DELEGATING NATIONAL SECURITY

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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.

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INTRODUCTION

 maximal discretion and minimal scrutiny. On this permissive legal armature has grown the world’s largest bureaucracy.

That bureaucracy engages in profuse rulemaking and adjudication—the meat and drink of administrative agencies. 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.

I call the combination of this bureaucracy and its private contractors the military-administrative complex (MAC). Although there is a rich literature on presidential authority in national security, the independent behavior of regulating agencies in that space has just begun to receive attention from legal scholars.

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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 [https://perma.cc/R8YV-LKE7].


8. See, e.g., Elena Chaichko, 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.\(^9\)

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.\(^10\) These entities employ millions.\(^11\) Their activities account for more than half of all federal discretionary spending.\(^12\)

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

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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 7000 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.


Those who challenge the administrative state’s constitutionality—I will refer to them as constitutional libertarians—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.\footnote{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].} 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.\footnote{Gundy, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).} A delegation of these Article II powers to agencies, then, cannot be a delegation of “legislative” power, no matter how legislative-seeking the nature of those powers.\footnote{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]).}

This highly formalist logic does little actual work, however.\footnote{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]).} Beneath it lie functional assumptions springing from a core belief that national security is a separate and unique sphere of governance.\footnote{See infra Part III.C.} 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 security power.
security activities. Nor do they acknowledge the serious threat to individual liberty those activities increasingly present.

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. The President, too, must delegate very broad regulatory authority to the national security bureaucracy.

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. 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, which he came to see as interest groups. He clashed with them over numerous policies—even Cold War grand strategy. In his Farewell Address, he described the

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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 ‘prescribe[e] the rules by which the duties and rights’ of citizens are determined” is a “quintessentially legislative power”); see supra note 1; Chachko, supra note 8, at 636–37 (arguing that the President exercised meaningful oversight of much of the intelligence community during the Obama administration).


27. 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).

“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.31

Today, empowered by expanding definitions of national security and the individualization of warfare and foreign policy,32 the military-industrial complex has evolved into a regulating administrative state—the military-administrative complex (MAC).33 Take the National Security Agency (NSA), for example.34 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.35 It works with thousands of contractors. And it regulates. It renders an individualized determination—adjudication—when it identifies targets for surveillance.36 It produces broadly-applicable policies—rulemaking—when it prescribes how Americans’ personal data may be collected and used.37 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.38 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, e.g., 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.”).
36. See, e.g., Hu, supra note 35, at 1431–32 (explaining the ways the NSA identifies targets).
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. At the same time, agencies regulate free of most procedural requirements ordinarily imposed on them by statutes and executive orders. 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.

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. I draw from the political science literature on the military-industrial complex (MIC), which has received scant attention from

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.
legal scholars. MIC theory offers a number of important insights for understanding the relevant political and institutional context.\textsuperscript{45}

Using these MIC theory insights, I construct a model of the military-administrative complex as a vicious cycle of overregulation.\textsuperscript{46} The cycle is driven by what scholars of domestic regulation would identify as bureaucratic empire-building,\textsuperscript{47} rent-seeking by private interests,\textsuperscript{48} and agency capture.\textsuperscript{49} 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.\textsuperscript{50} The use of that authority creates a market for intelligence validating it.\textsuperscript{51} The validating intelligence enables more threat inflation, starting the cycle again, and often justifying the expansion of the MAC to encompass traditionally-domestic domains.\textsuperscript{52}

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.\textsuperscript{53} A libertarian constitutionalist might draw on presidential

\textsuperscript{45}See LEDBETTER, supra note 29, at 6–12 (charting MIC theory’s major critiques of governance).
\textsuperscript{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).
\textsuperscript{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 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).
\textsuperscript{51}See infra Part III.D.4.
\textsuperscript{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”).
\textsuperscript{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. 54 Presidential administration cannot, by itself, legitimize a national security exception to the nondelegation doctrine. 55

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. 56

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. 57 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. 58 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. 59

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.
59. See infra notes 38 and accompanying text.
administrativism and national security exceptionalism. 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.

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. If fully realized in the caselaw, this approach could lead to a radical downsizing of the administrative state. At the same time, however, these libertarian constitutionalists recognize an exception for the government’s national security activities, supporting otherwise impermissibly broad


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.


delegations of authority and strong judicial deference in that realm. 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. 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.” 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. 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.

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.”).
67. See, e.g., BARNETT, supra note 66, at 32–52.
68. See, e.g., Morton J. Horwitz, 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.69 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.70 With respect to administrative agencies, libertarian constitutionalists seek to revive or strengthen doctrines that limit agency discretion and to scrap those that empower it.71 They argue for abandoning Chevron and other doctrines requiring judicial deference to many agency legal interpretations.72

But reviving the nondelegation doctrine is at the heart of the libertarian constitutionalists’ anti-agency project.73 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...

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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.”).


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”).

vests all legislative powers in Congress and nowhere else. 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. 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.

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. 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.”

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].


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

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.”80

But libertarian constitutionalists have not given up on the courts making it a regular practice of striking down legislation on nondelegation grounds.81 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.82

Scholars have uncovered some evidence linking a version of the nondelegation doctrine to the Founding and early history of the United States.83 Indeed, Professor Ilan Wurman has observed, influential members of the Founding generation argued against the constitutionality of even some delegations of foreign-affairs authority.84 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.
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.” 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. 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. 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.

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


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.


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 . . .”

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

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. Douglas Ginsburg, whom Reagan would appoint to the D.C. Circuit in 1986, and who later coined the phrase “Constitution-exile,” served as OIRA Administrator in Reagan’s first term and helped lead the deregulatory charge. In 1993, then-Judge Stephen Breyer made his own contribution to the literature, observing that bureaucrats tend to overregulate concerning rare, high-profile risks.

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. 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.

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. 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.
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.101

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.102 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.103 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.104

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.105 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.106 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.107

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.108 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.
104. See id.
106. See, e.g., KOH, supra note 7, at 94 (describing “withering criticism” of Curtiss-Wright).
Court developed to justify power over “Indians, aliens, and territories.”

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. 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.

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. 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. They have also argued for robust application of the political question doctrine in foreign affairs, which further limits judicial review.

Indeed, the Supreme Court’s early adaptors of libertarian constitutional law, Chief Justice Rehnquist and Justices Scalia and Thomas, routinely deferred to national security administrative determinations and

109. Id. at 14.
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.
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] consistant administrative construction of [The
expressed somewhat Lochnerian views concerning the rights of immigrants and foreign nationals. 116

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. 117 Justice Gorsuch observed that “Congress’s legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.” 118 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.” 119 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, 120 and Justice Jackson’s famous concurrence in Youngstown. 121 In the fourth case, The Cargo of the Brig Aurora v. United States, from 1813, the Court had upheld President James Madison’s order

Password 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.\footnote{122}{The Cargo of the Brig Aurora v. United States (The Aurora), 11 U.S. (7 Cranch) 382, 388–89 (1813).} 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.\footnote{123}{See Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting); see also \textit{Schoenbrod, Power Without Responsibility}, supra note 21, at 31.}

Justice Gorsuch went on to conclude that the statute under review in \textit{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.”\footnote{124}{\textit{Gundy}, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) (quoting \textit{The Federalist} No. 78, at 465 (Alexander Hamilton) (Clinton Rossier ed., 1961)).} 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.\footnote{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 \textit{Schoenbrod, Power Without Responsibility}, supra note 21, at 106, 186. \textit{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.”).}

These assumptions are inaccurate for several reasons. First, as I discussed above, even during the Lochner Era, the Court, in trade cases and in \textit{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.\footnote{126}{\textit{See supra} notes 102–116 and accompanying text.} And in the \textit{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.\footnote{127}{\textit{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. 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.” 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.

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. 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. 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.

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.
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”).
133. See, e.g., Winter v. Nat. Res. Def. Council, 555 U.S. 7, 24 (2008) (Reriterating 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. Professor Schoenbrod published a seminal text, *Power Without Responsibility*, in 1993, which inspired Judge Douglas Ginsburg, in reviewing it, to coin the term “Constitution-in-exile.” 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.

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. 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.” He began with the outdated 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.” 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.

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. Treating all national security delegations as delegations of executive power—no matter how vague the grant of authority and no matter its potential to...

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. 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.

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.

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.

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) (“Administrative 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.
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. But these features should trouble the libertarianconstitutionalist 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). 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. 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.

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 legitimates their decisions).


150. See Knowles, National Security Rulemaking, supra note 37, at 910.
chagrin of libertarian constitutionalists. But the National Security Act of 1947 is the vaguest organic statute of them all. It restructured institutions and created new ones in an attempt to centralize national security decisionmaking. But it gave the CIA, the NSA, and the National Security Council (NSC) vague mandates to gather intelligence for national security purposes. 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.

Congress imposed very few explicit restrictions on, or judicial supervision of, these agencies’ national security activities until the mid-1970s. 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. 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. But post-9/11 statutes largely expanded the government’s surveillance authority.

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

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 . . . .”).
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. 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. The combatant commanders have since played an outsized role in conducting and even shaping foreign policy. 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. 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.

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. The President may order the use of force in some circumstances without specific statutory authorization and with minimal congressional involvement. Even when Congress explicitly authorizes the use of military force by statute, it typically grants authority in broad, vague terms. 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.

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

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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.
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.
international law. 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.

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).” The new agency had “come to encompass functions ranging from international child labor investigations to marine fuel leaks . . .”. 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.”

The statutory mandate of DHS was to “prevent terrorist attacks.” 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. 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.

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.’”).
172. Id. at 696.
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.\(^{177}\) Although \textit{ex ante} enforcement is governed by a prolix statutory framework, \textit{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 \textit{ex post} enforcement, which, due to the large numbers of undocumented immigrants, has an immense impact in determining the composition of the immigrant population.\(^{178}\)

\section*{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.\(^{179}\) 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.\(^{180}\) The number of agencies and employees working on merely “secret” level programs is surely much larger.\(^{181}\) Agencies with national security missions and even many without—such as the Drug Enforcement Administration (DEA)—rely on Freedom of Information Act

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\(^{178}\) See id. at 131–35.

\(^{179}\) See Dakota S. Rudesill, \textit{Coming to Terms with Secret Law}, 7 \textit{Harv. Nat’l Sec. J.} 241, 249–50 (2015) (describing congressional processes that produce secret legislation); see generally Geoffrey R. Stone, \textit{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).

\(^{180}\) \textit{Priest} \& \textit{Arkin}, \textit{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.\footnote{See Benjamin W. Cramer, Old Love for New Snoops: How Exemption 3 of the Freedom of Information Act Enables an Irrebutable 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).}

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.\footnote{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. 552, 958–59 (2007) (arguing that Cheney’s requirement of contemporaneous reason‐giving plays a crucial role in keeping agency action within constitutional limits).} 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.\footnote{See infra notes 349–58 and accompanying text.} In general, the entire bureaucracy is incentivized to keep its decisions as secret as possible.\footnote{See infra notes 349–58 and accompanying text.}

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.\footnote{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.} The APA, the “constitution of the administrative state,”\footnote{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).} exempts “foreign affairs” and “military” functions from its critical adjudication and notice-and-comment rulemaking requirements.\footnote{See Kathryn E. Kovacs, Constraining the Statutory President, 98 WASH. U. L. REV. 63, 66 (2020).} And none of its requirements apply to military commissions, courts martial, or to “military authority
exercised in the field in time of war or in occupied territory.”  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.”

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. 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.

The APA also exempts the President from the definition of “agency.” 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. 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.

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

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.”).
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. But federal courts have remained largely reluctant to review the government’s national security activities. They have traditionally relied on several doctrines—political question, standing, immunity, and the state secrets privilege, 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.

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. Congressional grants of broad discretion leave much immigration lawmaking to the executive, making it largely a creature of administrative law. Congress revamps the immigration code once in a generation at most. Meanwhile, agencies shape immigration law through their interpretations and practices.

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196. See Metzger, Ordinary Administrative Law, supra note 183, at 525; Stack, supra note 183, at 955.
198. See Nzelibe, supra note 114, at 945–50 (citing and discussing cases).
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.
Moreover, courts give agency action in immigration a wide berth.\textsuperscript{208} 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.\textsuperscript{209} 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.\textsuperscript{210}

To be sure, conservative Justices on the Supreme Court have in recent years rejected some executive branch interpretations of foreign affairs law.\textsuperscript{211} 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.\textsuperscript{212}

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 \textit{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,\textsuperscript{213} 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”;\textsuperscript{214} and it declined to interrogate the process leading to President Trump’s ban on immigration from several predominantly-Muslim countries.\textsuperscript{215}

\begin{thebibliography}{9}
\bibitem{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.”).
\bibitem{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).
\end{thebibliography}
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. 216

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.” 217 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. 218 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.

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) (“[C]ourts 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 I. 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.219

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.220 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.”221 In fact, these models are compelling because they explain the pathologies that rational incentives produce in the MIC’s institutional and political settings.222

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.223


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).


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

The third subpart adapts these insights to an expanding national security space transformed by globalization and technological change. \textsuperscript{224} Warfare has become individualized, \textsuperscript{225} 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.

\textit{A. The Military-Industrial Complex as Theory}

Eisenhower’s 1961 Farewell Address is his most famous speech because he invoked the “military-industrial complex.” \textsuperscript{226} 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. \textsuperscript{227} 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. \textsuperscript{228} Scholars began to employ

\begin{itemize}
  \item \textsuperscript{224} See Aziz Z. Huq, \textit{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.”).
  \item \textsuperscript{225} See Issacharoff & Pildes, supra note 32, at 1523.
  \item \textsuperscript{226} See Farewell Address, supra note 6.
  \item \textsuperscript{227} See LEDBETTER, supra note 29, at 4-5.
  \item \textsuperscript{228} See, \textit{e.g.}, id. at 5 (describing the phrase’s current meaning as a “rhetorical Rorschach blot”).
\end{itemize}
other terms—such as “national security state”—to describe and critique the same phenomenon. But the original MIC theory remains quite salient.

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. As a descriptive matter, it portrays the military, its contractors, and the intelligence community 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. Sometimes these entities were collectively described as a “power elite” imposing their will on the rest of America.

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, while the contractors seek profit and expanding markets. 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”; and contractors have an incentive to “tell the agency chiefs what they want to hear” to ensure their status as “go-to’ contractors.”

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


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 INTELL., https://www.dni.gov/index.php/what-we-do/members-of-the-ic [https://perma.cc/8K6B-HKVY] (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.


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).


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. The fundamental indictment is threefold—that the MIC (1) inflates threats to U.S. national security, which enables it to (2) obtain and use new armaments and (3) expand its domain to include traditionally non-military government functions. 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. It encourages the commingling of public and private spending in ways not traditionally permitted in other areas of U.S. federal policy. It distorts every aspect of the economy—influencing the type and location of manufacturing centers and jobs, as well as trade policy. It also distorts the goals of academia, bending universities’ research priorities toward military ends. It encourages a growing culture of secrecy. And it erodes civil liberties.

The traditional MIC descriptive model comes in many varieties, but it is best depicted as a vicious cycle, in which the incentives of contractors, the military, and the intelligence community combine to inflate threats to U.S. national security. 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. 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.
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.’”).
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.
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.\footnote{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.}

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.\footnote{254}{See supra notes 160–64 and accompanying text.} 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.\footnote{255}{See supra notes 160–64 and accompanying text.} Congress may, at the urging of the contractors, appropriate more for certain budget items even than the military requests.\footnote{256}{See supra notes 160–64 and accompanying text.} Although war is not always popular, the military itself is.\footnote{257}{See William D. Hartung, Prophets of War: Lockheed Martin and the Making of the Military-Industrial Complex 2–12 (2011).} 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.\footnote{258}{See Robert Higgs, Depression, War, and Cold War: Studies in Political Economy 195–207 (2006).} 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.\footnote{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).} But in any event, Congress usually gives the MIC what it asks for, and sometimes more.\footnote{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.}

\section*{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
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.261

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.262 The President appoints only several hundred civilian officials to oversee a national security bureaucracy that, with contractors included, employs millions.263 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 work264 to undercounting collateral deaths from the use of force265 to conducting missions “off the books.”266 Scaling back the level of regulation is rarely


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.


considered because it is viewed as an admission of failure, which actually increases the threat to bureaucratic prestige.\footnote{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.”).}

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.”\footnote{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”).}

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.”\footnote{269}{See id. at 61 (discussing VALI NASR, THE DISPENSABLE NATION: AMERICAN FOREIGN POLICY IN RETREAT 180 (2013)).}

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.\footnote{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.}

Instead, they are rationally 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.\footnote{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.”).}

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

\footnote{272}{See GLENNON, supra note 11, at 19 (“The resulting incentive structure encourages the exaggeration of existing threats . . . .”).}
gathering. \textsuperscript{273} Recent attempts to centralize intelligence gathering have had, at best, mixed success. \textsuperscript{274} 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.

\textbf{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. \textsuperscript{275} 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. \textsuperscript{276} 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. \textsuperscript{277}

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

\begin{footnotesize}
\textsuperscript{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”).

\textsuperscript{274} See, e.g., John D. Negroponte & 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.”).

\textsuperscript{275} See infra Part IV.

\textsuperscript{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).

\textsuperscript{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”).

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

\end{footnotesize}
where they are located, and how to neutralize them.\textsuperscript{280} And warfare’s increased tempo makes intelligence gathering more important than ever.\textsuperscript{281}

These pressures have led to a convergence among the regulatory domains of national security, foreign policy, immigration, and even policing.\textsuperscript{282} Also driving this convergence are private contractors, who sell equipment and services developed for one domain to the others.\textsuperscript{283} 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.\textsuperscript{284}

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.\textsuperscript{285} And the internal administration of the bureaucracy itself involves complex and intrusive regulation of its individual personnel, which deserves more study.\textsuperscript{286}

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.\textsuperscript{287} These costs include, among other things, the disruption militarized immigration enforcement and policing imposes on all members of communities where it occurs,\textsuperscript{288} the

\begin{itemize}
\item \textsuperscript{280} See, e.g., McNeal, supra note 168, at 701–33 (summarizing the bureaucratic process involved in certain types of targeted killing).
\item \textsuperscript{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 . . . .”).
\item \textsuperscript{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).
\item \textsuperscript{283} See generally HARTUNG, supra note 256; see also Michaels, Privatization’s Pretensions, supra note 239, at 749–51.
\item \textsuperscript{284} See Banks, supra note 5, at 1635; Said, supra note 176, at 820–23.
\item \textsuperscript{285} See, e.g., Chachko, supra note 8.
\item \textsuperscript{286} I lack space to do so here. Instead, this Article focuses on how the MAC regulates individuals external to it.
\item \textsuperscript{287} See, e.g., Posner & Vermeule, supra note 24, at 1678.
\item \textsuperscript{288} See Said, supra note 176, at 820.
\end{itemize}
appropriation of private information,\textsuperscript{289} the suppression of speech,\textsuperscript{290} and, for targeted communities, the higher costs associated with greater scrutiny of their activities, infiltration by government agents, and detention.\textsuperscript{291}

The Trump administration announced a pivot away from counterterrorism to great-power competition as the centerpiece of U.S. national security policy.\textsuperscript{292} 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.\textsuperscript{293} 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.\textsuperscript{294} Moreover, the convergence of national security and other regulatory domains shows no sign of slowing down.

\textbf{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.\textsuperscript{295} Both cycles involve threat inflation as a key driver of change. But the main difference is that, in the

\begin{itemize}
\item \textsuperscript{289} See Derek E. Bambauer, \textit{Privacy Versus Security}, 103 J. CRIM. L. & CRIMINOLOGY 667, 674 (2013) (observing that firms retain consumer data because it has value).
\item \textsuperscript{290} See, \textit{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).
\item \textsuperscript{291} See \textsc{David Cole}, \textit{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, \textit{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).
\item \textsuperscript{293} See, \textit{e.g.}, John Vogly, \textit{Insurgency, Not War, Is China’s Most Likely Course of Action}, WAR ON THE ROCKS (Dec. 19, 2019), https://warontheroscks.com/2019/12/insurgency-not-war-is-chinas-most-likely-course-of-action/ [https://perma.cc/F67F-F6JV].
\item \textsuperscript{294} See id.
\item \textsuperscript{295} The military and contractors’ pursuit of expensive new aircraft and weapons systems, for example, has continued unabated. See, \textit{e.g.}, Christian Davenport, \textit{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://avalon.rms-journals.com/washington/2017/12/08/under-trump-the-f-35s-costs-more-than-1-trillion-over-60-years-continue-to-draw-scrutiny/utm_term=.ca7416fdd3a [https://perma.cc/3K4W-QSET].
\end{itemize}
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,” and broadening definitions of national security. It centers on threats from individuals and transnational groups, rather than nation-states or groups contending for political power within them.

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, its use of force aimed at non-state actors has continued largely undiminished—and in some respects it has even increased. 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. 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.
Resistance to change also emerges from a heavy shared investment among bureaucrats, contractors, “experts,” and the media in inflating threats from terrorism. 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. AQAP did in fact launch one successful stateside attack, but the intelligence community failed to detect it.

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. 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.

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.” Put another way, they overemphasize low-probability, high-risk, threats. In addition, individual analysts gain promotion and prestige
when they produce reports identifying threats, not dismissing them. They are therefore unlikely to probe for alternative explanations when they see data consistent with a preconceived threat.

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.

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. In 2011, the government followed up on approximately 5,000 leads per day, which were internally referred to as “threats.” 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.” On December 6, 2019, a Saudi aviation student with links to AQAP killed three and injured eight at the Pensacola Naval Air Station. But no other al Qaeda operatives or sleeper cells have been uncovered inside the United States.

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. 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
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. The third—and least studied—form is agencies, on their own, using their existing discretion to increase the level of regulation.

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

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 existing statutory authority and often also executive power derived from Article II of the Constitution. 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. Stuck, 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.


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

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

329. See id.

President Bush and his Cabinet declared a national emergency, triggering authority to impose economic sanctions on individuals and groups;\textsuperscript{331} created new military commissions;\textsuperscript{332} declared limits on the applicability of the Geneva Conventions to captured prisoners;\textsuperscript{333} ordered the detention of thousands of Muslim immigrants in the United States;\textsuperscript{334} and approved the use of torture.\textsuperscript{335} President Obama ramped up the drone program and personally presided over the process leading to strikes against certain individuals.\textsuperscript{336} 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.\textsuperscript{337} President Trump invoked the (again inflated) threat of terrorism to issue executive orders imposing travel bans\textsuperscript{338} and used statutory emergency authority to reallocate military funds toward the construction of a border wall.\textsuperscript{339}

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.\textsuperscript{340}

The less specific an agency’s mandate, the more mid-level and front-line

\textsuperscript{333} See id.
\textsuperscript{334} See supra note 291.
\textsuperscript{339} See Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).
\textsuperscript{340} WILSON, BUREAUCRACY, supra note 47, at 32.
bureaucrats are empowered to interpret it. And without external sources of supervision like judicial review, moreover, the front-end bureaucrats are all the more endowed with broad discretion.

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. 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. For most agencies operating in the national security space, the problems they encounter daily—what keeps them up at night—concern threats. The perceived primary mission is counterterrorism because it carries prestige and brings in the most money. 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.

Much agency national security rulemaking occurs informally and at a low level. 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”; memos from a mid-level DHS official initiating a policy of indiscriminate deportation by ICE 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; guidance by CIA officers or

341. See id.
342. See supra notes 92–93 and accompanying text.
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.fedscop.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].
military commanders in the field about what indicators of insurgent behavior justify the launching of a “signature” drone strike; and an NSA official’s creation of an AI algorithm that leads to the collection of thousands of individuals’ private electronic information.

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; the DoD’s decision to designate a prisoner as a “enemy combatant”; the addition of a name to the “no-fly list” by a low-level official at one of several agencies; the decision by the CIA or the DoD to target a particular individual or group with a drone strike; and a decision by NSA officials to collect data on a particular individual.

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. 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.

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

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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.


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

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


361. See Chachko, supra note 8 (describing procedures for imposing economic sanctions).
deference. The courts rarely rule that sanctions determinations are unlawful. 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.

Adjudication is also where presidential coordination of agency activities is least likely and least effective. 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. But the number of such strikes is relatively low compared to those conducted based on behavior exhibited on the ground—so-called “signature strikes”—and those conducted entirely off the record. Under President Trump, these types of deadly adjudicatory determinations, like thousands of others in the MAC, became largely bureaucratic endeavors.

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. 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. 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.
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. When DOJ scrutiny raised concerns, subsequent surveillance statutes served, in large part, to place existing exercises of authority on a firmer legal foundation.

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.” 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.

In still other situations, such as adjudicatory determinations, agencies expand their authority by using it. 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 . . . .”

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

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

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

374. See Chachko, supra note 8.

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. Over the course of hundreds of such signature strikes, the definition of “insurgent” eventually came to include virtually all military-age males and “insurgent activity” might encompass, as one State Department critic joked, “three guys doing jumping jacks.” These expansions of authority dovetail with contractor incentives to sell more drones and related services.

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. 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.

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. The numbers of drone attacks by the Trump administration far outstripped even the high number conducted under the

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.
Obama administration\textsuperscript{384}—and the numbers of immigrants in detention continues to increase.\textsuperscript{385}

4. \emph{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.\textsuperscript{386} 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.\textsuperscript{387} 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.\textsuperscript{388}

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.\textsuperscript{389} 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.\textsuperscript{390} The annual review boards established to determine the continuing “dangerousness” of the


\textsuperscript{386} See Knowles, \textit{Warfare As Regulation}, supra note 4, at 2016–18.

\textsuperscript{387} See, e.g., Becker & Shane, supra note 265; SCAHILL, supra note 352, at 47–48.

\textsuperscript{388} See SCAHILL, supra note 352, at 47–48.

\textsuperscript{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.

\textsuperscript{390} See Hegland, supra note 389.
detainees would often pile on even less reliable information to justify a decision not to release a detainee. 391

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. 392 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. 393 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. 394

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. 395 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. 396 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. 397 For example, the

391. See id. at 19–20.
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).
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. The military killed two birds with one stone by crafting media that glorified America while linking America’s identity with the military’s.399

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.400 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.401

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.402 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.403

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 9/11.404 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

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.
security,” and, if necessary, revising public policies or even a nation’s basic law.\textsuperscript{405}

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.”\textsuperscript{406} 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.”\textsuperscript{407}

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.\textsuperscript{408} In doing so, the President also authorized the Commerce Secretary to issue waivers for individual corporations—a form of agency adjudication.\textsuperscript{409}

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.\textsuperscript{410} In fact, a small subgroup of unauthorized immigrants actually engage in criminal activity or represent national security threats.\textsuperscript{411}

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.

\footnotesize{\bibitem{405}Sitaraman, supra note 279, at 38.}
\footnotesize{\bibitem{407}Id.}
\footnotesize{\bibitem{408}Timothy Meyer, \textit{Misaligned Lawmaking}, 73 VAND. L. REV. 151, 221 (2020).}
\footnotesize{\bibitem{409}See Chachko, supra note 8; Claussen, supra note 170.}
\footnotesize{\bibitem{410}See generally Said, supra note 176.}

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—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.\footnote{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://perma.cc/2PFE-LMAX].} The state sued DHS, alleging infringements of state sovereignty and equal protection.\footnote{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://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.\textsuperscript{421} 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.\textsuperscript{422} 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.\textsuperscript{423} 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.\textsuperscript{424} 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.\textsuperscript{425} 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—

\textsuperscript{421} See Slobogin, supra note 4, at 93–94.
\textsuperscript{423} See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).
\textsuperscript{424} See supra Part II.B.
with its *Curtiss-Wright* national security exception—or the doctrine the conservative justices would now revive.\(^{426}\)

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—\(^{427}\)in other words, executive power.\(^{427}\) 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.\(^{428}\)

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.”\(^{429}\)

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.


\(^{427}\) 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).

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. 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.” 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. Because the MAC 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

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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).
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. 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. The libertarians’ faith in the legitimacy and technocratic competence of national security decisionmaking mirrors liberal faith in domestic regulation during the New Deal. 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.

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. 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.” 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.
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.439 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.440 Outsourcing of traditional military and intelligence functions proceeded at a furious clip, further integrating the national security state and its contractors.441 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.442

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.
442. See supra Part III.A.