

ARTICLES

Administrative National Security

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In the past two decades, the United States has applied a growing number of foreign and security measures directly targeting individuals—natural or legal persons. These individualized measures have been designed and carried out by administrative agencies. Widespread application of individual economic sanctions, security watchlists and no-fly lists, detentions, targeted killings, and action against hackers responsible for cyberattacks have all become significant currencies of U.S. foreign and security policy. Although the application of each of these measures in discrete contexts has been studied, they have yet to attract an integrated analysis.

This Article examines this phenomenon with two main aims. First, it documents what I call “administrative national security”: the growing individualization of U.S. foreign and security policy, the administrative mechanisms that have facilitated it, and the judicial response to these mechanisms. Administrative national security encompasses several types of individualized measures that agencies now apply on a routine, indefinite basis through the exercise of considerable discretion within a broad framework established by Congress or the President. It is therefore best understood as an emerging practice of administrative adjudication in the foreign and security space.

Second, this Article considers how administrative national security integrates with the presidency and the courts. Accounting for administrative national security illuminates the President’s constitutional role as chief executive and commander-in-chief and his control of key aspects of

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administrative foreign and security action. It also challenges deeply rooted doctrines underlying foreign relations and national security law, including the portrayal of the President as the “sole organ” in international relations. Administrative national security further informs our understanding of the role of courts in this context. It renders more foreign and security action reviewable in principle under the Administrative Procedure Act (APA) and provides a justification for the exercise of robust judicial power in this category.

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INTRODUCTION

In the past two decades, the United States has applied a growing number of foreign policy and national security measures directly targeting individuals—natural or legal persons. Administrative agencies have taken the lead in designing and implementing these measures. The measures include the widespread application of individualized economic sanctions, ranging from sanctions against suspected proliferators and terrorists to sanctions against Russians for election meddling and Iranians for a range of nefarious activities. They further include security watchlists and other travel restrictions, detentions, targeted killings, and actions against individual hackers responsible for cyberattacks on U.S. targets. The inexorable development of technology that allows for precision targeting and algorithmic decisionmaking in international diplomatic, economic, and military efforts is likely to accelerate this individualization trend.

Although the individualization of foreign and security policy in discrete contexts has generated legal commentary, it has not yet attracted an integrated

assessment.¹ There has been little discussion about the growing individualization of U.S. foreign and security policy as an overarching trend that cuts across different types of measures and policy areas. This phenomenon merits attention in light of the now-central role of individualized measures in the general scheme of U.S. foreign and security policy, and because it challenges standard assumptions about the role of the President and the courts in those areas.²

This Article argues that foreign and security policy individualization has, in underappreciated ways, bolstered the role of administrative agencies in shaping and implementing key foreign policy and national security measures. The resulting form of administrative action, which I call “administrative national security,” involves the exercise of considerable discretion by administrative agencies on a routine, chronic, and indefinite basis within a broad legal framework established by Congress or the President. Because applying general standards and rules to individuals is at the core of administrative national security, it is best understood as an emerging practice of administrative adjudication in the foreign affairs and national security space.³

1. As Part I shows, there is an extensive literature on targeted killings, detentions, and sanctions, but it typically considers each type of measure separately. There are some exceptions. For example, scholars have considered the individualization of war. *See, e.g.*, Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflict*, in LAW AND WAR 48 *passim* (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2014) (providing an international law perspective); Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521 (2013) (analyzing the individualization of U.S. detention and targeting policy). Andrew Kent has considered the role of individuals in precipitating the disappearance of “legal black holes” in the foreign and security domain. *See* Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029 (2015); *cf.* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

In addition, an extensive literature has explored the role of individuals *within* government in designing foreign policy. By contrast, this Article examines the *targeting* of individuals. *See, e.g.*, GRAHAM ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (2d ed. 1999) (analyzing U.S. government decisionmaking during the crisis); RICHARD C. SNYDER, H. W. BRUCK & BURTON SAPIN, *FOREIGN POLICY DECISION-MAKING (REVISITED)* (2002). A strand of legal scholarship that focuses on the role of individuals in foreign and security policymaking is the literature on Executive Branch lawyering. *See, e.g.*, JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 122–35 (2007); Robert F. Bauer, *The National Security Lawyer, in Crisis: When the “Best View” of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175 (2018); Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT’L L. 633 (1962); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336–37 (2006); Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 64–65 (2011); Michael B. Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 B.C. INT’L & COMP. L. REV. 179 (2009); Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017). This Article complements this literature by looking at the individuals on the receiving end of modern U.S. foreign and security policy.

2. I do not argue that U.S. foreign and security policy is now entirely or even largely individualized. Nor do I suggest that traditional diplomacy, international agreements, and military action have become obsolete. Far from it, as even a cursory look at the headlines on any given day would make clear. In fact, there has been renewed scholarly interest lately in “old-school” great power rivalries.

3. *See infra* Section II.F.

Of course, administrative agencies have long been involved in foreign and security policy. The State and Defense Departments and the intelligence community are dedicated to foreign affairs and national security. And in today's highly regulated global environment, administrative agencies often address foreign and security matters through measures of general applicability, such as rules executing international agreements.⁴ These broader phenomena are not my focus. Rather, I focus on the subset of administrative action in the foreign and security realm that consists of individualized measures applied repeatedly and indefinitely through bureaucratic mechanisms. This Article provides a detailed account of administrative national security as administrative adjudication. It thus contributes to the broader administrative adjudication literature, which has seen renewed interest recently.⁵

After describing the rise and operation of administrative national security, this Article examines how the administrative state integrates with the presidency and the courts in this category.⁶ This examination informs (and, in some instances, requires rethinking of) longstanding debates about the role of the President and the courts in foreign affairs and national security. It offers a new lens through which to approach the literature on presidential power in foreign affairs, presidential control of the administrative state, and judicial deference.

I first consider the structural and doctrinal implications of administrative national security for presidential control of administrative agencies in the foreign and security sphere. Influential accounts of the relationship between the President and the administrative state—in particular, Elena Kagan's *Presidential Administration*⁷—have portrayed a President who asserts authority over the administrative state, aligns it with his policy priorities, and takes an active and visible role in regulation. We would expect to see a strong version of presidential administration in shaping and overseeing the legal architecture of administrative national security given the President's elevated role in these contexts. But in fact,

4. See, e.g., Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 747–49 (2014); see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 652 (2000) (“[O]ur administrative state . . . is becoming . . . an international administrative state. A wide variety of administrative agencies now confront foreign affairs issues, such as whether to comply with international law, whether to apply federal regulations to foreign conduct, and whether and how to incorporate the decisions of international institutions.” (emphasis omitted) (citations omitted)); Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489 (2014) (surveying examples of general foreign and security measures in arguing for rigorous hard look review in this context).

5. This renewed attention was spurred by the Supreme Court's 2018 decisions in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018), as well as efforts led by the Administrative Conference of the United States (ACUS) to map the various forms of adjudication within the administrative state. See *infra* Section II.F. This Article informs these conversations through its detailed account of adjudication in the foreign and security sphere.

6. I do not consider implications for Congress in this Article. For a recent account of the role of Congress in foreign affairs that provides insight into its potential role in administrative national security, see Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395 (2020).

7. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

we see the opposite. The President has delegated significant elements of his foreign relations powers as chief executive and commander-in-chief to the administrative state. He has gradually reduced his personal involvement in their exercise. The administrative state has in turn established independent mechanisms to effectuate those powers. These trends are not unique to the Trump Administration. They reflect broader structural dynamics that transcend administrations.

Conceiving of administrative national security as administrative adjudication helps explain why presidential involvement in this category has diminished over time.⁸ This decline in presidential control and oversight dovetails with an entrenched practice and norm of presidential insulation from administrative adjudication in domestic policy. The norm grew out of a combination of functional and due process concerns, as well as conventions of agency independence. Although the due process and agency-independence calculus may be different in administrative national security, the functional reasons for limited presidential control of administrative adjudication retain their force. The President and his staff simply lack the capacity and bandwidth to routinely make thousands of complex, granular individualized decisions.⁹

The shift in the center of gravity in administrative national security from the President to the bureaucracy has a number of implications for our understanding of presidential power in foreign affairs and national security. One set of implications focuses on the ways in which administrative national security simultaneously constrains and empowers the President in exercising that power.

The constraining function stems from the entrenchment of the administrative national security bureaucracy in the past two decades. Although it does not restrict the President's authority to wield his foreign affairs and national security power in principle, it does channel action toward reliance on individualized measures. The bureaucracy's existence makes it more likely that Presidents will use it due to bureaucratic inertia and the costs of changing course.

The empowering function stems from the array of fine-grained and subtle options this bureaucracy gives the President to address intractable foreign and security problems he faces in the twenty-first century. The traditional presidential tool kit in this context consisted of diplomacy, military intervention against states, economic boycotts, and covert action. The administrative national security bureaucracy gives the President a menu of alternatives that can be less costly and more effective—politically, economically, and strategically. The President can deploy these measures unilaterally within existing legal frameworks, without further authorization from Congress. Finally, as measures like targeted killings and blacklisting have become bureaucratized and gradually regularized, public scrutiny has atrophied, allowing the President to apply them more aggressively. Such

8. As I elaborate in section III.A.1, Kagan in fact distinguishes adjudication as an area of administrative action that remained insulated from presidential control in the Clinton administration.

9. See discussion *infra* Section III.A.1.

measures used to be the subject of intense public debate, but they hardly command attention anymore despite their frequent application.

Another set of implications concerns the doctrinal legal challenge posed by administrative national security. For example, it is settled that the nation should speak with one voice in foreign affairs and national security, and that the President is “the sole organ of the federal government in the field of international relations.”¹⁰ These doctrines identify the federal government’s foreign affairs and national security powers with the President himself. Recognizing that a significant portion of foreign and security action on key issues now engages the President only peripherally, and that administrative agencies enjoy broad discretion, adds to existing critiques of these doctrines by highlighting the President’s limited *de facto* control—as a structural matter—of administrative national security action.

Accounting for administrative national security also has implications for the role of courts. It *explains* the growth in adjudicated foreign and security cases because individuals targeted by foreign and security measures are more likely to satisfy justiciability and reviewability requirements under the Administrative Procedure Act (APA) than in cases that challenge broader policies. It offers a *justification* for judicial review by challenging assumptions underlying the conventional wisdom that courts should typically defer to the political branches—usually the Executive—in foreign and security matters due to the courts’ inferior information and competence. Such deference makes much less sense when individuals are the targets of foreign policy and national security measures through a process that resembles ordinary administrative adjudication. In this limited context, courts do not necessarily face abstract policy problems that they are ill-equipped to adjudicate but rather familiar questions of administrative law and due process. Secrecy and dispatch as institutional arguments for deference are also diminished in administrative national security.

Part I of this Article surveys the historical precursors of individualized administrative national security and factors that have contributed to its rise. Part II documents the emergence of administrative national security in the past two decades. It considers targeted killings, detentions, targeted sanctions, security watchlists, other travel restrictions, and individualized cyber countermeasures. It examines the role of administrative agencies in facilitating the application of each of these measures and analyzes related case law. It then offers an account of administrative national security as administrative adjudication and outlines its main features. Part III explores how administrative national security informs our understanding of the relationship between the administrative state and the President in the foreign and security realm. Part IV reflects on how administrative national security relates to the conventional wisdom about the role of courts in this area and how it might affect judicial review under the APA. A brief conclusion follows.

10. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); *see infra* Section III.B.

I. THE ORIGINS OF FOREIGN AND SECURITY INDIVIDUALIZATION

U.S. foreign and security policy has become increasingly individualized in the past two decades.¹¹ Before turning to the concrete manifestations of this trend in Part II, it is useful to consider its historical precursors and key drivers. Past instances of individualized targeting in the areas of foreign affairs and national security foreshadowed and influenced the legal response to the more recent iteration of foreign and security individualization that this Article explores. The historical perspective also illustrates that, although individualized measures were on the periphery of U.S. foreign and security policy in previous eras, they have now moved closer to its core. The following section considers a number of historical examples of individualized targeting from the early- and mid-twentieth century and related judicial decisions.

A. HISTORICAL PRECURSORS

Military detentions away from the battlefield, blacklisting, and targeted killings have precedents in the modern history of U.S. foreign and security policy. Consider a few prominent historical examples. In 1942, the FBI detained eight Nazi saboteurs who landed on U.S. shores in order to attack various targets. Upon their capture, President Roosevelt proclaimed that nationals of any nation at war with the United States who enter the country to commit sabotage, espionage, hostile acts, or violations of the law of war “shall be subject to the law of war and to the jurisdiction of military tribunals.”¹² The President also appointed a military

11. One could ask what exactly is becoming increasingly individualized. There has long been a debate about defining foreign and security policy. *See* Walter Carlsnaes, *Foreign Policy*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 298, 303–05 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2013); Bernard C. Cohen & Scott A. Harris, *Foreign Policy*, in 6 *HANDBOOK OF POLITICAL SCIENCE: POLICIES AND POLICYMAKING* 381 (Fred I. Greenstein & Nelson W. Polsby eds., 1975) (“There is a certain discomfort in writing about foreign policy, for no two people seem to define it in the same way . . .”). Cohen and Harris define it broadly as “a set of goals, directives or intentions, formulated by persons in official or authoritative positions, directed at some actor or condition in the environment beyond the sovereign nation state, for the purpose of affecting the target in the manner desired by the policymakers.” *Id.* at 383. This capacious definition accommodates a broad range of policy processes and outputs that have a foreign element. Foreign policy and national security are generally thought of as broad and pliable categories in practice as well. For instance, a global threat assessment from former U.S. Director of National Intelligence Dan Coats addressed not only traditional challenges such as state adversaries, terrorism, and weapons of mass destruction but also human security and climate change. *See, e.g.*, DANIEL R. COATS, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, *WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY* (2018), <https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA—Unclassified-SSCI.pdf> [<https://perma.cc/HDR9-MBS5>]; *see also* Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1706–09 (2011). The analysis in this Article need not choose between such a broad definition of foreign policy and a narrower one that encompasses only traditional diplomacy and security. The types of measures discussed here and the contexts in which they have been applied are at the core of what we commonly understand as foreign and security policy, even strictly defined.

12. *Ex parte Quirin*, 317 U.S. 1, 23 (1942).

commission in Washington, D.C. to try the saboteurs. The Supreme Court famously sanctioned these measures in its swift decision in *Ex parte Quirin*.¹³

Other examples include past U.S. involvement in political assassinations abroad and U.S. covert action more broadly.¹⁴ The 1975 Church Committee Interim Report, which examined the role of the U.S. government in assassination attempts against foreign leaders, found that the United States was involved in five assassination plots in the 1950s and 1960s.¹⁵ The Report made a clear moral distinction between “a coldblooded, targeted, intentional killing of an individual foreign leader and other forms of intervening in the affairs of foreign nations.”¹⁶

Blacklisting individuals and groups in the name of national security also has ample precedent in the modern history of U.S. foreign and security policy.¹⁷ In the period spanning World War I to the end of the McCarthy Era, individuals and groups were extensively targeted for alleged subversive activity intended to promote foreign interests and undermine the U.S. government.¹⁸

13. *Id.* at 48 (denying the saboteurs’ application for leave to file habeas petitions). The eight were subsequently tried and sentenced to death. See generally Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153 (2013) (discussing the modern implications of the Court’s decision in *Quirin* to allow the saboteurs access to civilian courts).

14. Oft-cited examples are the 1943 assassination of Japanese Admiral Isoroku Yamamoto, the architect of the Pearl Harbor attack, and the CIA-led Phoenix program in Vietnam. Note, however, that these assassinations occurred in the context of active interstate wars. See, e.g., Christopher Kutz, *How Norms Die: Torture and Assassination in American Security Policy*, 28 ETHICS & INT’L AFFAIRS 425, 434–37 (2014).

15. S. REP. NO. 94-465, at 1 (1975); see Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. INT’L & COMP. L. REV. 1, 19–20 (2003); see also Christopher J. Fuller, *The Origins of the Drone Program*, LAWFARE (Feb. 18, 2018, 10:00 AM), <https://www.lawfareblog.com/origins-drone-program> [<https://perma.cc/LE2W-BBTK>] (discussing covert CIA terrorism strikes under President Reagan).

16. S. REP. NO. 94-465, at 6.

17. See Rachel Barnes, *United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence*, in ECONOMIC SANCTIONS AND INTERNATIONAL LAW 197, 199–200 (Matthew Happold & Paul Eden eds., 2016) (discussing blacklisting in the framework of U.S. World War II economic warfare).

18. The practice began with the Deportation and Exclusion Laws of 1917, 1918, and 1920. These statutes prohibited the entry into or presence within the United States of aliens that belonged to organizations advocating the violent overthrow of the U.S. government. Few groups, however, were eventually targeted under these statutes. In 1934, as Nazism rose in Germany, Congress established the first Special Committee on Un-American Activities to counter Nazi and other foreign propaganda. The Committee listed a total of seven organizations as un-American. This included the Communist Party, as well as organizations that espoused fascist ideology. See ELEANOR BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* 159–63 (1953). Throughout the late 1930s and the 1940s, against the backdrop of World War II, the practice of systematically listing allegedly subversive groups expanded. Among other legislative developments, Congress passed the Hatch Act in 1939, which limited certain political activities of federal employees. The Act and additional measures purported to ban Communists and Nazis from government employment. See An Act to Prevent Pernicious Political Activities (Hatch Act of 1939), Pub. L. No. 252, § 9(a), 53 Stat. 1147, 1148. The Justice Department became deeply entangled in the proscription of allegedly subversive organizations in order to determine which associations would disqualify federal employees. The Attorney General compiled a list of roughly forty-seven designated organizations. See BONTECOU, *supra*, at 165–67; Donald L. King, *The Legal Status of the Attorney General’s “List,”* 44 CALIF. L. REV. 748, 748–49 (1956). This targeting of groups and individuals on an ideological basis is now widely viewed as political oppression, not a practice driven by genuine national

For example, in 1947, President Truman issued what became known as the “Loyalty Order”—Executive Order 9,835.¹⁹ The Order instructed the Attorney General to compile a list of foreign and domestic groups designated as subversive or advocating certain ideologies. The Attorney General was to transmit his list to the Federal Loyalty Review Board, whose role was to ensure the loyalty of federal employees. Subsequently, in 1948, then-Attorney General Clark published a list of eighty-two subversive organizations.²⁰ By late 1950, that number increased to 197—132 of which were labeled as Communist organizations. Although these designations underwent review within the Justice Department, the designated persons and groups were excluded from the process entirely.²¹ This singling out of individuals and groups for harboring allegedly subversive ideologies continued throughout the McCarthy Era.²²

The Supreme Court weighed in on these practices. In its 1951 decision in *Joint Anti-Fascist Refugee Committee v. McGrath (JAFRC)*, the Court rebuked the Attorney General over the Loyalty Order designation procedure.²³ The plaintiffs were a number of groups designated as Communists pursuant to the Order.²⁴ The absence of due process for listed groups and individuals was central to the Court’s reasoning, although no majority opinion emerged.²⁵ In *Kent v. Dulles*,²⁶ decided several years later, the Court addressed national security travel restrictions.²⁷ Writing for the Court, Justice Douglas held that the denial of passports to individuals suspected to be Communists exceeded the Secretary of State’s

security concerns. See S. REP. NO. 94-755, at 5–9 (1976) (the Church Committee Report); Kent, *supra* note 1, at 1046 (noting that those targeted under these programs “posed no real threat of any kind to the security of the United States and were plainly inappropriate targets of the national security state”); see also David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C. L. L. REV. 1, 7 (2003) (asserting that punishments for dissent and political association are now viewed as “a grave error”).

19. 12 Fed. Reg. 1,935 (Mar. 21, 1947) (prescribing procedures for the administration of an employee loyalty program in the Executive Branch of the government).

20. Exec. Order No. 9,936, 13 Fed. Reg. 1471, 1473 (Mar. 20, 1948); see BONTECOU, *supra* note 18, at 170; see also Note, *Designation of Organization as Subversive by Attorney General: A Cause of Action*, 48 COLUM. L. REV. 1050, 1050 (1948) (“[T]he Attorney General has designated over ninety organizations and associations as ‘subversive.’”).

21. See BONTECOU, *supra* note 18, at 168–69, 171.

22. President Eisenhower’s Executive Order 10,450 supplanted Executive Order 9,835. Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953). This Order introduced structural changes to Truman’s Loyalty-Security Program. However, as then-FBI Director Hoover observed, it still required every federal employee to undergo a loyalty investigation. See John Edgar Hoover, *Role of the FBI in the Federal Employee Security Program*, 49 NW. U. L. REV. 333, 334–35 (1954).

23. See 341 U.S. 123, 142 (1951).

24. See *id.* at 124–25.

25. *Id.* at 141–42. Justice Burton, joined by Justice Douglas, concluded that the Attorney General’s designation of the groups as Communist organizations without notice or hearing was patently arbitrary and therefore exceeded his authority. See *id.* at 137–38. The concurring opinions of Justices Black, Frankfurter, Douglas, and Jackson concluded that the Fifth Amendment’s Due Process Clause entitled the organizations to predesignation notice and hearing. See *id.* at 143 (Black, J., concurring), 165 (Frankfurter, J., concurring), 176 (Douglas, J., concurring), 186 (Jackson, J., concurring).

26. 357 U.S. 116, 129 (1958).

27. For a study of the history and scope of U.S. security-related travel restrictions, see generally JEFFREY KAHN, *MRS. SHIPLEY’S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS* (2013).

authority.²⁸ Justice Clark's dissent surveyed the many instances since 1917 in which individuals had been denied passports on purported national security grounds like Communist affiliations.²⁹

These and other examples demonstrate that the direct targeting of individuals through an administrative process has roots in the modern history of U.S. foreign and security policy. The legal and political responses to military detention outside the theater of war, assassinations, and the blacklisting of individuals and groups foreshadowed and played a role in the more recent legal debates surrounding detentions, targeted killings, and blacklisting that are the focus of this Article. *Ex parte Quirin* returned in the Guantanamo detentions debate.³⁰ The outcry over U.S. participation in political assassinations culminating in the Church Interim Report and the resulting ban on assassinations later featured in the controversy over the legality of targeted killings.³¹ The Court in *JAFRC* established that blacklisted persons could assert due process rights in court.³² In the late 1990s, groups designated by the State Department as foreign terrorist organizations invoked *JAFRC* in challenging their designation before the D.C. Circuit.³³ *Kent* reappeared in a key travel-watchlist case.³⁴ These early instances of individualization therefore provide context for the contemporary emergence of administrative national security on a scale far larger than before.

B. THE CAUSES OF INDIVIDUALIZATION

A number of interrelated factors contributed to the individualization of U.S. foreign and security policy and the corresponding expansion of the role of administrative agencies in the past two decades: the war on terror, technology, and frustration with the ineffectiveness and humanitarian costs of broad economic sanctions. Underlying these factors was the rise of liberalism after the Cold War, with its focus on individuals rather than collectives as both the subjects of rights and objects of blame. Each factor represents complex, long-term processes that have generated volumes of analysis in their own right. I provide only an overview of these factors and explain how they have converged around the targeting of individuals.

28. *Kent*, 357 U.S. at 130.

29. *Id.* at 139–43 (Clark, J., dissenting).

30. See Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 281 (2002); *Kent*, *supra* note 13, at 220–21.

31. See Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, U.S. Att'y Gen., Re: Lethal Operation Against Shaykh Anwar Aulaqi 4 (Feb. 19, 2010) [hereinafter Memorandum from David J. Barron], https://www.aclu.org/sites/default/files/assets/olc_opinion_feb_2010.pdf [<https://perma.cc/A5TR-TQNL>]; see also Matthew Spurlock, *The Assassination Ban and Targeted Killings*, JUST SECURITY (Nov. 5, 2015), <https://www.justsecurity.org/27407/assassination-ban-targeted-killings/> [<http://perma.cc/8ZR6-9YWH>].

32. See *infra* Section II.C.

33. *People's Mojahedin Org. of Iran v. U.S. Dep't of State (PMOI I)*, 182 F.3d 17, 22 (D.C. Cir. 1999); see *infra* Section II.C.2.

34. See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1148 (D. Or. 2014), *appeal dismissed*, No. 14-36027 (9th Cir. Dec. 31, 2014).

1. The War on Terror

Much has been said and written about the origins of the war on terror in the aftermath of the September 11, 2001 (9/11) attacks and how it has evolved into its current iteration.³⁵ That war has focused on dispersed groups that transcend national borders: al-Qaeda, the Islamic State, offshoots like the Khorasan group in Syria and al-Qaeda in the Arab Peninsula, al-Shabaab in Somalia, and others. United States efforts to combat these transnational groups and their attempts to inspire radicalization to terrorism worldwide have targeted individuals suspected as leaders or affiliates of such groups. In addition, the United States has sought to prevent unaffiliated individuals and groups from carrying out attacks, relying on a combination of individualized military and nonmilitary measures such as travel restrictions and economic sanctions.³⁶

The war on terror has no end in sight. It has gradually expanded over the course of its eighteen years to new countries and new groups. Despite then-candidate Barack Obama's criticism of the counterterrorism policies of the Bush Administration,³⁷ the Obama Administration continued the war on terror based on the same legal theory.³⁸ It expanded the scope of U.S. counterterrorism operations outside hot battlefields. There is evidence that the Trump Administration has doubled down on counterterrorism strikes across the globe.³⁹ This "forever war" on terror has become a seemingly permanent state of affairs in which the United States routinely targets individual terrorism suspects and groups worldwide, and administers blacklists that impose severe restrictions on individuals.⁴⁰

35. See, e.g., RICHARD L. ABEL, *LAW'S WARS: THE FATE OF THE RULE OF LAW IN THE US "WAR ON TERROR"* (2018); GABRIELLA BLUM & PHILIP B. HEYMANN, *LAWS, OUTLAWS, AND TERRORISTS: LESSONS FROM THE WAR ON TERRORISM* (2010); PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* (2008); GOLDSMITH, *supra* note 1; HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 91–140 (2019).

36. See *infra* Sections II.C, II.D.

37. See Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L.J. 455, 455 (2016). But see Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 2 (May 11, 2009), https://www.brookings.edu/wp-content/uploads/2016/06/0511_counterterrorism_anderson.pdf [<https://perma.cc/4GXA-V78N>] (discussing Obama's support for targeting al-Qaeda leadership).

38. Compare John B. Bellinger, III, *Legal Issues in the War on Terrorism*, U.S. DEP'T OF STATE (Oct. 31, 2006), <https://perma.cc/FSU6-EMK9>, with Harold Hongju Koh, Former Legal Advisor, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (March 25, 2010), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/50-3_nat_sec_obama_admin.authcheckdam.pdf [<https://perma.cc/V3LT-NGFW>].

39. See *infra* Section II.A.

40. See Harold Hongju Koh, Former Legal Advisor, U.S. Dep't of State, Speech at the Oxford Union: How to End the Forever War? (May 7, 2013), <https://law.yale.edu/sites/default/files/documents/pdf/Faculty/KohOxfordSpeech.pdf> [<https://perma.cc/ZL9P-SCTP>]; Sarah Grant & Jack Goldsmith, *The Scope of the Endless War after One Year Under Trump*, LAWFARE (Jan. 19, 2018, 2:38 PM), <https://www.lawfareblog.com/scope-endless-war-after-one-year-under-trump> [<https://perma.cc/G8NG-YHJB>]; Greg Jaffe, *For Trump and His Generals, 'Victory' has Different Meanings*, WASH. POST (Apr. 5, 2018, 2:26 PM), https://www.washingtonpost.com/world/national-security/for-trump-and-his-generals-victory-has-different-meanings/2018/04/05/8d74eab0-381d-11e8-9c0a-85d477d9a226_story.html ("These days, senior officers talk about 'infinite war.'"); see also John Wynne, Note, *After al-Qaida: A Prospective*

2. Technology

Technology has advanced the individualization of U.S. foreign and security policy in two ways: the individualization of threats and the individualization of capabilities. With respect to the threats, technology now allows individuals and small groups without substantial resources to inflict significant harm on nations and societies through malicious cyber activity. These private cyber actors may act independently or on behalf of rival states. The individualized nature of the cyber threat landscape has, therefore, required targeted policy responses. As a corollary, technology has also facilitated individualized targeting by states. The explosion of data about individuals from diverse sources, increased computational power, the development of artificial intelligence and algorithmic decision-making, and growing reliance on these tools in government have made it easier for government agencies to collect and analyze information about persons of interest anywhere, and to act upon that information in real time.⁴¹ As the Obama Administration's 2014 Big Data report pointed out, "[c]omputational capabilities now make 'finding a needle in a haystack' not only possible, but practical."⁴²

The ability to generate, process, and analyze large troves of data about individuals in real time enables government agencies to gain insight into their behavior and predict future behavior in unprecedented ways.⁴³ At one time, acquiring such extensive personal data about an individual would have required a tailored intelligence-collection operation, yet the same can be done today simply by querying a database. Technology has reduced the need for human processing and decisionmaking and has caused the cost of the infrastructure necessary for generating, storing, and handling individualized data to decline as well.⁴⁴

Counterterrorism AUMF, 93 N.Y.U. L. REV. 1884 (2018) (surveying proposals for replacing the 2001 Authorization for the Use of Military Force (AUMF) against al-Qaeda and associated forces; these proposals are premised on the assumption that the war on terror and its focus on individuals, is here to stay).

41. See, e.g., EXEC. OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES 1–9, 22–32 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf [<https://perma.cc/339Q-JAFK>]; Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277 (2018) (examining the government's use of artificial intelligence in law enforcement and national security decisionmaking); Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1252 (2008) ("In the past, computer systems helped humans apply rules to individual cases. Now, automated systems have become the *primary* decision makers." (citations omitted)); Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633 (2017) (examining the use of algorithms in security and immigration vetting protocols); Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735 (2015) [hereinafter Hu, *Big Data*] (examining the use of data in blacklist decisionmaking); see also DUSTIN A. LEWIS, GABRIELLA BLUM & NAZ K. MODIRZADEH, *WAR-ALGORITHM ACCOUNTABILITY* (2016) (examining the use of algorithms and autonomous weapons in warfare); DILLON REISMAN ET AL., *ALGORITHMIC IMPACT ASSESSMENTS: A PRACTICAL FRAMEWORK FOR PUBLIC AGENCY ACCOUNTABILITY* (2018) (examining automated decisionmaking in agencies).

42. EXEC. OFFICE OF THE PRESIDENT, *supra* note 41, at 6.

43. See *id.* at 5 ("[D]ata collection and analysis is being conducted at a velocity that is increasingly approaching real time, which means there is a growing potential for big data analytics to have an immediate effect on a person's . . . environment or decisions being made about his or her life.").

44. See *id.* at 2. As this Article later shows, big data and algorithmic decisionmaking now appear to play a role in targeted killings and risk assessment for blacklisting purposes.

Remotely operated precision weapons systems are another technological innovation that has contributed to the individualization of U.S. foreign and security policy. Unmanned Aerial Vehicles (UAVs)—drones—and other remotely operated systems have allowed the United States to conduct surgical operations across the globe without putting soldiers in harm's way and with "fewer humans at the switch."⁴⁵ They also permit the United States, at least in theory, to reduce harm to civilians relative to traditional heavy-footprint operations.⁴⁶ Big data and algorithmic decisionmaking have amplified the targeting capability of those weapons systems.⁴⁷ These attributes have made targeting individuals both more available and more appealing.⁴⁸

3. From Embargoes to "Targeted" or "Smart" Sanctions

Frustration with the impact and humanitarian costs of economic sanctions led to a shift in their method of application in international relations. From ancient times until the early 1990s, nations imposed general trade restrictions like blockades and trade embargoes to address security threats or change the behavior of rivals.⁴⁹ In modern history, economic sanctions targeted states or entire sectors within states, resulting in a variety of comprehensive, indiscriminate trade restrictions.⁵⁰ The international sanctions levied against Rhodesia, South Africa, and

45. LEWIS, BLUM & MODIRZADEH, *supra* note 41, at i.

46. President Obama's Executive Order 13,732 of July 1, 2016 alluded to this in requiring that agencies "develop, acquire, and field weapon systems and other technological capabilities that further enable the discriminate use of force." 81 Fed. Reg. 44,485 (July 1, 2016).

47. See LEWIS, BLUM & MODIRZADEH, *supra* note 41, at iv; see also John Naughton, *Death by Drone Strike, Dished Out by Algorithm*, GUARDIAN (Feb. 21, 2016, 3:59 AM), <https://www.theguardian.com/commentisfree/2016/feb/21/death-from-above-nia-csa-skynet-algorithm-drones-pakistan> [<https://perma.cc/9MKP-NPPM>] (quoting former NSA director Michael Hayden: "We kill people based on metadata.").

48. See Issacharoff & Pildes, *supra* note 1, at 1596; Kent, *supra* note 1, at 1082 (agreeing with Issacharoff and Pildes that "there will be increased pressure, including by legal means, for the U.S. military to 'individuate' by applying force in a surgical manner so that it only impacts individuals who have been deemed targetable or guilty in some fashion through fair procedures"); see also Anderson, *supra* note 37, at 2 ("The strategic logic that presses toward targeted stand-off killing as a necessary, available and technologically advancing part of counterterrorism is overpowering. So too is the moral and humanitarian logic behind its use."). Anderson adds that remote targeting technology has become more attractive because it limits the possibility of detention, which has become unsustainable. See Anderson, *supra* note 37, at 7.

49. See, e.g., JUAN C. ZARATE, *TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE* 3–6 (2013) (surveying economic warfare practices from the ancient world to the late 1990s).

50. For example, this was the type of sanctions Woodrow Wilson contemplated in his 1919 Appeal for Support of the League of Nations for states that initiate war without turning to the League first. Such states would face not war but:

[A]n absolute boycott . . . and just as soon as it applies, then this happens: No goods can be shipped out of that country; no goods can be shipped into it. No telegraphic message may pass either way across its borders. No package of postal matter . . . can cross its borders either way. No citizen of any member of the League can have any transactions . . . with any citizen of that nation.

2 WOODROW WILSON, *WAR AND PEACE: PRESIDENTIAL MESSAGES, ADDRESSES, AND PUBLIC PAPERS* (1917-1924), at 35 (Ray Stannard Baker & William E. Dodd eds., 1927).

Iraq (in 1990) are examples of such general sanctions.⁵¹

The effectiveness of blanket economic sanctions proved to be limited, and they were criticized as unjust. Embargoes are blunt instruments. They do not allow policymakers to apply direct pressure on decisionmakers, and scholars who have studied their impact have argued that they failed to meet their goals. Moreover, leaders of sanctioned states have exploited the harmful effects of general sanctions to galvanize public opinion and garner support, creating the opposite effect of what was intended.⁵² The collateral damage of blanket sanctions has also raised significant human rights concerns.⁵³ Such sanctions harm all the nationals of a target state, including those who oppose the policies that provoked the sanctions or had nothing to do with them. These concerns motivated a rethinking of economic sanctions as a tool of statecraft.⁵⁴

Consequently, beginning with U.S. and international sanctions against members of Haiti's military junta in 1993,⁵⁵ states and international institutions have increasingly turned to targeted sanctions⁵⁶ to exert direct pressure on leaders, elites, and others implicated in objectionable behavior.⁵⁷ Targeted sanctions typically freeze the assets of the sanctioned individual or entity, limit their economic transactions, and restrict their travel. Nations have not abandoned general trade restrictions, but they have made targeted sanctions an important element of both

51. See S.C. Res. 661 (Aug. 6, 1990) (Iraq); S.C. Res. 333 (May 22, 1973) (Rhodesia); S.C. Res. 181 (Aug. 7, 1963) (South Africa).

52. See Johan Galtung, *On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia*, 19 WORLD POL. 378, 409 (1967); T. Clifton Morgan, Navin Bapat & Yoshiharu Kobayashi, *Threat and Imposition of Economic Sanctions 1945–2005: Updating the TIES Dataset*, 31 CONFLICT MGMT. & PEACE SCI. 541, 541–42 (2014).

53. See Gary C. Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?*, 32 L. & POL'Y INT'L BUS. 11, 11 (2000).

54. The 1990 Iraq Sanctions regime, which resulted in a humanitarian crisis, was a turning point. See Matthew Happold, *Targeted Sanctions and Human Rights*, in ECONOMIC SANCTIONS AND INTERNATIONAL LAW 87, 88–90 (Matthew Happold & Paul Eden eds., 2016); Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT'L L. 63 (2002). In a 1997 report, then-UN Secretary General Kofi Annan implored states to “render sanctions a less blunt and more effective instrument” and reduce the humanitarian costs to civilian populations.” Hufbauer & Oegg, *supra* note 53, at 11 (quoting U.N. Secretary-General, *Report of the Secretary-General on the Work of the Organization*, ¶ 89, U.N. Doc. A/52/1 (Sept. 3, 1997)).

55. See Exec. Order No. 12,583, 58 Fed. Reg. 35,843 (June 30, 1993) (blocking government of Haiti property and prohibiting transactions with Haiti); S.C. Res. 841 (June 16, 1993); see also Howard W. French, *Clinton Faulted on Haiti Sanctions*, N.Y. TIMES (June 6, 1993), <https://www.nytimes.com/1993/06/06/world/clinton-faulted-on-haiti-sanctions.html> (detailing criticism of Haiti sanctions).

56. I define “targeted sanctions” as sanctions directed at individual persons or entities. See Hufbauer & Oegg, *supra* note 53, at 12. But see Morgan, Bapat & Kobayashi, *supra* note 52, at 551–52, 554 n.19 (defining targeted sanctions as those “intended to target the regime leadership, business interests or the military”).

57. See, e.g., Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 YALE J. INT'L L. 1, 9–12 (2019); Morgan, Bapat & Kobayashi, *supra* note 52, at 551–52 (documenting the increase in targeted sanctions between 1990 and 2005).

unilateral and international sanctions regimes.⁵⁸ The United States has been a leader of this trend,⁵⁹ and the events of 9/11 accelerated it.⁶⁰

* * *

To conclude this Part, the following Google Ngram illustrates the scope and historical progression of the individualization trend by tracking the individual measures discussed here. It depicts the frequency of references to these measures between 1900 and 2008 in the corpus of books written in English. Although it is not a perfectly accurate representation and may exclude substantively similar measures described with different terms in previous eras, the Ngram suggests that the frequency of the appearance of these measures began to rise in the early 1990s and spiked in the 2000s.⁶¹ It offers a useful, rough illustration of the overall trend that this Article identifies.

Figure 1



58. See, e.g., S.C. Res. 2397 (Dec. 22, 2017) (North Korea); S.C. Res. 1929 (June 9, 2010) (Iran). As of September 2018, there were 698 individuals and 392 entities on the Security Council's blacklist. See *United Nations Security Council Consolidated List*, UNITED NATIONS SECURITY COUNCIL (Nov. 10, 2019, 9:16 PM), <https://www.un.org/securitycouncil/content/un-sc-consolidated-list> [<https://perma.cc/2WYV-PMLA>].

59. See *infra* Section II.C.

60. Targeted sanctions have become a central counterterrorism tool at both the national and international level. At the international level, see, for example, S.C. Res. 2368 (July 20, 2017); S.C. Res. 2253 (Dec. 17, 2015); S.C. Res. 1988 (June 17, 2011); S.C. Res. 1989 (June 17, 2011); S.C. Res. 1267 (Oct. 15, 1999).

61. Google Ngram is a search engine that charts the frequency of any set of comma-divided strings of characters in English language books between 1500 and 2008. The live version of the graph is available at <https://books.google.com/ngrams> [<https://perma.cc/NS6Z-JW88>] (search for "targeted sanctions, targeted killings, no-fly list, military detention, cyber-attack, watchlist").

II. THE EMERGENCE OF ADMINISTRATIVE NATIONAL SECURITY

The previous Part considered the roots and main drivers of U.S. foreign and security policy individualization in the past two decades. This Part turns to the particular settings in which individualized measures have been applied, the role of administrative agencies in designing and implementing these measures, and how courts have addressed their application. It considers targeted killings; detentions; targeted sanctions; security watchlists, no-fly lists, and other travel restrictions; and individualized cyber countermeasures.⁶² This Part concludes with an account of administrative national security as administrative adjudication.

A. TARGETED KILLINGS

Targeted killings have become a central component of U.S. counterterrorism efforts in the past two decades. What began as a few isolated operations in the Clinton Administration developed into a large-scale targeting program with hundreds of strikes carried out each year.

The Clinton Administration was hesitant about targeted killings. It heavily debated the legality of using lethal force directly against Osama bin Laden and senior al-Qaeda leadership. President Clinton authorized cruise missile strikes against al-Qaeda targets after the bombings of U.S. embassies in Africa in 1998, but his use of targeted killings remained limited.⁶³ After 9/11, and particularly in the past decade, counterterrorism targeted killings have increased dramatically. The Bush Administration reportedly conducted targeted drone strikes in five countries.⁶⁴ The Obama Administration further ratcheted up the resort to targeted killings—often described as the cornerstone of its counterterrorism strategy.⁶⁵ President Obama approved a substantially larger number of targeted strikes

62. I discuss these categories of measures because they constitute the most significant examples of individualization through bureaucratic processes in U.S. foreign and security policy in the past two decades.

63. Steve Coll, *Legal Disputes Over Hunt Paralyzed Clinton's Aides*, WASH. POST (Feb. 22, 2004), <https://www.washingtonpost.com/archive/politics/2004/02/22/legal-disputes-over-hunt-paralyzed-clintons-aides/ae5ca66d-5dcf-49c0-b8db-b99a19184eb0/>; Glenn Kessler, *Bill Clinton and the Missed Opportunities to Kill Osama bin Laden*, WASH. POST (Feb. 16, 2016, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2016/02/16/bill-clinton-and-the-missed-opportunities-to-kill-osama-bin-laden/>; see also Jonathan Ulrich, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1039–40 (2005) (noting that the Clinton Administration “refused to admit that bin Laden himself had been singled out” in the 1998 U.S. strikes on al-Qaeda targets).

64. Goldsmith, *supra* note 37, at 458 (“As of April 2016, Obama had ordered approximately ten times as many drone strikes as Bush, which killed seven times as many people, and he did so in seven countries as opposed to Bush’s five.”).

65. Micah Zenko, *Obama's Final Drone Strike Data*, COUNCIL ON FOREIGN REL.: POL., POWER, & PREVENTATIVE ACTION (Jan. 20, 2017), <https://www.cfr.org/blog/obamas-final-drone-strike-data> [<https://perma.cc/2DBZ-QDRV>]; see also JAMEEL JAFFER, *THE DRONE MEMOS: TARGETED KILLINGS, SECRECY, AND THE LAW* 9 (Jameel Jaffer ed., 2016) (“Obama disavowed some of the Bush [A]dministration’s most extreme national security policies, but he made the drone campaign emphatically his own.”).

compared to President Bush and expanded their geographical scope to seven countries.⁶⁶

In July 2016, the Obama Administration released a summary of U.S. counterterrorism strikes outside of areas of active hostilities between 2009 and 2015. The summary identified Afghanistan, Iraq, and Syria as areas of active hostilities, meaning that it did not cover strikes in those three countries. According to the summary, the United States launched 473 strikes against terrorism targets in that period, resulting in between 2,372 to 2,581 combatant deaths.⁶⁷ In January 2017, the Administration released another summary indicating that in 2016 alone, the United States conducted fifty-three strikes outside of areas of active hostilities, resulting in between 431 to 441 combatant deaths.⁶⁸ Strike watchers have estimated that President Obama oversaw 542 drone strikes by the time he left office in January 2017.⁶⁹ These figures underestimate the number of targeted strikes because they do not reflect strikes in Afghanistan, Iraq, and Syria.

The Trump Administration has not released a summary of targeting data, and it revoked President Obama's Executive Order requiring periodic reporting of aggregate strike data.⁷⁰ Publicly available data suggest that the Trump Administration has further escalated U.S. targeted strikes around the globe.⁷¹

66. Goldsmith, *supra* note 37, at 458; *see also* JAFFER, *supra* note 65, at 9–10 (“Within two years of Obama’s . . . inauguration, the pace of drone strikes had increased roughly sixfold, and the number of drone deaths had quadrupled. . . . President Obama’s first term saw the drone program expand on every axis: more strikes, with more drones, in more countries.”); Micah Zenko, *Obama’s Embrace of Drone Strikes Will Be a Lasting Legacy*, N.Y. TIMES (Jan. 12, 2016, 2:57 PM), <https://www.nytimes.com/roomfordebate/2016/01/12/reflecting-on-obamas-presidency/obamas-embrace-of-drone-strikes-will-be-a-lasting-legacy>.

67. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES (July 1, 2016), <https://perma.cc/X9Q4-DQ5K>. The summary was issued pursuant to Executive Order 13,732. *See* 81 Fed. Reg. 44,485 (July 1, 2016).

68. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, SUMMARY OF 2016 INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES (Jan. 19, 2017), <https://perma.cc/LN9C-BUKH>.

69. *See* Zenko, *supra* note 65.

70. *See* Exec. Order No. 13,862, 84 Fed. Reg. 8789 (Mar. 6, 2019) (revoking the reporting requirement).

71. *See* Jessica Purkiss & Jack Serle, *US Counter Terror Air Strikes Double in Trump’s First Year*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Dec. 19, 2017), <https://www.thebureauinvestigates.com/stories/2017-12-19/counterterrorism-strikes-double-trump-first-year> [<https://perma.cc/4ELK-YV48>]; Hina Shamsi, *Trump’s Secret Rules for Killings Abroad*, ACLU (Dec. 21, 2017, 1:00 PM), <https://www.aclu.org/blog/national-security/targeted-killing/trumps-secret-rules-killings-abroad> [<https://perma.cc/52YX-BUL3>] (arguing that targeted strikes under Trump are “taking place at a virtually unprecedented rate—in some countries, the number has doubled or tripled The U.S. is conducting strikes in recognized wars in Iraq, Syria, and Afghanistan, but also in operations governed by . . . secret rules . . . —those conducted outside ‘areas of active hostilities’ in Yemen, Somalia, Pakistan, Nigeria, and elsewhere.”); Micah Zenko & Jennifer Wilson, *How the Pentagon Announces Killing Terrorists Versus Civilians*, COUNCIL ON FOREIGN REL.: POL., POWER, & PREVENTATIVE ACTION (Apr. 24, 2017), <https://www.cfr.org/blog/how-pentagon-announces-killing-terrorists-versus-civilians> [<https://perma.cc/HD5Z-NLCP>].

According to some estimates, by March 2017, the Trump Administration carried out at least thirty-six counterterrorism strikes outside areas of active hostilities, averaging a strike every 1.25 days compared to the Obama Administration's average of a strike every 5.4 days.⁷² At least until recently, the Trump Administration continued operations against the Islamic State in Syria.⁷³ By September 2017, over 100 U.S. targeted strikes had been launched against al-Qaeda in the Arabian Peninsula (AQAP) in Yemen, up from thirty-eight strikes in 2016.⁷⁴ The United States has expanded its counterterrorism drone strikes in Libya.⁷⁵ It resumed drone strikes in Pakistan.⁷⁶ Strikes in Somalia surged in late 2018.⁷⁷ The Administration declared parts of Somalia areas of active hostilities, loosening the constraints on strikes in the country.⁷⁸ Targeted strikes continue under the public radar without the public scrutiny that the practice provoked under President Obama. The unusual January 2020 targeted killing in Iraq of Qassem Soleimani—a senior Iranian state official and the commander of Iran's Islamic Revolutionary Guard Corps Quds Force—suggests that the practice of individualized lethal targeting may expand beyond non-state actors and become increasingly utilized

72. Micah Zenko, *The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama*, COUNCIL ON FOREIGN REL.: POL., POWER, & PREVENTATIVE ACTION (Mar. 2, 2017), <https://www.cfr.org/blog/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama> [https://perma.cc/X6EH-MTCC]; see also Luke Hartig & Joshua Geltzer, *An Opportunity for National Security Transparency in the Trump Era*, JUST SECURITY (Apr. 27, 2018), <https://www.justsecurity.org/55454/opportunity-national-security-transparency-trump-era/> [https://perma.cc/5GQ8-TDFE] (noting the Trump Administration has released much less information to the public about targeted strikes than did the Obama Administration).

73. See David D. Kirkpatrick & Eric Schmitt, *ISIS Reaps Gains of U.S. Pullout from Syria*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/world/middleeast/isis-syria-us.html> ("American forces and their Kurdish-led partners in Syria had been conducting as many as a dozen counterterrorism missions a day against Islamic State militants, officials said. That has stopped."). But see Shawn Snow, *US Withdrawal in Syria Is Only a Small Number of Special Operators, Says Trump Administration*, MIL. TIMES (Oct. 7, 2019), <https://www.militarytimes.com/flashpoints/2019/10/07/how-the-us-troop-withdrawal-from-northern-syria-could-create-an-isis-resurgence/> [https://perma.cc/6FCL-HDXG].

74. See Farea Al-Muslimi & Sarah Knuckey, *Yemen Strike Raises Questions About Whether the US Follows Its Own Drone Rules*, JUST SECURITY (Nov. 15, 2017), <https://www.justsecurity.org/47103/yemen-strike-raises-question-killing-capture-feasible/> [https://perma.cc/DS3F-XJSD]; John Haltiwanger, *Trump Has Dropped Record Number of Bombs on Middle East*, NEWSWEEK (Sept. 19, 2017, 2:42 PM), <https://www.newsweek.com/trump-era-record-number-bombs-dropped-middle-east-667505> [https://perma.cc/4PWB-SKYK]; Paul McLeary, *U.S. Bombs Falling in Record Numbers in Three Countries*, FOREIGN POL'Y (Sept. 18, 2017, 7:29 PM), <https://foreignpolicy.com/2017/09/18/u-s-bombs-falling-in-record-numbers-in-three-countries/> [https://perma.cc/KJ9W-LBAY].

75. Declan Walsh & Eric Schmitt, *U.S. Strikes Qaeda Target in Southern Libya, Expanding Shadow War There*, N.Y. TIMES (Mar. 25, 2018), <https://www.nytimes.com/2018/03/25/world/middleeast/us-bombs-qaeda-libya.html>.

76. Dan De Luce & Seán D. Naylor, *The Drones Are Back*, FOREIGN POL'Y (Mar. 26, 2018, 7:55 AM), <https://foreignpolicy.com/2018/03/26/the-drones-are-back/> [https://perma.cc/Q3YM-89NX].

77. Eric Schmitt & Charlie Savage, *Trump Administration Steps Up Air War in Somalia*, N.Y. TIMES (Mar. 10, 2019), <https://www.nytimes.com/2019/03/10/us/politics/us-somalia-airstrikes-shabab.html>.

78. See Charlie Savage & Eric Schmitt, *Pentagon Foresees at Least Two More Years of Combat in Somalia*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/world/africa/pentagon-somalia-combat-islamic-militants.html>.

against state officials, even outside the context of an armed conflict.⁷⁹

1. Targeted Killings and the Role of Administrative Agencies

The details of the decisionmaking process through which targeted killings are cleared and executed remain classified. Nevertheless, official documents released by the Obama Administration,⁸⁰ judicial decisions, accounts from practitioners and journalists,⁸¹ and leaks⁸² have provided insight into this process. These sources indicate that decisions to target individuals outside hot battlefields are made in Washington, D.C. through an interagency process. The CIA and the Joint Special Operations Command (JSOC) share operational responsibility for targeted strikes.⁸³

When President Obama came into office, targeted killings had already been on the rise, becoming a routine practice led by the CIA, the Defense Department, and the intelligence community.⁸⁴ But the practice was not formalized until 2013, when Obama issued a Presidential Policy Guidance (PPG) covering the use of lethal force and detention, and outlining the legal and policy framework governing “direct action” against terrorism suspects outside areas of active hostilities.⁸⁵

79. Anthony Dworkin, *Soleimani Strike Marks a Novel Shift in Targeted Killing, Dangerous to the Global Order*, JUST SECURITY (Jan. 7, 2010), <https://www.justsecurity.org/67937/soleimani-strike-marks-a-novel-shift-in-targeted-killing-dangerous-to-the-global-order/> [https://perma.cc/6GA8-98F7].

80. PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013) [hereinafter PRESIDENTIAL POLICY GUIDANCE], https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download [https://perma.cc/YGN3-35HM].

81. See, e.g., JAFFER, *supra* note 65; DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* (2012); DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* (2012); Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681 (2014).

82. See Cora Currier, *The Kill Chain: The Lethal Bureaucracy Behind Obama's Drone War*, INTERCEPT (Oct. 15, 2015, 7:57 AM), <https://theintercept.com/drone-papers/the-kill-chain/> [https://perma.cc/A74D-J9LF].

83. CIA-led strikes are governed by Title 50 of the U.S. Code. See Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 539 (2012). Title 50 action requires a presidential “finding” and is subject to reporting requirements to Congress. Military-led strikes are covered by Title 10. See *id.* at 539 n.2. As Robert Chesney has argued, however, in the post-9/11 era there has been a convergence of military and intelligence activities, including in targeted killings, which led to the blurring of the Title 10–Title 50 distinction. See *id.* Chesney argues that this blurring resulted in concentration of related decisionmaking and oversight within the Executive Branch. See *id.* It is noteworthy that although the President Obama tried to shift responsibility for targeted killings from the CIA to the Defense Department, President Trump appeared to have sanctioned an even greater role for the CIA. See JAFFER, *supra* note 65, at 22–23; Eric Schmitt & Matthew Rosenberg, *C.I.A. Wants Authority to Conduct Drone Strikes in Afghanistan for the First Time*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/us/politics/cia-drone-strike-authority-afghanistan.html>; Shannon Vavra, *Trump Is Letting the CIA Launch Drone Strikes*, AXIOS (Mar. 13, 2017), <https://www.axios.com/trump-is-letting-the-cia-launch-drone-strikes-1513300930-2e0c4eaa-cef7-4fe1-887a-65b620cf684d.html> [https://perma.cc/9UTN-54BS].

84. See Jonathan Chait, *Five Days That Shaped a Presidency*, N.Y. MAG. (Aug. 25, 2016), <http://nymag.com/intelligencer/2016/10/barack-obama-on-5-days-that-shaped-his-presidency.html>.

85. PRESIDENTIAL POLICY GUIDANCE, *supra* note 80, §§ 2–3. The full PPG was declassified in 2016. See U.S. Releases Drone ‘Playbook’ in Response to ACLU Lawsuit, ACLU (Aug. 6, 2016), <https://www.aclu.org/news/2016/08/06/us-releases-drone-playbook-in-response-to-acclu-lawsuit>.

Justice Department opinions on the legality of targeting U.S. citizens complemented the PPG.⁸⁶ In an interview shortly before he left office, Obama explained that

what prompted a lot of the internal reforms we put in place had less to do with [criticism from nongovernmental organizations] and had more to do with me looking at . . . the way in which the number of drone strikes was going up and the routineness with which, early in my presidency, you were seeing both DOD and CIA and our intelligence teams think about this.⁸⁷

The PPG adopted the view that the United States is in an armed conflict with al-Qaeda and its associates that transcends national borders, authorized domestically by the 2001 AUMF.⁸⁸ Therefore, the United States could lawfully use force against related terrorism suspects even outside hot battlefields. The PPG's targeting and civilian protection requirements pulled together elements from the international law of armed conflict and international human rights law.⁸⁹ The Obama Administration maintained that key elements of the PPG were policy rather than binding legal obligations, and the PPG allowed the president to authorize "direct action that would fall outside of" the PPG.⁹⁰ Furthermore, the PPG introduced a broad concept of continuing imminence that sanctioned use of force against high-value targets long before they could pose an immediate threat to the United States.⁹¹

The PPG also put in place a complex interagency process for nominating and clearing individuals for lethal action.⁹² The nominating agency was required to prepare a profile for each nominated target. Every target first had to be reviewed for legality. If the proposed target was a U.S. citizen, then that target also had to be reviewed by the Justice Department. If a target cleared this preliminary review, it underwent further interagency review. The National Security Staff

www.aclu.org/press-releases/us-releases-drone-strike-playbook-response-aclu-lawsuit [https://perma.cc/RPN4-U5XU].

86. See DEP'T OF JUSTICE, *LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE* (2011); DEP'T OF JUSTICE, *LEGALITY OF A LETHAL OPERATION BY THE CENTRAL INTELLIGENCE AGENCY AGAINST A U.S. CITIZEN* (2011); Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, U.S. Att'y Gen., Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010), <https://fas.org/irp/agency/doj/olc/aulaqi.pdf> [https://perma.cc/K7JP-D3AD]; Memorandum from David J. Barron, *supra* note 31.

87. Chait, *supra* note 84.

88. See sources cited *supra* note 38.

89. See, e.g., Ryan Goodman, *Why the Laws of War Apply to Drone Strikes Outside "Areas of Active Hostilities"* (A Memo to the Human Rights Community), JUST SECURITY (Oct. 4, 2017), <https://www.justsecurity.org/45613/laws-war-apply-drone-strikes-areas-active-hostilities-a-memo-human-rights-community/> [https://perma.cc/U2C9-6Z4V] (noting that the 2013 PPG "[was] designed to place far greater constraints than what the laws of war require in the way of civilian protection and other matters").

90. PRESIDENTIAL POLICY GUIDANCE, *supra* note 80, § 5.B.

91. See *id.* § 3.

92. See *id.*

(NSS) convened a special forum—the Restricted Counterterrorism Security Group (RCSG)—to review the proposed target and prepare the material for the NSC Deputies Committee. At this stage, the National Counterterrorism Center (NCTC) was required to prepare an assessment of each nomination. The nomination was then forwarded to the Deputies Committee, comprising deputies from key national security agencies.⁹³

Next, the deputies would convey their recommendation to agency principals. The principal of the nominating agency could approve lethal action if there was consensus among the principals and the President had been notified. If there was no consensus or the proposed target was a U.S. citizen, the President himself would review the case and decide whether to authorize lethal force. The PPG also required an annual review of authorized targets. Notably, early reporting about President Obama’s degree of involvement in targeted killing authorization suggested that he insisted on deciding every case himself unless there was near certainty that there would be no civilian casualties.⁹⁴ This may indicate that the intensity of his personal involvement in the process declined over time.

The inclusion of a suspected terrorist in the list of authorized targets did not mean that the suspect would be targeted immediately.⁹⁵ According to some reports, an individual on the list would be targetable for sixty days after being cleared without further review.⁹⁶ In other words, these were not necessarily decisions made in real time on the battlefield.

The 2013 PPG demonstrates that the Obama Administration built an extensive administrative infrastructure to facilitate and regulate the targeted killing program.⁹⁷ The interagency process involved regular meetings attended by more than a hundred officials.⁹⁸ As Jameel Jaffer observed, President Obama “oversaw the design of a new bureaucracy responsible for nominating suspected militants to government ‘kill lists.’”⁹⁹ Jaffer criticized this normalization of targeted killings and warned that the existence of a sprawling targeted killing bureaucracy encourages use of this tool.¹⁰⁰

93. *Id.* § 3.C. This included the Departments of State, Defense, Justice, and Homeland Security; the Joint Chiefs of Staff; the Director of National Intelligence; the CIA; and the NCTC. *See id.* § 3.D.2.

94. *See* Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?mtref=www.google.com&gwh=C3D1D7793D8748A5FCB72FF9D9F501B5&gwt=pay&assetType=REGIWALL>.

95. *See* JAFFER, *supra* note 65, at 43.

96. *See* Currier, *supra* note 82.

97. *See also* McNeal, *supra* note 81.

98. *See* JAFFER, *supra* note 65, at 10.

99. *Id.*

100. *Id.* at 8 (highlighting “the jarring fact that the practice of targeted killing . . . no longer seems remarkable, and the fact that the United States now boasts a legal and bureaucratic infrastructure to sustain this practice” and adding that “[e]ight years ago the targeted-killing campaign required a legal and bureaucratic infrastructure, but now that infrastructure will demand a targeted-killing campaign”). Others lauded the PPG. *See, e.g.*, Marty Lederman, *The Presidential Policy Guidance for Targeting and Capture Outside Afghanistan, Iraq and Syria*, JUST SECURITY (Aug. 6, 2016), <https://www.justsecurity.org/32298/presidential-policy-guidance-targeting-capture-afghanistan-iraq-syria/> [<https://perma.cc/Q8ZJ-LJ3S>] (“I

The elements of the PPG that the Obama Administration viewed as policy, rather than law, could be rescinded. It appears that the Trump Administration did just that. Although there is evidence that the Administration preserved a version of the PPG,¹⁰¹ it reportedly replaced the PPG with a new document—entitled Principles, Standards, and Procedures (PSP)—that introduced significant revisions. First, the PSP expanded the category of targetable individuals from high-level targets to rank-and-file militants. Second, the Trump Administration discontinued high-level vetting of targets and partially removed bureaucratic hurdles for approving individual strikes. Contrary to President Obama, President Trump apparently has extracted himself from the target nomination and authorization process entirely, delegating this role to the bureaucracy.¹⁰² As we have seen, strikes under President Trump have spiked.

Over the past decade, then, the decision whether to authorize targeted killings of individuals across the globe became an administrative decision made through an interagency process, much like many other decisions pertaining to individuals the administrative state makes on a regular basis. What we may have imagined as an operational decision to use lethal force in real time on the battlefield was often a decision made in Washington, at times weeks or months before a strike. Although President Obama personally oversaw this process, administrative agencies controlled the heart of it. President Trump's revised policy framework grants significantly greater discretion to the targeted killing apparatus than did President Obama's PPG—with minimal presidential input.

2. Targeted Killings and the Courts

The growing frequency of targeted killings has produced a number of attempts to challenge the practice in federal courts. To date, these attempts have been

suspect that there's never been anything . . . quite like the interagency and interbranch review reflected [in the PPG]. It is certainly leagues beyond what DOD is ordinarily required to do . . . when it uses force overseas.”).

101. See *Zaidan v. Trump*, 317 F. Supp. 3d 8, 22–23 (2018) (noting that the government does “not disavow the [PPG] or its applicability to any decision in 2016 or earlier” to put the plaintiff’s name on a “kill list”); see also Jessica Purkiss, *Trump’s First Year in Numbers: Strikes Triple in Yemen and Somalia*, BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 19, 2018), <https://www.thebureauinvestigates.com/stories/2018-01-19/strikes-in-somalia-and-yemen-triple-in-trumps-first-year-in-office> [<https://perma.cc/LE75-58PB>] (“President Trump inherited the framework allowing [U.S.] aircraft to hit suspected terrorists outside of declared battlefields from Obama. His administration has largely stuck within the framework . . .”).

102. See Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html> (“The plan would extend . . . Trump’s pattern of giving broader day-to-day authority to the Pentagon and the [CIA]—authorizing the agencies to decide when and how to conduct high-risk counterterrorism operations that . . . Obama had insisted be used sparingly and only after top officials across the government reviewed them.”). The report indicates that “the new plan would still require higher-level approval to start conducting strikes or raids in new countries under ‘country plans’ that would be reviewed every [twelve] months.” *Id.* For analysis of the PSP, see Goodman, *supra* note 89, and Luke Hartig, *Trump’s New Drone Strike Policy: What’s Any Different? Why It Matters*, JUST SECURITY (Sept. 21, 2017, 9:50 PM), <https://www.justsecurity.org/45227/trumps-drone-strike-policy-different-matters/> [<https://perma.cc/WEN6-4VVS>].

unsuccessful. The best-known case is that of U.S. citizen Anwar al-Aulaqi, who was killed in a 2011 drone strike in Yemen.¹⁰³ Prior to the strike, al-Aulaqi's alien father brought action on his behalf at the U.S. District Court for the District of Columbia.¹⁰⁴ The father alleged that al-Aulaqi was on a "kill list" for his role in al-Qaeda attacks on U.S. targets.¹⁰⁵

Al-Aulaqi's father advanced both constitutional and statutory claims. He argued that placing his son on a kill list and the government's refusal to disclose the criteria for inclusion in that list violated his son's Fourth and Fifth Amendment rights.¹⁰⁶ Al-Aulaqi's father further argued that the targeting of his son violated international law, and therefore he could bring suit under the Alien Tort Statute (ATS).¹⁰⁷ The court dismissed the case on justiciability grounds.¹⁰⁸ It found that al-Aulaqi's father lacked standing to bring constitutional claims on his behalf and also dismissed the father's ATS claims.¹⁰⁹ Finally, the court held that even if the father could sue under the ATS, the political question doctrine precluded the court's jurisdiction despite al-Aulaqi being an individual and a U.S. citizen.¹¹⁰

The court's framing of the case is telling. At the opening of his opinion, Judge Bates made it clear that the stakes were extremely high. He stressed that the case was "unique and extraordinary."¹¹¹ He stated that it presented "fundamental questions of separation of powers involving the proper role of the courts" in the U.S. constitutional order, and that "[v]ital considerations of national security and of military and foreign affairs" were at play.¹¹² This theme carried over to the political question analysis. Judge Bates observed that "national security, military matters and foreign relations are 'quintessential sources of political questions.'"¹¹³ He recited familiar tropes in foreign affairs and national security cases: that such cases frequently turn on standards that defy judicial application; that they involve the exercise of discretion demonstrably committed to the Executive; that they require expertise that courts simply lack.¹¹⁴

Yet, Judge Bates appeared to make these observations with precedents reviewing either general or (at the time) one-off foreign and security policy decisions in

103. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

104. *Id.*

105. *Id.* at 11.

106. *Id.* at 12.

107. *See id.*; *see also* 28 U.S.C. § 1350 (2012) (granting the U.S. district courts jurisdiction over any civil action brought by an *alien* "for a tort only, committed in violation of the law of nations or a treaty of the United States").

108. *Al-Aulaqi*, 727 F. Supp. 2d at 9.

109. *Id.* at 35. Judge Bates held that the father lacked an ATS cause of action; that al-Aulaqi, a U.S. citizen, was ineligible to sue under the ATS; and that the United States had not waived its sovereign immunity for the challenged conduct. *Id.* at 38, 40–44.

110. *Id.* at 44, 48–49. The court recognized that this was the first time the political question doctrine was applied in a case involving the constitutional rights of a U.S. citizen. *Id.* at 49.

111. *Id.* at 8.

112. *Id.*

113. *Id.* at 45 (quoting *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006)).

114. *Id.* at 45–46, 52.

mind. He cited earlier cases applying the political question doctrine to “battlefield decisions”;¹¹⁵ “the standard for the government’s use of covert operations in conjunction with political turmoil in another country”;¹¹⁶ the bombing of a Sudanese plant associated with bin-Laden, ordered by President Clinton;¹¹⁷ and collusion with the Pinochet regime in Chile.¹¹⁸ The question *Al-Aulaqi* brings to sharp relief is whether these examples are relevant in the context of routine and indefinite targeting of individuals through a bureaucratic process, similar to other administrative action that courts regularly review.¹¹⁹

The same District Court engaged with this question in a recent case, *Zaidan v. Trump*.¹²⁰ The case involves two journalists who alleged that they had been included in the terrorist kill list. Plaintiff Zaidan, an Al Jazeera reporter, claimed that SKYNET, an intelligence tool that uses metadata to identify terrorism suspects, had him listed. Plaintiff Kareem, a reporter and U.S. citizen, claimed that he was the target of five near-miss aerial strikes in Syria, indicating that he too was on the list.¹²¹

In the intervening period between *Al-Aulaqi* and *Zaidan*, al-Aulaqi was in fact killed in a drone strike along with three others, including another U.S. citizen.¹²² The Obama Administration released a 2010 Office of Legal Counsel (OLC) opinion that outlined the legal and policy framework for targeting al-Aulaqi.¹²³ President Obama’s 2013 PPG was released, shedding light on the “lethal bureaucracy.”¹²⁴ President Trump came into office, reportedly loosening the restrictions on targeted strikes self-imposed by his predecessor. In addition, the Supreme Court appeared to narrow the scope of the foreign relations political question doctrine in *Zivotofsky v. Clinton*.¹²⁵ These developments could explain the different outcomes of the government’s motions to dismiss in these two cases. Although

115. *Id.* at 45.

116. *Id.*

117. *Id.* at 46 (discussing *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010)). In *El-Shifa*, plaintiffs alleged that the plant had nothing to do with terrorism and sought compensation. The court applied the political question doctrine. Deciding the case, it found, would require judicial assessment of “the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.” *El-Shifa*, 607 F.3d at 842.

118. *Al-Aulaqi*, 727 F. Supp. 2d at 48–49.

119. Another key aspect of *Al-Aulaqi* is the Court’s assertion that there are no judicially manageable standards to apply to a decision to target an individual terrorism suspect with lethal force. The court reached this conclusion notwithstanding the fact that the Supreme Court found justiciable the constitutional claims of a U.S. citizen in another case that heavily implicated national security in a similar way—the case of U.S. citizen and Guantanamo detainee Hamdi. The court distinguished *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), by citing the courts’ explicit constitutional authority to conduct habeas review and asserting that habeas cases are retrospective, while al-Aulaqi sought injunctive relief. *Al-Aulaqi*, 727 F. Supp. 2d at 49–50.

120. 317 F. Supp. 3d 8 (D.D.C. 2018).

121. *Id.* at 14–15.

122. JAFFER, *supra* note 65, at 5.

123. See *N.Y. Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100 (2d Cir. 2014).

124. JAFFER, *supra* note 65, at 8.

125. 566 U.S. 189, 191 (2012) (holding that the doctrine does not bar the Court’s jurisdiction to decide whether Congress may compel the President to indicate Israel as the place of birth on a passport of a person born in Jerusalem).

the court dismissed the case as it pertained to plaintiff Zaidan for lack of standing,¹²⁶ it allowed the case to move forward as it pertained to U.S. citizen Kareem. The five near-miss strikes that Kareem had suffered were sufficient in the court's view to establish standing.¹²⁷

Al-Aulaqi and *Zaidan* diverge on both sovereign immunity and the application of the political question doctrine. The *Zaidan* court approached the case with ordinary administrative law tools. It first concluded that the APA's waiver of sovereign immunity extended to Kareem's claims. The court conceded that the act of targeting a terrorism suspect with lethal force might constitute "military authority exercised in the field in time of war"—an exception to the definition of "agency action" under the APA, which excludes certain military action from the APA's purview.¹²⁸ However, the court concluded that the agency action in question was the alleged *decision to place Kareem on the kill list*—the outcome, according to the PPG, of an interagency process in Washington.¹²⁹ It was not made on a battlefield in a distant country but rather in conference rooms thousands of miles away. Consequently, although the implementation of this decision would be an exempt exercise of military authority, the decision itself was not. The ruling highlighted the administrative designation process and it was this element of the alleged decision to target Kareem that made it reviewable under the APA in the eyes of the court. Next, the court declined to find that the political question doctrine rendered Kareem's entire case nonjusticiable,¹³⁰ allowing his First, Fourth, and Fifth Amendment claims to move forward.¹³¹ Ultimately, however, the Trump Administration invoked the state secrets privilege and the court dismissed the case.¹³²

126. *Zaidan*, 317 F. Supp. 3d at 18–19. Judge Collyer concluded that Zaidan lacked standing because his claims were conjectural and failed to satisfy the injury in fact requirement. She found that there was no evidence that being identified by SKYNET meant automatic inclusion in the kill list. *Id.*

127. *Id.* at 20.

128. *Id.* at 22 (citing 5 U.S.C. § 701(b)(1)(G) (2012)). President Trump was dropped from the suit because the President is not an "agency" under the APA. *Zaidan*, 317 F. Supp. 3d at 22; see discussion *infra* Section IV.A.

129. *Zaidan*, 317 F. Supp. 3d at 25 ("It remains a truism that judges are not good judges of military decisions during war. The immediate Complaint asks for no such non-judicial feat; rather, it alleges that placement on the Kill List occurs only after nomination by a defense agency principal and agreement by other such principals, with prior notice to the President. The persons alleged to have exercised this authority are alleged to have followed a known procedure that occurred in Washington or its environs."); see *id.* at 22 ("[T]he [c]omplaint plausibly argues that the decision itself was made by authorities who were not 'in the field' as required for the APA exemption to apply.").

130. Judge Collyer distinguished *Al-Aulaqi*, finding that the challenged decision there was different: *al-Aulaqi* challenged military action, whereas this case was about the decision to nominate an individual to the kill list. She also distinguished her earlier decision in *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014), in which she declined to extend *Bivens* constitutional challenges to targeted killings. See *Zaidan*, 317 F. Supp. 3d at 24–25.

131. *Id.* at 26–29 ("[C]onstitutional questions are the bread and butter of the federal judiciary."). However, Judge Collyer found that the political question doctrine barred Kareem's claims that his designation was arbitrary and capricious because it violated the PPG; that it violated the ban on assassinations; and that it violated certain statutory and treaty provisions. *Id.*

132. See *Kareem v. Haspel*, No. 17-581 (RMC), 2019 WL 4645155, at *6 (D.D.C. Sept. 24, 2019). The court found that the government adequately invoked the state secrets privilege and that the case could not proceed without the material that the privilege covered. *Id.* Because the privilege is absolute,

Judge Brown's concurrence in the D.C. Circuit's 2017 decision, *Bin Ali Jaber v. United States*, similarly highlights the disconnect between how targeted killings have been carried out in recent years and the application of the political question doctrine in this context.¹³³ The case involved a lethal 2012 drone strike in Yemen. Judge Brown recalled the hundreds of strikes carried out since the Bush Administration. She noted that the availability of precision-targeting technology at zero risk for U.S. troops encourages use of force and cited the growth in bystander casualties.¹³⁴ She expressed concern in light of the extension of drone strikes to "signature strikes."¹³⁵

In Judge Brown's view, the precedent on targeted killings and the political question doctrine, which she traced to the D.C. Circuit's 2010 en banc decision in *El-Shifa*,¹³⁶ envisioned a different scenario: "a singular threat that might occur once or twice at widely separated intervals."¹³⁷ *El-Shifa*'s doctrine, she continued, "seems a wholly inadequate response to an executive decision—deployed through the CIA/JSOC targeted killing program—implementing a standard operating procedure that will be replicated hundreds if not thousands of times."¹³⁸ Per Judge Brown, approaching that decision through *El-Shifa*'s legal framework is "simply impossible."¹³⁹ Like Judge Collyer's decision in *Zaidan* a year later, Judge Brown's concurrence highlights the increased targeting of individuals, the routine and indefinite nature of this targeting, and the significant role of administrative agencies and decisionmaking ("standard operating procedure") as factors that put pressure on existing doctrine governing judicial review of such measures.¹⁴⁰

B. DETENTIONS

Military detentions have a long history in warfare. But their application in the context of the war on terror was an evolution. Detainees were no longer just nameless side effects of relatively well-defined wars. Instead, post-9/11, individuals have been detained and sometimes held indefinitely for their individual involvement in terrorism.¹⁴¹ The mechanisms created to administer detentions

the court held that even Kareem's claim that he had a right to due process before the United States could take his life could not outweigh it. *Id.* at *3, 6.

133. *Bin Ali Jaber v. United States*, 861 F.3d 241 (D.C. Cir. 2017). Plaintiffs sued on behalf of two men they alleged were accidentally killed in a 2012 drone strike in Yemen. Relying on *El-Shifa*, the D.C. Circuit held that the political question doctrine barred its jurisdiction. *Id.* at 242. The existence and publication of the legal and operational framework governing drone strikes, it reasoned, did not constitute "an invitation to the [j]udiciary to intrude upon the traditional executive role." *Id.* at 249.

134. *Id.* at 251 (Brown, J., concurring)

135. *Id.* Signature strikes are strikes based on metadata without positive identification of the target.

136. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010).

137. *Bin Ali Jaber*, 861 F.3d at 252 (Brown, J., concurring).

138. *Id.*

139. *Id.*

140. *Id.* at 250–53.

141. See, e.g., Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1383 (2008). The Bush Administration also engaged in extraordinary rendition of individuals for detention and interrogation.

have also been highly individualized. Because detentions have been studied extensively,¹⁴² I survey only major milestones, focusing on the role of administrative agencies.

The United States has maintained that the 2001 AUMF authorized the military detention of enemy combatants until the end of hostilities with al-Qaeda and associated forces. The Bush Administration notoriously operated detention facilities outside U.S. territory, including Guantanamo Bay, the Bagram prison in Afghanistan, and covert CIA facilities. A total of about 800 detainees were held at Guantanamo, 500 of whom had been released by 2009.¹⁴³ President Obama's commitment to closing the facility led to the prosecution, transfer, or release of most remaining detainees, as well as the closure of CIA covert detention facilities.¹⁴⁴ No new detainees were brought to Guantanamo, leaving only 40 detainees at the prison.¹⁴⁵ Bagram, where 600 individuals were held in 2013, was closed in 2014.¹⁴⁶ New detentions declined significantly under President Obama.¹⁴⁷ Nevertheless, he encountered congressional backlash and ultimately left Guantanamo open.¹⁴⁸

President Trump reversed President Obama's Executive Order closing Guantanamo and stated that his Administration might resume the transfer of detainees to the facility.¹⁴⁹ To date, however, no new detainees have been brought there. Unlike President Obama, President Trump does not appear to apply a hands-on approach to terrorist detentions, and related issues are handled under the public radar. This includes treatment of the "legacy" detainees at Guantanamo and attempts to try them before a dysfunctional military commissions system, as well

142. See, e.g., Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 353 (2010); Aziz Z. Huq, *The Predicates of Military Detention at Guantánamo: The Role of Individual Acts and Affiliations*, 13 J. EMPIRICAL LEGAL STUD. 567, 570 (2016) (surveying detentions scholarship).

143. *The Guantánamo Docket*, N.Y. TIMES, <https://www.nytimes.com/interactive/projects/guantanamo> (last updated May 2, 2018).

144. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) (entitled "Review and Disposition of Individuals Detained [a]t the Guantánamo Bay Naval Base and Closure of Detention Facilities"); GUANTANAMO REVIEW TASK FORCE, FINAL REPORT (2010), <https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf> [<https://perma.cc/G2D9-4R9N>].

145. *The Guantánamo Docket*, *supra* note 143.

146. Jack Daniel, *U.S. Closes Bagram Prison, Says No More Detainees in Afghanistan*, REUTERS (Dec. 10, 2014), <https://www.reuters.com/article/us-usa-cia-torture-bagram/u-s-closes-bagram-prison-says-it-has-no-more-detainees-in-afghanistan-idUSKBN0JO2B720141210> [<https://perma.cc/MKB3-HJYM>]; *Redacted List of Detainees Held at Bagram Air Base*, ACLU, <https://www.aclu.org/other/redacted-list-detainees-held-bagram-air-base> [<https://perma.cc/MM79-JGJZ>] (last visited Mar. 2, 2020).

147. Cf. KLAIDMAN, *supra* note 81, at 122–28. The Administration was accused of favoring targeted killings over politically and legally fraught detentions.

148. See JENNIFER K. ELSA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, WARTIME DETENTION PROVISIONS IN RECENT DEFENSE AUTHORIZATION LEGISLATION 1 (2016), <https://fas.org/sgp/crs/natsec/R42143.pdf> [<https://perma.cc/JS2A-996H>].

149. Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Jan. 30, 2018).

as detentions of new individuals and their disposition.¹⁵⁰

1. Detentions and Administrative Agencies

The last three Administrations have put in place or preserved procedural mechanisms for status assessment of Guantanamo detainees. In response to the landmark 2004 Supreme Court decisions *Hamdi v. Rumsfeld* and *Rasul v. Bush*,¹⁵¹ President Bush's Defense Department established Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs).¹⁵² The CSRTs provided a one-time review by three military officers to determine whether each Guantanamo detainee was properly designated an enemy combatant. After that initial determination, ARBs staffed by military officers conducted an annual status review for each detainee.¹⁵³ Although the Defense Department established the CSRTs, and their operation resembled administrative adjudication, both the CSRTs and the ARBs consisted of military personnel. In *Bismullah v. Gates*, the D.C. Circuit struggled with CSRTs' classification for APA purposes.¹⁵⁴ Although the judges' opinions diverged, they agreed that CSRTs were not "agencies" under the APA.¹⁵⁵

President Obama transferred responsibility for detainee status review from the military to civilian administrative agencies. In 2011, he created the Guantanamo Periodic Review Boards (PRBs) by executive order, later incorporated in legislation.¹⁵⁶ The Order established an interagency process to determine whether the continued detention of each Guantanamo detainee remains necessary for national security. The Secretary of Defense coordinates the process through "a secretariat to administer the PRB review and hearing process."¹⁵⁷ The PRBs are comprised of senior officials from the Departments of Defense, Homeland Security, Justice, and State, the Joint Chiefs of Staff, and the Office of the Director of National

150. See *Doe v. Mattis*, 889 F.3d 745, 747 (D.C. Cir. 2018) (recent detention of an ISIS-linked U.S. citizen in Syria); Courtney Kube, Dan De Luce & Josh Lederman, *Trump Admin May Send Captured ISIS Fighters to Iraq Prison, Guantanamo*, NBC NEWS (Aug. 30, 2018), <https://www.nbcnews.com/storyline/isis-terror/trump-admin-may-send-captured-isis-fighters-iraq-prison-guantanamo-n905066> [<https://perma.cc/TR7K-FBBL>]; see also Robert Chesney, Sabrina McCubbin & Benjamin Wittes, *Back to the Future on Detention and Military Commissions*, LAWFARE (Nov. 2, 2017, 9:05 AM), <https://www.lawfareblog.com/back-future-detention-and-military-commissions> [<https://perma.cc/WG5U-YCSV>].

151. 542 U.S. 507 (2004); 542 U.S. 466 (2004); see *infra* Section II.B.2.

152. U.S. DEP'T OF DEF., COMBATANT STATUS REVIEW TRIBUNALS (2006), <https://archive.defense.gov/news/Oct2006/d20061017CSRT.pdf> [<https://perma.cc/6V9S-V5CN>]; Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., Dep't of Def., to Sec'y of the Navy, Dept. of the Navy (July 7, 2004), https://www.law.utoronto.ca/documents/Mackin/MuneerAhmad_ExhibitV.pdf [<https://perma.cc/Q44E-53PE>].

153. See Kathleen T. Rhem, *Review Boards Assessing Status of Guantanamo Detainees*, U.S. DEP'T DEF. (July 8, 2005), <https://archive.defense.gov/news/newsarticle.aspx?id=16694> [<https://perma.cc/AGQ5-PHKD>].

154. 501 F.3d 178, 193 (D.C. Cir. 2007).

155. See, e.g., *id.* at 193; see also *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008) (annulling a CSRT determination).

156. Exec. Order No. 13,567, 76 Fed. Reg. 13,275, 13,277 (Mar. 7, 2011).

157. *Id.* at § 3(a)(8); see also *The Periodic Review Board*, PERIODIC REV. SECRETARIAT, <https://www.prs.mil/About-the-PRB/> [<https://perma.cc/8JGB-XNXB>].

Intelligence.¹⁵⁸ President Obama's Order also contained procedural requirements: adequate advance notice to the detainee; a government-provided "personal representative" with access to the PRB file, including classified material; a right to retain private counsel; opportunity to submit arguments and to bring witnesses; an oral hearing; and a written decision.¹⁵⁹ A principals committee reviews PRB determinations in certain cases. As of 2018, eighty-nine PRB hearings have been held for sixty-four detainees.¹⁶⁰ Detainees that remain in Guantanamo are eligible for full PRB review of their status every three years and for more limited review twice per year.¹⁶¹ The Trump Administration has kept the PRB process in place.¹⁶²

2. Detentions and the Courts

Detentions have received the most sustained judicial attention among the measures discussed in this Article. In *Rasul v. Bush*, the Supreme Court established that Guantanamo detainees could seek habeas review in U.S. courts under the federal habeas statute.¹⁶³ In *Hamdi v. Rumsfeld*, a plurality of the Justices held that a U.S. citizen detained at Guantanamo was entitled to certain due process protections, namely an opportunity to contest his classification as an enemy combatant before a neutral decisionmaker.¹⁶⁴ These decisions led to the establishment of the CSRTs, but they also provoked legislation that stripped statutory habeas jurisdiction for detainees and replaced it with limited review before the D.C. Circuit.¹⁶⁵ In *Hamdan v. Rumsfeld*, the Supreme Court held that the military commissions set up to try detainees violated the statutory requirement that military commissions comply with Common Article 3 of the Geneva Conventions.¹⁶⁶ This led to the enactment of the 2006 Military Commissions Act (MCA), which stripped federal courts of habeas jurisdiction over alien detainees entirely.¹⁶⁷ In *Boumediene v. Bush*, the Supreme Court held that this aspect of the MCA constituted an unconstitutional suspension of the writ of habeas corpus and that aliens detained at Guantanamo had a constitutional right to habeas review.¹⁶⁸ In *Munaf*

158. See *Guantanamo Periodic Review Boards*, HUM. RTS. FIRST (Apr. 9, 2018), <https://www.humanrightsfirst.org/resource/guantanamo-periodic-review-boards> [https://perma.cc/XGV9-F2GQ].

159. See Exec. Order No. 13,567, *supra* note 156, § 3(a)(1)–(3), (6)–(7).

160. See *Guantanamo Periodic Review Boards*, *supra* note 158.

161. See *The Periodic Review Board*, *supra* note 157.

162. See Exec. Order No. 13,823, 83 Fed. Reg. 4831, 4831 (Jan. 30, 2018). *But see* Benjamin R. Farley, *Who Broke Periodic Review at Guantanamo Bay?*, LAWFARE (Oct. 15, 2018, 10:00 AM), <https://www.lawfareblog.com/who-broke-periodic-review-guantanamo-bay> [https://perma.cc/S2PG-XFTA].

163. See 542 U.S. 466, 484 (2004) (analyzing 28 U.S.C. § 2241 (2012)).

164. See 542 U.S. 507, 509 (2004).

165. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

166. See 548 U.S. 557, 613, 635 (2006).

167. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635–36.

168. See 553 U.S. 723, 732–33 (2008). However, courts have declined to extend habeas review to aliens held at other facilities. See *Maqaleh v. Hagel*, 738 F.3d 312, 337 (D.C. Cir. 2013), *vacated sub nom.* *Amanatullah v. Obama*, 575 U.S. 908 (2015) (mem.), and *vacated in part sub nom.* *Al-Najar v. Carter*, 575 U.S. 908 (2015).

v. Geren, the Court sanctioned the transfer of U.S. citizens detained in Iraq to Iraqi custody.¹⁶⁹

These cases paved the way for hundreds of habeas challenges to various aspects of U.S. detention policy in the D.C. federal courts. These cases addressed questions that the Supreme Court left open, such as whether alien detainees are entitled to due process rights in addition to habeas,¹⁷⁰ to what extent international law should inform AUMF interpretation,¹⁷¹ whether there are limits to the duration of detentions¹⁷² or the authority to transfer detainees,¹⁷³ and various issues pertaining to the military commissions.¹⁷⁴

To summarize this section, detentions are different from other measures this Article considers in two aspects: their frequency has decreased over time, and the Supreme Court has played a significant role in shaping the trajectory of U.S. detention policy. Still, as the recent case of *Doe v. Mattis* illustrates,¹⁷⁵ new detentions are likely to occur as long as the United States continues its global war on terror, and treatment of existing detainees remains a policy challenge. Most important for our purposes is the gradual increase in the role of administrative agencies—first, hybrid administrative-military bodies and later, interagency PRBs—in detention administration, and the manner in which the individualized, long-term nature of detentions has progressively led to greater judicial willingness to intervene.

C. INDIVIDUAL ECONOMIC SANCTIONS

Individual economic sanctions have become a frequently used tool in U.S. foreign and security policy in the past two decades. Several statutes empower the

169. 553 U.S. 674, 692 (2008).

170. See *Qassim v. Trump*, 927 F.3d 522, 527–28 (D.C. Cir. 2019) (remanding to district court to consider whether the Due Process Clause applies to petitioner’s request to see classified information relevant to his detention); *Hatim v. Obama*, 760 F.3d 54, 57–59 (D.C. Cir. 2014) (upholding challenges to confinement as properly raised in habeas petitions and assuming, without deciding, that habeas rights include the right to representation by counsel); *Ali v. Obama*, 736 F.3d 542, 551 (D.C. Cir. 2013), (holding that any error resulting from the government’s alleged failure to disclose evidence in habeas proceedings was harmless); *Odah v. United States*, 611 F.3d 8, 13–14 (D.C. Cir. 2010) (upholding the preponderance of the evidence standard and use of hearsay evidence for courts considering detainees’ habeas petitions); *Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) (rejecting detainees’ claim to a due process right against their transfer to another country for fear of torture).

171. See *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (en banc).

172. See *Al-Alwi v. Trump*, 901 F.3d 294, 296–97 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 1893 (2019); see also Charlie Savage, *Testing Novel Power, Trump Administration Detains Palestinian After Sentence Ends*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/us/politics/adham-hassoun-indefinite-detention.html?smid=tw-nytimes&smtyp=cur>.

173. See *Kiyemba*, 561 F.3d at 514.

174. See *In re Al-Nashiri*, 921 F.3d 224, 226 (D.C. Cir. 2019) (vacating commission orders issued by detainee’s presiding military judge, whose “job application to the Justice Department created a disqualifying appearance of partiality”); *Al-Bahlul v. United States*, 840 F.3d 757, 758 (D.C. Cir. 2016) (per curiam) (upholding detainee’s conviction by military commission for conspiracy to commit war crimes); *In re Al-Nashiri*, 835 F.3d 110, 113 (D.C. Cir. 2016) (denying detainee’s mandamus writ to enjoin trial by military commission).

175. 889 F.3d 745 (D.C. Cir. 2018).

President to impose sanctions to advance foreign and security policy goals: the 1977 International Emergency Economic Powers Act (IEEPA),¹⁷⁶ the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁷⁷ and other statutes on specific policy issues such as the 2017 Countering America's Adversaries Through Sanctions Act (CAATSA) concerning Russia, Iran, and North Korea.¹⁷⁸

The IEEPA is the primary authority U.S. administrations have relied upon to impose individual economic sanctions. It grants the President broad authority to take extensive economic measures in response to an "unusual and extraordinary" threat to the national security, foreign policy, or economy of the United States, if he declares an emergency with respect to that threat.¹⁷⁹ This includes blocking the property of natural and legal persons.¹⁸⁰ Individual sanctions pursuant to the IEEPA are typically imposed by executive orders that outline the criteria and interagency process for designations under their authority. The Treasury Department's Office of Foreign Assets Control (OFAC) administers most sanctions programs. The AEDPA provides for a much smaller subset of sanctions. It governs designations of Foreign Terrorist Organizations (FTOs) by the Secretary of State.¹⁸¹

From the enactment of the IEEPA until the early 1990s, U.S. presidents declared emergencies and imposed IEEPA economic measures against a total of seven states: Iran, Libya, Panama, Nicaragua, Kuwait, Iraq, and Yugoslavia.¹⁸² Beginning in the early 1990s, however, presidents invoked the IEEPA to address situations involving not only states but also transnational threats such as the proliferation of weapons of mass destruction (WMD),¹⁸³

176. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (2012); *see* National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2012).

177. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

178. Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017); *see* Exec. Order No. 13,849, 83 Fed. Reg. 48,195 (Sept. 20, 2018) (authorizing the implementation of CAATSA); *see also* Barnes, *supra* note 17, at 202 n.20.

179. 50 U.S.C. §1701(a) (2012). IEEPA is triggered if the President declares a national emergency with respect to a threat with a significant foreign element. *See id.*

180. *See id.* §1702(a)(1)(B).

181. 8 U.S.C. § 1189(a)(1) (2012). A group may be designated an FTO if it is foreign and engages in terrorist activity that threatens the United States or its nationals. *Id.* Treasury may freeze an FTO's assets, those providing it material support may face criminal sanctions, and its alien members may be denied admission to the United States. *See* Louisa C. Slocum, Comment, *OFAC, the Department of State, and the Terrorist Designation Process: A Comparative Analysis of Agency Discretion*, 65 ADMIN. L. REV. 387, 393–94 (2013).

182. *See* CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign to Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT'L L. 849, 862 (2009); James J. Savage, *Executive Use of the International Emergency Economic Powers Act - Evolution Through the Terrorist and Taliban Sanctions*, 10 CURRENTS: INT'L TRADE L.J. 28, 32–35 (2001).

183. Exec. Order No. 12,938, 59 Fed. Reg. 58,099 (Nov. 14, 1994) (entitled "Proliferation of Weapons of Mass Destruction"), *amended in* Exec. Order No. 13,094, 63 Fed. Reg. 40,803 (July 28, 1998); Exec. Order No. 12,735, 55 Fed. Reg. 48,587 (Nov. 16, 1990) (entitled "Chemical and Biological Weapons Proliferation").

terrorism,¹⁸⁴ and narcotics trafficking.¹⁸⁵ These applications of the IEEPA were an innovation. United States sanctions now targeted not only states, their leaders, and their instrumentalities but also individual persons and entities.¹⁸⁶

Use of individualized economic sanctions accelerated following 9/11.¹⁸⁷ In the immediate aftermath of the attacks, President Bush issued Executive Order 13,224 (EO 13,224) pursuant to the IEEPA, declaring a national emergency with respect to terrorism.¹⁸⁸ EO 13,224 went on to become one of the United States' main counterterrorism tools. Designations under the Order increased under the Obama Administration.¹⁸⁹ The Trump Administration has so far extended the terrorism national emergency.¹⁹⁰ As of November 2018, 6,763 persons have been designated under EO 13,224.¹⁹¹

Terrorism is hardly the only policy area that saw a substantial increase in the United States' resort to individual economic sanctions. Since the early 2000s, there has been a steady increase in the application of individual sanctions pursuant to the IEEPA and other authorities in a host of policy areas.¹⁹² One recent example is the role that individual economic sanctions have played in U.S. policy toward Russia in the wake of Moscow's resurgence. The United States reacted to Russia's annexation of Crimea by imposing individual sanctions on prominent Russian and Ukrainian individuals.¹⁹³ It also imposed economic sanctions on

184. Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (July 4, 1999); Exec. Order No. 13,009, 63 Fed. Reg. 45,167 (Aug. 20, 1998); Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

185. Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 21, 1995).

186. See CHRISTOPHER A. CASEY ET AL., CONG. RES. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 16–23 (2019), <https://fas.org/sgp/crs/natsec/R45618.pdf> [<https://perma.cc/FTB5-XFER>] (stating that “[o]riginally, IEEPA was used to target foreign governments; however, [since 1990,] [p]residents have increasingly targeted groups and individuals”); see also Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 13–14 (2005) (stating Clinton “broke new ground under IEEPA” by targeting terrorist groups and their members rather than states); Savage, *supra* note 182, at 37 (“When the IEEPA was originally created, it was used against nations and national corporations Now our national interests have necessitated that the IEEPA evolve further, so that it can be used to block transactions, freeze and seize assets of terrorists who are basically stateless . . .”).

187. Chesney, *supra* note 186, at 20.

188. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), *amended in* Exec. Order No. 13,886, 84 Fed. Reg. 48,041 (Sept. 9, 2019) (Modernizing Sanctions to Combat Terrorism).

189. See Zac Copeland, *The National Emergency Under Executive Order 13224 Moves into Year 16*, LAWFARE (Nov. 3, 2016, 11:00 AM), <https://www.lawfareblog.com/national-emergency-under-executive-order-13224-moves-year-16> [<https://perma.cc/YL27-4XLB>].

190. Continuation of the National Emergency With Respect to Certain Terrorist Attacks, 83 Fed. Reg. 46,067 (Sept. 10, 2018).

191. The number is the result of a search using the tag “SDGT” in the text version of the consolidated SDN list. See Office of Foreign Assets Control, *Alphabetical Listing of Specially Designated Nationals and Blocked Persons (“SDN List”)*, U.S. DEPT OF TREASURY, <https://www.treasury.gov/ofac/downloads/sdnlist.txt> [<https://perma.cc/9JGC-4YS7>].

192. See Kathy Gilsinan, *A Boom Time for U.S. Sanctions*, ATLANTIC (May 3, 2019), <https://www.theatlantic.com/politics/archive/2019/05/why-united-states-uses-sanctions-so-much/588625/>.

193. Exec. Order No. 13,685, 79 Fed. Reg. 77,357 (Dec. 19, 2014) (entitled “Blocking Property of Certain Persons and Prohibiting Certain Transactions [w]ith Respect to the Crimea Region of Ukraine”); Exec. Order No. 13,662, 79 Fed. Reg. 16,169 (Mar. 20, 2014) (entitled “Blocking Property of Additional Persons Contributing to the Situation in Ukraine”); Exec. Order No. 13,661, 79 Fed. Reg. 15,535 (Mar.

persons involved in Russia's effort to interfere with the 2016 U.S. elections, including hackers, pursuant to both the CAATSA and the IEEPA.¹⁹⁴ In addition, the United States sanctioned Russian nationals for corruption and human rights abuses.¹⁹⁵ Executive Order 13,848 authorizes sanctions against any foreign person involved in U.S. election meddling.¹⁹⁶

Individual sanctions have been a significant component of U.S. policy on other key international challenges as well. One such challenge is nonproliferation of weapons of mass destruction. In 2005, building on preliminary groundwork laid by the H. W. Bush and Clinton Administrations, President W. Bush issued Executive Order 13,382, authorizing the blocking of the assets of proliferators and their supporters.¹⁹⁷ OFAC has since routinely relied on this Order for new proliferator designations. The United States has also imposed close to one thousand individual sanctions concerning Iran's nuclear program, its regional activities, and human rights abuses.¹⁹⁸ Individual sanctions have similarly played a

16, 2014) (entitled "Blocking Property of Additional Persons Contributing to the Situation in Ukraine"); Exec. Order No. 13,660, 79 Fed. Reg. 13,493 (Mar. 6, 2014) (entitled "Blocking Property of Certain Persons Contributing to the Situation in Ukraine").

194. Exec. Order No. 13,757, 82 Fed. Reg. 1 (Dec. 28, 2016) (entitled "Taking Additional Steps to Address the National Emergency [w]ith Respect to Significant Malicious Cyber-Enabled Activities"); Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Russian Federal Security Service Enablers (June 11, 2018), <https://home.treasury.gov/news/press-releases/sm0410> [<https://perma.cc/CC34-89R6>]; Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Russian Cyber Actors for Interference with the 2016 U.S. Elections and Malicious Cyber-Attacks (Mar. 15, 2018), <https://home.treasury.gov/news/press-releases/sm0312> [<https://perma.cc/J2PH-JGF7>] (noting that the Trump administration designated "more than 100 individuals and entities" under Russia-related authorities).

195. Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Dec. 20, 2017) (entitled "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption"); Press Release, U.S. Dep't of the Treasury, Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity (Apr. 6, 2018), <https://home.treasury.gov/news/press-releases/sm0338> [<https://perma.cc/J67X-T5WX>]; Press Release, U.S. Dep't of the Treasury, Treasury Targets Individuals Involved in the Sergei Magnitsky Case and Other Gross Violations of Human Rights in Russia (Dec. 20, 2017), <https://home.treasury.gov/news/press-releases/sm0240> [<https://perma.cc/ZH3T-YTTK>].

196. Exec. Order No. 13,848, 83 Fed. Reg. 46,843 (Sept. 12, 2018) (entitled "Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election"); *see also* Press Release, U.S. Dep't of the Treasury, Treasury Targets Assets of Russian Financier Who Attempted to Influence 2018 U.S. Elections (Sept. 30, 2019), <https://home.treasury.gov/news/press-releases/sm787> [<https://perma.cc/R5H2-S4HS>].

197. Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005) (entitled "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters").

198. On the nuclear and regional aspects, *see* Exec. Order No. 13,876, 84 Fed. Reg. 30,573 (June 24, 2019) (entitled "Imposing Sanctions with Respect to Iran"); Exec. Order No. 13,846, 83 Fed. Reg. 38,939 (Aug. 6, 2018) (entitled "Reimposing Certain Sanctions with Respect to Iran"); Press Release, U.S. Dep't of State, Maximum Pressure Campaign on the Regime in Iran (Apr. 4, 2019), <https://ge.usembassy.gov/maximum-pressure-campaign-on-the-regime-in-iran-april-4/> [<https://perma.cc/FP8G-9S2S>]; *see also* Elena Chachko, *Trump Withdraws from the Iran Nuclear Agreement: What Comes Next*, LAWFARE (May 8, 2018, 7:30 PM), <https://www.lawfareblog.com/trump-withdraws-iran-nuclear-agreement-what-comes-next> [<https://perma.cc/XVM8-EVKL>]. On human rights, *see* Exec. Order 13,606, 77 Fed. Reg. 24,571 (Apr. 22, 2012) (entitled "Blocking the Property and Suspending Entry Into the United States of Certain Persons [w]ith Respect to Grave Human Rights Abuses by the Governments of Iran and Syria via Information Technology"); Exec. Order No. 13,553, 75 Fed. Reg. 60,567 (Sept. 28,

key role in the United States' policy on North Korea.¹⁹⁹

Other key areas in which the United States has applied individual sanctions include the situation in Syria²⁰⁰ and fighting malicious cyber activity.²⁰¹ The United States also recently sanctioned seventeen Saudi nationals for their role in the murder of journalist Jamal Khashoggi in Turkey.²⁰² And the list goes on. In the past two decades, U.S. administrations have applied individual economic sanctions to address situations in Belarus,²⁰³ Burundi,²⁰⁴ Central African Republic,²⁰⁵ Congo,²⁰⁶

2010) (entitled "Blocking Property of Certain Persons [w]ith Respect to Serious Human Rights Abuses by the Government of Iran and Taking Certain Other Actions").

199. See Exec. Order. 13,810, 82 Fed. Reg. 44,705 (Sept. 20, 2017) (entitled "Imposing Additional Sanctions [w]ith Respect to North Korea"); Exec. Order. No. 13,722, 81 Fed. Reg. 14,943 (Mar. 15, 2016) ("Blocking Property of the Government of North Korea and the Workers' Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea"); Exec. Order. No. 13,687, 80 Fed. Reg. 819 (Jan. 2, 2015) (entitled "Imposing Additional Sanctions [w]ith Respect [t]o North Korea"); Exec. Order No. 13,551, 75 Fed. Reg. 53,873 (Aug. 30, 2010) (entitled "Blocking Property of Certain Persons [w]ith Respect to North Korea").

200. See Exec. Order No. 13,399, 71 Fed. Reg. 25,059 (Apr. 25, 2016) (entitled "Blocking Property of Additional Persons in Connection [w]ith the National Emergency [w]ith Respect to Syria"); Exec. Order No. 13,608, 77 Fed. Reg. 26,409 (May 1, 2012) (entitled "Prohibiting Certain Transactions [w]ith and Suspending Entry [i]nto the United States of Foreign Sanctions Evaders [w]ith Respect to Iran and Syria"); Exec. Order No. 13,606, 77 Fed. Reg. 24,571 (Apr. 22, 2012) (entitled "Blocking the Property and Suspending Entry [i]nto the United States of Certain Persons [w]ith Respect to Grave Human Rights Abuses by the Governments of Iran and Syria via Information Technology"); Exec. Order No. 13,582, 76 Fed. Reg. 52,209 (Aug. 17, 2011) (entitled "Blocking Property of the Government of Syria and Prohibiting Certain Transactions [w]ith Respect to Syria"); Exec. Order No. 13,573, 76 Fed. Reg. 29,143 (May 18, 2011) (entitled "Blocking Property of Senior Officials of the Government of Syria"); Exec. Order No. 13,572, 76 Fed. Reg. 24,787 (Apr. 29, 2011) (entitled "Blocking Property of Certain Persons [w]ith Respect to Human Rights Abuses in Syria"); Exec. Order No. 13,460, 73 Fed. Reg. 8991 (Feb. 13, 2008) (entitled "Blocking Property of Additional Persons in Connection [w]ith the National Emergency [w]ith Respect to Syria"); Exec. Order No. 13,338, 69 Fed. Reg. 26,751 (May 11, 2004) (entitled "Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria"); Press Release, U.S. Dep't of the Treasury, Treasury Designates Syrian Oligarch Samer Foz and His Luxury Reconstruction Business Empire (June 11, 2019), <https://home.treasury.gov/news/press-releases/sm704> [<https://perma.cc/Y4JC-PCU6>].

201. See Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015) (entitled "Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities"), *amended in* Exec. Order No. 13,757, 82 Fed. Reg. 1 (Dec. 28, 2016) (entitled "Taking Additional Steps to Address the National Emergency [w]ith Respect to Significant Malicious Cyber-Enabled Activities"); Office of Foreign Assets Control, Cyber-related Designations, U.S. DEP'T TREASURY (Mar. 23, 2018), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180323.aspx> [<https://perma.cc/9TE9-ZWMS>].

202. Press Release, U.S. Dep't of the Treasury, Treasury Sanctions 17 Individuals for Their Roles in the Killing of Jamal Khashoggi (Nov. 15, 2018), <https://home.treasury.gov/news/press-releases/sm547> [<https://perma.cc/8U6X-JKVR>].

203. See Exec. Order No. 13,405, 71 Fed. Reg. 35,485 (June 16, 2006) (entitled "Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus").

204. See Exec. Order No. 13,712, 80 Fed. Reg. 73,633 (Nov. 22, 2015) (entitled "Blocking Property of Certain Persons Contributing to the Situation in Burundi").

205. See Exec. Order No. 13,667, 79 Fed. Reg. 28,387 (May 12, 2014) (entitled "Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic").

206. See Exec. Order No. 13,413, 71 Fed. Reg. 64,105 (Oct. 27, 2006) (entitled "Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo"), *amended in* Exec. Order No. 13,671, 79 Fed. Reg. 39,949 (July 8, 2014) (entitled "Taking Additional Steps to

Iraq,²⁰⁷ Lebanon,²⁰⁸ Libya,²⁰⁹ Somalia,²¹⁰ Sudan,²¹¹ Yemen,²¹² Venezuela,²¹³ and Zimbabwe.²¹⁴ Thousands of individuals and entities have been designated in the framework of these policies.²¹⁵

1. Individual Economic Sanctions and Administrative Agencies

Among the measures discussed in this Article, the process of imposing targeted economic sanctions, led by OFAC (IEEPA) and the State Department (AEDPA), most closely resembles “classic” agency action. The AEDPA fleshes out the designation process that the Secretary of State must follow.²¹⁶ By contrast, OFAC’s designation process is somewhat opaque to the outside observer and depends on the particular authority the agency relies upon in a given case. OFAC draws on information from multiple sources, including relevant U.S. agencies, and puts together an evidentiary memorandum to support a proposed designation.²¹⁷ Other

Address the National Emergency [w]ith Respect to the Conflict in the Democratic Republic of the Congo”).

207. See Exec. Order No. 13,438, 72 Fed. Reg. 39,719 (July 17, 2007) (entitled “Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq”); Exec. Order No. 13,315, 68 Fed. Reg. 52,315 (Aug. 28, 2003) (entitled “Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions”), *modified by* Exec. Order No. 13,350, 69 Fed. Reg. 46,055 (July 29, 2004) (entitled “Termination of Emergency Declared in Executive Order 12,722 [w]ith Respect to Iraq and Modification of Executive Order 13,290, Executive Order 13,303, and Executive Order 13,315”).

208. See Exec. Order No. 13,441, 72 Fed. Reg. 43,499 (Aug. 1, 2007) (entitled “Blocking Property of Persons Undermining the Sovereignty of Lebanon or Its Democratic Processes and Institutions”).

209. See Exec. Order No. 13,726, 81 Fed. Reg. 23,559 (Apr. 19, 2016) (entitled “Blocking Property and Suspending Entry [i]nto the United States of Persons Contributing to the Situation in Libya”); Exec. Order No. 13,566, 76 Fed. Reg. 11,315 (Feb. 25, 2011) (entitled “Blocking Property and Prohibiting Certain Transactions Related to Libya”).

210. See Exec. Order No. 13,620, 77 Fed. Reg. 43,483 (July 20, 2012) (entitled “Taking Additional Steps to Address the National Emergency [w]ith Respect to Somalia”); Exec. Order No. 13,536, 75 Fed. Reg. 19,869 (Apr. 12, 2010) (entitled “Blocking Property of Certain Persons Contributing to the Conflict in Somalia”).

211. See Exec. Order No. 13,664, 79 Fed. Reg. 19,283 (Apr. 3, 2014) (entitled “Blocking Property of Certain Persons [w]ith Respect to South Sudan”); Exec. Order No. 13,400, 71 Fed. Reg. 25,483 (Apr. 26, 2006) (entitled “Blocking Property of Persons in Connection [w]ith the Conflict in Sudan’s Darfur Region”).

212. See Exec. Order No. 13,611, 77 Fed. Reg. 29,533 (May 16, 2012) (entitled “Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen”).

213. See Exec. Order No. 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015) (entitled “Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela”).

214. See Exec. Order No. 13,469, 73 Fed. Reg. 43,841 (July 25, 2008) (entitled “Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe”); Exec. Order No. 13,391, 70 Fed. Reg. 71,201 (Nov. 22, 2005) (entitled “Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe”); Exec. Order No. 13,288, 68 Fed. Reg. 11,457 (Mar. 6, 2003) (entitled “Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe”).

215. See Office of Foreign Assets Control, *Specially Designated Nationals and Blocked Persons List*, U.S. DEP’T TREASURY (Nov. 26, 2019), <https://www.treasury.gov/ofac/downloads/sdnlist.pdf> [<https://perma.cc/ZQA6-WPD6>].

216. See 8 U.S.C. § 1189(a)(2) (2012).

217. See Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendant’s Motion to Dismiss, or in the Alternative, for Summary Judgment at ¶¶ 24–27, *KindHearts for Charitable Dev., Inc. v. Paulson*, 647 F. Supp. 2d 857 (N.D. Ohio 2008); *Filing a*

agencies, including the Justice and State Departments, then review the proposal.²¹⁸ A final designation is advertised in the Federal Register.²¹⁹

Although the IEEPA is silent on due process for blocked individuals, OFAC's elaborate regulations include procedural safeguards.²²⁰ OFAC regulations allow a designated person or entity to seek administrative reconsideration of the designation.²²¹ A blocked person may contest the basis for the designation. The person may propose "remedial steps" that would negate the basis for the designation.²²² The blocked person may also request a meeting with OFAC. After completing its review, OFAC provides a written decision to the blocked person.²²³ According to OFAC, this administrative review offers a genuine opportunity to challenge designations because it removes hundreds of names from the Specially Designated Nationals and Blocked Persons List (SDN List) each year.²²⁴

2. Individual Economic Sanctions and the Courts

The Supreme Court has yet to review an AEDPA or OFAC designation directly.²²⁵ There have been relatively few individual sanctions cases in lower courts as well, considering the volume of individual sanctions imposed in the past two decades. Individual sanctions review cases have been related to either terrorism or narcotics.²²⁶ Judicial treatment of designations has varied. In most cases,

Petition for Removal from an OFAC List, U.S. DEP'T OF TREASURY (May 2, 2017), <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx> [https://perma.cc/2RVC-U9AX].

218. *See id.*

219. *See id.*

220. *See* 31 C.F.R. ch. V (2002); *see also* Barnes, *supra* note 17, at 204–06.

221. *See* 31 C.F.R. § 501.807 (2018).

222. *Id.*

223. *See id.*

224. *See id.*

225. *But see* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (rejecting a First Amendment challenge to the prohibition on providing material support to FTOs).

226. For terrorism (SDGT) designations under Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (entitled "Blocking Property and Prohibiting Transactions [w]ith Persons Who Commit, Threaten to Commit, or Support Terrorism"), *see, for example*, *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*, 686 F.3d 965, 970 (9th Cir. 2012); *Islamic American Relief Agency v. Gonzales*, 477 F.3d 728, 731 (D.C. Cir. 2007); *Holy Land Foundation for Relief & Development v. Ashcroft*, 333 F.3d 156, 159 (D.C. Cir. 2003); *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002); *Kadi v. Geithner*, 42 F. Supp. 3d 1, 5 (D.D.C. 2012); *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F. Supp. 2d 857, 864 (N.D. Ohio 2009); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 66 (D.D.C. 2008); *Salah v. U.S. Department of Treasury*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/salah-v-us-department-treasury> [https://perma.cc/YHK3-JKKA] (last visited Mar. 2, 2020); *see also* Fares v. Smith, 901 F.3d 315 (D.C. Cir. 2018) (narcotics).

For FTO designations under AEDPA, *see, for example*, *People's Mojahedin Organization of Iran v. United States Department of State (PMOI III)*, 613 F.3d 220 (D.C. Cir. 2010); *Chai v. United States Department of State*, 466 F.3d 125, 126 (D.C. Cir. 2006); *National Council of Resistance of Iran v. United States Department of State (NCRI II)*, 373 F.3d 152, 153 (D.C. Cir. 2004); *People's Mojahedin Organization of Iran v. United States Department of State (PMOI II)*, 327 F.3d 1238, 1239 (D.C. Cir. 2003); *32 County Sovereignty Committee v. United States Department of State*, 292 F.3d 797, 798 (D.C. Cir. 2002); *National Council of Resistance of Iran v. United States Department of State (NCRI I)*, 251

courts have deferred to the agencies and their expertise in national security matters. In a few cases, however, courts have attempted to constrain these unique administrative mechanisms that deprive individuals of key interests on foreign and security policy grounds.

Because the IEEPA is silent on the standard of judicial review of individual designations under its authority,²²⁷ the APA governs their review.²²⁸ Under the general APA standard, a designation should be struck down if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²²⁹ In applying this standard, courts have focused on whether designations were supported by substantial evidence. By contrast, the AEDPA provides for review of FTO designations before the D.C. Circuit and outlines a standard similar to the APA’s.²³⁰

The D.C. Circuit has dismissed most cases involving FTOs designated under the AEDPA.²³¹ In one early case, *People’s Mojahedin Organization of Iran v. U.S. Department of State (PMOI I)*, the court denied petitions for review from Iranian group People’s Mojahedin Organization of Iran (PMOI) and the Sri-Lankan Tamil Tigers.²³² Distinguishing *JAFRC*, the 1951 Communist blacklisting case,²³³ the court held that the two groups could not assert Fifth Amendment due process rights because they lacked sufficient ties to the United States. It therefore limited its review to the AEDPA criteria.²³⁴ Even within the statutory framework, the court declined, under the political question doctrine, to review the Secretary of State’s finding that the groups posed a security threat.²³⁵

Later challenges from PMOI and its alleged alias, the National Council of Resistance of Iran (NCRI), proved more successful. In *National Council of Resistance of Iran v. U.S. Department of State (NCRI I)*, the court put a thumb on

F.3d 192, 195–96 (D.C. Cir. 2001); *People’s Mojahedin Organization of Iran v. United States Department of State (PMOI I)*, 182 F.3d 17, 18 (D.C. Cir. 1999).

227. *But see* 50 U.S.C. § 1702(c) (2012) (allowing the President to share classified material with a reviewing court); Slocum, *supra* note 181, at 396. Courts have interpreted presidential authority under the IEEPA broadly. *See Dames & Moore v. Regan*, 453 U.S. 654, 677 (1981) (“[T]he IEEPA delegates broad authority to the President to act in times of national emergency with respect to property of a foreign country.”); *see also* ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 86 (2010) (stating that the IEEPA “has been construed by the courts to grant broad executive power”); Guymon, *supra* note 182, at 861 (“U.S. courts typically decline to question the executive’s invocation of IEEPA . . .”).

228. *See, e.g., Al Haramain Islamic Found., Inc.*, 686 F.3d at 976 (“The judicial review provisions of the Administrative Procedure Act . . . govern challenges to OFAC’s designation decisions.” (citing *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 496–97 & 496 n.18 (2004))).

229. 5 U.S.C. § 706(2)(A) (2012).

230. 8 U.S.C. § 1189(c) (2012); *see* Slocum, *supra* note 181, at 395–96.

231. *See, e.g., PMOI III*, 613 F.3d at 222–25; *Chai*, 466 F.3d at 125; 32 *Cty. Sovereignty Comm.*, 292 F.3d at 797.

232. 182 F.3d 17 (D.C. Cir. 1999).

233. *Joint Anti-Fascist Refugee Comm. v. McGrath (JAFRC)*, 341 U.S. 123, 142 (1951); *see supra* note 25 and accompanying text.

234. *PMOI I*, 182 F.3d at 22.

235. *Id.* at 25.

the procedural scale in favor of the designated groups.²³⁶ The court found that the PMOI alias' (and therefore PMOI's) U.S. presence was sufficient to assert Fifth Amendment due process rights.²³⁷ The court then assessed whether the designations implicated the Due Process Clause. It concluded that at least one protected interest, the groups' property interests in the United States that could be blocked as a result of their FTO designations, was sufficient to entitle them to due process.²³⁸ In assessing what process the groups were due, the court applied the *Mathews v. Eldridge* tripartite balancing test.²³⁹ The *Mathews* test weighs the protected individual interest at stake and the risk of erroneous deprivation of that interest against the agency's interests.²⁴⁰ The court held that the Secretary of State should typically give notice and a genuine opportunity to be heard to a group prior to its FTO designation.²⁴¹

Judicial review of OFAC designations has been deferential as well. The D.C. Circuit dismissed challenges from two Muslim charities of their designation as Specially Designated Global Terrorists.²⁴² The D.C. District Court similarly dismissed cases brought by a Saudi citizen and alleged al-Qaeda financier, Yasin Kadi.²⁴³ However, not all courts have exhibited the same level of deference in reviewing OFAC designations.

For example, in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*,²⁴⁴ the Ninth Circuit reviewed OFAC's designation of the Oregon branch of an international Muslim charity for ties to al-Qaeda.²⁴⁵ Applying the APA's arbitrary and capricious standard, the court first assessed whether there was substantial evidence to support Al Haramain's designation. After reviewing classified material, the court answered this question in the affirmative.²⁴⁶ The court then considered Al Haramain's Fifth Amendment procedural due process claims.²⁴⁷ Although it recognized that OFAC terrorism designations implicate a strong government interest in national security, the court concluded that the

236. 251 F.3d 192 (D.C. Cir. 2001).

237. *Id.* at 200.

238. *Id.*

239. *Id.* at 208; *see Mathews v. Eldridge*, 424 U.S. 319 (1976).

240. *See* 424 U.S. 319 (1976).

241. *NCRI I*, 251 F.3d at 208; *see also* *People's Mojahedin Org. of Iran v. U.S. Dep't of State (PMOI III)*, 613 F.3d 220 (D.C. Cir. 2010) (remanding PMOI's FTO redesignation to the Secretary of State after finding due process violations).

242. *See Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003).

243. *See Kadi v. Geithner*, 42 F. Supp. 3d 1, 5 (D.D.C. 2012); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008); *see also* *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002). For an analysis of *Kadi*, *see* Douglas Cantwell, Note, *A Tale of Two Kadis: Kadi II, Kadi v. Geithner & U.S. Counterterrorism Finance Efforts*, 53 COLUM. J. TRANSNAT'L L. 652 (2015).

244. 686 F.3d 965 (9th Cir. 2012).

245. *See also* *KindHearts for Charitable Dev., Inc. v. Paulson*, 647 F. Supp. 2d 857, 918–19 (N.D. Ohio 2008) (holding that OFAC violated the Fifth and Fourth Amendment in provisionally designating an Ohio nonprofit without notice, hearing, or warrant; and that OFAC's restriction of funds for plaintiff's legal fees was arbitrary and capricious).

246. *Al Haramain Islamic Found., Inc.*, 686 F.3d at 979.

247. *Id.*

Mathews analysis favored Al Haramain.²⁴⁸ Although OFAC was entitled to designate the group based on undisclosed classified material, the court held, the agency should at least have disclosed a summary of the classified evidence or offered another mitigating measure.²⁴⁹ The court further held that OFAC's failure to give adequate notice to Al Haramain violated due process.²⁵⁰ Still, the court ultimately rejected Al Haramain's Fifth Amendment claims, finding that OFAC's violations were nonprejudicial and therefore harmless.²⁵¹ By contrast, the court concluded that OFAC had violated Al Haramain's Fourth Amendment rights by blocking its assets without obtaining a warrant,²⁵² and that the prohibition on coordinated advocacy with Al Haramain under EO 13,224 violated the First Amendment.²⁵³

As this section illustrates, individual economic sanctions, particularly OFAC designations, have become a significant component of U.S. foreign and security policy in the past two decades. OFAC has operated within a broad framework that includes the IEEPA and a slew of executive orders delegating designation power to the Treasury Department and other agencies based on flexible criteria. OFAC exercises considerable discretion in collecting information, putting together listing recommendations, and reviewing listings after they are challenged through the administrative reconsideration process. Despite the resemblance of agency decisionmaking in this context to ordinary administrative decisionmaking, judicial oversight has been limited and confined to specific policy areas. When courts have ruled against the government, it was mostly on constitutional grounds. Constitutional protection is not available to the vast majority of designated persons, who tend to be aliens without substantial U.S. ties. The main oversight of this practice is therefore conducted through the mechanism that exists within the administrative state.

D. SECURITY WATCHLISTS, NO-FLY LISTS, AND OTHER TRAVEL RESTRICTIONS

Several authorities allow the Executive to impose travel bans and related restrictions on individuals for foreign policy or national security reasons. The main statute governing this area is the Immigration and Nationality Act, codified in pertinent part in title 8, section 1182 of the U.S. Code.²⁵⁴ Section 1182 outlines

248. *Id.* at 985.

249. *Id.* at 982–84. The court was careful not to categorically require OFAC to provide limited disclosure of classified material, noting that whether disclosure is required should be decided on a case-by-case basis. *Id.*

250. *Id.* at 985.

251. *Id.* at 988.

252. *Id.* at 995. The Ninth Circuit amended the opinion on denial of rehearing, clarifying that the warrant requirement applies only to U.S.-located assets of U.S. persons. *Id.* at 993.

253. *Id.* at 1001; *cf.* Holder v. Humanitarian Law Project, 561 U.S. 1, 8 (2010) (finding that the material support statute did not violate the First Amendment rights of groups that wished to support the lawful activities of two FTOs).

254. 8 U.S.C. § 1182 (2012). Other provisions providing for individualized national security measures are included in Chapter 5 of Title 8 of the U.S. Code, which details removal procedures for individual alien terrorists and establishes a specialized Article III court for this purpose. However, the Court has not adjudicated a single case to date. *See Alien Terrorist Removal Court, 1996–Present*, FED.

categories of inadmissible aliens. For instance, section 1182(a)(3)(C) empowers the Secretary of State to ban the entry of aliens whose “entry or proposed activities” could have “serious adverse foreign policy consequences” for the United States.²⁵⁵ Section 1182(a)(3)(B) governs inadmissibility on grounds of involvement in terrorism.²⁵⁶ Section 1182(f) empowers the President to suspend visas for aliens whose entry would be “detrimental to the interests of the United States.”²⁵⁷ Among other examples, the Trump Administration invoked these authorities to impose a travel ban on nationals from predominantly Muslim countries and to revoke the U.S. visa of the chief prosecutor of the International Criminal Court.²⁵⁸

The main area of growth in security-related individual travel restrictions, however, has been the U.S. watchlisting system. After 9/11, the Bush Administration expanded the practice of maintaining classified lists of terrorism suspects for various security purposes. The government’s watchlisting policies are shrouded in secrecy, but presidential directives and executive orders, as well as a National Counterterrorism Center (NCTC) Watchlisting Guidance leaked in 2014, provide insight into the administration of those lists.²⁵⁹

In 2003, President Bush issued Homeland Security Presidential Directive 6 (HSPD-6) on screening information for counterterrorism purposes. HSPD-6 instructed the Attorney General to “establish an organization to consolidate the government’s approach to terrorism screening and provide for the appropriate and lawful use of [t]errorist [i]nformation in screening processes.”²⁶⁰ HSPD-6 also instructed all relevant agencies to regularly share information with that organization, later incorporated into the NCTC.²⁶¹

As part of the implementation of HSPD-6, the Attorney General, the Secretaries of State and Homeland Security, and the Director of National Intelligence signed a Memorandum of Understanding (MOU) establishing the

JUD. CTR., <https://www.fjc.gov/history/courts/alien-terrorist-removal-court-1996-present> [https://perma.cc/YFZ8-YJT9] (last visited Mar. 2, 2020).

255. 8 U.S.C. § 1181(a)(3)(C) (2012).

256. *Id.* § 1181(a)(3)(B).

257. *Id.* § 1182(f). See *Trump v. Hawaii (Travel Ban Case)*, 138 S. Ct. 2392 (2018), for a broad interpretation of this statute.

258. See *Travel Ban Case*, 138 S. Ct. at 2392; Mike Pompeo (@SecPompeo), TWITTER (Mar. 15, 2019, 3:38 PM), <https://twitter.com/secpompeo/status/1106640744868122625> [https://perma.cc/HKN7-7GKJ]; see also Elena Chachko, *The U.S. Names the Iranian Revolutionary Guard a Terrorist Organization and Sanctions the International Criminal Court*, LAWFARE (Apr. 10, 2019, 4:05 PM), <https://www.lawfareblog.com/us-names-iranian-revolutionary-guard-terrorist-organization-and-sanctions-international-criminal> [https://perma.cc/8WKD-B6GZ].

259. See NAT’L COUNTERTERRORISM CTR., WATCHLISTING GUIDANCE (2013) [hereinafter NCTC GUIDANCE], https://www.eff.org/files/2014/07/24/2013-watchlist-guidance_1.pdf [https://perma.cc/J3YL-B87X]; see also Anya Bernstein, *The Hidden Costs of the Terrorist Watch Lists*, 61 BUFFALO L. REV. 461 (2013).

260. Directive on Integration and Use of Screening Information to Protect Against Terrorism, 39 WEEKLY COMP. PRES. DOC. 1234 (Sept. 16, 2003); see also Hu, *Big Data*, *supra* note 41, at 1773–76.

261. See Intelligence Reform and Terrorism Prevention (IRTPA) Act of 2004, Pub. L. 108-458, § 1021, 118 Stat. 3638, 3672–75; Exec. Order No. 13,354, 69 Fed. Reg. 53,589 (Aug. 27, 2004) (National Counterterrorism Center).

Terrorism Screening Center (TSC).²⁶² Housed in the FBI,²⁶³ the TSC is the government's focal point for terrorist screening information. TSC administers the Terrorist Screening Database (TSDB)—an unclassified database of terrorist identity information that constitutes the consolidated Terrorist Watchlist.

Two main sources feed into the TSDB: NCTC's Terrorist Identities Datamart Environment (TIDE), which contains information concerning known or suspected international terrorists; and TSC's Terrorist Review and Examinations Unit (TREX), which contains information on known or suspected "purely domestic" terrorists.²⁶⁴ TSDB records are accessible to numerous "partners" at the federal, state, and local level, as well as to certain private parties and foreign governments.²⁶⁵ The Transportation Security Administration (TSA), the State Department's consular database, the Customs and Border Protection Agency, and the National Crime Information Center are among those partners.²⁶⁶ In addition to the consolidated Terrorist Watchlist, the government maintains the "No Fly," "Selectee," and "Expanded Selectee" Lists as well as the Known or Suspected Terrorist (KST) File—all subsets of the consolidated list.²⁶⁷ Individuals placed on the various watchlists suffer severe consequences. They may be barred from traveling by air or sea or undergo invasive screening at airports. They may also be denied a visa or entry into the United States and face repeated questioning and even detention in the United States or abroad. Their relatives and associates might also be exposed to certain restrictions.²⁶⁸

An individual must meet basic identification criteria as well as broad substantive criteria to be added to the consolidated Terrorist Watchlist (TSDB): a "reasonable suspicion" that the individual is "a known or suspected terrorist."²⁶⁹ Importantly, even individuals who do not meet these criteria may end up in NCTC's database (TIDE) and suffer certain consequences. United States nationals may be included on watchlists subject to additional review.²⁷⁰ By June 2016, 1.5 million individuals were in NCTC's TIDE database, and roughly one million

262. See NCTC GUIDANCE, *supra* note 259, app. 3. An information sharing MOU among relevant national security agencies was also signed in March 2003. *Id.* at 6 n.6.

263. See *Terrorist Screening Center*, FBI, <https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc> [<https://perma.cc/PMD8-NKBW>] (last visited Mar. 4, 2020).

264. NCTC GUIDANCE, *supra* note 259, at 7.

265. See *Elhady v. Kable*, 391 F. Supp. 3d 562, 569–70 (E.D. Va. 2019).

266. See NCTC GUIDANCE, *supra* note 259, at 24–25.

267. *Id.* at 50–57. On the KST, see also CIVIL LIBERTIES & NAT'L SEC. CLINIC, YALE LAW SCH., TRAPPED IN A BLACK BOX: GROWING TERRORISM WATCHLISTING IN EVERYDAY POLICING (2016), <https://www.aclu.org/report/trapped-black-box-growing-terrorism-watchlisting-everyday-policing> [<https://perma.cc/56T8-D8WG>].

268. See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1149 (D. Or. 2014).

269. See NCTC GUIDANCE, *supra* note 259, at 12–13; see also *Elhady*, 391 F. Supp. 3d at 568 (noting that inclusion in the TSDB requires "a reasonable suspicion that the individual is engaged, has been engaged, or intends to engage, in conduct constituting, in preparation for, in aid or in furtherance of, or related to, terrorism and/or terrorist activities").

270. See NCTC GUIDANCE, *supra* note 259, at 19–20.

were on the Terrorist Watchlist.²⁷¹ By June 2017, the number of individuals on the TSDB reached about 1.2 million.²⁷²

Additional presidential directives and executive orders followed HSPD-6, aiming to enhance terrorism-related screening, improve information sharing among agencies, and regulate the use of biometrics in this context.²⁷³ The NCTC Guidance, issued early in President Obama's second term, indicates that this framework remained in place under President Obama with certain modifications. President Trump issued two National Security Policy Memoranda (NSPMs) that appear to augment the watchlisting system. NSPM-7 instructed national security agencies to improve the integration and sharing of "threat actor information" on individuals, groups, and networks, and to further develop related technological infrastructure.²⁷⁴ It cited threats beyond terrorism, including cyber counterintelligence and proliferation. To supplement the existing watchlisting bureaucracy, NSPM-9 established an interagency National Vetting Center within the Homeland Security Department.²⁷⁵

1. The Watchlisting Process and Administrative Agencies

The legal framework that governs the watchlisting enterprise established a sprawling bureaucracy, with multiple administrative agencies sharing related responsibilities. NCTC, TSC, and other agencies may nominate individuals to TIDE (NCTC) or the TSDB (TSC) if available intelligence indicates that they meet the listing criteria. Aggregator agencies, primarily NCTC and TSC, receive and retain information on terrorism suspects. Screening agencies such as TSA vet individuals against the TSDB list, as well as the No Fly and Selectee lists.²⁷⁶

271. See ACLU, WHAT'S WRONG WITH THE GOVERNMENT'S RULES FOR WATCHLISTING 4, >https://www.aclu.org/sites/default/files/field_document/watchlisting_guidance_takeaways.pdf [<https://perma.cc/3MEM-KHWF>]; see also CIVIL LIBERTIES & NAT'L SEC. CLINIC, YALE LAW SCH., *supra* note 267, at 1–2 ("The number of individuals tracked by the VGTOF/KST File has increased exponentially. From just over 13,000 entries in 2003, VGTOF ballooned to 272,198 entries in 2008 . . .").

272. See *Elhady v. Kable*, 391 F. Supp. 3d 562, 568 (E.D. Va. 2019).

273. See Directive on Comprehensive Terrorist-Related Screening Procedures, 40 WEEKLY COMP. PRES. DOC. 1707 (Aug. 27, 2004); Exec. Order No. 13,356, 69 Fed. Reg. 53,599 (Aug. 27, 2004) (entitled "Strengthening the Sharing of Terrorism Information [t]o Protect Americans"); Directive on Biometrics for Identification and Screening to Enhance National Security, 44 WEEKLY COMP. PRES. DOC. 788 (June 5, 2008).

274. Memorandum on Integration, Sharing, and Use of National Security Threat Actor Information to Protect Americans (NSPM-7), 2017 DAILY COMP. PRES. DOC. 722 (Oct. 4, 2017).

275. See DEP'T OF HOMELAND SEC., PLAN TO IMPLEMENT THE PRESIDENTIAL MEMORANDUM ON OPTIMIZING THE USE OF FEDERAL GOVERNMENT INFORMATION IN SUPPORT OF THE NATIONAL VETTING ENTERPRISE 11 (2018), <https://perma.cc/YFW2-KE68>; Memorandum on Optimizing the Use of Federal Government Information in Support of the National Vetting Enterprise (NSPM-9), 2018 DAILY COMP. PRES. DOCS. 78 (Feb. 6, 2018).

276. Screeners may include federal, state, local, tribal, territorial, or foreign governments and certain private entities. Screening officials include homeland security officers, consular affairs officers, transportation safety personnel, and, in certain cases, officials of foreign governments. TIDE and other records that do not meet the TSDB inclusion criteria may still be used for immigration and visa screening by DHS and the State Department. See NCTC GUIDANCE, *supra* note 259, at 16.

TSC coordinates the activity of screeners on the ground and operational responses in case of a match, which may include additional screening or denial of boarding, denial of admission to the United States, and other measures, depending on the list.²⁷⁷

The newly established National Vetting Center and its interagency oversight board add another administrative layer to this watchlisting system. How they fit within the existing watchlisting mechanism is unclear. They appear to expand the scope of systematic individualized blacklisting and related restrictions on travel and admission to the United States from terrorism to a variety of other threats.

The Watchlisting Guidance outlined procedures for the removal of individuals from the Terrorist Watchlist, as well as “redress procedures.”²⁷⁸ For instance, the Department of Homeland Security’s Traveler Redress Inquiry Program (TRIP) mechanism allows individuals to seek redress for any travel-related screening issues, such as denial of boarding or repeated referral for additional screening.²⁷⁹ The outcome of the TRIP process may be challenged through an administrative appeal or in federal court.²⁸⁰ President Trump’s NSPM-9 similarly mentions redress procedures, but its specifics are vague.

2. Watchlisting and the Courts

The 2013 Watchlisting Guidance stated that “[t]he general policy of the U.S. Government is to neither confirm nor deny an individual’s watchlist status.”²⁸¹ This put listed individuals in a Kafkaesque position. Because they had no way of knowing whether they were in fact on a watchlist, challenging their listing in court was no easy feat. Nevertheless, plaintiffs have successfully challenged their listings on due process²⁸² and other grounds.²⁸³

277. *Id.* at 13–15.

278. *Id.* at 27–29.

279. 49 C.F.R. § 1560.205 (2009) (detailing the DHS traveler redress inquiry program).

280. *See* *Latif v. Holder*, 28 F. Supp. 3d 1134, 1153 (D. Or. 2014).

281. NCTC GUIDANCE, *supra* note 259, at 11.

282. *See* *Fikre v. FBI*, 904 F.3d 1033, 1035 (9th Cir. 2018) (reversing the dismissal of the plaintiff’s challenge to his inclusion on the No Fly List); *Tarhuni v. Sessions*, 692 F. App’x 477, 478 (9th Cir. 2017) (overruling the dismissal of the plaintiff’s watchlisting challenge as moot); *Kovac v. Wray*, 363 F. Supp. 3d 721, 748–58 (N.D. Tex. 2019) (allowing challenges to the plaintiffs’ inclusion in the TSDB); *Mohamed v. Holder*, 995 F. Supp. 2d 520 (E.D. Va. 2014) (allowing a Fifth Amendment and APA challenge to the inclusion of a U.S. citizen on the No Fly List); *Ibrahim v. Dep’t of Homeland Sec.*, 62 F. Supp. 3d 909, 910 (N.D. Cal. 2014) (holding that the mistaken inclusion of a visa-holding Stanford student on the No Fly List violated due process); *see also* Jennifer Daskal, *Secrets Revealed: The Government’s No Fly List Arguments Aren’t Flying*, JUST SECURITY (Apr. 25, 2014), <https://www.justsecurity.org/9865/secrets-revealed-governments-fly-list-arguments-arent-flying/> [<https://perma.cc/SX77-33G2>]; Shirin Sinnar, *A Terrorist Watchlist Error Revealed*, JUST SECURITY (Feb. 7, 2014), <https://www.justsecurity.org/6841/terrorist-watchlist-error-revealed/> [<https://perma.cc/Z45J-W2XP>]. *But see* *Mokdad v. Sessions*, 876 F.3d 167, 168 (6th Cir. 2017) (affirming the dismissal of the plaintiff’s challenge to his inclusion on the No Fly List as moot); *Mohamed v. Holder*, 266 F. Supp. 3d 868, 872 (E.D. Va. 2017), *appeal dismissed sub nom.* *Mohamed v. Sessions*, No. 17-7235, 2017 WL 8289654 (4th Cir. Dec. 21, 2017) (dismissing the case on the merits).

283. *See, e.g.,* *Tanvir v. Tanzin*, 894 F.3d 449, 452–53 (2d Cir. 2018) (reversing the dismissal of a case alleging that senior federal law enforcement officials retaliated against the plaintiffs for their refusal to serve as informants by including or retaining them on the No Fly List).

A key case that precipitated limited reform in the watchlisting process was *Latif v. Holder*.²⁸⁴ The plaintiffs were thirteen U.S. citizens and permanent residents, including four veterans of the U.S. armed services.²⁸⁵ They suspected that they were on the No Fly List after being prevented from boarding domestic and international flights. The plaintiffs first turned to the DHS TRIP redress procedure, but the government refused to confirm or deny their listing statuses, or to provide assurances about future travel. The plaintiffs then turned to the United States District Court for the District of Oregon. They sought removal from the list or a meaningful opportunity to contest their listing.²⁸⁶ They argued that it violated their Fifth Amendment due process rights, and that it was arbitrary and capricious and thus unlawful under the APA.²⁸⁷ Similar to other cases discussed in this Article, the court applied the *Mathews* balancing test to decide the due process questions.²⁸⁸

The court first held that the plaintiffs had a constitutionally protected interest in international air travel and in defending their reputation.²⁸⁹ Next, it concluded that the TRIP procedure created a high risk of erroneous deprivation of these interests.²⁹⁰ The low listing threshold under the reasonable suspicion criterion coupled with the wholly one-sided nature of the listing procedure, the court decided, increased the risk of erroneous listing.²⁹¹ According to the court, judicial review was an insufficient safeguard because the plaintiffs were denied any access to the administrative record.²⁹² Finally, the court concluded that additional procedures like notice and a hearing would have had significant probative value.²⁹³

Balancing the first two *Mathews* factors against the government's interest in protecting national security, the court ruled in favor of the plaintiffs, drawing on targeted-sanctions case law.²⁹⁴ "[W]hile the [G]overnment's interest in national security in this case weighs heavily," Judge Brown reasoned, "the DHS TRIP process falls far short of satisfying the requirements of due process."²⁹⁵ "[W]ithout proper notice and an opportunity to be heard," she continued, "an individual could be doomed to indefinite placement on the No-Fly List."²⁹⁶ The court also held that the TRIP mechanism was arbitrary and capricious because it failed to account for the listed individuals' version of the facts.²⁹⁷ Yet, the court left it to

284. 28 F. Supp. 3d at 1134.

285. *Id.* at 1140.

286. *See id.*

287. *Id.*

288. *See id.* at 1139.

289. *Id.* at 1149–51.

290. *Id.* at 1153.

291. *Id.*

292. *Id.*

293. *Id.* at 1153–54.

294. *See id.* at 1163.

295. *Id.* at 1160–61.

296. *Id.* at 1161.

297. *Id.* at 1162–63.

the government to devise new, adequate procedures without jeopardizing national security.²⁹⁸

Latif led to a revision of the DHS TRIP redress procedure. The TSA Administrator now decides whether to maintain an individual on the No Fly List based on the recommendation of the TSC. An order to maintain an individual on the list must state the basis for the decision, subject to national security constraints.²⁹⁹ Subsequently, the government informed seven of the thirteen plaintiffs that they were not on the No Fly List. The remaining six plaintiffs—all U.S. citizens—were provided with unclassified summaries of the reasons for their listing, approved by the Acting TSA Administrator. Those six plaintiffs challenged the government's revised procedures mainly on the grounds that the criteria for inclusion on the No Fly List are unconstitutionally vague, and that they had been denied due process because the government failed to give them adequate notice and a hearing. The Oregon District Court dismissed these claims, concluding that the government's revised procedures met the requirements that the court had outlined in its 2014 decision.³⁰⁰ The Ninth Circuit affirmed the ruling as applied to the plaintiffs.³⁰¹ The post-*Latif* revised No Fly List redress procedure now applies in other cases as well.³⁰²

More recently, in *Elhady v. Kable*, the United States District Court for the Eastern District of Virginia ruled that the inclusion of American citizens on the TSDB—the main consolidated government watchlist from which other watchlists are derived—violated their constitutional due process rights.³⁰³ The court's due process analysis was similar to that of the *Latif* court. It found that the administrative process for placing individuals on the TSDB “has an inherent, substantial risk of erroneous deprivation,” and that additional procedures, similar to those required by *Latif*, would reduce that risk.³⁰⁴ The court asked the parties to present arguments on the question of what additional procedures would meet constitutional requirements. The implications of this ruling are broader than *Latif*'s. The decision is not confined to the No Fly List, and it goes to the heart of the watch-listing system.³⁰⁵

298. *Id.* at 1161–62.

299. See *Latif v. Sessions*, No. 3:10-cv-00750-BR, 2017 WL 1434648, at *3 (D. Or. Apr. 21, 2017) (dismissing the remaining *Latif* plaintiffs' substantive claims against the TSA Administrator's order for lack of jurisdiction under the revised post-*Latif* redress procedure).

300. *Latif v. Lynch*, No. 3:10-cv-00750-BR, 2016 WL 1239925, at *14, *17 (D. Or. Mar. 28, 2016) (finding that procedural due process in this context does not require a live hearing and that national security may limit disclosure of reasons).

301. *Kashem v. Barr*, 941 F.3d 358, 364 (9th Cir. 2019).

302. See Chelsea Creta, *The No-Fly List: The New Redress Procedures, Criminal Treatment, and the Blanket of “National Security,”* 23 WASH. & LEE J. C.R. & SOC. JUST. 233, 256–57 (2016).

303. 391 F. Supp. 3d 562, 568 (E.D. Va. 2019).

304. *Id.* at 577.

305. See, e.g., Jeffrey Kahn, *Why a Judge's Terrorism Watchlist Ruling Is a Game Changer: What Happens Next*, JUST SECURITY (Sept. 9, 2019), <https://www.justsecurity.org/66105/elhady-kable-what-happens-next-why-a-judges-terrorism-watchlist-ruling-is-a-game-changer/> [https://perma.cc/T3XS-QNRR]; Shirin Sinnar, *Q&A on Court Decision Invalidating Administration's Terrorism Watchlist*,

As we have seen, administrative agencies play a central role in maintaining the various national security watchlists within a broad legal and policy framework created by the last three presidents. The system is based on extremely broad listing criteria and low evidentiary thresholds. It now appears to extend beyond terrorism. The multiple agencies involved are allowed a wide margin of discretion in applying measures that deprive individuals of fundamental interests under a veil of secrecy.

The courts, on their part, have been relatively welcoming to individuals affected by watchlists. This is perhaps due to the scope of the watchlisting system—which captures not only foreigners but also U.S. citizens and residents, its restrictive implications, and extreme one-sidedness. Prior to *Latif*, the government refused to even confirm or deny the presence of individuals on watchlists. Judicial review has resulted in the strengthening of procedural safeguards in the watchlisting process, bringing it closer in line with—but still far from—the procedural standards that agencies must comply with outside the national security context.

E. INDIVIDUALIZED CYBER COUNTERMEASURES

The individualization of U.S. foreign and security policy extends into the cyber realm in two important ways. The first relates to the nature of offensive cyber action in recent years. States have deployed an arsenal of cyber warfare tools that allow governments to attack specific organizations and individuals. Intelligence services have long penetrated the technological systems of adversaries for espionage, but more recent cyber warfare took a turn toward destructive action. Moreover, the sheer scale of individuals' exposure online and the relatively low costs of hacking make the option of offensive cyber targeting of individuals and organizations much more practical and accessible than it used to be.

Much is unknown about how the U.S. government has deployed offensive cyber tools and against whom, although recent, targeted cyber action against Iran and Russia, including planning related to direct targeting of individuals, has raised the public profile of these activities.³⁰⁶ Other states whose technological

JUST SECURITY (Sept. 5, 2019), <https://www.justsecurity.org/66068/shirin-sinnar-on-court-decision-invalidating-administrations-terrorism-watchlist/> [<https://perma.cc/HEF3-AFC5>].

306. See Julian E. Barnes, *U.S. Begins First Cyberoperation Against Russia Aimed at Protecting Elections*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/us/politics/russian-hacking-usa-cyber-command.html>; Robert Chesney, *The Legal Context for CYBERCOM's Reported Operations Against Iran*, LAWFARE (June 24, 2019, 4:25 PM), <https://www.lawfareblog.com/legal-context-cybercoms-reported-operations-against-iran> [<https://perma.cc/QW37-5KWM>]; *Cyber Operations Tracker*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/interactive/cyber-operations/search?keys=united+states> [<https://perma.cc/57C7-WAN8>] (last visited Mar. 2, 2020); Ellen Nakashima, *U.S. Cybercom Contemplates Information Warfare to Counter Russian Interference in 2020 Election*, WASH. POST (Dec. 25, 2019), https://www.washingtonpost.com/national-security/us-cybercom-contemplates-information-warfare-to-counter-russian-interference-in-the-2020-election/2019/12/25/21bb246e-20e8-11ea-bed5-880264cc91a9_story.html#click=https://t.co/gZ7XXrgKtw ("When the Russians put implants into an electric grid, it means they're making a credible showing that they have the ability to hurt you if things escalate What may be contemplated [in recent Cybercom planning against Russia] is an individualized version of that, not unlike individually targeted economic sanctions. It's

capabilities pale in comparison to the United States' have successfully engaged in such individualized targeting. This includes North Korea's cyberattack against Sony in 2014, and Russia's hacking of the Democratic Party and personal accounts of top Democratic officials surrounding the 2016 U.S. presidential election.³⁰⁷

The second way in which U.S. cyber policy has become individualized, which I focus on here, is the nature of the U.S. response to recent high-profile cyberattacks. That response, at least its overt component, has consisted primarily of economic sanctions and criminal indictments against individual hackers and groups.³⁰⁸ The sanctions prong of the U.S. response was discussed in section II.C. The use of criminal indictments in response to cyberattacks backed by U.S. adversaries like China, Iran, North Korea, and Russia began in 2014, under President Obama. Multiple indictments have been filed since. The practice continued under President Trump.³⁰⁹

For example, in May 2014, the Justice Department indicted five Chinese military officers by name for computer hacking, economic espionage, and other offenses against American companies.³¹⁰ In March 2016, the Justice Department indicted seven Iranians for cyberattacks against forty-six companies in the U.S. financial sector.³¹¹ In March 2017, the United States charged Russian FSB officers

sending credible signals to key decision-makers that they are vulnerable if they take certain adversarial actions.”); see also DAVID E. SANGER, *THE PERFECT WEAPON: WAR, SABOTAGE, AND FEAR IN THE CYBER AGE* (2018); David E. Sanger & William J. Broad, *Trump Inherits a Secret Cyberwar Against North Korean Missiles*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/world/asia/north-korea-missile-program-sabotage.html>.

307. See generally JOHN P. CARLIN & GARRETT M. GRAFF, *DAWN OF THE CODE WAR: AMERICA'S BATTLE AGAINST RUSSIA, CHINA, AND THE RISING GLOBAL CYBER THREAT* (2018).

308. John Carlin, Assistant Attorney General for National Security under President Obama, highlighted the individualized components of U.S. cyber policy. See John P. Carlin, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks on the National Security Cyber Threat at Harvard Law School (Dec. 3, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-national-security-john-p-carlin-delivers-remarks-national> [<https://perma.cc/7K6N-DH8Y>] (“[T]he federal government has developed a suite of tools . . . to combat online threats to national security—including criminal prosecution, sanctions and designations and diplomacy – and we have the ability to pick the best tool or combination of tools to get the job done . . .”).

309. For analysis of U.S. cyber attribution practices, see Kristen E. Eichensehr, *The Law & Politics of Cyberattack Attribution*, 67 UCLA L. REV. (forthcoming 2020) (manuscript at 10–13) (on file with author).

310. See Ellen Nakashima, *Following U.S. Indictments, China Shifts Commercial Hacking Away from Military to Civilian Agency*, WASH. POST (Nov. 30, 2015), https://www.washingtonpost.com/world/national-security/following-us-indictments-chinese-military-scaled-back-hacks-on-american-industry/2015/11/30/fcd097a-9450-11e5-b5e4-279b4501e8a6_story.html; Press Release, U.S. Dep't of Justice, U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), <https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor> [<https://perma.cc/H69L-GT5T>].

311. See Press Release, U.S. Dep't of Justice, Seven Iranians Working for Islamic Revolutionary Guard Corps-Affiliated Entities Charged for Conducting Coordinated Campaign of Cyber Attacks Against U.S. Financial Sector (Mar. 24, 2016), <https://www.justice.gov/opa/pr/seven-iranians-working-islamic-revolutionary-guard-corps-affiliated-entities-charged> [<https://perma.cc/78VW-WRUL>].

and coconspirators for hacking Yahoo.³¹² In February 2018, Special Counsel Robert Mueller indicted thirteen Russian individuals and three Russian companies for election meddling.³¹³ In August 2018, the Justice Department unsealed three indictments against Ukrainian nationals for their involvement in a malware campaign targeting over a hundred U.S. companies.³¹⁴ In September 2018, the Justice Department indicted a North Korean hacker in connection with the Global WannaCry 2.0 ransomware attack, the Sony attack, and other malicious cyber activities.³¹⁵ In October 2018, the United States charged seven Russian GRU officers for hacking into computer networks used by sporting officials and organizations investigating Russia's use of chemical weapons.³¹⁶ Later that month, two Chinese intelligence officials and several hackers were indicted for hacking private U.S. companies in order to steal commercial and industrial information.³¹⁷ In December 2018, the Justice Department unsealed indictments against two China-associated hackers for targeting companies that store and protect commercial data.³¹⁸ And in January 2019, the Department unsealed an indictment against Chinese telecom giant Huawei and one of its senior executives, accusing the company of stealing trade secrets.³¹⁹

312. See Press Release, U.S. Dep't of Justice, U.S. Charges Russian FSB Officers and Their Criminal Conspirators for Hacking Yahoo and Millions of Email Accounts (Mar. 15, 2017), <https://www.justice.gov/opa/pr/us-charges-russian-fsb-officers-and-their-criminal-conspirators-hacking-yahoo-and-millions> [<https://perma.cc/HL9E-Q86G>].

313. See Press Release, U.S. Dep't of Justice, Grand Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the U.S. Political System (Feb. 16, 2018), <https://www.justice.gov/opa/pr/grand-jury-indicts-thirteen-russian-individuals-and-three-russian-companies-scheme-interfere> [<https://perma.cc/X7YY-W26V>].

314. See Victoria Clark, *Document: Justice Department Unseals the Indictments of Three Members of International Cybercrime Group "Fin7,"* LAWFARE (Aug. 1, 2018, 2:14 PM), <https://www.lawfareblog.com/document-justice-department-unseals-indictments-three-members-international-cyber-crime-group-fin7> [<https://perma.cc/TL3A-P5YM>].

315. See Press Release, U.S. Dep't of Justice, North Korean Regime-Backed Programmer Charged with Conspiracy to Conduct Multiple Cyber Attacks and Intrusions (Sept. 6, 2018), <https://www.justice.gov/opa/pr/north-korean-regime-backed-programmer-charged-conspiracy-conduct-multiple-cyber-attacks-and> [<https://perma.cc/44CN-HDBT>].

316. See Press Release, U.S. Dep't of Justice, U.S. Charges Russian GRU Officers with International Hacking and Related Influence and Disinformation Operations (Oct. 4, 2018), <https://www.justice.gov/opa/pr/us-charges-russian-gru-officers-international-hacking-and-related-influence-and> [<https://perma.cc/V8VD-NJAG>].

317. See Press Release, U.S. Dep't of Justice, Chinese Intelligence Officers and Their Recruited Hackers and Insiders Conspired to Steal Sensitive Commercial Aviation and Technological Data for Years (Oct. 30, 2018), <https://www.justice.gov/opa/pr/chinese-intelligence-officers-and-their-recruited-hackers-and-insiders-conspired-steal> [<https://perma.cc/WD39-X6R8>].

318. See Press Release, U.S. Dep't of Justice, Deputy Attorney General Rod J. Rosenstein Announces Charges Against Chinese Hackers (Dec. 20, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-announces-charges-against-chinese-hackers> [<https://perma.cc/34SA-TNF4>].

319. See Press Release, U.S. Dep't of Justice, Chinese Telecommunications Conglomerate Huawei & Huawei CFO Wanzhou Meng Charged with Financial Fraud (Jan. 28, 2019), <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial> [<https://perma.cc/4U2R-3692>].

The Justice Department filed many of these indictments knowing that the defendants, who are often state backed, would likely never be turned over to U.S. custody or face trial in U.S. courts. As officials and commentators have pointed out, the main objectives of these indictments are attribution, deterrence, and “naming and shaming”—informing U.S. adversaries that their cyber activities are visible to the United States, warning them against further hacking, and taxing individual hackers.³²⁰

Cyber indictments are different from the other types of individualized measures that form the category of administrative national security. Although these indictments are the product of an interagency process led by the Justice Department, they are not readily distinguishable from ordinary criminal prosecutions. Courts might not even get a chance to weigh in because most defendants will likely never wind up in U.S. custody. Even if some of these cases make it to court, they will be governed by criminal law, not administrative law. Nevertheless, these cyber indictments are predominantly driven by foreign policy—international signaling and deterrence—rather than traditional law enforcement considerations. Therefore, they are a part of the individualization trend, and administrative agencies lead their application. Although these indictments are different from other administrative national security measures, they belong in this category.

F. SUMMARY: ADMINISTRATIVE NATIONAL SECURITY AS ADMINISTRATIVE ADJUDICATION

This Part explored the major sites of foreign and security individualization in the past two decades and the emergence of administrative national security. In all of the areas surveyed, administrative agencies operate within a broad framework established by Congress or the President through executive orders or presidential directives. They apply general standards or criteria within that legal and policy framework to the facts of individual cases while exercising a significant amount of discretion. A bureaucratic infrastructure has developed to design and apply individualized measures. The measures are repetitive—that is, their application involves a series of similar administrative decisions over long periods of time.³²¹

Consequently, although the underlying legal architecture of administrative national security reflects general policy choices about the means for addressing

320. Carlin, *supra* note 308 (“[W]hy investigate targets that we might never apprehend? . . . [O]ne, public attribution itself can have a deterrent effect; two, public attribution charges can also have a positive effect on victims . . . and three, investigation and attribution enables the use of other tools, including sanctions and diplomacy.”); Garrett Hinck & Tim Maurer, *What’s the Point of Charging Foreign State-Linked Hackers?*, LAWFARE (May 24, 2019, 11:20 AM), <https://www.lawfareblog.com/whats-point-charging-foreign-state-linked-hackers> [<https://perma.cc/TB6A-XLAV>]. But see Jack Goldsmith & Robert D. Williams, *The Failure of the United States’ Chinese-Hacking Indictment Strategy*, LAWFARE (Dec. 28, 2018, 9:00 AM), <https://www.lawfareblog.com/failure-united-states-chinese-hacking-indictment-strategy> [<https://perma.cc/JR7Y-65TT>].

321. It is also worth noting that big data and algorithmic decisionmaking have become significant in the application of several of these individualized measures, particularly watchlisting and targeted killings. In addition, given their similarities, these measures are interconnected in case law.

various foreign and security challenges, its routine implementation by administrative agencies resembles informal administrative adjudication—“the process of formulating an agency order, typically involving the application of law to particular facts.”³²² By “informal” adjudication I mean adjudication not governed by the APA. Under section 554 of the APA, informal adjudication is *not* “required by statute to be determined on the record after opportunity for an agency hearing.”³²³ The vast majority of agency adjudication today is informal adjudication not subject to the APA’s formal adjudication requirements,³²⁴ and administrative national security is no different in that respect. Administrative national security is therefore best understood as an emerging adjudicative practice in the foreign and security space.

The Administrative Conference of the United States (ACUS) and the ABA Section of Administrative Law and Regulatory Practice recently recommended a tripartite categorization of adjudications: formal adjudication governed by the APA (Type A); informal adjudication in which an evidentiary hearing is legally required by statute, executive order, or regulation (Type B);³²⁵ and informal adjudication not subject to a legally required evidentiary hearing (Type C).³²⁶ Administrative national security straddles the line between Type B and Type C adjudications. At one end of the spectrum there is the targeted killing informal adjudication process, which does not involve any kind of evidentiary hearing or direct interaction with affected parties. At the other, there are individualized OFAC economic sanctions and the Guantanamo PRBs. As we have seen, OFAC regulations provide for post-deprivation hearings that allow designated persons to present evidence and arguments.³²⁷ Similarly, Executive Order 13,567, which established the PRBs, required adversarial evidentiary hearings for determining whether a detainee remains a threat to U.S. national security.³²⁸ At the time of writing, the watchlisting system

322. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1212 (2013).

323. 5 U.S.C. § 554 (2012). “Adjudication” is defined as “agency process for the formulation of an order.” 5 U.S.C. § 551(7).

324. See Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153 (2019); see also MICHAEL ASIMOW, *FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT* (2019) (comparing and contrasting the different types of administrative adjudications).

325. It is important to note that Type B adjudications may sometimes be more “formal” than formal Type A adjudications in terms of the procedures to which they are subject. By “informal” here, I simply mean adjudications not subject to the adjudication requirements of the APA. I am grateful to Michael Asimow for this observation.

326. See Walker & Wasserman, *supra* note 324, at 155.

327. See 31 C.F.R. § 501.807 (2018); *supra* Section II.C.1.

328. Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011) (entitled “Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force”). Of course, even in the areas that can be classified as Type B adjudications, administrative national security often lacks many of the hallmarks of such adjudications in the domestic context. Based on an extensive study of Type B adjudications across government, ACUS identified thirty-one best practices that agencies should consider implementing. See Walker & Wasserman, *supra* note 324, at 165. These practices include, among others, exclusivity of the administrative record, disqualification mechanisms for adjudicator bias, a ban on outsider ex parte communications, separation of functions between adjudicatory and adversarial functions within the agency, pretrial discovery, open

was closer to the targeted killings end of the spectrum. Although “redress mechanisms” such as DHS TRIP allow individuals to communicate with agencies, they do not get any kind of hearing in advance of their inclusion in TSDB. They are able to submit limited arguments and evidence only retrospectively through DHS TRIP after being subjected to travel restrictions.

Administrative national security adjudication is a form of coordinated adjudication because it involves an iterative interagency process.³²⁹ Multiple agencies—the Departments of State, Treasury, Defense and Homeland Security; the intelligence community; and others—share responsibility for fact-finding, integrative case analysis, formulation of targeting decisions, execution of these decisions, and interaction with those targeted. These interagency processes are governed by presidential directives, executive orders, and MOUs. In some cases, they are mandated by statute.³³⁰

Administrative national security operates under the public radar, with limited political and judicial oversight. Its underlying legal architecture and bureaucratic structures transcend presidential administrations. Related measures are applied in the context of policies that have no expiration date and could continue indefinitely. Direct presidential involvement in the conduct of administrative national security is limited and has decreased over time. Judicial review of the outcomes of individual administrative national security adjudications has been sparse and, for the most part, highly deferential.

III. ADMINISTRATIVE NATIONAL SECURITY AND THE PRESIDENT

This Part considers the implications of the emergence of administrative national security for conceptualizing the relationship between the President and the administrative state in the foreign and security sphere. The analysis proceeds along two dimensions: structural and doctrinal. The structural dimension explores how administrative national security informs our understanding of presidential control of administrative agencies in the foreign and security domain. It also reflects on how administrative national security structures the environment in which the President wields his Article II foreign affairs and national security powers as chief executive and commander-in-chief. The doctrinal dimension of this analysis explores how the advent of administrative national security

hearings, use of administrative judges, evidentiary rules, and opportunity for rebuttal. *See id.* at 166–67. Detention review and targeted sanctions decisions lack many of these features. *See id.* Due to their extensive reliance on classified intelligence, administrative national security adjudications also present the additional challenges of secret evidence, sources, and methods.

329. For comprehensive discussion of coordinated interagency adjudication (mostly) outside the national security context, see Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015). Under Shah’s typology, the typical form of coordinated adjudication that we see in administrative national security is what she calls “collaborative adjudication.” *Id.* at 846. Note, however, that administrative national security adjudications may not conform to Shah’s operative definition, which is limited to adjudications before a neutral decisionmaker with binding precedent and outcome. *Id.* at 826.

330. *See, e.g.*, 8 U.S.C. § 1189(a)(1), (d)(4) (2012) (prescribing the process for FTO designations under AEDPA).

reinforces critiques of deeply rooted foreign relations legal doctrines, namely the “one voice” and “sole organ” doctrines.

A. THE STRUCTURAL DIMENSION

1. Presidential Control

There are two distinct levels of presidential control of administrative national security. One level is the legal and policy architecture underlying this category—the executive orders and presidential directives that provide for individualized measures and establish the process for their application within the Executive Branch. The other level is control of administrative adjudication of individual cases under these authorities. Part II suggested that *de facto* presidential control of administrative national security has diminished over time on both levels despite the President’s elevated role in the foreign and security realm. As a corollary, the role of administrative agencies in both contexts has expanded.

a. Control Over the Legal and Policy Framework.

Influential accounts of the relationship between the President and the administrative state, in particular Elena Kagan’s *Presidential Administration*,³³¹ have

331. See Kagan, *supra* note 7. Presidential Administration intersects with (while being distinct from) another strand of theory of Executive power—the unitary executive theory. The theory has different versions. At its core, it posits that the Executive is unitary in the sense that the President has the power to direct officers of the United States and to remove officers who refuse to comply with his policy directions from their positions. See Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 315, 325–29 (2010). Stronger versions of the theory suggest that independent Executive agencies that are not subordinate to the President are unconstitutional, and that Congress cannot allocate Executive power to anyone other than the President. *Id.* at 319. For comprehensive treatments of the unitary executive theory, see, for example, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–4 (1994) (offering an originalist critique of the unitary executive “myth” but supporting a unitary executive on structural grounds). Note the difference between Lessig and Sunstein’s articulation of the weak and strong versions of the theory and Tushnet’s. Compare Lessig & Sunstein, *supra*, at 8–11, with Tushnet, *supra*.

My discussion focuses on how administrative national security fits within the presidential administration account as a descriptive matter and how it structures the President’s policymaking environment. I do not address in detail the key constitutional questions associated with the unitary executive theory—the President’s removal power, which is tied to his constitutional authority to impose his will on subordinates—and the extent to which Congress may encroach upon his Executive powers. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986). Suffice it to say that with respect to most administrative national security measures, save for cyber indictments, the President likely has the constitutional power (and, depending on the context, the statutory authority) to actively engage in the work of relevant administrative agencies. On this point, see for example the statute cited *infra* note 370 and accompanying text. See also, e.g., Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 554 (2018) (“‘The President told me to do it’ is not a legal reason for agency action, except in those instances (largely concerning foreign affairs) in which the Constitution gives the President independent authority, or where Congress has statutorily delegated administration to the President.”). Moreover, the trend in administrative national security has not been presidential aggrandizement and assertiveness over the bureaucracy—the type of conflict that is at the heart of the unitary executive theory. The trend is actually in the opposite direction.

portrayed a President who asserts his authority over the administrative state, aligns it with his policy priorities, takes an active role in policymaking, regulation and implementation, and exercises ownership of agency work product by embracing it as his own. Drawing primarily on President Clinton's style of administration, Kagan observed that "a self-conscious and central object of the White House was to devise, direct, and/or finally announce administrative actions."³³² Clinton and his predecessors put "in place a set of mechanisms and practices, likely to survive into the future, that greatly enhanced presidential supervision of agency action, thus changing the very nature of administration (and, perhaps too, of the Presidency)."³³³ According to Kagan, then, presidential administration means presidential *direction* of agency action, active *participation* in regulation, and *ownership* of agency product.³³⁴ Notably, Kagan focuses on domestic policy. She does not consider in detail how presidential administration applies in foreign affairs and national security.

Scholars such as Peter Shane and Jerry Mashaw have criticized Kagan's normative defense of administrative presidentialism. Nevertheless, they agreed with her basic descriptive claim that presidents have become increasingly assertive in controlling the administrative state.³³⁵ Taken together, the accounts of these scholars suggest that Presidents from Reagan to Trump have dramatically increased presidential control of the administrative state.³³⁶ Administrative presidentialism fits within the broader literature on ever-expanding presidential power.³³⁷

Presidential administration cannot realistically be fully realized. Presidential control of all aspects of the administrative state, Kagan recognized, is impossible.³³⁸ But administrative national security is an intriguing case study for

332. Kagan, *supra* note 7, at 2248.

333. *Id.* at 2250.

334. *See id.* at 2284–85. Kagan calls this "appropriation" of agency action. *Id.* Note that the participation criterion as applied in this analysis adapts one of the key presidential control mechanisms Kagan considers, namely, centralized review of proposed and final regulations by the Office of Information and Regulatory Affairs (OIRA) within the Executive Office of the President. *Id.* at 2286. OIRA review does not extend to administrative national security.

335. *See generally* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009) (criticizing presidential aggrandizement); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549 (2018) (same).

336. Writing about case studies of administrative presidentialism in the Obama and Trump Administrations, Mashaw and Berke assert that "the ever more prevalent use of presidential directive authority" created a situation in which "the general public . . . now seems to assume an identity between the President and administration." Mashaw & Berke, *supra* note 331, at 576–77. On the entrenchment of presidential control of agencies during the George W. Bush and Obama Administrations, see Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 692–706 (2016). For additional normative critiques of presidential administration that accept this descriptive premise, see *infra* note 352.

337. For an overview of these accounts, see Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 34–35 (2016).

338. *See* Kagan, *supra* note 7, at 2250 ("Of course, presidential control did not show itself in all, or even all important, regulation; no President (or his executive office staff) could, and presumably none

presidential administration because foreign and security policy is perhaps the area most closely associated with the President. The conduct of foreign relations and use of military force have traditionally been quintessential functions of the Executive. Presidents have typically assumed a central, active, and visible role in foreign and security policy. Although the precise scope of the President's exclusive Article II powers is unsettled, certain elements of such constitutional power in this area have been ruled exclusive, with the implication that Congress may not encroach upon their exercise.³³⁹ Courts have interpreted congressional delegations of foreign affairs authority to the President liberally.³⁴⁰ The President has been portrayed as the face of the nation and its "sole organ" in the realm of foreign relations.³⁴¹ Given this perception of the presidency in foreign affairs, we would expect presidential administration of the architecture of administrative national security—that is, the legal and policy framework that regulates related individualized measures—to be in full throttle across all three parameters: direction, participation, and ownership.

Yet, as Part II demonstrates, the overall trend with respect to the architecture of administrative national security has been a gradual drift away from presidential administration. This architecture consists of executive orders and presidential directives that delegate substantial policymaking and implementation power from the President to the administrative state.³⁴² Many of these instruments, including sanctions executive orders, the legal infrastructure of the watchlisting system, and detainee status review mechanisms, have persisted across administrations. They have become standing authorities for the application of the individualized measures that they authorize.

Administrative agencies, in turn, have developed elaborate, independent mechanisms for designing and implementing individualized administrative national security measures. Those administrative mechanisms, too, have persisted and

would wish to, supervise so broad a swath of regulatory activity. . . . At times, indeed, presidential administration surely seemed to Clinton and his staff . . . more an aspiration than an achievement.").

339. See *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (noting that in Category 3, when the President acts in defiance of Congress and his power is thus at its "lowest ebb," he can prevail only if his constitutional power to act on the matter is *exclusive*). The Court has held that the President's power to recognize foreign nations is exclusive. See *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2087 (2015); Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015); see also Kagan, *supra* note 7, at 2322 n.305 (referring to "a core set of presidential functions, probably lying mainly in the defense and foreign policy spheres, that would prevent Congress from, say, restricting the President's power to remove the Secretary of Defense or State").

340. See, e.g., *Trump v. Hawaii (Travel Ban Case)*, 138 S. Ct. 2392, 2409 (2018); *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936); see also CASEY ET AL., *supra* note 186, at 34 n.202 (surveying lower court cases upholding IEEPA against nondelegation challenges).

341. *Curtiss-Wright*, 299 U.S. at 320.

342. My focus is on the allocation of power *within* the Executive. But see Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801 (2011) (identifying voluntary delegations of national security authority from the Executive to external entities, and arguing that they challenge the conventional wisdom that the Executive is power aggrandizing).

expanded across administrations, sometimes without active presidential reassessment of their effectiveness and adverse effects on individuals. The political pressure on the President to become more involved in the administration of these mechanisms has declined over time as these measures and their supporting bureaucracies became regularized and routine. These bureaucracies operate under the public radar. They primarily affect foreigners with little political clout. As we have seen, judicial oversight, which could theoretically provoke greater presidential engagement, has been limited.

Consequently, contrary to the “presidentialization of administration” that Kagan identified in the domestic policy context,³⁴³ the trend in administrative national security has been gradual *de*presidentialization and reduced de facto presidential control. This *de*presidentialization is not unique to the current Administration, in which instances of disconnect between the President and his Administration abound both within and outside the foreign and security context.³⁴⁴ Similar dynamics occurred in previous Administrations of the individualization era as well. Administrative national security is now an area of administrative action in which there appears to be limited presidential direction. There is little presidential involvement in the policy process and scant presidential ownership of the measures that the bureaucracy produces. For the reasons elaborated in section III.A.2, the structural features of administrative national security create inertia that perpetuates these autonomous administrative mechanisms and preserves this state of affairs. To be clear, this is not intended as a critique of Kagan. My analysis builds on Kagan’s framework as a useful reference for illustrating the trend lines in presidential control of administrative national security.

Consider the degree to which the components of administrative national security discussed in Part II correspond with the presidential administration parameters of direction, participation, and ownership. In the areas of individual economic sanctions and watchlisting, there has been a decoupling of the presidency and the bureaucracy. The last three Presidents have all exercised a certain degree of *direction* over the application of these measures by issuing new executive orders and presidential directives.³⁴⁵ But the sanctions and watchlisting programs that grew out of these directives and executive orders have taken on a life of their own. These orders and directives often remained in place across administrations, and administrative agencies have continuously relied on them to designate individuals and entities, and to add names to the various watchlists. The current watchlisting system is an outgrowth of Bush-Era directives and executive orders. Similarly, a range of sanctions-related executive orders issued by

343. Kagan, *supra* note 7, at 2252.

344. See, e.g., Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 357 (2019); Benjamin Wittes & Susan Hennessey, *Is Trump Changing the Executive Branch Forever?*, FOREIGN POL’Y (Aug. 29, 2017, 2:40 PM), <https://foreignpolicy.com/2017/08/29/is-trump-changing-the-executive-branch-forever/> [https://perma.cc/KH69-3NH4].

345. See *supra* Sections II.C–D.

Presidents Bush and Obama remain in place and routinely serve as the basis for new designations.³⁴⁶ Presidential *participation* in the management of individual economic sanctions and the watchlisting system after the initial issuance of framework directives and executive orders has also been marginal. And—with notable exceptions³⁴⁷—it is difficult to say that the last three Presidents became associated with these administrative mechanisms and the measures that they produce in a manner that signals *ownership*.³⁴⁸

The picture is more complicated with respect to targeted killings and detentions, but here, too, presidential control and engagement have declined over time. Both Presidents Bush and Obama prioritized military detentions and clashed with other government branches over related policies. President Bush responded to pressure from the courts on judicial review and due process for detainees, as well as the operation of the military commissions. President Obama faced pushback from Congress in his efforts to close Guantanamo. Although he has not been involved in detention policy with the same level of intensity as his predecessors, President Trump said he would resume Guantanamo detentions and has exercised directive authority to reverse Obama's policy on the matter.³⁴⁹ Nevertheless, over time, the role of administrative agencies in detention policy has expanded, and presidential engagement has diminished.³⁵⁰

With regard to targeted killings, some level of presidential *direction* has been preserved. Although little is known about the inner workings of the Bush Administration's targeted-killing decisionmaking, the last two Presidents, and particularly President Obama, have exercised what Kagan calls directive authority over the administrative state's targeted-killing process. In his second term, President Obama put in place a detailed policy guidance to govern the use of lethal force against individuals outside areas of active hostilities. President Trump reportedly preserved but revised this framework, ceding control to the administrative state. It thus appears that the intensity of presidential

346. See *supra* Sections II.C–D.

347. These exceptions include President Obama and President Trump's involvement in Iran sanctions, and President Trump's association with Russia-related sanctions and North Korea sanctions. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 22, 2019, 1:22 PM), <https://twitter.com/realdonaldtrump/status/1109143448634966020?lang=en> [<https://perma.cc/SWM4-UZGT>] ("It was announced today by the U.S. Treasury that additional large scale Sanctions would be added to those already existing Sanctions on North Korea. I have today ordered the withdrawal of those additional Sanctions!"). The tweet highlights the disconnect between the application of individualized sanctions by the Treasury Department bureaucracy and President Trump. His public rejection of these sanctions after the fact suggests that he was not involved in the process, despite the centrality of North Korea on his foreign policy agenda. See also Alan Rappeport, *Trump Overrides Own Experts on Sanctions, in Favor to North Korea*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/world/asia/north-korea-sanctions.html> (characterizing President Trump's decision to reverse new sanctions on North Korea as a "remarkable display of dissension within" the Administration).

348. See *supra* Sections II.C–D.

349. See Exec. Order No. 13,823, 83 Fed. Reg. 4831, 4831–32 (Jan. 30, 2018).

350. See, e.g., CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY* 308 (2015) ("By the middle of 2010, it was clear that while closing Guantánamo remained Obama's stated goal, it was fading as a priority.").

direction of targeted killings has gradually diminished over time and across administrations.

Presidential *participation* in the targeted killing process has also declined. President Obama was notified of each target authorized through the interagency process, and in some cases even made the decision himself. Yet, reports suggest that even President Obama's personal involvement in the process decreased over time,³⁵¹ and that toward the end of his Administration, administrative agencies were in control of the process of selecting, preparing, vetting, and authorizing targets, as well as framing the exceptional cases that reached the President's desk. President Trump appears to have withdrawn himself from the target authorization process entirely, reducing direct presidential participation in the process to a minimum.³⁵² As for personal *ownership*, only President Obama can be said to have exercised personal ownership of the targeted killing program. He eventually owned up to the program in high-profile addresses.³⁵³ But the nascent targeted-killing program was hidden from public view under President Bush, and President Trump has yet to publicly associate himself with the program as President Obama did. All three Presidents rarely announced individual strikes.³⁵⁴

These examples show that although one could speak of some version of presidential administration when the relevant presidential policy frameworks—directives or executive orders—were initially issued by the last three Presidents, the level of presidential engagement in each of these contexts has declined precipitously as these individualized administrative national security measures became routine and gradually normalized. As a corollary, administrative agencies have become more independent in designing and implementing measures that now constitute a significant component of U.S. foreign and security policy on a plethora of strategic issues, from Russia, China, and Iran to terrorism and cyber-security.

Two final notes are in order. First, the depresidentialization that has occurred in the category of administrative national security is, of course, a reversible process. It is contingent upon the identity and priorities of a given President and how that President chooses to wield his or her power as chief executive and

351. See *supra* Section II.A.1.

352. See *supra* note 102 and accompanying text.

353. President Barack Obama, *Remarks by the President at the National Defense University*, OBAMA WHITE HOUSE (May 23, 2013, 2:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [https://perma.cc/4TXE-LPWZ].

354. But see, e.g., President Barack Obama, *Remarks by the President on Osama Bin Laden*, OBAMA WHITE HOUSE (May 2, 2011, 11:35 PM), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden> [https://perma.cc/N6R9-NPDD]; Press Release, The White House, Statement from the President on the Death of Abu Bakr al-Baghdadi (Oct. 27, 2019), <https://www.whitehouse.gov/briefings-statements/statement-president-death-abu-bakr-al-baghdadi/> [https://perma.cc/SV3U-Q5JC]; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2019, 10:27 AM), <https://twitter.com/realdonaldtrump/status/1081935373914259458?lang=en> [https://perma.cc/4AXL-QTMU]; President Donald J. Trump, *Remarks by President Trump on the Killing of Qasem Soleimani*, TRUMP WHITE HOUSE (Jan. 3, 2020, 3:13 pm), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/> [https://perma.cc/3PPS-E8LR].

commander-in-chief. There is nothing preventing the current President or successors, in principle, from reasserting authority over the application of individualized foreign and security measures, becoming more vigorously engaged in related decisionmaking, and even reforming or discarding the legal frameworks and bureaucracies that administer them. However, as we will see, structural features of administrative national security weigh significantly in favor of the status quo.

Second, presidential administration is not merely a descriptive account of the relationship between the President and the administrative state. Kagan argued that presidential direction, participation, and personal ownership of administrative policymaking are normatively desirable. Such presidential engagement, she explained, increases the effectiveness, transparency, and accountability of administrative agencies, as well as their responsiveness to the public.³⁵⁵ I do not advance a normative assessment of presidential disengagement in administrative national security, which would exceed the scope of this Article. I note only that if one subscribes to Kagan's view of the virtues of presidential administration, its decline in administrative national security should be a cause for concern.³⁵⁶

In conclusion, this section explored whether the concept of presidential administration accurately describes the relationship between the President and the administrative state when it comes to the architecture of administrative national security. The analysis suggests that the trend in this area, over time, has been less de facto presidential control and greater independence for administrative agencies to the point that the President now plays a peripheral role in the application of the individualized measures encompassed by this category. This is the case despite the fact that the exercise of these administrative national security measures—targeted killings, detentions, targeted sanctions, watchlisting, security travel bans, and cyber countermeasures—is at the core of the President's constitutional

355. Kagan, *supra* note 7, at 2331–39.

356. For normative discussion of presidential administration, see, for example, Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017). For critiques, see, for example, SHANE, *supra* note 335, at 4, 153–55, 158–67 (agreeing with Kagan's descriptive claim that presidential control over the administrative state has increased significantly across administrations, while highlighting the dangers of presidentialism and criticizing its normative underpinnings; and positing that "[t]he Clinton-era developments illustrate one of the great dangers of presidentialism—its resistance to contraction. The usurpation of authority works as a one-way ratchet"); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 61–62 (2006) (arguing that the presidential control model and its purported benefits for administrative accountability and effectiveness rely on flawed empirical assumptions that neglect the perspective of agencies); Mashaw & Berke, *supra* note 331, at 612–13 (criticizing proponents of administrative presidentialism for relying on underdeveloped normative criteria); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1977–83 (2015) (criticizing Kagan's assumption that the process-focused general concepts of accountability and transparency would effectively constrain executive power); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 711–14 (2007) (arguing that presidential administration weakens the legal constraints on the Executive and undermines the role of Congress; and that the President should assume a supervisory and coordinating role rather than displacing agency decisionmaking).

and statutory role as chief executive and commander-in-chief. These insights should inform future thinking about presidential administration in foreign and security policy—an aspect absent from the existing presidential administration literature.³⁵⁷

b. Control of Administrative National Security Adjudication.

Part II illustrates that, at its core, administrative national security is a form of informal adjudication—the application by agencies of standards and rules laid out in statutes, executive orders, and presidential directives to individual persons and entities. Therefore, it should come as no surprise that this aspect of administrative national security is not subject to active and intimate presidential control. The relative de facto independence of administrative national security adjudication from presidential control dovetails with an entrenched norm and practice of presidential insulation from agency adjudication in the domestic policy context.

Although scholars have highlighted the tension between agency independence in adjudication and political accountability,³⁵⁸ there is an established practice of agency independence from presidential control in domestic individual adjudications.³⁵⁹ As Adrian Vermeule observed, “[c]ommentators widely agree that presidential direction is highly constrained” in adjudication.³⁶⁰ Kagan herself did not argue for presidential administration of administrative adjudication, noting that “[t]he only mode of administrative action from which Clinton shrank was

357. *But see* Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 646–59 (2016) (describing a greater presidential role in intelligence policy and oversight).

358. For a recent analysis of the independence-accountability trade-off in adjudication and its manifestation in the Supreme Court decisions in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) and *Oil States Energy Services v. Greene’s Energy Group*, 138 S. Ct. 1365 (2018), see generally Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679 (2019). For an overview of critiques of adjudicative decisional independence, see Shah, *supra* note 329, at 876–78.

359. *See* Vermeule, *supra* note 322, at 1211–14; *see also* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2252 (2018) (“[L]ongstanding understandings (derived from both practice and statutes) insulate certain officials, such as those exercising adjudicatory functions, from the President . . .”); Shah, *supra* note 329, at 856–57, 875–77 (calling for executive oversight of interagency adjudications, while recognizing that “the concept of oversight in the adjudication context is particularly charged because agency adjudicators have long been granted decisional independence as if they were Article III judges”). *But see* Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L.J. 579 (2020) (suggesting that the political inclinations of the administration in power influence the outcomes of agency immigration adjudications). Shah also notes that “there has been neither the suggestion of nor actual oversight of large-scale agency adjudication by higher-level executive bodies or leaders like the OMB, the President, or an appointed White House committee.” Shah, *supra* note 329, at 860.

The oft-cited legal anchors of this norm are *Wiener v. United States*, 357 U.S. 349, 356 (1958) (holding that the President was precluded from interfering with the work of the War Claims Commission due to its strictly adjudicative functions); *Myers v. United States*, 272 U.S. 52, 135 (1926) (noting, in dictum, that adjudicative decisions concerning individuals may be beyond the scope of the President’s directive control); and *Portland Audubon Society v. The Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993) (restricting ex parte contacts between the President and his staff and an agency on matters subject to formal adjudication).

360. Vermeule, *supra* note 322, at 1211.

adjudication.”³⁶¹ She viewed adjudications as “fundamentally different” from rulemaking and general policymaking due to the special objectives of fairness and due process that they serve, which militate against presidential interference.³⁶² The norm remains robust despite concerns that recent presidents have eroded it.³⁶³

Some scholars, such as Kagan, have grounded the norm of agency insulation from the President in adjudication in fairness and due process.³⁶⁴ Selective presidential interference in individual adjudications also compromises consistency across cases and potentially injects political considerations into law enforcement. Other scholars, such as Adrian Vermeule, have attributed this norm to a “network of tacit unwritten conventions that protect the independence of even executive agencies when engaged in adjudication.”³⁶⁵ Adding to these normative factors, there are structural reasons that make it both difficult and politically unattractive for presidents to exercise intimate control of adjudications. Adjudications require expertise, granular processing of facts, and engagement with affected parties. Presidents (and their staff) lack the bandwidth to micromanage adjudications of millions of individual cases across different agencies and policy areas.³⁶⁶ Furthermore, the political payoff of micromanaging adjudications is relatively small.³⁶⁷ Myriad issues compete for the President’s attention at any given time. The President is far more likely to prioritize salient regulatory action on big-ticket issues than routine individual adjudications that fly below the public radar.³⁶⁸

The normative arguments for insulating the President from administrative adjudication in the domestic context—due process, fairness, and conventions of agency independence—do not neatly translate to administrative national security. First, administrative national security measures typically target aliens who lack

361. Kagan, *supra* note 7, at 2306. Kagan appears to be referring only to formal adjudication here because she notes that “[a]t no time in his tenure did [Clinton] attempt publicly to exercise the powers that a department head possesses over an agency’s *on-the-record* determinations.” *Id.* (emphasis added).

362. *Id.* at 2362–63 (“The consequence here is to disallow the President from disrupting or displacing the procedural, participatory requirements associated with agency adjudication, thus preserving their ability to serve their intended, special objectives.”).

363. See Mashaw & Berke, *supra* note 331, at 594–97, 606–07 (“[P]residential administration [is] insinuating itself more and more into areas where Kagan cautioned against aggressive presidentialism, such as prosecution/adjudication and government science . . .”). Mashaw and Berke suggest that President Obama pushed for more aggressive enforcement through adjudication “across agencies to further policy goals of consumer and environmental protection, financial regulation, and corporate responsibility.” *Id.* at 595. President Trump did the same by prioritizing immigration enforcement. *Id.* at 574. Still, it appears that these efforts involved setting enforcement priorities at a high level—not dictating the outcome of individual adjudications. Note that Kagan similarly described President Clinton’s role in setting enforcement priorities. See Kagan, *supra* note 7, at 2306. On potential erosion of the adjudicative independence norm, see also Shah, *supra* note 329, at 858 n.228.

364. See Kagan, *supra* note 7, at 2362–63; Vermeule, *supra* note 322, at 1212–13; see also Walker, *supra* note 358, at 2680 (noting that “political control over agency adjudication . . . raises due process concerns”).

365. Vermeule, *supra* note 322, at 1211.

366. See Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1071 (2013).

367. See *id.* at 1073.

368. See, e.g., *id.* at 1071–73.

constitutional due process rights. Whether the United States has a legal duty under domestic law to respect at least some elements of procedural justice when acting against foreigners outside U.S. territory is an open question. The case law discussed in Part II suggests that such a duty, if it exists at all, is far more limited in scope than what due process requires in the domestic policy context.³⁶⁹ Concerns about partisan enforcement through adjudication also do not translate well in cases in which the United States targets foreigners outside U.S. territory. Foreign and security policy is arguably inherently political and selective. Of course, the due process and depoliticization rationales supporting presidential insulation from adjudication in the domestic context hold when administrative national security measures target U.S. citizens or those with substantial U.S. ties.

Second, rationales for presidential insulation grounded in conventions of agency independence are much weaker in administrative national security compared to run-of-the-mill domestic adjudications. The measures in this category are based on executive orders and presidential directives that build on the President's independent Article II powers, as well as broad delegations of authority from Congress to the *President*. For example, section 1702 of the IEEPA, the basis for targeted sanctions, is entitled "*Presidential authorities*."³⁷⁰ Under section 1182(f) of title 8 of the U.S. Code, "[w]henever *the President* finds that the entry of any aliens . . . into the United States would be detrimental to [U.S. interests], he may by proclamation . . . suspend the entry . . . or impose . . . any restrictions."³⁷¹ The 2001 AUMF provides that "*the President* is authorized to use all necessary and appropriate force" against the perpetrators of 9/11 and their accomplices.³⁷² Suggesting that Congress sought to insulate the exercise of these measures from the President, therefore, conflicts with the plain statutory text.³⁷³ Because agency authority over most administrative national security measures flows from the President, it is difficult to argue that there exists a convention of agency independence in this category.

Still, the functional reasons for presidential insulation from administrative adjudication continue to apply with equal force in administrative national security. Like its counterparts in the domestic context, administrative national security adjudication does not lend itself to tight presidential control after the President initially establishes the legal and policy framework for the application of related

369. As Part II shows, when the courts intervened in favor of targeted individuals it was on constitutional rather than APA grounds. Those who could not assert constitutional rights did not benefit from the same protection. For analysis of potential legal obligations under the APA, see discussion *infra* Section IV.A.

370. 50 U.S.C. § 1702 (2012) (emphasis added).

371. 8 U.S.C. § 1182(f) (2012) (emphasis added).

372. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (emphasis added).

373. *But see* 8 U.S.C. § 1182(a)(3)(C)(i) (empowering the Secretary of State to make inadmissibility determinations on foreign policy grounds); Pub. L. No. 112-81, § 1023, 125 Stat. 1298, 1564 (2011) (imposing certain requirements on the Secretary of Defense with respect to the Guantanamo PRB process).

measures. It is much harder for presidents to exercise the kind of intimate control over individualized decisions in this category compared to the control that they are able to exercise over regulations that reflect a broader policy agenda or even the legal and policy architecture of administrative national security itself (in theory). Moreover, for some presidents, becoming associated with individualized administrative national security measures—which raise significant individual-rights issues—could exact a political price. President Obama, for instance, was criticized across the political spectrum for his Administration’s detention and targeted killing practices.³⁷⁴

As in the discussion of the legal and policy architecture underlying administrative national security, the aim here is not to offer definitive conclusions regarding the desirable extent of presidential control of administrative national security adjudication. That would exceed the scope of this Article. The aim here is simply to provide descriptive and analytical foundations for future consideration of this question.

2. Power or Constraint?³⁷⁵

The previous section considered presidential control of administrative national security. But there is also a sense in which administrative national security “controls” the President. The emergence of administrative national security in the past two decades has contributed to the development of mechanisms that structure the policy environment in which the President operates. They have come to function as both a constraining and empowering force on the President as he wields his constitutional power as chief executive and commander-in-chief.

There are at least two aspects to the *constraining* effect of administrative national security. One element of that effect stems from the existence of the administrative national security infrastructure. It does not limit the President’s authority to exercise his foreign affairs and national security power in principle, but it does channel presidential action toward individualized measures. It makes it more difficult for the President to dramatically deviate from the status quo by significantly ratcheting down the resort to individualized foreign and security measures or even dismantling the administrative mechanisms that produce them. The vast administrative national security complex and its standard operating procedures are self-perpetuating simply by virtue of bureaucratic inertia. They create path dependency in U.S. foreign and security policy.

In a classic study of bureaucratic politics and process in foreign policy, echoing common observations in organizational studies, Graham Allison and Philip Zelikow argued that existing programs and routines—standard operating procedures—constrain bureaucratic behavior, and that bureaucracies are

374. See, e.g., JAFFER, *supra* note 65, at 43; *supra* Section II.B.

375. This title paraphrases JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012).

predisposed to doing more of the same.³⁷⁶ They observed that “societies and their organizations may become so dependent on a particular path toward prosperity, the inertia and transaction costs of change becoming so high, that choices for future development become quite constrained.”³⁷⁷ Michael Glennon similarly pointed to the bureaucracy as the main reason for the continuity in the national security policies of the Bush and Obama Administrations.³⁷⁸ He attributed the bureaucracy’s primacy over elected institutions to its expertise, relative flexibility, institutional memory, and policy stability.³⁷⁹ Like Allison and Zelikow, Glennon observed that the bureaucracy’s policy options are dictated by its existing capabilities and procedures.³⁸⁰

The resort to individualized measures in the foreign and security context has become so entrenched in the past two decades that reversing course and dismantling the related bureaucratic infrastructure, should a future reconstructive President so desire, would be costly. A policy realignment effort on this scale would require resources and political energy. It would prompt bureaucratic resistance.³⁸¹ Although this insight does not preclude future reform, it highlights the structural constraints on the President’s ability to effectuate it.

It also aligns with how the development of the administrative national security bureaucracy has played out in practice. The frequency of the application of all related measures except detentions has increased over time and across administrations. To the extent that presidents weighed in, it was a one-way ratchet. Instead of cutting back, they preserved or expanded the bureaucracy by adding new authorities or creating new bureaucratic entities like the PRBs and the National Vetting Center. Over time, we have seen more targeted sanctions executive orders, watchlisting directives, and targeted killings.

The second element of the constraining effect is internal to the administrative national security architecture. It is embedded within the system. It stems from the legal and procedural safeguards introduced over time to the various mechanisms that produce individualized measures, including court-ordered procedures. These safeguards operate as another constraint on the President’s freedom of action. For

376. ALLISON & ZELIKOW, *supra* note 1, at 145. For an overview of the bureaucratic process and politics literature, see CHRISTOPHER M. JONES, BUREAUCRATIC POLITICS AND ORGANIZATIONAL PROCESS MODELS (2010), <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-2?print=pdf> [<https://perma.cc/6PUC-6L4M>].

377. ALLISON & ZELIKOW, *supra* note 1, at 148–49.

378. See MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT 73, 82–83 (2014).

379. See *id.* at 82–83.

380. *Id.* at 83 (“Contingencies that might better be addressed with different capabilities are therefore addressed with existing, available capabilities.”).

381. Cf. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 191–92 (2015) (describing ICE resistance to President Obama’s immigration policy); Nou, *supra* note 344, at 349–50; Tushnet, *supra* note 331, at 315–17, 326 (describing the challenges President Reagan faced in dismantling the New Deal and Great Society bureaucratic structures and noting that “reconstructive destruction” of existing bureaucracies becomes increasingly difficult with time). On bureaucratic resistance in national security, see generally Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139 (2018).

example, the procedural and legal standards that President Obama put in place to govern targeted killings appear to have survived, at least in part, in the Trump Administration's revised guidance.³⁸² There is no public evidence that the Trump Administration discarded sanctions or watchlisting procedural protections that previous Administrations introduced. President Trump's vetting NSPMs include a redress mechanism. Of course, the semblance of procedural regularity in administrative national security also serves to normalize related measures. Paradoxically, this aspect of the constraining effect also has an empowering function: it regularizes those measures and contributes to their entrenchment.

Administrative national security *empowers* the President in other ways as well. The existence of an infrastructure that regularly produces individualized measures for addressing intractable strategic problems such as terrorism, Russia, China, and cybersecurity diversifies the policy options available to the President. It provides the assurance that something is being done on these difficult issues, while allowing the President to avoid politically, economically, and strategically risky alternatives. In other words, it is a default option and a convenient fallback. Furthermore, these are tools that the President can apply unilaterally based on broad congressional delegations and his Article II powers, without further cooperation from Congress. In an era of gridlock, this weighs heavily in favor of greater reliance on administrative national security measures.

Finally, as the resort to contentious administrative national security measures became bureaucratized and gradually normalized, public attention and opposition to these measures have wavered and atrophied. Although targeted killings, detentions, and blacklisting used to be the subject of intense public and political debate, they hardly command public attention these days. The decline in the level of scrutiny and political opposition to these measures allows the President to be more aggressive in applying them under the public radar and to face less friction in doing so.³⁸³

These restraining and empowering structural features have had—and arguably will continue to have—a long-term effect on how presidents wield their foreign affairs and national security power.

B. THE DOCTRINAL DIMENSION

Administrative national security has not only structural but also doctrinal implications. By calling attention to the President's now-peripheral role in a significant category of foreign and security measures, it challenges deeply rooted assumptions about the President that underlie foreign relations and national security law. One trope of foreign relations law, originating in Justice Sutherland's dicta in *United States v. Curtiss-Wright*, posits that the President has "[a] very

382. See *supra* Section II.A.1.

383. President Obama expressed this concern regarding targeted killings: "[Y]ou could see, over the horizon, a situation in which, without Congress showing much interest in restraining actions . . . you end up with a president who can carry on perpetual wars all over the world, and a lot of them covert, without any accountability or democratic debate." Chait, *supra* note 84.

delicate, plenary and exclusive power . . . as *the sole organ* of the federal government in the field of international relations.”³⁸⁴ On this view, “the President alone has the power to speak or listen as a representative of the nation.”³⁸⁵ A similar but distinct doctrine,³⁸⁶ the “one voice” doctrine, posits that the nation must “speak . . . with one voice” in foreign affairs³⁸⁷—typically the voice of the President.³⁸⁸ These doctrines equate the federal bureaucracy’s foreign and security powers and actions with those of the President himself.

The sole organ and one voice doctrines are something of a caricature. They are legal fictions. As many have observed, the Executive is a “they,” not an “it,”³⁸⁹ and scholars have excoriated both doctrines on constitutional and empirical grounds.³⁹⁰ Nevertheless, these doctrines have been influential and persistent in foreign relations law. Judges and government lawyers have invoked them extensively to defend assertions of presidential authority.³⁹¹ The staying power of the doctrines demonstrates that it is still necessary to debate their merits. Studying administrative national security contributes to this debate because it adds to the empirical and functional aspects of the critique of the doctrines.

That critique has roughly three elements: the doctrines’ incoherence, their conflict with the Constitution, and their dubious functional logic. Scholars have argued that the sole organ and one voice doctrines are not doctrines at all, but rather collective names for rationales applied in different doctrinal contexts.³⁹²

384. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (emphasis added).

385. *Id.* at 319.

386. The sole organ doctrine is distinguishable from the one voice doctrine in that the latter encompasses the federal government as a whole, whereas the former focuses on the President.

387. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000); *see also* Sarah H. Cleveland, *Crosby and the “One-Voice” Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 979 (2001) (referring to the one voice doctrine as “a familiar mantra of U.S. foreign relations jurisprudence”).

388. *See* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 968 (2014) (noting that the one-voice doctrine has been used to expand *presidential* power); *see also* Goldsmith, *supra* note 339, at 128 (“[T]he [Supreme] Court and especially the lower courts have often relied on the [*Curtiss-Wright*] dicta to support a generous reading of the President’s foreign relations powers.”). Because the one voice doctrine is typically invoked to support assertions of presidential power, I discuss the doctrines interchangeably.

389. *See, e.g.*, Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–38 (2011); Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POL’Y 213, 235 (2012).

390. *See* Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT. 149, 150–51 (2016); Moore, *supra* note 388.

391. *See* Moore, *supra* note 388, at 969–71 (noting that *Curtiss-Wright*’s sole organ dicta have “defied demise” and citing Harold Koh on the frequent reliance on the doctrine by government lawyers); *see also* Goldsmith, *supra* note 339, at 128 (noting that the *Curtiss-Wright* sole organ dicta remain influential despite the arguments on which they relied being “clearly wrong”).

392. *See* Moore, *supra* note 388, at 958–76. In the context of federalism, the one voice/sole organ rationale serves to limit the power of states to engage in foreign affairs. *See, e.g.*, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–20 (2003) (relying on the one voice doctrine to preempt a state law that infringed upon the foreign policy of the Executive); *United States v. Pink*, 315 U.S. 203, 233 (1942) (relying on the one voice doctrine in asserting that “[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (stating that with respect to “our foreign relations,” the state “does not exist”). Another

The constitutional critique recalls that the Constitution allocates foreign relations power to Congress, and that Congress, states, and courts engage in uncoordinated activities that affect foreign relations all the time. The federal government, the critique goes, “rarely speaks with one voice in foreign relations.”³⁹³

My focus here is the critique of the functional logic of the sole organ and one voice doctrines. Courts have asserted that a cohesive U.S. message on the international stage is necessary to avoid harmful confusion.³⁹⁴ They have also emphasized the institutional attributes that render the President uniquely equipped to handle foreign affairs, such as secrecy, dispatch, and “unity of design.”³⁹⁵ Although Justice Kennedy’s opinion for the Court in *Zivotofsky v. Kerry* (*Zivotofsky II*) criticized *Curtiss-Wright*’s expansive language on presidential power, it relied heavily on such functional considerations in holding that the President’s power to recognize foreign nations is exclusive.³⁹⁶ Critics of the sole organ and one voice doctrines argue that, as *Zivotofsky II* illustrates, these functional considerations have elevated the doctrines to the level of a constitutional principle that is systematically favoring the President and capable of invalidating legislation.³⁹⁷ They question the claim that having multiple voices on foreign policy matters is in fact harmful.³⁹⁸

Studying administrative national security highlights the fiction inherent in the sole organ and one voice doctrines by calling attention to the complex dynamic between the President and the administrative state *within* the Executive Branch. The functional case underlying the sole organ and one voice fiction is premised on an image of the presidency that assumes a high degree of presidential control. Recall Justice Sutherland’s invocation of unity of design, and Justice Kennedy’s assertion in *Zivotofsky II* that “[b]etween the two political branches, only the

context is judicial review, where the one voice rationale underlies the political question doctrine, allowing courts to stay their hand in foreign affairs so as not to muddy the President’s message. A third context is separation of powers, where the one voice/sole organ rationale serves to delineate the powers of the President relative to Congress. See *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2086, 2094 (2015) (invoking the one voice doctrine to support the conclusion that the President’s recognition power is exclusive).

393. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1634–59, 1688 (1997); see also Cleveland, *supra* note 387, at 975; Moore, *supra* note 388, at 1000.

394. See, e.g., *Zivotofsky II*, 135 S. Ct. at 2086 (“[T]he Nation must have a single policy regarding which governments are legitimate . . . and which are not. . . . Recognition is a topic on which the Nation must ‘speak . . . with one voice.’ That voice must be the President’s.” (citations omitted)).

395. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936), Justice Sutherland asserted that the President, “not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries He has his confidential sources of information. He has his agents” Justice Sutherland underscored that international transactions require unity of design and that their success “depends on secrecy and dispatch,” all being attributes of the presidency. *Id.* at 319 (quoting S. REP. NO. 24-406, at 24 (1836)).

396. *Zivotofsky II*, 135 S. Ct. at 2086, 2089–90; Goldsmith, *supra* note 339, at 114 (the Court “revived a functional approach to exclusive presidential power that many scholars thought was dead”).

397. *Zivotofsky II*, 135 S. Ct. at 2123 (Scalia, J., dissenting) (the Court’s functionalism “will systematically favor the unitary President over the plural Congress in disputes involving foreign affairs”); see MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 8 (2007).

398. See Moore, *supra* note 388, at 1017–23.

Executive has the characteristic of *unity at all times*.³⁹⁹ It envisions a single, cohesive, and deliberate presidential voice in foreign affairs and national security, coupled with tight Presidential control over related actions of the Executive Branch.

By contrast, the category of administrative national security illustrates that there are significant areas of foreign and security action in which the President now plays a marginal role and exercises limited control, while the administrative state has a substantial degree of independence in the targeting of individuals. In addition, this category demonstrates that there is, in fact, more than one voice at play in foreign affairs. As we have seen, Congress and courts alike play a role, albeit a limited one, in administrative national security. Congress does so through legislation that governs economic sanctions, travel restrictions stemming from the watchlisting system, aspects of U.S. detention policy, and to a minimal degree, the legal framework for detentions and targeted killings. The courts have reviewed, and at times invalidated, related measures.

Administrative national security thus highlights a dimension that has not been central in the sole organ and one voice debate to date. That debate has focused on how the constitutional role and actions of government actors outside the executive—Congress, states, and the courts—in foreign affairs undermine those doctrines, but that debate has not focused on how the administrative state undermines the same. Accounting for this aspect is particularly timely in light of the significance that *Zivotofsky II* ascribed to functional arguments in delineating the President's foreign relations powers.

IV. ADMINISTRATIVE NATIONAL SECURITY AND THE COURTS

The previous Part focused on the relationship between the administrative state and the President. It considered the structural and doctrinal implications of administrative national security for that relationship. This Part turns to the role of courts. It considers how accounting for administrative national security informs our understanding of that role.

Administrative national security offers both an explanation and a justification for the relatively greater involvement of courts in reviewing foreign affairs and national security measures in the past two decades.⁴⁰⁰ As Shirin Sinnar recently noted, “[i]n the last fifteen years, individuals have brought hundreds of cases challenging government counterterrorism policies or national security practices.”⁴⁰¹ Andrew Kent pointed to the disappearance of “legal black holes” in the

399. *Zivotofsky II*, 135 S. Ct. at 2086 (emphasis added).

400. This analysis is loosely modeled on Ronald Dworkin's concepts of fit and justification as interpretive principles judges ought to follow. The former instructs the judge to ask whether a certain interpretation of the law fits into a coherent set of principles that define the legal system. The latter instructs the judge to choose the interpretation that casts the legal system in the best light. See RONALD DWORKIN, *LAW'S EMPIRE* 255–56 (1986).

401. Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 993 (2018).

foreign and security domain due to greater judicial willingness to decide foreign affairs and national security cases.⁴⁰² Ganesh Sitaraman and Ingrid Wuerth identified a “normalization of foreign relations law.”⁴⁰³ Although Sinnar underscored that courts have ultimately resolved few national security cases on the merits,⁴⁰⁴ and Curtis Bradley and Stephen Vladeck questioned the claim that foreign relations law has in fact been “normalized,”⁴⁰⁵ scholars agree that courts have become more involved in foreign and security matters than in the past.

In what follows, I consider how the features of administrative national security make measures in this category more likely to be reviewable under the APA. I also argue that these features challenge some of the traditional arguments in favor of increased judicial deference in foreign affairs and national security.

A. EXPLANATION

The common denominator of administrative national security measures is that they target individuals directly and that they are predominantly designed and executed by administrative agencies. As we have seen, the resort to these measures has risen consistently in the past two decades, the same period in which courts have assumed a more active role in foreign affairs and national security. Although it is difficult to prove a direct causal link, these trends are related. The expansion of administrative national security contributes to explaining the parallel growth in adjudicated foreign and security cases since 9/11.

Administrative national security expands the reach of courts into the foreign and security sphere in several ways. First, individuals directly targeted by administrative national security measures are more likely to take legal action in the first place and pursue a judicial remedy than a large group of indirect victims of non-targeted measures. Second, cases brought by targeted individuals are more likely to satisfy constitutional standing requirements: a concrete, particularized “injury in fact” that affects the plaintiff in a personal and individual way;⁴⁰⁶ a causal connection between the injury and the wrongful behavior; and redressability.⁴⁰⁷ As courts have recognized, deprivation of access to assets, restriction of liberty and

402. Kent, *supra* note 1, at 1033.

403. See generally Sitaraman & Wuerth, *supra* note 1.

404. Sinnar, *supra* note 401, at 993; see also Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269, 270–71 (providing data on post-9/11 U.S. national security cases); Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035, 1040 (2016) (“[T]here have been hundreds of civil lawsuits brought over the past 14-plus years challenging some aspect of post-9/11 national security or counterterrorism policies.”).

405. See generally Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from “Exceptionalism,”* 128 HARV. L. REV. F. 294 (2015); Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322 (2015).

406. See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (2013) (civil society plaintiffs lacked standing to challenge an NSA surveillance program because they could not show that their personal communications were likely to be intercepted).

407. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

movement, and deprivation of life all satisfy the injury in fact condition. These injuries are also easy to trace back to government action.

Furthermore, the APA grants individuals directly affected by agency action statutory standing to seek judicial review. Section 702 of the APA waives the federal government's sovereign immunity for claims brought by natural and legal persons against wrongful agency action.⁴⁰⁸ This includes aliens without substantial ties to the United States—the typical targets of individualized U.S. measures. Therefore, administrative national security expands the class of potential plaintiffs able to challenge foreign and security action in federal courts. Although aliens abroad would typically not enjoy the protection of the U.S. Constitution unless they had sufficient U.S. ties,⁴⁰⁹ the APA allows them to at least seek review under the APA's arbitrary and capricious and substantial evidence standards.⁴¹⁰

Third, administrative national security measures are more likely to meet a key APA reviewability requirement—the “agency action” requirement. A government measure must constitute final agency action to be reviewable under the APA.⁴¹¹ The term “agency” is defined in section 701(b) of the APA as “each authority of the government of the United States,” with eight enumerated exceptions including Congress, the courts, and “military authority exercised in the field in time of war or in occupied territory.”⁴¹²

The precise meaning and scope of the term “agency action” remains unsettled,⁴¹³ but this much has been established: the President is not an agency and thus the President's actions and decisions are not reviewable under the APA.⁴¹⁴

408. 5 U.S.C. § 702 (2012) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

409. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“[A]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country.”); see also *Clapper*, 568 U.S. at 421 (noting that an attorney's “foreign client might not have a viable Fourth Amendment claim” (citing *Verdugo-Urquidez*, 494 U.S. at 261)); 32 *Cty. Sovereignty Comm. v. U.S. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (concluding that foreign organizations designated as FTOs for links to the IRA lacked a sufficient presence in the United States, and could not assert constitutional due process rights); *People's Mojahedin Org. of Iran v. U.S. Dep't of State (PMOI)*, 182 F.3d 17, 22 (D.C. Cir. 1999) (same).

410. See 5 U.S.C. § 706(2) (2012). Note that the APA also exempts military and foreign affairs functions from its procedural requirements for rulemaking and adjudication. See, e.g., *id.* §§ 553(a)(1), 554(a)(4).

411. See 5 U.S.C. § 704. On the finality element, see, for example, *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

412. 5 U.S.C. § 701(b). Under 5 U.S.C. § 551(13), “‘agency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”

413. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1107–12 (2009) (“[T]he staggering variety of governmental bodies, and the extreme heterogeneity of the circumstances in which they operate, have made it pragmatically impossible for courts to adhere strictly to the restrictive structure of the APA's definition of ‘agency’ . . .”).

414. See *Dalton v. Specter*, 511 U.S. 462, 470–71 (1994) (finding a challenge to the implementation of the President's decision to close a Philadelphia naval shipyard unreviewable under the APA); *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (holding that the APA does not apply to the President because the President is not an agency within the meaning of the APA).

The same applies to agency action that requires the President's final approval.⁴¹⁵ Furthermore, the challenged agency "action" must be "circumscribed" and "discrete" (as opposed to general conduct or practice), and it must fall into one of the categories listed in the APA's definition of agency action.⁴¹⁶ Therefore, Presidential involvement and difficulties in identifying sufficiently discrete agency action to contest are among the factors that have precluded judicial review of foreign and security measures and shielded them from judicial review under the APA.⁴¹⁷

These factors are significantly diminished, albeit still present, in administrative national security. Consequently, administrative national security measures have greater chances of satisfying the "agency action" requirement. Whatever the outer limits of "agency action" may be, it is difficult to think of more discrete action than a measure that targets a specific person or entity by name, depriving them of liberty, property, and even their lives. Moreover, as Part III illustrates, the President is only peripherally involved in the application of many of the individualized measures that form this category. The President has delegated significant policymaking and implementation power to administrative agencies that *do* qualify as "agencies" under the APA. The President may be above the APA, but most agencies that apply administrative national security measures—including

415. See *Dalton*, 511 U.S. at 470–71; see also *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1338–40 (Fed. Cir. 2010); *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551–52 (D.C. Cir. 1993); *Pub. Citizen v. Kantor*, 864 F. Supp. 208, 213 (D.D.C. 1994). Note that district courts have held that when the President delegates authority to agencies, their exercise of that authority is unreviewable under the APA even if final presidential approval is not required—especially when the President delegates his inherent foreign affairs authority (as opposed to authority delegated to him from Congress). See *Nat. Res. Def. Council, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009) (denying review under the APA of State Department action pursuant to executive order and agreeing that "a delegation of the President's inherent constitutional authority over foreign affairs is tantamount to an action by the President himself"); *Tulare County v. Bush*, 185 F. Supp. 2d 18, 27–29 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002) (denying APA review of National Forest Service actions pursuant to a presidential proclamation establishing a national monument). But see *Protect Our Cmty's Found. v. Chu*, No. 12cv3062 L(BGS), 2014 WL 1289444, at *5–6 (S.D. Cal. Mar. 27, 2014) (finding agency exercise of authority delegated by the President reviewable under the APA, and noting that denying review would allow an agency to "theoretically shield itself from judicial review under the APA for any action by arguing that it was 'Presidential,' no matter how far removed from the decision the President actually was"); *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 n.3 (D. Minn. 2010) (same).

416. *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 678–79 (6th Cir. 2007) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004)) ("[T]here is no authority to support the invocation of the APA to challenge generalized conduct."); see also Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 Geo. L.J. 157, 168–69 (2014) ("[T]he APA reaches only discrete agency action, as opposed to broad administration of programs.").

417. See Vermeule, *supra* note 413, at 1111–12 (stating that "[a] great deal of executive and administrative action relating to wars and emergencies fails" to meet the Supreme Court's definition of agency action, "and thus will not be covered by the APA, even if no other exclusion applies"); see also Galbraith & Zaring, *supra* note 4, at 775 (noting the "awkward fit between notice-and-comment rulemaking, with its presumption of a discrete decision-making body, and the realities of international regulatory cooperation").

the Departments of Treasury, State, Homeland Security, and Defense—are not.⁴¹⁸

Recognizing the administrative nature of measures once perceived as presidential decisions or military action might also affect how courts apply APA exceptions to the definition of “agency.” The D.C. District Court’s denial of the government’s motion to dismiss in *Zaidan*, discussed in section II.A.2, is one example. The court dropped President Trump as a defendant because the President is not subject to the APA. But it declined to apply the military authority exception to bar APA review of the plaintiff’s alleged designation for targeted killing. The court construed the designation as a reviewable interagency decision made in Washington—not an unreviewable military command on the battlefield.⁴¹⁹ Although it would be unwise to jump to conclusions based on one district court decision in a case that was ultimately dismissed, we might see more examples of such granular analysis of the nature of agency action that presents itself on the surface as exempt military or presidential action.

Finally, cases brought by individuals should be harder to dismiss under the political question doctrine than generalized challenges to policy. In *Zivotofsky v. Clinton*, Chief Justice Roberts highlighted two factors that should govern the application of the doctrine: whether there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” and whether there are “judicially discoverable and manageable standards” for resolving the question at issue.⁴²⁰ At least with respect to the latter factor, there is, in principle, law to apply when the issue before a court is the legality of the outcome of an agency adjudication of an individual case, assuming that threshold standing and reviewability requirements are met. If the individual is entitled to constitutional protections, the applicable legal frameworks are the APA and relevant statutes, procedural due process, and depending on the context, other constitutional provisions. If the targeted individual is an alien without substantial ties to the United States, there remains (at least) APA arbitrary and capricious review. These standards are all “judicially manageable.”⁴²¹

418. *But see* *Bismullah v. Gates*, 501 F.3d 178, 182 (D.C. Cir. 2007). It is important to note, however, that even if both prongs of the agency action requirement are satisfied, courts may still decline review under the APA on other grounds. Courts have denied review in national security cases involving measures targeting individuals based on Section 701(a) of the APA, which creates an exception to reviewability for agency action that “is committed to agency discretion by law,” such that the reviewing court is left with “no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 828, 830 (1985); *see, e.g., Webster v. Doe*, 486 U.S. 592, 601 (1988) (finding that the termination of a CIA employee because of his sexual orientation was unreviewable under the APA); *Merida Delgado v. Gonzales*, 428 F.3d 916, 919–20 (10th Cir. 2005) (finding that the statutory claims of the plaintiff, who the Attorney General designated as a threat to national security and aviation safety, were barred under the “committed to agency discretion by law” exception). As *Al-Aulaqi* demonstrates, the political question doctrine has remained a vehicle for denying review in this context. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44, 48–49 (D.D.C. 2010).

419. *See supra* Section II.A.2.

420. 566 U.S. 189, 195 (2012) (citing *Nixon v. United States*, 506 U.S. 224, 228 (1993)). Roberts cited only two of the “*Baker* factors.”

421. *Id.* at 209 (Sotomayor, J., concurring).

In addition to rendering more foreign and security measures reviewable, studying administrative national security also advances our understanding of judicial deference where it persists. Measures like economic sanctions, watchlisting, detentions, and targeted killings are currently applied in the framework of policies that have no expiration date. Their application involves a series of similar individual decisions over a long period of time. Therefore, even when courts refrain from weighing in on the merits of an individual measure, they can signal to policymakers what the legal red lines might be. These signals could then have a systemic impact on future individual decisions because policymakers seek to preserve their ability to apply the measure in question. They have an incentive to adjust in order to avoid adverse judicial rulings that could undermine an entire class of foreign and security tools.⁴²² In other words, doctrines that have facilitated judicial avoidance in foreign affairs and national security operate differently in the context of systematic application of individualized measures by administrative agencies.⁴²³

One example of the systemic impact of even sparse and deferential judicial review on the application of individualized administrative national security measures is the addition of procedural safeguards.⁴²⁴ As Part II shows, we have witnessed the entrenchment of habeas review for Guantanamo detainees and the strengthening of administrative detainee status review mechanisms, the strengthening of procedural safeguards in imposing targeted economic sanctions, and the addition of minimal procedural safeguards for individuals on the No Fly List. The specter of judicial review and freedom of information litigation contributed to the institution of procedural safeguards for targeted killings.

These reforms have arguably been driven, at least in part, by a desire to ward off judicial review that might jeopardize policymakers' ability to effectively apply individualized measures in the future or undermine multiple existing measures. The prospect of judicial review incentivizes investment in creating at least a semblance of fairness and procedural regularity in imposing such measures. Even judicial avoidance in the context of administrative national security could therefore have a subtle yet significant impact on related government decisionmaking, which should be considered in debates about judicial review in the foreign and security space.

422. See Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1757 (2013) ("That agencies may act strategically to avoid costly reversals, . . . is hardly a surprise, nor is it a novel insight.").

423. Cf. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 829–33 (2013) (identifying an "observer effect" whereby courts influence national security executive action even while exercising deference).

424. See *id.* at 829 & n.3 (noting that when courts did intervene in national security cases, "they have focused on the decisional processes that surround executive decisionmaking, rather than on the substance of those decisions themselves").

B. JUSTIFICATION

Accounting for administrative national security not only contributes to explaining why there is greater judicial involvement in foreign affairs and national security. It also offers a justification for judicial review in this category because it challenges assumptions underlying the conventional wisdom about the role of courts in foreign affairs and national security.

The conventional wisdom is as follows: courts should defer to the political branches—typically, to the Executive—in cases that implicate foreign affairs and national security. Foreign affairs and national security matters are better left to government policymakers than courts because policymakers have the requisite expertise, are capable of operating with dispatch and secrecy, and are politically accountable. Courts lack democratic legitimacy to weigh in on such inherently political matters and risk confrontation with the other branches of government if they do.⁴²⁵

In line with this approach, an array of doctrines explored in the previous section, including standing, the political question doctrine, and APA reviewability doctrine, have traditionally served as vessels for curtailing the role of courts in foreign affairs and national security. Although scholars have criticized this foreign-affairs “exceptionalism,”⁴²⁶ it continues to feature in judicial reasoning.⁴²⁷ Part II makes clear that judicial deference in foreign affairs and national security is alive and well.

However, now that individuals are increasingly the direct targets of foreign policy and national security measures, and related foreign and security decisionmaking resembles ordinary administrative adjudication, this conventional wisdom is undermined for a significant category of foreign and security cases. Once individuals are directly affected, the issues before courts transform from abstract policy problems with a range of plausible solutions that require unique expertise to narrowly tailored questions of administrative law and procedural due process—the type of questions that courts decide regularly.

The power of secrecy and dispatch as arguments for increased deference in foreign affairs and national security is also diminished in cases pertaining to administrative national security. As we have seen in Part II, most individuals are able to challenge the measures targeting them only after the fact—that is, after they had

425. For an overview, see Sinnar, *supra* note 401, at 997–1001 and Sitaraman & Wuerth, *supra* note 1, at 1900. See also ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS* 10–19 (2007) (judicial deference in the context of emergencies).

426. See Sitaraman & Wuerth, *supra* note 1, at 1901; see also THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 3–9 (1992); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 146–48, 218–24 (1990); Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226. But see Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1177, 1227–28 (2007) (arguing that courts should be more deferential to the Executive when interpreting ambiguous foreign affairs statutes).

427. See, e.g., *Trump v. Hawaii (Travel Ban Case)*, 138 S. Ct. 2392, 2409 (2018); see also Bradley, *supra* note 405, at 298–99; Sinnar, *supra* note 401, at 1001–06; Vladeck, *supra* note 405, at 322–23.

been sanctioned, blacklisted, detained, or shot at from a drone.⁴²⁸ The measures presumptively remain in force throughout the judicial proceedings, unless the reviewing court grants interim injunctive relief. Interim injunctive relief was not granted in any of the cases discussed in Part II, and courts have discretion to deny such relief if they find that it would harm security or undermine foreign policy.

Consequently, judicial review in administrative national security is unlikely to impede any urgent foreign policy or national security action. It does not require a quick decision that courts have been said to be incapable of producing. The universe of evidence that the government might be required to provide and that courts need to process is narrowed to the facts rendering a person targetable under the relevant authorities. Concerns about divulging classified information are mitigated by the availability of *ex parte*, *in camera* consideration.

To be sure, these are all functional arguments. They do not go to the democratic legitimacy and accountability prong of the argument for increased judicial deference in foreign affairs and national security. I do not suggest that they settle the broader normative question of whether courts should review foreign affairs and national security as a general matter. These arguments do, however, call for a more nuanced approach to the judicial role when it comes to administrative national security—and offer *a* justification for judicial review in related cases.

CONCLUSION

This Article explored the individualization of U.S. foreign and security policy in the past two decades and the emergence of administrative national security as a form of administrative adjudication in the foreign and security sphere. It considered how these developments inform longstanding theoretical and doctrinal debates about the relationship between the administrative state, the President, and the courts. Studying administrative national security provides a new lens for examining these relationships and offers several insights that challenge established assumptions and narratives. For instance, it reveals that there are structural and functional constraints on the President's control of administrative national security despite the President's elevated role in foreign and security policy. It also invites a rethinking of the posture of courts in a significant category of national security cases from both a theoretical and APA-doctrinal perspective. This Article by no means exhausts the discussion. It starts a conversation—to be continued in future work.

428. The cases discussed in Part II, *Al-Aulaqi* and *Zaidan*, are exceptions because in both cases, judicial remedy was sought prior to a potential future strike.