on-deadly-airstrikes-are-wrong-thousands-have-gone-unreported/> [<https://perma.cc/UF6X-GYT5>] (discussing the “potentially thousands” of lethal airstrikes that the U.S. military has failed to publicly disclose).

considered because it is viewed as an admission of failure, which actually increases the threat to bureaucratic prestige.<sup>267</sup>

This resistance to presidential control influences decisionmaking even at the highest levels and by political appointees. When NSC members are united on a particular policy, it is especially difficult for the President to say “no.”<sup>268</sup> In 2009, for example, four members of the NSC—the Secretary of Defense, Director of National Intelligence (DNI), CIA Director, and National Security Advisor—formed a united front to persuade President Obama to continue and expand the drone program begun under President Bush. At the same time, they leveraged their control over information to “curtail discussion of the policy’s broader ramifications.”<sup>269</sup>

This example serves as a reminder that, even when the President exercises direct supervisory authority over a particular decision, she must rely on the intelligence provided by the bureaucracy and the advice of the officials who lead it. The military and civilian workers in the intelligence community possess the same motivations as other bureaucrats—they seek increased budgets, authority, and prestige.<sup>270</sup> They can rarely obtain those goals by reporting that all is well in the world, and if they fail to identify a threat, their agency will suffer serious reputational damage, as the CIA did after 9/11.<sup>271</sup> Instead, they are *rationaly* motivated to obtain as much information as possible from as many sources as possible and to identify national security threats in the information they obtain. The military and its contractors’ incentives are aligned with the intelligence community’s. Aggressive intelligence gathering and threat inflation serve the goals of all three.<sup>272</sup>

These incentives and the sheer complexity of the intelligence community have constrained Presidents’ efforts to exercise control over intelligence

---

267. See Dalal, *supra* note 155, at 105 (“[C]hanging course implies that the existing course is incorrect—an admission of failure that might expose the agency to unwanted scrutiny and negatively implicate the agency’s top brass.”).

268. See GLENNON, *supra* note 11, at 62–64 (noting that the “president must choose his battles carefully . . . he has limited political capital and must spend it judiciously . . . Under the best of circumstances, he can only attack . . . policies one by one, in flanking actions, and even then with no certainty of victory”).

269. See *id.* at 61 (discussing VALI NASR, *THE DISPENSABLE NATION: AMERICAN FOREIGN POLICY IN RETREAT* 180 (2013)).

270. See, e.g., Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information Sharing*, 78 GEO. WASH. L. REV. 279, 282 (2010) (observing that “[i]ntelligence agencies seek to maximize their influence over senior policymakers” and “autonomy—i.e., the ability to pursue agency priorities without outside interference”). Perhaps the most comprehensive study of bureaucrats’ incentives remains WILSON, *BUREAUCRACY*, *supra* note 47.

271. TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* 555 (2008) (describing 9/11 as “the Pearl Harbor that the CIA had been created to prevent.”).

272. See GLENNON, *supra* note 11, at 19 (“The resulting incentive structure encourages the exaggeration of existing threats . . .”).

gathering.<sup>273</sup> Recent attempts to centralize intelligence gathering have had, at best, mixed success.<sup>274</sup> More broadly, in order to exercise effective control over national security policy, the President must contend with and counterbalance the constant barrage of threat inflation influencing Congress, the media, and the public. This is an extremely difficult task, even in optimal circumstances.

### *C. From a Military-Industrial to a Military-Administrative Complex*

Libertarian constitutionalists typically exclude the national security state from their blistering critiques of agency regulation.<sup>275</sup> And yet many of the U.S. government's most significant national security activities fall within the definition of regulation, and increasingly so. Like agencies that regulate drug manufacturers or polluters, the national security state's core mission is to limit risk—to provide safety to American society by imposing concentrated costs on potential or actual enemies and the public.<sup>276</sup> And like criminal justice agencies, the national security state often imposes those costs through the application of coercive power directly upon individuals—both enemies and the public.<sup>277</sup>

The twenty-first century focus on deterring threats from transnational groups and individuals has altered the U.S. government's national security activities.<sup>278</sup> Traditional military operations—such as surveillance, targeting, and detention—have become borderless and individualized.<sup>279</sup> Sprawling bureaucracies sprang up to determine who are the enemies,

---

273. See Sales, *supra* note 270, at 282; WEINER, *supra* note 271, at 36. *But see* Rascoff, *supra* note 8, at 637 (arguing that “the norms of presidential control that have characterized the majority of the regulatory state for decades have recently begun to take hold in the domain of intelligence collection”).

274. See, e.g., John D. Negroponce & Edward M. Wittenstein, *Urgency, Opportunity, and Frustration: Implementing the Intelligence Reform and Terrorism Prevention Act of 2004*, 28 YALE L. & POL'Y REV. 379, 388 (2010) (“[The IRPTA is] a consensus piece of legislation that created a DNI position with broad responsibilities but only vague authorities in critical respects.”).

275. See *infra* Part IV.

276. See PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 12 (2008) (arguing that most democracies today have evolved into “[m]arket states,” whose “strategic raison d’être . . . is the protection of civilians, not simply territory or national wealth or any particular dynasty, class, religion, or ideology”); BREYER, *supra* note 46, at 9–10 (explaining that the regulatory system can be divided into two parts—“risk assessment” and “risk management”); cf. Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3, 6–7 (2014) (proposing that the risk-management literature be utilized to develop a more rights-protective approach to the regulation of domestic intelligence collection).

277. See Slobogin, *supra* note 4, at 96 (comparing agency adjudication to the discretionary decision a police officer makes to “stop, arrest, or search someone”).

278. See Huq, *supra* note 224, at 908 (describing the shift from “state-based enemies” to “new threats in the more fragmented international environment”).

279. See GANESH SITARAMAN, *THE COUNTERINSURGENT’S CONSTITUTION: LAW IN THE AGE OF SMALL WARS* 3 (2013).

where they are located, and how to neutralize them.<sup>280</sup> And warfare's increased tempo makes intelligence gathering more important than ever.<sup>281</sup>

These pressures have led to a convergence among the regulatory domains of national security, foreign policy, immigration, and even policing.<sup>282</sup> Also driving this convergence are private contractors, who sell equipment and services developed for one domain to the others.<sup>283</sup> The consequences are the militarization of all these domains and their assimilation into a national security state increasingly influenced by contractors' interests and entangled with American life.<sup>284</sup>

When viewed from the perspective of its targets, then, the government's national security activities are just as burdensome as regulation in other areas, if not more so. Indeed, the national security bureaucracy has always regulated individual behavior, sometimes on a very large scale—from the draft to blacklisting to wartime detention.<sup>285</sup> And the internal administration of the bureaucracy itself involves complex and intrusive regulation of its individual personnel, which deserves more study.<sup>286</sup>

Today, the concentrated costs of these national security activities are being imposed, with greater frequency, on American civilians and other individuals inside the United States.<sup>287</sup> These costs include, among other things, the disruption militarized immigration enforcement and policing imposes on all members of communities where it occurs,<sup>288</sup> the

---

280. See, e.g., McNeal, *supra* note 168, at 701–33 (summarizing the bureaucratic process involved in certain types of targeted killing).

281. See SITARAMAN, *supra* note 279, at 3 (“Rather [than in traditional warfare], insurgents hibernate in the shadows, emerging only when ready for devastating attack . . .”).

282. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008) (arguing that the traditional criminal model and the traditional military model have converged in the context of counterterrorism detention efforts); Kristen E. Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 475 (2017) (observing that crime control, foreign policy, and national defense closely relate “to the modern understanding that the state’s function is to monopolize the legitimate use of force within a territory and to protect its citizens from both internal and external threats”); Said, *supra* note 176, at 820–23 (describing similarities among the theories driving, and methods used by, agencies involved in policing, immigration enforcement, and national security).

283. See generally HARTUNG, *supra* note 256; see also Michaels, *Privatization’s Pretensions*, *supra* note 239, at 749–51.

284. See Banks, *supra* note 5, at 1635; Said, *supra* note 176, at 820–23.

285. See, e.g., Chachko, *supra* note 8.

286. I lack space to do so here. Instead, this Article focuses on how the MAC regulates individuals external to it.

287. See, e.g., Posner & Vermeule, *supra* note 24, at 1678.

288. See Said, *supra* note 176, at 820.

appropriation of private information,<sup>289</sup> the suppression of speech,<sup>290</sup> and, for targeted communities, the higher costs associated with greater scrutiny of their activities, infiltration by government agents, and detention.<sup>291</sup>

The Trump administration announced a pivot away from counterterrorism to great-power competition as the centerpiece of U.S. national security policy.<sup>292</sup> But this new grand strategy cannot turn back the clock. Surveillance, counterinsurgency, and other modes of warfare requiring extensive rulemaking and adjudication will remain crucial to U.S. national security strategy—regardless of the enemy.<sup>293</sup> Because the actual use of force directly against another nation raises the stakes to dangerous heights, nations seeking to weaken U.S. power are more likely to use other tactics—such as surveillance, covert action, economic measures, and cyber operations—and the United States is likely to respond in kind.<sup>294</sup> Moreover, the convergence of national security and other regulatory domains shows no sign of slowing down.

#### *D. The Vicious Cycle of the Military-Administrative Complex*

Like the MIC, the MAC manifests in a vicious cycle. The two cycles operate simultaneously and interdependently.<sup>295</sup> Both cycles involve threat inflation as a key driver of change. But the main difference is that, in the

---

289. See Derek E. Bambauer, *Privacy Versus Security*, 103 J. CRIM. L. & CRIMINOLOGY 667, 674 (2013) (observing that firms retain consumer data because it has value).

290. See, e.g., *Ragbir v. Homan*, 923 F.3d 53, 57 (2d Cir. 2019) (holding that courts have jurisdiction to consider whether the First Amendment prohibits ICE from targeting immigrants in retaliation for exercising their right to free speech), *vacated sub nom.* *Pham v. Ragbir*, No. 19-1046, 2020 WL 5882107, at \*1 (U.S. Oct. 5, 2020).

291. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 22–46 (2003) (describing the federal government’s preventative detention campaign targeting Muslim Americans that ensued after the terrorist attacks on September 11, 2001); Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 L. & SOC’Y REV. 365, 369 (2010) (concluding that intrusive policing strategies—such as intensive frisks, surveillance, infiltration, and detention—used against Muslim Americans are counterproductive).

292. See Benjamin Denison, *Confusion in the Pivot: The Muddled Shift from Peripheral War to Great Power Competition*, WAR ON THE ROCKS (Feb. 12, 2019), <https://warontherocks.com/2019/02/confusion-in-the-pivot-the-muddled-shift-from-peripheral-war-to-great-power-competition/> [<https://perma.cc/N2QU-ZNZV>].

293. See, e.g., John Vrolyk, *Insurgency, Not War, Is China’s Most Likely Course of Action*, WAR ON THE ROCKS (Dec. 19, 2019), <https://warontherocks.com/2019/12/insurgency-not-war-is-chinas-most-likely-course-of-action/> [<https://perma.cc/F67F-F6JV>].

294. See *id.*

295. The military and contractors’ pursuit of expensive new aircraft and weapons systems, for example, has continued unabated. See, e.g., Christian Davenport, *Under Trump, the F-35’s Costs, More Than \$1 Trillion Over 60 Years, Continue to Draw Scrutiny*, WASH. POST (Dec. 8, 2017, 4:00 PM), [https://www.washingtonpost.com/news/the-switch/wp/2017/12/08/under-trump-the-f-35s-costs-more-than-1-trillion-over-60-years-continue-to-draw-scrutiny/?utm\\_term=.ca7416ffdd3a](https://www.washingtonpost.com/news/the-switch/wp/2017/12/08/under-trump-the-f-35s-costs-more-than-1-trillion-over-60-years-continue-to-draw-scrutiny/?utm_term=.ca7416ffdd3a) [<https://perma.cc/3K4W-QSET>].

MAC cycle, threat inflation (stage one) leads to increased *regulatory authority* (stage two), rather than the purchase of new arms. The increased regulatory authority attracts pressure to use it (stage three) resulting in its actual use (stage four). The use creates a demand for validating intelligence (stage five). The production of new intelligence enables further threat inflation (back to stage one), and periodically leads to an expansion of the national security state's regulatory domain (stage six).

### 1. Threat Inflation

Threat inflation in the MAC takes many of the same forms as in the MIC and is caused by many of the same factors. But threat inflation in the MAC reflects the changing nature of warfare, a “fragmented international environment,”<sup>296</sup> and broadening definitions of national security.<sup>297</sup> It centers on threats from individuals and transnational groups, rather than nation-states or groups contending for political power within them.<sup>298</sup>

Although the U.S. government proclaimed in 2017 that its defense and national security policies would shift to focus on great power competition rather than terrorism,<sup>299</sup> its use of force aimed at non-state actors has continued largely undiminished—and in some respects it has even increased.<sup>300</sup> This continuity can be attributed to the entrenchment of bureaucracies within the national security state dedicated to particular types of administrative decisionmaking—such as targeted killing—that increasingly operate with little presidential involvement.<sup>301</sup> The Special Operations Command (SOC), for example, has resisted the shift away from the strikes and raids that brought it prestige, influence, and autonomy. It has even circumvented the chain of command to advocate for its own interests with Congress.<sup>302</sup>

---

296. Huq, *supra* note 224, at 908.

297. *See supra* Part II.A.

298. The major recent exceptions have been Iraq and Iran. *See generally, e.g.*, ROBERT JERVIS, *WHY INTELLIGENCE FAILS: LESSONS FROM THE IRANIAN REVOLUTION AND THE IRAQ WAR* (2010).

299. *See* WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf> [<https://perma.cc/99VA-KG4M>].

300. *See* Denison, *supra* note 292.

301. *See* Chachko, *supra* note 8, at 1118 (discussing the diminished involvement of the President and the corresponding independence of the bureaucracy in decisions involving targeted killing, economic sanctions, and detention).

302. Mark E. Mitchell, Zachary Griffiths & Cole Livieratos, *America's Special Operators Will Be Adrift Without Better Civilian Oversight*, *WAR ON THE ROCKS* (Feb. 18, 2020), <https://warontherocks.com/2020/02/americas-special-operators-will-be-adrift-without-better-civilian-oversight/> [<https://perma.cc/G3JY-RARB>].

Resistance to change also emerges from a heavy shared investment among bureaucrats, contractors, “experts,” and the media<sup>303</sup> in inflating threats from terrorism.<sup>304</sup> As recently as 2015, the elite consensus was that al Qaeda in the Arabian Peninsula (AQAP) presented the most significant threat to the United States—even an existential one.<sup>305</sup> AQAP did in fact launch one successful stateside attack, but the intelligence community failed to detect it.<sup>306</sup>

Such inflated assessments have proved stubbornly difficult to counter, despite numerous studies concluding that the actual threat to the United States from terrorist groups is quite low.<sup>307</sup> Threat inflation’s persistence has everything to do with bureaucratic incentives. Bureaucrats will—all other factors being equal—embrace policies enabling them to more easily perform a small set of core tasks while avoiding carrying out policies that require taking on new tasks.<sup>308</sup>

Intelligence analysis that provides the basis for national security decisionmaking accordingly suffers from an overly narrow focus. As one former intelligence official observed, “[intelligence analysts] have little understanding of probability and suffer from low base rate neglect for very rare events.”<sup>309</sup> Put another way, they overemphasize low-probability, high-risk, threats.<sup>310</sup> In addition, individual analysts gain promotion and prestige

---

303. See CALVIN F. EXOO, *THE PEN AND THE SWORD: PRESS, WAR, AND TERROR IN THE 21ST CENTURY* 97 (2010).

304. See generally JOHN MUELLER, *OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM* (2006).

305. See, e.g., Council on Foreign Relations Staff, *Al-Qaeda in the Arabian Peninsula (AQAP)*, COUNCIL ON FOREIGN RELS. (June 19, 2015), <http://www.cfr.org/yemen/al-qaeda-arabian-peninsulaaqa/p/p9369> [<https://perma.cc/C2GY-ZWZZ>]; Mary Habeck et al., *A Global Strategy for Combating al Qaeda and the Islamic State*, AM. ENTER. INST. 1, 3 (Dec. 2015) (“The United States faces a fundamental challenge to its way of life.”), <https://www.aei.org/wp-content/uploads/2015/12/A-Global-Strategy-for-Combating-al-Qaeda-and-the-Islamic-State-online.pdf>.

306. See Katie Benner & Adam Goldman, *F.B.I. Finds Links Between Pensacola Gunman and Al Qaeda*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/politics/justice-department-al-qaeda-florida-naval-base-shooting.html> [<https://perma.cc/R3Y6-PLX7>].

307. See, e.g., JOHN MUELLER & MARK G. STEWART, *CHASING GHOSTS: THE POLICING OF TERRORISM 2* (2016) (concluding that “the United States has created or reorganized more than two entire counterterrorism organizations for every terrorist arrest or apprehension it has made of people plotting to do damage within the country”) (emphasis omitted); Cramer & Thrall, *Understanding Threat Inflation*, *supra* note 50, at 6.

308. See WILSON, *BUREAUCRACY*, *supra* note 47, at 222 (“[Changes] that are consistent with existing task definitions will be accepted; those that require a redefinition of tasks will be resisted.”); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV’T. L. REV. 1, 9 (2009) (observing that agencies will “systematically overperform on the tasks that are easier to measure and have higher incentives, and underperform on the tasks that are harder to measure and have lower incentives”).

309. Marc Sageman, *The Stagnation in Terrorism Research*, 26 TERRORISM & POL. VIOLENCE 565, 574 (2014).

310. Cf. BREYER, *supra* note 46, at 2–7 (describing the tendency of domestic agencies to overregulate high-profile, low-probability threats to public health and the environment).

when they produce reports identifying threats, not dismissing them.<sup>311</sup> They are therefore unlikely to probe for alternative explanations when they see data consistent with a preconceived threat.<sup>312</sup>

Similar incentives drive threat inflation concerning terrorism within the United States. In the panic after 9/11, the intelligence community, the military, and federal law enforcement made wildly inflated assessments about the stateside threat posed by al Qaeda and other foreign-based terror groups.<sup>313</sup>

This immediate response was in many ways understandable, if not helpful. But the same threat inflation continued for years in the face of overwhelming evidence that transnational terrorist groups lacked the capacity to—or often even the interest in—launching further attacks on U.S. soil.<sup>314</sup> In 2011, the government followed up on approximately 5,000 leads per day, which were internally referred to as “threats.”<sup>315</sup> Law enforcement—especially the FBI—has expended tremendous resources pursuing them. In fifteen years, just a few hundred prosecutions resulted, many from sting operations, and most on “quite minor charges.”<sup>316</sup> On December 6, 2019, a Saudi aviation student with links to AQAP killed three and injured eight at the Pensacola Naval Air Station.<sup>317</sup> But no other al Qaeda operatives or sleeper cells have been uncovered inside the United States.<sup>318</sup>

Threat inflation regarding terrorist groups operating across borders throughout the Middle East, Central Asia, and Africa—in nations all geographically remote from United States—puts pressure on the limits of authority to use force abroad.<sup>319</sup> Similarly, high levels of threat perception about stateside terrorist attacks puts pressure on the boundaries of authority in law enforcement, domestic intelligence collection, and immigration, among other domains. These pressures push the vicious cycle into stage two—increased regulatory authority.

## 2. *Increased Regulatory Authority*

The increased regulatory authority occurring at stage two of the vicious cycle takes three forms. The first is Congress enhancing an agency’s

---

311. See JERVIS, *supra* note 298, at 10; Sageman, *supra* note 309, at 567.

312. MUELLER & STEWART, *supra* note 307, at 25–26.

313. See *id.*

314. See *id.* at 1–10.

315. See GARRETT M. GRAFF, *THE THREAT MATRIX: INSIDE ROBERT MUELLER’S FBI AND THE WAR ON GLOBAL TERROR* 399 (2011).

316. MUELLER & STEWART, *supra* note 307, at 14, 24.

317. See Benner & Goldman, *supra* note 306.

318. See MUELLER & STEWART, *supra* note 307, at 20.

319. See Hathaway, *supra* note 2, at 86.



statutory authority or vesting it with new authority. The second is the President directing agencies to exercise greater authority, invoking powers granted her by statute, the Constitution, or some mixture of the two.<sup>320</sup> The third—and least studied—form is agencies, on their own, using their existing discretion to increase the level of regulation.<sup>321</sup>

Congress, in the wake of 9/11, has continually expanded statutory authority to regulate regarding national security, while only rarely imposing limits.<sup>322</sup> Examples include the following: expanding surveillance scope and methods;<sup>323</sup> twice authorizing the use of force;<sup>324</sup> creating the Special Operations Command;<sup>325</sup> legalizing the use of military commissions at Guantanamo Bay Naval Base and attempting to strip constitutional habeas rights from prisoners there;<sup>326</sup> shifting much of the federal bureaucracy into the national security space by creating the DHS;<sup>327</sup> and appropriating robust budget increases for national security. Voting against such measures was considered politically perilous for members of Congress from both parties.<sup>328</sup> Threat inflation—hammered home by the military, the intelligence community, and their contractors—has had a strong, lasting impact on voters and legislators.<sup>329</sup>

When seeking increased authority from Congress has seemed too burdensome, politically challenging, or time-consuming, the President has simply invoked new authority as flowing from in existing statutory authority and often also executive power derived from Article II of the Constitution.<sup>330</sup> Some examples include the following: in the wake of 9/11,

---

320. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (recognizing presidential authority to suspend claims in federal courts pursuant to a sole-executive international agreement, grounded in similar statutory authorization and congressional acquiescence in previous instances of the same practice).

321. See Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 34 (2017) (arguing that law enforcement agencies create new primary rules of conduct when they shift enforcement patterns); cf. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244–45 (2017) (arguing that “many internal measures” have the “paradigmatic features of legal norms even if they lack the element of enforcement through independent courts”).

322. See *supra* Part II.

323. See *supra* note 159 and accompanying text.

324. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

325. See 10 U.S.C. § 167.

326. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (2006) (codified as amended at 28 U.S.C. § 2241(e)); Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2680, 2741-42 (2005) (codified as amended at 28 U.S.C. § 2241(e)).

327. See *supra* notes 171–76 and accompanying text.

328. See, e.g., COHEN & ZENKO, *supra* note 230, at 5–10.

329. See *id.*

330. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1171–72 (2019).

President Bush and his Cabinet declared a national emergency, triggering authority to impose economic sanctions on individuals and groups;<sup>331</sup> created new military commissions;<sup>332</sup> declared limits on the applicability of the Geneva Conventions to captured prisoners;<sup>333</sup> ordered the detention of thousands of Muslim immigrants in the United States;<sup>334</sup> and approved the use of torture.<sup>335</sup> President Obama ramped up the drone program and personally presided over the process leading to strikes against certain individuals.<sup>336</sup> Obama also further broadened the geographical scope of the war against terrorist groups, authorizing the use of force in Yemen, Somalia, Libya, Syria, Chad, and Niger, in addition to Afghanistan and Pakistan.<sup>337</sup> President Trump invoked the (again inflated) threat of terrorism to issue executive orders imposing travel bans<sup>338</sup> and used statutory emergency authority to reallocate military funds toward the construction of a border wall.<sup>339</sup>

But the most frequent—and perhaps the most consequential—expansions of regulatory authority occur at the agency, and even sub-agency, level. As I discussed in Part II, legal frameworks constituting national security regulatory domains typically feature vague statutory mandates, few formal procedural requirements, secret decisionmaking, and limited judicial review. These features will, over time, tend to push the bulk of administrative lawmaking to the bottom rungs of the agency ladder. Professor James Q. Wilson observed that an agency’s leadership must spend most of its time dealing with external forces within and outside the Executive Branch, leaving little time left to refine its agency’s mandate.<sup>340</sup> The less specific an agency’s mandate, the more mid-level and front-line

---

331. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sep. 23, 2001).

332. Mil. Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833–36 (Nov. 16, 2001).

333. *See id.*

334. *See supra* note 291.

335. *See* Matt Apuzzo, Sheri Fink & James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html> [<https://perma.cc/9BCJ-VSMZ>].

336. Presidential Policy Guidance, Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013) [hereinafter PPG], <https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf> [<https://perma.cc/YGN3-35HM>]; *see generally* THE DRONE MEMOS: TARGETED KILLING, SECRECY, AND THE LAW (Jameel Jaffer ed., 2016) [hereinafter DRONE MEMOS] (detailing the U.S. government’s previously secret legal and policy documents concerning the targeted killing program); DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY (2012) (describing the executive branch decisionmaking behind the escalation of the drone program).

337. *See* Curtis A. Bradley & Jack L. Goldsmith, *Obama’s AUMF Legacy*, 110 AM. J. INT’L L. 628, 629 (2016) (concluding that “part of Obama’s legacy will be cementing the legal foundation for an indefinite conflict against various Islamist terrorist organizations”).

338. *See, e.g.*, Exec. Order No. 13,769 §§ 3-5, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017).

339. *See* Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

340. WILSON, BUREAUCRACY, *supra* note 47, at 32.

bureaucrats are empowered to interpret it.<sup>341</sup> And without external sources of supervision like judicial review, moreover, the front-end bureaucrats are all the more endowed with broad discretion.<sup>342</sup>

It may seem counterintuitive, but lower-level bureaucrats typically take broad discretion and narrow it to an intense focus on a small set of core tasks.<sup>343</sup> These tasks are defined by the problems the bureaucrats encounter on a daily basis, what is perceived to be the agency's primary mission, and the agency's culture.<sup>344</sup> For most agencies operating in the national security space, the problems they encounter daily—what keeps them up at night—concern threats.<sup>345</sup> The perceived primary mission is counterterrorism because it carries prestige and brings in the most money.<sup>346</sup> Although individual agency cultures vary, they have become much more homogenized within the national security realm by the creation of DHS and their common alignment toward the counterterrorism mission.<sup>347</sup>

Much agency national security rulemaking occurs informally and at a low level.<sup>348</sup> This has been true of many rules increasing regulatory authority in response to threat inflation. Examples include the NSA expanding surveillance authority by broadening its interpretation of the term “facility” in the Foreign Intelligence Surveillance Act (FISA) to include, not just a telephone number, but also a “general gateway” or “cable head”,<sup>349</sup> memos from a mid-level DHS official initiating a policy of indiscriminate deportation by ICE<sup>350</sup> and directing, in secret, CBP agents to detain and interrogate citizens of Iranian descent following the targeted killing by the United States of an Iranian General in Iraq;<sup>351</sup> guidance by CIA officers or

---

341. *See id.*

342. *See supra* notes 92–93 and accompanying text.

343. *See* WILSON, BUREAUCRACY, *supra* note 47, at 27–30.

344. *See id.*

345. *See supra* Part III.D.1.

346. *See generally* MUELLER & STEWART, *supra* note 307; *see, e.g.*, Joe Warminsky, *Trump's Cybersecurity Budget Emphasizes DOD While Spreading Cuts Elsewhere*, FEDSCOOP (Mar. 18, 2019), <https://www.fedscoop.com/cybersecurity-budget-2020-trump-white-house/> [<https://perma.cc/W7RK-6XYL>] (reporting that, in the President's budget, “[a]n agency was more likely to be proposed for an increase if it works on national security in some way”).

347. *See supra* notes 171–76 and accompanying text; ZEGART, *supra* note 39, at 37 (“[N]ational security agencies live in a much more tightly knit, stable bureaucratic world than their domestic policy counterparts.”).

348. *See generally* Knowles, *National Security Rulemaking*, *supra* note 37.

349. Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 132 (2015) [hereinafter Donohue, *Section 702*].

350. *See, e.g.*, Memorandum from Matthew T. Albence, Exec. Assoc. Dir., U.S. Immigr. & Customs Enf't, to All ERO Emps., *Implementing the President's Border Security and Interior Immigration Enforcement Policies* (Feb. 21, 2017).

351. Laura Strickler, *Memo Shows CBP Ordered Agents to Question Iranian Americans at the Border*, NBC NEWS (Jan. 30, 2020, 4:34 PM), <https://www.nbcnews.com/politics/immigration/memo-shows-cbp-ordered-agents-question-iranian-americans-border-n1126776> [<https://perma.cc/5KNQ-HZG5>].

military commanders in the field about what indicators of insurgent behavior justify the launching of a “signature” drone strike;<sup>352</sup> and an NSA official’s creation of an AI algorithm that leads to the collection of thousands of individuals’ private electronic information.<sup>353</sup>

Lower-level bureaucrats enjoy particularly broad discretion when they make individualized, adjudicatory determinations. In the national security space, such determinations include arrest, detention, and interrogation by immigration enforcement officers at airports or elsewhere within the United States;<sup>354</sup> the DoD’s decision to designate a prisoner as a “enemy combatant”;<sup>355</sup> the addition of a name to the “no-fly list” by a low-level official at one of several agencies;<sup>356</sup> the decision by the CIA or the DoD to target a particular individual or group with a drone strike;<sup>357</sup> and a decision by NSA officials to collect data on a particular individual.<sup>358</sup>

The process leading to these determinations often—but not always— involves both a sprawling public bureaucracy and an almost-as-substantial private bureaucracy intertwined with it. Today’s national security contractors provide numerous services in addition to equipment.<sup>359</sup> They fill personnel gaps, gather intelligence, pilot drones, program surveillance software, operate detention facilities, interrogate and guard detainees, and undertake a host of other activities.<sup>360</sup>

Some national security adjudications follow more formal procedures and provide multiple levels of internal review, due process rights, and judicial review.<sup>361</sup> But these adjudications still receive very strong judicial

---

352. JEREMY SCAHILL, *THE ASSASSINATION COMPLEX: INSIDE THE GOVERNMENT’S SECRET DRONE WARFARE PROGRAM* 47 (2016).

353. See generally Peter Margulies, *Surveillance By Algorithm: The NSA, Computerized Intelligence Collection, and Human Rights*, 68 FLA. L. REV. 1045 (2016); see also Banks, *supra* note 5, at 1635.

354. See U.S. CUSTOMS & BORDER PROTECTION, CBP DIRECTIVE NO. 3340-049A, BORDER SEARCH OF ELECTRONIC DEVICES ¶ 5.4 (Jan. 4, 2018) (setting forth guidelines governing “Detention and Review in Continuation of Border Search Information” and providing individual agents with broad discretion).

355. See Mark Denbeaux et al., *No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo*, 41 SETON HALL L. REV. 1231, 1236 (2011).

356. See, e.g., NAT’L COUNTERTERRORISM CTR., WATCHLISTING GUIDANCE (Mar. 2013), [https://www.aclu.org/sites/default/files/field\\_document/March%202013%20Watchlist%20Guidance.pdf](https://www.aclu.org/sites/default/files/field_document/March%202013%20Watchlist%20Guidance.pdf) [<https://perma.cc/J3YL-B87X>].

357. See McNeal, *supra* note 168, at 684.

358. See Hu, *supra* note 36, at 1429.

359. See COCKBURN, *supra* note 264, at 48–50 (describing examples of specific services private contractors provide and the ways in which these contractors interact with and influence military officials); Michael S. Schmidt, *Air Force, Running Low on Drone Pilots, Turns to Contractors in Terror Fight*, N.Y. TIMES (Sept. 5, 2016), [https://www.nytimes.com/2016/09/06/us/air-force-drones-terrorism-isis.html?mcubz=1&\\_r=0](https://www.nytimes.com/2016/09/06/us/air-force-drones-terrorism-isis.html?mcubz=1&_r=0) [<https://perma.cc/J9RB-M4CV>] (discussing the recent increase in the United States’ use of private contractors for drone attacks).

360. See HARTUNG, *supra* note 256, at 217–30.

361. See Chachko, *supra* note 8 (describing procedures for imposing economic sanctions).

deference. The courts rarely rule that sanctions determinations are unlawful.<sup>362</sup> And the D.C. Circuit, which has “enjoy[ed] almost exclusive jurisdiction over national security detention,” has sided with the government nearly every time it has considered the legality of a Guantanamo prisoner’s detention.<sup>363</sup>

Adjudication is also where presidential coordination of agency activities is least likely and least effective.<sup>364</sup> For a time, President Obama and high-level officials in several agencies had direct involvement in decisions regarding which individuals to target with “personality” drone strikes.<sup>365</sup> But the number of such strikes is relatively low compared to those conducted based on behavior exhibited on the ground—so-called “signature strikes”<sup>366</sup>—and those conducted entirely off the record.<sup>367</sup> Under President Trump, these types of deadly adjudicatory determinations, like thousands of others in the MAC, became largely bureaucratic endeavors.<sup>368</sup>

When statutory authority is vague, and procedural requirements and judicial review are weak or absent, very informal rulemaking and adjudication creates administrative law by accretion. In the national security space, the accretion of authority occurs in collaboration with the private contractors intimately involved in the decisionmaking. For example, private firms not only manufacture drones, but pilot them and provide intelligence supporting a decision to strike.<sup>369</sup> The financial benefits to these private firms from drone strikes creates powerful incentives to increase the number of strikes and the geographical range of their use.<sup>370</sup> This is one important way legal authority gradually expands.

### 3. *Pressure to Use Authority and Its Use*

In the MIC, new arms must be produced before they can be “used.” But when the MAC uses new regulatory authority, the process is not as linear. The boundaries of regulatory authority cannot be tracked with the same precision as the contents of a nation’s arsenal; indeed, these boundaries may never be known until they are challenged. And authority may never be identified until there is sufficient demand for it.

---

362. *See id.*

363. Lee Kovarsky, *Citizenship, National Security Detention, and the Habeas Remedy*, 107 CALIF. L. REV. 867, 869 (2019).

364. *See Chachko, supra* note 8.

365. *See Becker & Shane, supra* note 265.

366. *See DRONE MEMOS, supra* note 336, at 12–13 (describing the decision to expand a form of signature strikes to Yemen in 2012).

367. *See deGrandpre & Snow, supra* note 266.

368. *See Chachko, supra* note 8; Claussen, *supra* note 170.

369. *See COCKBURN, supra* note 264, at 48–50.

370. *See id.* at 77.

Agencies sometimes seek legislative approval for existing activities when doubt emerges about authority for those activities and when the prospects of approval are strong. The NSA had been engaging in the warrantless collection of Americans' electronic communications since immediately after 9/11, relying initially on the President's Article II authority as Commander-in-Chief, the 2001 Authorization for the Use of Military Force (AUMF), and the War Powers Resolution.<sup>371</sup> When DOJ scrutiny raised concerns, subsequent surveillance statutes served, in large part, to place existing exercises of authority on a firmer legal foundation.<sup>372</sup>

Similarly, the President may provide a more thorough invocation of expanded authority for existing activities if there is pressure to do so. For example, even though the CIA and the military had been conducting drone strikes against the leadership of terrorist organizations outside the "hot" zones in Afghanistan since the beginning of Obama's Presidency, it was four years before the administration, in response to criticism, produced a framework charting the legal authority for such "direct action."<sup>373</sup> In order to justify targeting individuals in remote mountain areas who were in no position to launch attacks against the United States anytime soon, this legal framework offered a broader definition of "imminence" than had been previously invoked in the targeting context.<sup>374</sup>

In still other situations, such as adjudicatory determinations, agencies expand their authority *by* using it.<sup>375</sup> These expansions are often driven by bureaucrats' narrow focus on their core, short-term tasks. Agencies "tend to choose the goals that are more easily measured so they can demonstrate progress" and "[t]his often means taking an approach that focuses on short-term concerns with tangible outputs, as opposed to long-term effects that might be harder to predict and quantify . . . ."<sup>376</sup>

In the targeting process, "enemies killed in action" is as tangible an output as they come. As drone attacks on insurgents in Afghanistan escalated, commanders turned more and more to the use of "signature

---

371. U.S. DEP'T OF JUST., LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), <http://www.usdoj.gov/opa/whitepaperonnsal egalauthorities.pdf> [<http://perma.cc/GL5C-T7H2>]; Letter from William E. Moschella, Assistant Att'y Gen., U.S. Dep't of Just., to Sen. Pat Roberts, Chair, Senate Select Comm. on Intel., et al. (Dec. 22, 2005), <https://www.fas.org/irp/agency/doj/fisa/dojl22205.pdf> [<http://perma.cc/Z3CA-U7ZP>].

372. See Donohue, *Section 702*, *supra* note 349, at 132.

373. See KLAIMAN, *supra* note 336, at 13; see generally PPG, *supra* note 336.

374. See Chachko, *supra* note 8.

375. See, e.g., *Haig v. Agee*, 453 U.S. 280, 303 (1981) (noting that "a pattern of actual enforcement is one indicator of Executive policy" in foreign affairs); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 926 (1965) ("Agencies, like courts, frequently evolve detailed and precise rules in the course of adjudication.").

376. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 309–10 (2013).

strikes”—those launched, not based a previous determination, after a lengthy process, that a named individual poses an imminent threat, but when “insurgent activity” has been detected and an “opportunity” for a strike presents itself.<sup>377</sup> Over the course of hundreds of such signature strikes, the definition of “insurgent” eventually came to include virtually all military-age males<sup>378</sup> and “insurgent activity” might encompass, as one State Department critic joked, “three guys doing jumping jacks.”<sup>379</sup> These expansions of authority dovetail with contractor incentives to sell more drones and related services.<sup>380</sup>

Meanwhile, at the DHS, more than a decade before the Trump Administration and its aggressive bureaucratic jawboning, contractors worked with bureaucrats to implement a de facto indiscriminate removal policy.<sup>381</sup> The agency ramped up immigration detention and began outsourcing detention management to private prison companies that were not accountable to detainees for violations of detention standards. These private prison contractors were a powerful ally to ICE in congressional budget negotiations. Flush with government contracts, private companies like Geo Group and CoreCivic lobbied Congress for even more money for immigration enforcement.<sup>382</sup>

In general, agencies in the national security space continue to use their authority aggressively. The NSA, for example, tripled its collection of text and call records from telecoms between 2016 and 2017, and increased “unmasking” the identities of Americans it surveilled in response to requests from other agencies.<sup>383</sup> The numbers of drone attacks by the Trump administration far outstripped even the high number conducted under the

---

377. See DRONE MEMOS, *supra* note 336, at 12–13; Matthew Craig, *Targeted Killing, Procedure, and False Legitimation*, 35 CARDOZO L. REV. 2349, 2368 (2014).

378. See Becker & Shane, *supra* note 265 (reporting that the U.S. government “counts all military-age males in a strike zone as combatants . . . unless there is explicit intelligence posthumously proving them innocent”); see also SCAHILL, *supra* note 352, at 47–48.

379. See Becker & Shane, *supra* note 265.

380. See COCKBURN, *supra* note 264, at 253–55.

381. See Robert Knowles & Geoffrey Heeren, *Zealous Administration: The Deportation Bureaucracy*, 72 RUTGERS U. L. REV. 749, 770–74 (2020).

382. See Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. ON MIGRATION & HUM. SEC. 145, 148 (2018).

383. See Dustin Volz, *NSA Reports 75% Increase in Unmasking U.S. Identities Under Foreign Surveillance Law in 2018*, WALL ST. J. (April 30, 2019, 3:52 PM), <https://www.wsj.com/articles/nsa-reports-75-increase-in-unmasking-u-s-identities-under-foreign-surveillance-law-in-2018-11556641509> [<https://perma.cc/838Z-J93F>].

Obama administration<sup>384</sup>—and the numbers of immigrants in detention continues to increase.<sup>385</sup>

#### 4. *Intelligence Validating the Use of Legal Authority and Resulting Threat Inflation*

National security activities inevitably involve uncertainty, and mistakes happen. What pre-operation intelligence indicated was a weapons factory may turn out to be a hospital. But if too many such mistakes are revealed, every entity involved in the operation suffers a setback. The military and intelligence community elements lose prestige.<sup>386</sup> The mistake also taints the contractors' products or services, which may even be blamed.

That is why the military, the contractors, and the intelligence community share a strong interest in finding intelligence validating a previous use of authority.<sup>387</sup> In the aftermath of many combat situations, there will be uncertainty about whether the targets qualified as “enemies.” Was the “wedding party” in Northeast Afghanistan just that, or was it cover for a meeting of al Qaeda organizers? After every attack, when the smoke clears and the bodies are counted, the intelligence community and the military will be hunting for evidence that the individuals targeted or killed can be categorized as enemies.<sup>388</sup>

The hunt for validating intelligence occurs in other regulatory contexts, too. Guantanamo detainees discovered that the decision to send them there in the first place was remarkably sticky: the defense bureaucracy and intelligence community had strong incentives to justify the initial determination.<sup>389</sup> The Combatant Status Review Tribunals (CSRTs)—which ultimately determined that every detainee was an “enemy combatant,” sometimes after multiple do-overs—relied on questionable justifying intelligence, even when sources recanted.<sup>390</sup> The annual review boards established to determine the continuing “dangerousness” of the

---

384. See S. E. Cupp, *Under Donald Trump, Drone Strikes Far Exceed Obama's Numbers*, CHI. SUN-TIMES (May 8, 2019, 2:00 PM), <https://chicago.suntimes.com/news/2019/5/8/18619206/under-donald-trump-drone-strikes-far-exceed-obama-s-numbers> [<https://perma.cc/S8DX-8H48>].

385. See Monsy Alvarado et al., *These People Are Profitable': Under Trump, Private Prisons Are Cashing in on ICE Detainees*, USA TODAY (Dec. 20, 2019, 10:48 PM), <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/4393366002/> [<https://perma.cc/JH8Y-ETFP>].

386. See Knowles, *Warfare As Regulation*, *supra* note 4, at 2016–18.

387. See, e.g., Becker & Shane, *supra* note 265; SCAHILL, *supra* note 352, at 47–48.

388. See SCAHILL, *supra* note 352, at 47–48.

389. See Denbeaux et al., *supra* note 355, at 1236; Corine Hegland, *Guantánamo's Grip*, NAT'L J., Feb. 4, 2006; Ben Taub, *Guantánamo's Darkest Secret*, THE NEW YORKER, Apr. 15, 2019.

390. See Hegland, *supra* note 389.



detainees would often pile on even less reliable information to justify a decision not to release a detainee.<sup>391</sup>

Fictional sting operations are a variation on the search for validating intelligence. Instead of hunting for past indicators of participation in acts of terrorism, the fictional sting operation involves the government itself creating the conditions for participation.<sup>392</sup> Such operations serve legitimate purposes in certain law enforcement contexts, but their use in stateside antiterrorism policy is problematic. The agents involved often receive bonuses if the operation leads to a successful prosecution, giving them an incentive to push the coercion envelope.<sup>393</sup> The typical antiterrorism sting operation has targeted “armchair terrorists”—individuals who may be radicalized, but would otherwise not have the skills or inclination to participate in any terrorist activity. Even so, the successful prosecution is hailed as another attack prevented and used to further inflate the terrorism threat.<sup>394</sup>

Indeed, in general, when validating intelligence demonstrates that the MAC is successfully addressing a national security threat, the vicious cycle returns to *stage one, threat inflation*. The success may be said to reveal a previously unrecognized or underappreciated threat, or it is simply used to emphasize the danger of the threat that began that iteration of the cycle.<sup>395</sup> The process then moves to *stage two, increased regulatory authority*, and repeats itself again and again.

##### 5. Militarization of Other Regulatory Domains

When a threat is regarded as sufficiently serious, or if the prestige of the entities in the MAC has received a sufficient boost, the cycle turns to *stage six—the expansion of the MAC’s regulatory domain*. Absent a large-scale war, the U.S. military rarely has the opportunity to use more than a small portion of the arms it deploys.<sup>396</sup> So the military, contractors, and intelligence community must find ways to remind Congress, the President, and the public of their continuing importance. One such way is to show they can perform traditionally non-military functions.<sup>397</sup> For example, the

---

391. See *id.* at 19–20.

392. See Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1542–1545 (2017).

393. See MUELLER & STEWART, *supra* note 307, at 31.

394. See *id.* at 31–33.

395. GLENNON, *supra* note 11, at 19 (observing that the exaggeration of existing threats may also include creating new threats).

396. Andrew J. Bacevich, *Ending Endless War: A Pragmatic Military Strategy*, FOREIGN AFFS. (Sept./Oct. 2016), <https://www.foreignaffairs.com/articles/united-states/2016-08-03/ending-endless-war> [<https://perma.cc/M4QC-N2GJ>].

397. See generally BROOKS, *supra* note 23.

military and the CIA became expert at propaganda during the Cold War, often crowding out the State Department, which traditionally performed that task.<sup>398</sup> The military killed two birds with one stone by crafting media that glorified America while linking America's identity with the military's.<sup>399</sup>

This strategy eventually paid off. For the U.S. government, the MAC has become the hammer in a sea of nails. And no matter how diverse the military's tasks have become, the major contractors have expanded their portfolios accordingly. Lockheed Martin, for example, operates the world's largest private intelligence agency, which conducts surveillance and engages in covert action.<sup>400</sup> At one time or another, Lockheed subsidiaries have recruited and trained interrogators, security screeners, drone pilots, and spies, as well as foreign judges and lawyers. Other subsidiaries provide much of the equipment agencies use for these tasks.<sup>401</sup>

But the nature of the "complex" in the MAC is that influence moves in both directions. The many, many corporate entities contracting with the government to perform national security functions often must agree to surrender their accountability and duty to shareholders.<sup>402</sup> The DoD installs its handpicked directors on the boards of these corporations, who influence decisionmaking and monitor corporate activities so they do not conflict with the government's national security policies.<sup>403</sup>

Counterterrorism strategy complements the MAC's interest in expanding its regulatory domain. Counterinsurgency—a mode of warfare that seeks to incapacitate the enemy by undermining its support among the people it depends on for resources—has been a key part of U.S. counterterrorism strategy since before 9/11.<sup>404</sup> It involves the military and contractors performing a wide range of government functions. The progressive branch of counterinsurgency seeks to build popular support by shoring up the rule of law and essential services, "ensuring civilian

---

398. See generally HUGH WILFORD, *THE MIGHTY WURLITZER: HOW THE CIA PLAYED AMERICA* (2008).

399. MICHAELS, *CONSTITUTIONAL COUP*, *supra* note 14, at 221.

400. See HARTUNG, *supra* note 256, at 243–49; see also *id.* at 249 (quoting a veteran national security journalist's conclusion that, "If I had to choose a candidate for Big Brother, I would choose Lockheed Martin").

401. See *id.* at 247 (reporting that Lockheed Martin is "involved at one level or another in nearly everything the federal government does, from providing instruments of death and destruction to collecting taxes and recruiting spies").

402. See Andrew Verstein, *The Corporate Governance of National Security*, 95 WASH. U. L. REV. 775, 777 (2018) (reporting that "the federal government frequently compels companies to 'effectively exclude the Shareholder . . . from . . . influence over the Corporation's business or management'" (quoting a DoD sample agreement)).

403. See *id.*

404. See SITARAMAN, *supra* note 279, at 66–67 (discussing counterinsurgency forces' utilization of a "win-the-population strategy"); DEP'T OF THE ARMY, FIELD MANUAL 3-24, *INSURGENCIES AND COUNTERING INSURGENCIES* v (2014) [hereinafter *COUNTERINSURGENCY FIELD MANUAL*] ("provid[ing] a doctrinal foundation for counterinsurgency").

security,” and, if necessary, revising public policies or even a nation’s basic law.<sup>405</sup>

AFRICOM, the military’s Africa Command, has taken this comprehensive mission to heart. Its goal is to be the one stop shop for U.S. policy on the continent—what it calls the “whole-of-government approach.”<sup>406</sup> It borrows (“attachés”) senior officials from other agencies—including Agriculture, Energy, and Commerce—and claims “responsibility for development, public health, professional and security training, and other humanitarian tasks.”<sup>407</sup>

Even as the United States pivots from counter-terrorism to great power rivalry, agencies will pursue the new grand strategy, at least in part, through the regulation of individuals—including Americans. President Trump used statutory authority to impose tariffs on China—a foreign-affairs-based administrative decision to subsidize a particular U.S. industry at the expense of others and the consumer.<sup>408</sup> In doing so, the President also authorized the Commerce Secretary to issue waivers for individual corporations—a form of agency adjudication.<sup>409</sup>

Within the United States, the MAC has expanded its regulatory domain in a different way—through the militarization of law enforcement. In an apparent attempt to use threat inflation about terrorism to rally support for restrictive immigration policies, the Trump administration often elided distinctions among terrorists, drug traffickers, transnational gangs, and undocumented immigrants.<sup>410</sup> In fact, a small subgroup of unauthorized immigrants actually engage in criminal activity or represent national security threats.<sup>411</sup>

Agencies whose activities have a domestic center of gravity—such as the FBI, DEA, ICE, and CBP—hug the counterterrorism mission to increase their status and budgets. These agencies adopt many of the military’s tactics, even when they are not appropriate to the task. Because these agencies conduct operations more directly intertwined with American life than the military’s, the resulting infringement of liberty is more apparent and more common.

---

405. SITARAMAN, *supra* note 279, at 38.

406. Eric Schewe, *Why Is the U.S. Military Occupying Bases Across Africa?*, JSTOR DAILY (Apr. 11, 2018), <https://daily.jstor.org/why-is-the-u-s-military-occupying-bases-across-africa/> [<https://perma.cc/LE7Q-BV2E>].

407. *Id.*

408. Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151, 221 (2020).

409. See Chachko, *supra* note 8; Claussen, *supra* note 170.

410. See generally Said, *supra* note 176.

411. See Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/upshot/illegal-immigration-crime-research.html> [<https://perma.cc/5P8A-PMQV>].

Many of DHS's regulatory activities bear the hallmarks of a counter-insurgency campaign whose goal is to deny support to, and discourage, the "enemy."<sup>412</sup> ICE makes arrests and raids in formerly safe locations like schools and courts,<sup>413</sup> conducts surveillance and covert operations,<sup>414</sup> uses U.S. citizens as bait to capture their undocumented relatives,<sup>415</sup> and retaliates against those who resist its policies.<sup>416</sup> When ICE separates families, detains immigrants in harsh conditions, and deports them to countries where they face life-threatening dangers, it aims to deter unauthorized immigration and encourage "self-deportation."<sup>417</sup>

DHS also leverages the breadth of its mandate by using regulatory authority in one domain to coerce compliance in another. In doing so, it regulates the broader population more heavily in pursuit of its national security mission. It seeks to punish "sanctuary" cities and states, for example<sup>418</sup>—CBP stopped processing applications or renewals by New York residents for its Trusted Traveler programs when the state enacted a law preventing ICE and CBP from accessing its DMV records.<sup>419</sup> The state sued DHS, alleging infringements of state sovereignty and equal protection.<sup>420</sup>

---

412. See Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1442–43 (2018).

413. Stephen Rex Brown, *Courthouse Arrests of Immigrants by ICE Agents Have Risen 900% in New York This Year: Immigrant Defense Project*, N.Y. DAILY NEWS (Nov. 15, 2017), <https://www.nydailynews.com/new-york/ice-courthouse-arrests-immigrants-900-n-y-2017-article-1.3633463>; Ted Sherman, *AG Criticizes ICE Arrests of Immigrants as Kids Were Going to School*, NJ.COM (Jan. 26, 2018), [https://www.nj.com/news/2018/01/ag\\_criticizes\\_ice\\_arrests\\_of\\_immigrants\\_as\\_kids\\_we.html](https://www.nj.com/news/2018/01/ag_criticizes_ice_arrests_of_immigrants_as_kids_we.html) [<https://perma.cc/9K4F-PT9V>].

414. Nausicaa Renner, *As Immigrants Become More Aware of Their Rights, ICE Steps Up Ruses and Surveillance*, THE INTERCEPT (July 25, 2019, 11:09 AM), <https://theintercept.com/2019/07/25/ice-surveillance-ruse-arrests-raids/> [<https://perma.cc/9T4Y-3CBU>].

415. Ryan Devereaux, *Documents Detail ICE Campaign to Prosecute Migrant Parents as Smugglers*, THE INTERCEPT (Apr. 29, 2019, 12:36 PM), <https://theintercept.com/2019/04/29/ice-documents-prosecute-migrant-parents-smugglers/> [<https://perma.cc/EPU7-GK BX>].

416. See Cade, *supra* note 412, at 1442–43.

417. Within DHS, this is known as "consequence delivery." Nick Miroff, *ICE Air: Shackled Deportees, Air Freshener and Cheers. America's One-Way Trip Out*, WASH. POST (Aug. 10, 2019), [https://www.washingtonpost.com/national/ice-air-shackled-deportees-air-freshener-and-cheers-americas-one-way-trip-out/2019/08/10/bc5d2d36-babe-11e9-aeb2-a101a1fb27a7\\_story.html](https://www.washingtonpost.com/national/ice-air-shackled-deportees-air-freshener-and-cheers-americas-one-way-trip-out/2019/08/10/bc5d2d36-babe-11e9-aeb2-a101a1fb27a7_story.html) [<https://perma.cc/TQG2-UEDV>]. See also K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1884–85 (2019) (discussing the long history of the concept).

418. See Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1258 (2019) (describing sanctuary cities and other public and private forms of resistance to immigration enforcement).

419. Press Release, U.S. Customs & Border Patrol, *New York Residents No Longer Eligible to Apply for or Renew Trusted Traveler Programs* (Feb. 6, 2020), <https://www.cbp.gov/newsroom/national-media-release/new-york-residents-no-longer-eligible-apply-or-renew-trusted> [<https://perma.cc/B5LS-H43R>].

420. See Complaint for Declaratory and Injunctive Relief, *New York v. Wolf* (S.D.N.Y. Feb. 10, 2020), [https://ag.ny.gov/sites/default/files/ny\\_v\\_w\\_complaint.pdf](https://ag.ny.gov/sites/default/files/ny_v_w_complaint.pdf) [<https://perma.cc/2PFE-LMAX>].

A constant throughout this vicious cycle is “panvasive” surveillance by the MAC, which has secondary rights-diminishing effects beyond the warrantless collection and use of Americans’ private communications.<sup>421</sup> The fear of this surveillance interferes with the work of journalists and lawyers. Sources are more reluctant to come forward, and clients are more reluctant to share information with their attorneys.<sup>422</sup> The MAC’s regulatory activities have a wide and deep impact on the American community.

#### IV. THE MILITARY-ADMINISTRATIVE COMPLEX AND LIBERTARIAN CONSTITUTIONALISM

This Part briefly explores the interaction between the MAC and libertarian constitutionalism, focusing on a prospective revival of a strict nondelegation doctrine. As I discussed in Part I, libertarian constitutionalism emerged from nostalgia for a Lochnerian judiciary that would protect economic liberty, combined with public choice critiques of domestic regulation. And yet the critique of regulatory power embodied in Military-Industrial Complex theory has attracted little interest from libertarian constitutionalists. In this Part, I assess the tension between the sweeping, invasive nature of the MAC’s regulatory activities and libertarian constitutionalists’ ardent insistence on rolling back the administrative state.<sup>423</sup> In the end, the failure to resolve this tension would undermine the libertarian constitutionalists’ reform project. Moreover, it would further embolden the part of the administrative state most in need of restraint.

As I discussed in Part I, libertarian constitutionalists and other originalists have made efforts to ground their critiques of the administrative state in the Constitution’s text and structure. But the evidence is susceptible to conflicting interpretations.<sup>424</sup> Indeed, a great deal of the indeterminacy surrounding originalist support for the nondelegation doctrine flows from the fact that the many of the controversial early delegations of rulemaking authority concerned foreign affairs and national security.<sup>425</sup> The nondelegation-based objections to bills delegating authority to impose embargos, raise a volunteer army, and remove and detain aliens simply do not square with the nondelegation doctrine as it existed in the Lochner Era—

---

421. See Slobogin, *supra* note 4, at 93–94.

422. See *US: Surveillance Harming Journalism, Law, Democracy*, HUM. RTS. WATCH (July 28, 2014), <https://www.hrw.org/news/2014/07/28/us-surveillance-harming-journalism-law-democracy#> [https://perma.cc/DBJ6-FGH9] (finding that “government surveillance and secrecy are undermining press freedom, the public’s right to information, and the right to counsel, all human rights essential to a healthy democracy”).

423. See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

424. See *supra* Part II.B.

425. See Mortenson & Bagley, *supra* note 16, at 96–109.

with its *Curtiss-Wright* national security exception—or the doctrine the conservative justices would now revive.<sup>426</sup>

For Professor Schoenbrod, whose article Justice Gorsuch relied on in articulating the national security exception in his *Gundy* dissent, the failure to distinguish between national security and domestic delegations presented a mortal danger to the nondelegation doctrine. Professor Schoenbrod observed that the Court, in the two 1935 cases deploying the doctrine to strike down New Deal legislation regulating the domestic economy, mistakenly relied on precedent involving exercises of foreign affairs power—in other words, executive power.<sup>427</sup> It was a serious mistake, he argued, for the Court not to mark this distinction; when it upheld the delegation of vast administrative authority to control the domestic economy during World War II, the Court stretched the “intelligible principle” concept so far that no one raised a nondelegation challenge again until the 1960s.<sup>428</sup> Put differently, what should have been a set of cases regarding solely the delegation of executive power, and limited to the national security context in which they arose, were instead treated like any other delegation of authority to regulate the domestic economy. “[T]he Court has had little success,” he lamented, “in preventing the precedents of war from becoming precedents of peace.”<sup>429</sup>

As I discussed in Part III, policing the foreign affairs-domestic line and discerning the limits of “executive power” in the foreign affairs realm are tasks for which an elegant theoretical model is poorly suited. Instead, it is the insights from critiques of agency regulation that should presumably inform applications of the nondelegation doctrine. This is where Military-Industrial Complex theory and the evolution of the military-administrative complex becomes especially important.

---

426. See Parrillo, *Supplemental Paper*, *supra* note 75, at 19–20.

427. Professor Schoenbrod observed that “*Panama Refining* and *Schechter* relied on *Cargo of the Brig Aurora*, *Field v. Clark*, and *Hampton* in entirely domestic contexts without regard to their roots in matters of war and foreign affairs. Similarly, in the cases dealing with price and profit regulations enacted in response to World War II, the primary ground of decision was not a doctrine of authorization of independent executive power, but rather the fiction that the statutes provided standards.” Schoenbrod, *The Delegation Doctrine*, *supra* note 20, at 1264–65 (footnote call numbers omitted).

428. See *id.* at 1265 (discussing, e.g., *Yakus v. United States*, 321 U.S. 414, 420 (1944) (sustaining the Emergency Price Control Act [EPCA]’s authorization of the Office of Price Administration to set prices that “will be generally fair and equitable and will effectuate the purposes of this Act” for commodities and rents nationwide)). See also James R. Conde & Michael S. Greve, *Yakus and the Administrative State*, 42 HARV. J.L. & PUB. POL’Y 807, 812 (2019) (arguing that *Yakus* marked a sea change in administrative law because the Court separately embraced each of the EPCA’s “unprecedented combination of administrative instruments—broad delegation, bare-bones procedures, the separation of the courts’ review and enforcement functions”—and thereby abandoned the pre-New Deal order which would have considered the total rights-denying effect of these innovations).

429. Schoenbrod, *The Delegation Doctrine*, *supra* note 20, at 1265 (quoting CLINTON ROSSITER & RICHARD P. LONGAKER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 129 (expanded ed. 1976)).

It would be anachronistic to conclude that MIC theory and these domestic regulatory critiques share common roots. MIC theory emerged from the political left and became a mature and sophisticated model of government by the 1950s, when conservative public choice scholars were tinkering with their first models of domestic regulation.

Moreover, these scholars' mounting attacks on the domestic administrative state had very little to say about the MIC.<sup>430</sup> Professor Gordon Tullock, who wrote groundbreaking work on rent-seeking, seemed ambivalent about the MIC, even though it presented a clear example of his own theory in action. In advocating for outsourcing, he wrote that, "What is sometimes called the military-industrial complex produces, on the whole (with some exceptions), excellent military equipment; but there seems to be no doubt that the costs are a good deal higher than they have to be."<sup>431</sup> Tullock's comment highlights an important distinction between MIC theory and most public choice prescriptions. For the public choice theorist, outsourcing results in better outcomes and strengthens the free market, enhancing liberty. For the MIC theorist, in contrast, a close working relationship between the government and private firms is inherently dangerous and anti-democratic.

Most of the time, however, libertarian constitutionalists simply did not address regulation by the national security state, perhaps assuming that it was not really part of the administrative state they were attacking. This was a serious oversight.

MIC theory and libertarian constitutional law share pessimistic views of government regulation that assume bureaucrats are rationally motivated to expand their budgets and build their prestige, rather than further the public interest.<sup>432</sup> Because the MIC distorts the free market and encourages agencies to overregulate, libertarian constitutionalists should be especially interested in reforming it. But they are not. The national security state is still treated as exceptional by the same scholars and jurists seeking to tame the administrative state. Even as courts weaken their deference toward agencies regulating in other areas, they continue to recognize, even lean into, deference toward agency action in the national security space.

This strange disjuncture lays bare three major flaws in libertarian constitutionalism. First, a descriptive model of the administrative state that omits a large portion of agency action is radically incomplete. To place all

---

430. One exception is Professor John Yoo's concern over the military's independence from presidential control. See John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2282 (2009) (noting the paucity of administrative law scholarship addressing the military bureaucracy).

431. Gordon Tullock, *Public Choice in Practice*, in COLLECTIVE DECISIONMAKING: APPLICATIONS FROM PUBLIC CHOICE THEORY 27, 43 (Clifford S. Russell ed., 1979).

432. See *supra* Parts II.A, III.B.

national security activities in the “executive power” category and thereby exempt them from the nondelegation doctrine was always going to be a problematic approach, even before the latest wave of globalization.<sup>433</sup> But the Supreme Court has already once gone down the path of approving, in wartime, broad delegations of authority to determine citizens’ economic rights with few procedural requirements, and it has continued to do so in peacetime. There is little indication the Court would not again take the same path with a revived nondelegation doctrine.

Second, the exceptional treatment libertarian constitutionalists afford the MAC displays an unwillingness to fully embrace the theories of regulatory capture and bureaucratic incentives—the very insights giving libertarian constitutional law its greatest force.<sup>434</sup> The libertarians’ faith in the legitimacy and technocratic competence of national security decisionmaking mirrors liberal faith in domestic regulation during the New Deal.<sup>435</sup> Yet a belief that national security bureaucrats are, somehow, fundamentally different cannot be sustained in the face of vanishing boundaries between the domestic and national security realms.<sup>436</sup>

And finally, the libertarians’ omission of the MAC from their critique makes clear that their conception of constitutional liberty is quite thin. It is primarily focused on economic and religious liberty, rather than the liberties most frequently infringed by the MAC—including privacy, freedom from restraint, and the right to travel.<sup>437</sup> And yet with respect to economic regulation as well, what was once exclusively domestic can become very quickly a matter of national security and part of the land of the exception. For example, the U.S. military has long studied climate change as a national security threat, and the potential for securitized environmentalism to transform the economic regulatory landscape for corporations is immense. Professor Sarah E. Light has argued that “[t]he Military-Environmental Complex . . . has the potential to transform some of the negatives of the historic military-industrial complex into positives for the environment and sustainability.”<sup>438</sup> So too can national security imperatives infringe on religious freedom, as the Muslim-American community can attest.

What the behavior of the MAC teaches is that the most effective way to rein in the administrative state is to apply ordinary administrative law constraints to regulation by the national security state. “Normalizing” national security law in this way would enable courts to effectively police

---

433. See *supra* Part II.

434. See *supra* Part III.B.

435. See MASHAW, *supra* note 88, at 10–11.

436. See *supra* Part II.A.

437. See *supra* Part III.D.

438. Sarah E. Light, *The Military-Environmental Complex*, 55 B.C. L. REV. 879, 884 (2014).



the separation of powers and protect liberty. Once this has been accomplished, courts and scholars can consider whether some form of a strengthened nondelegation doctrine would truly be necessary.

#### CONCLUSION

In 2000, after a relatively peaceful decade that saw the Soviet Union collapse, one scholar published a triumphalist assessment of the Cold War years, arguing that fears of a “garrison state” expressed by Eisenhower and others had never come to pass because the United States had outspent the Soviet Union militarily while “anti-statist” internal forces largely preserved individual liberty.<sup>439</sup> Twenty years later, that assessment seemed premature at best. After the 9/11 attacks, U.S. military spending again exploded, returning to Cold War levels as a percentage of the budget, where it has remained ever since.<sup>440</sup> Outsourcing of traditional military and intelligence functions proceeded at a furious clip, further integrating the national security state and its contractors.<sup>441</sup> And the changing nature of warfare and technological innovation expanded the scope of the military’s regulation of individuals, transforming what had once been a MIC into a MAC.<sup>442</sup>

This growing phenomenon should be part of any assessment scholars make about the strength of the American administrative state. The way in which the MAC operates should also inform our understanding about the genuine consequences of a nondelegation revival. Neither the libertarian constitutionalists nor the regulatory state’s defenders can afford to ignore it.

---

439. See FRIEDBERG, *supra* note 149, at 3–4.

440. See LEDBETTER, *supra* note 29, at 206–07; *supra* note 12 and accompanying text.

441. See ALLISON STANGER, ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY 3–9 (2009).

442. See *supra* Part III.A.