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Warfare as Regulation

Robert Knowles
Valparaiso University Law School

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Robert Knowles*

Abstract

The United States government's national security activities, including the use of force, consume more than half of all federal discretionary spending and are carried out by the world's largest bureaucracy. Yet existing scholarship treats these activities as conduct to be regulated, rather than as forms of regulatory action.

This Article introduces a new paradigm for depicting what agencies involved in national security do. It posits that, like other agencies, the national security bureaucracy is best understood to be engaging in regulatory activity—by targeting, detaining, interrogating, and prosecuting enemies; patrolling the border; and conducting surveillance and covert actions. Also, like other agencies, this bureaucracy may overregulate—by using force or conducting surveillance more aggressively than necessary to achieve its objectives.

This warfare-as-regulation paradigm offers several advantages over the predominant paradigm. It provides a cohesive explanatory framework for recent trends, including the individuation of targeting decisions, the infusion of legality into war-making, and widespread concern that national security decision-making favors aggressive policies and lacks sufficient transparency, accountability, and deliberation. Viewing warfare as regulation also helps reformers better identify the pathologies in the regulatory process and their true causes.

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* Associate Professor, Valparaiso University Law School. I must thank Jean Galbraith, Evan Criddle, Jonathan Hafetz, Miriam Baer, Michael Sant'Ambrogio, Melissa Durkee, Maggie Gardner, Scott Sullivan, Ryan Scoville, Jeremy Telman, David Herzig, Neha Jain, Marc Falkoff, Bec Hamilton, Geoffrey Heeren, and Alan Miller, as well as participants in workshops at the University of Pennsylvania Law School, the University of Washington School of Law, Valparaiso University Law School, and the John Marshall Law School for their thoughtful comments.

Using basic insights from public choice theory, and using the practice of targeted killing as a case study, this Article maps the power dynamics and bureaucratic incentives that drive national security regulating. It concludes that these dynamics and incentives systematically encourage overregulation. This Article then explores administrative law principles, institutional reforms, and new opportunities for political influence that may create countervailing anti-regulatory pressures.

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I. Introduction

This Article examines, for the first time, the U.S. government's national security activities as a form of regulatory action.[1] It focuses on the targeted killing process—specifically, the use of drones to kill members of armed groups in Afghanistan, Iraq, Pakistan, Somalia, Syria, and Yemen—as a case study for how bureaucrats regulate in the national security realm.[2]

Like all U.S. national security endeavors, this targeting process is undertaken by the world's largest bureaucracy.[3] The

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1. The term "national security" lacks a precise definition, but it seems to be an ever-expanding concept. *See* U.S. DEP'T OF DEFENSE, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 162 (2017) (defining national security as encompassing both national defense and foreign relations of the United States with the purpose of gaining a military or defense advantage over any foreign nation or group of nations, a favorable foreign relations position, or a defense posture capable of resisting hostile or destructive action); BARAK ORBACH, REGULATION: WHY AND HOW THE STATE REGULATES 2 (2013) (defining regulation as government intervention in the private domain); *infra* Part II (arguing that national security qualifies as regulatory action because most of its actions can be categorized as either rulemaking or adjudication).

2. *See generally* THE DRONE MEMOS: TARGETED KILLING, SECRECY, AND THE LAW (Jameel Jaffer ed., 2016) [hereinafter Jaffer] (detailing the U.S. government's previously secret legal and policy documents concerning the targeted killing program); DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY (2012) (describing the executive branch decision-making behind the escalation of the drone program).

3. *See* Niall McCarthy, *The World's Biggest Employers*, FORBES (June 23, 2015, 8:20 AM), http://www.forbes.com/sites/niallmccarthy/2015/06/23/the-worlds-biggest-employers-infographic/#3ae7382c51d0 (last visited Nov. 12, 2017) (reporting that the U.S. Department of Defense was the largest employer in the world in 2015, with 3.2 million workers, followed by China's People's Liberation Army (2.3 million), Walmart (2.1 million), McDonald's (1.9 million), and the U.K.'s National Health Service (1.7 million)) (on file with the Washington and Lee Law Review).

U.S. national security state comprises the Departments of Defense, State, and Homeland Security, the National Security Council (NSC), the Central Intelligence Agency (CIA), the National Security Agency (NSA), and more than a thousand other sub-agencies within them and in other departments.[4] These agencies employ millions.[5] Their activities account for more than half of all federal discretionary spending.[6]

Yet the growing academic literature on the administration of national security activities largely treats them as conduct to be regulated, rather than as a form of regulation.[7] For example, under the predominant paradigm, the drone bureaucracy is seen as a subject of regulation, rather than as an entity that regulates those affected by drone strikes.[8] It seems natural, then, for critics

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4. The Intelligence Community officially consists of seventeen organizations, but they have numerous agencies nested within them, and many other departments and agencies have intelligence-collection arms. *See Members of the IC*, OFF. DIR. NAT'L INTELLIGENCE, https://www.dni.gov/index.php/what-we-do/members-of-the-ic (last visited Nov. 12, 2017) (noting that the intelligence community is composed of two independent agencies, eight Department of Defense elements, and seven elements of other federal departments and agencies) (on file with the Washington and Lee Law Review); DANA PRIEST & WILLIAM M. ARKIN, TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE 86 (2011) (reporting that 1,074 federal government organizations and nearly 2,000 private companies work on programs related to counterterrorism, homeland security, and intelligence in at least 17,000 locations across the United States).

5. *See* MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT 16 (2014) (observing that the total annual outlay for federal agencies engaged in national security is around $1 trillion and that those agencies employ millions).

6. *See* CONG. BUDGET OFFICE, AN ANALYSIS OF THE PRESIDENT'S 2017 BUDGET 24 (2016) (reporting that the President's 2017 budget allocated $610 billion for defense discretionary spending and $564 billion for nondefense discretionary spending).

7. *See infra* notes 68–71 and accompanying text (explaining that legal scholarship assumes a distinction between domestic bureaucrats' regulatory activities and the government's war-making activities).

8. *See* Joshua Andresen, *Putting Lethal Force on the Table: How Drones Change the Alternative Space of War and Counterterrorism*, 8 HARV. NAT'L SEC. J. 426, 434 (2017) (suggesting that drones present unique legal challenges and require legal innovations to regulate them). *See generally* Andrew M. Anderson, Comment, *Look, Up in the Sky!: Regulating Drone Use to Protect Our Safety and Privacy*, 88 TEMP. L. REV. ONLINE 48 (2017) (arguing that precise legislation is necessary to regulate drone use to protect privacy).

of those activities to pitch reform proposals as attempts to regulate "the war machine,"[9] instead of attempts to identify and correct errors in an existing regulatory system.[10] Their proposals are aimed at striking that elusive balance between liberty and security.[11] The difficulty is that, without a theory of how and why the national security bureaucracy regulates, these reform proposals do not engage with the biggest source of problems—power dynamics, bureaucratic incentives, and the pathologies they cause.[12]

This Article begins, in Part II, by offering an explanation for why modeling national security activities as regulation has not previously been attempted.[13] Several factors—the perceived uniqueness of national security as an area of government activity and the nature of traditional warfare, in particular—contributed to scholars' neglect of national security activities when exploring the regulatory behavior of agencies.[14]

Next, in Part III, this Article explains why changes in the nature of warfare and the national security state's modes and

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9. *See* Part II.B (explaining how traditional modes of warfare fit uneasily with concepts of regulation); GILLES DELEUZE & FELIX GUATTARI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA 352 (Brian Massumi trans., 1987) ("[I]rreducible to the State apparatus . . . outside its sovereignty and prior to its law: it comes from elsewhere.").

10. *See infra* notes 410–467 and accompanying text (describing the bureaucratic process of adding a nominee to the kill list).

11. *See infra* notes 187–196 and accompanying text (discussing factors unique to national security that make it difficult to measure the effectiveness and efficiency of national security regulation); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 290 (2012) (stating that national security law scholarship focuses almost entirely on how the federal government balances liberty and security); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 38 (2007) (performing analysis that weighs liberty losses against security gains).

12. *See infra* Part IV.B (discussing the domestic and foreign players connected to the drone bureaucracy); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 925 (2005) (emphasizing that "predictions about the behavior of government institutions ought to rest on plausible accounts of the interests of individual officials who direct these institutions").

13. *See infra* Part II (summarizing national security characteristics giving rise to the current paradigm and accounting for that paradigm's persistence).

14. *See infra* notes 58–71 and accompanying text (describing the recent legal scholarship on national security regulation).

scope of activity have made a warfare-as-regulation model both viable and necessary.[15] The expansion of national security activities into the domestic realm imposes more concentrated costs on U.S. citizens in the United States.[16] In addition, the nature of warfare has fundamentally changed so that it routinely involves legal interpretation, rulemaking, and individualized determinations that are tantamount to adjudication.[17] These activities are the meat and drink of regulating agencies.[18]

It is time to embrace the reality that what looks, swims, and quacks like regulating is just that. The *warfare-as-regulation* paradigm is better suited for depicting the behavior of the national security state than the dominant *regulated-war-machine* paradigm.[19] Moreover, by grounding national security activities firmly in the language, concepts, and theory of regulation, the *warfare-as-regulation* paradigm provides a cohesive explanatory framework for recent trends—including the individuation of detention and targeting decisions,[20] the infusion of legality into war-making,[21] and widespread concern that national security

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15. *See infra* Part III (explaining the impact of globalization and the changing nature of warfare).

16. *See infra* notes 140–150 (describing domestic national security costs to U.S. citizens' privacy).

17. *See infra* Part IV.A.2 (detailing the government's process of identifying targets and procuring drones).

18. *See* 5 U.S.C. § 553 (2012) (prescribing the process for notice-and-comment rulemaking); 5 U.S.C. §§ 556–557 (2012) (prescribing the process for agency adjudication); United States v. Mead Corp., 533 U.S. 218, 227 (2001) (stating that adjudicating and notice-and-comment rulemaking are two major ways Congress delegates authority to agencies).

19. *See infra* Part III (discussing how factors that led to the current paradigm are becoming less important).

20. *See infra* Part III.A.2 (describing the individualized determination of targets as similar to agency adjudication processes); Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1523 (2013) (observing the shift from the traditional war practice of defining an enemy by a group-based judgment to the current practice, requiring individuation of enemy responsibility before military force is justified).

21. *See infra* Part III.B (arguing that the *warfare-as-regulation* paradigm ensures better compliance with domestic and international law); Margo Schlanger, *Intelligence Legalism and the National Security Agency's Civil Liberties Gap*, 6 HARV. NAT'L SEC. J. 112, 118 (2015) (arguing that intelligence

decision-making favors aggressive policies and lacks sufficient transparency, accountability, and deliberation.[22]

Part IV introduces a *warfare-as-regulation* model for the specific context of targeted killing that also applies, with some variation, to other national security activities. In constructing a simple model, like much of administrative law literature on agency behavior, this Article relies on classic insights from public choice theory, which are contested.[23] However, the evidence strongly suggests that, irrespective of bureaucratic incentives in domestic regulation, these classic insights are accurate regarding national security bureaucrats: they are motivated by zeal for the counterterrorism mission; they strive to maximize their agency's budget, authority, and prestige; and, like domestic bureaucrats, they tend to overregulate concerning rare, high-profile risks.[24]

In the targeted killing process, U.S. government agencies, supported by private firms, interpret and apply a set of substantive rules derived from international and domestic law as they develop intelligence, select targets, and carry out targeting operations.[25] When these activities are viewed as a form of

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legalism is not effective in protecting individual liberties).

22. *See infra* Part III.B (suggesting that an accurate national security regulatory model effectively accomplishes risk management); Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 284 (2011) (noting that the Central Intelligence Agency and the U.S. Department of Defense conduct significant extraterritorial targeted killings without accountability under domestic law or international obligations).

23. *See* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 2 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (noting that public choice theory rests on assumptions that public actors behave rationally and act consistently to pursue particular objectives).

24. *See infra* Section III.D.1 (discussing incentives and traits of national security bureaucrats); GLENNON, *supra* note 5, at 26–28 (depicting national security bureaucrats as team players who are committed to the process rather than the outcome); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 9–11 (1993) (describing domestic agencies' tendency to overregulate high-profile, low probability risks).

25. *See* U.S. DEP'T OF JUSTICE, PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES 1 (2013) [hereinafter Drone Playbook] (prescribing procedures for approving targeted killing operations outside Iraq, Afghanistan, and Syria); Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 701–33 (2014) (summarizing the bureaucratic process involved in certain types of targeted killing). *See generally* JEREMY SCAHILL, THE

regulation, that targeted killing bureaucracy resembles the fabled overreaching government agency of conservative nightmares in the 1970s and 80s—captured by a handful of public interest organizations and populated by empire-building, prestige-oriented bureaucrats who together drive the agency to overregulate without regard to the costs and long-term consequences.[26] The difference is that the "public interest organizations" are, in this case, powerful military and intelligence contractors.[27]

The bureaucrats' incentives, and the lack of countervailing pressures, consistently push the national security bureaucracy toward overregulation.[28] Under normal circumstances, in other words, that bureaucracy will use greater force or broader surveillance than necessary to efficiently achieve its objectives.[29]

This Article then offers an account of how these bureaucratic incentives influence decision-making in the specific context of the targeting process.[30] The national security bureaucracy maximizes

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ASSASSINATION COMPLEX: INSIDE THE GOVERNMENT'S SECRET DRONE WARFARE PROGRAM (2016) (offering, based on leaked documents and interviews, a more skeptical view of the process's effectiveness at producing accurate intelligence, successfully eliminating enemies, and avoiding unnecessary civilian deaths and injuries).

26. *See infra* Part IV.D.1 (describing the development of public choice theory in the 1970s and 1980s); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) [hereinafter DeMuth & Ginsburg, *White House Review*] (depicting regulation as excessively cautious and favoring narrow groups instead of the general public); *cf.* Jaffer, *supra* note 2, at 9–10 (describing the formation of the targeted killing bureaucracy).

27. *See* LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS 118 (2011) [hereinafter DICKINSON, OUTSOURCING WAR AND PEACE] (noting that, in the first eighteen months of the Bush administration, at least thirty-two top policy appointees were former executives, consultants, or major shareholders of top military contractors); ANDREW COCKBURN, KILL CHAIN: RISE OF THE HIGH-TECH ASSASSINS 49–50 (2015) (discussing how, following the Vietnam War, defense contractors mobilized support in Congress for various drone projects).

28. *See* GLENNON, *supra* note 5, at 19 ("The resulting incentive structure encourages the exaggeration of existing threats . . . .").

29. *See id.* (observing that the exaggeration of existing threats may also include creating new threats).

30. *See infra* Section IV.D.1 (explaining the incentives driving the national security bureaucracy).

agency prestige by producing enough targets to maintain the drone program's primacy as a counterterrorism tool.[31] In order to do so, it incentivizes the intelligence community and private contractors to supply targets.[32] When strikes fail to kill an intended target, the agencies respond to this prestige threat by incentivizing the finding of intelligence to support a determination that those actually killed qualified as "enemies."[33] The result is that, despite rigorous internal bureaucratic control mechanisms, the agencies involved in targeted killing will tend to overregulate—to launch too many strikes with inadequate intelligence, and to adopt overbroad assumptions that favor counting those killed as "enemies."[34]

Part V explores ways to compensate for the large imbalance in favor of overregulation in the targeting process specifically, and in the national security realm more generally. It offers no easy solutions.[35] Because agencies in the national security state all generally share the same counterterrorism mission and bureaucratic incentives, institutional reforms that may be successful in the domestic context are unlikely to have the same effect in the national security context.[36]

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31. *See* OFFICE OF DIR. OF NAT'L INTELLIGENCE, SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES 1 (2016) (reporting between 2,372 to 2,581 combatant deaths by drone strike between Jan. 20, 2009 and Dec. 31, 2015).

32. *See* SCAHILL, *supra* note 25, at 71 (describing a former drone operator's observation that there is an ever-increasing demand to add more targets to the kill list).

33. *See infra* notes 356–3369 (discussing the incentives for finding intelligence to support the "enemy" designation).

34. *See, e.g.*, Jaffer, *supra* note 2, at 13–14 (offering evidence that the drone bureaucracy applied a presumption of combatant status if there was no evidence showing those killed were innocent bystanders); *see also infra* Section IV.D.1 (discussing how bureaucrats' incentives guide national security regulating).

35. *See infra* Part V (discussing the value of recognizing the strong pro-regulatory and weak anti-regulatory forces to help reformers correct the imbalance).

36. *See infra* Part V.A (describing the unique institutional reform considerations in the national security context); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 335 (2013) [hereinafter Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*] (proposing re-assignment of some Department of Justice functions to other agencies with different institutional

Courts or truly independent quasi-judicial review bodies could help address the imbalance if they would apply administrative law principles that encourage and test agencies' contemporaneous reason-giving.[37] Although two scholars have previously proposed applying them in internal CIA procedures to increase accountability,[38] this Article provides a different rationale for them—that their most important attributes are their anti-regulatory effects.[39]

Finally, this Article identifies emerging opportunities to use political influence to alter bureaucratic incentives in the targeting process by focusing on the military contractors intimately involved in it.[40] In particular, the rapid growth of the law enforcement and commercial drone market may create new cleavages between contractors seeking to expand into domestic markets and the bureaucrats they work with in the targeting process.[41] If the public, U.S. and worldwide, becomes more aware of the costs of drone use, it could pressure the private firms, who in turn could pressure the bureaucrats to scale back the level of regulation.[42]

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missions as a means of blunting prosecutors' incentives to over-regulate).

37. *See infra* Part V.B (asserting that establishing a judicial review mechanism can reduce the incentive to over-regulate); SEC v. Chenery Corp., 318 U.S. 80, 94–95 (1943) (holding that agency decisions may be upheld by courts only on the grounds articulated by the agency during the decision-making process); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 958–59 (2007) (arguing that *Chener*y, by prohibiting agencies from relying on post hoc rationales, promotes the core values of the nondelegation doctrine, assuring the agency has exercised judgment on an issue in the first instance).

38. *See* Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1235 (2011) (observing that U.S. administrative law, the "hard look" and *Chenery* doctrines in particular, are useful for "fleshing out" the procedures for reviewing CIA drone strikes).

39. *See infra* Part V (discussing the benefits of applying key administrative law principles to the national security context).

40. *See* COCKBURN, *supra* note 27, at 16–20 (explaining that contractors are intimately involved in nearly every stage of the targeting process); *infra* Part III.D.1 (discussing contractors' incentives).

41. *See infra* Part V.C (discussing how firms experience a shift in incentives when supplying for commercial and private use).

42. *See infra* Part V.C (arguing that heightened public awareness of the

II. Two Paradigms of National Security Activities: The Regulated War Machine and the Regulating War Bureaucracy

The term "regulation," as I use it here, encompasses any "government intervention in the private domain,"[43] but also extends to government activity designed to control the conduct of public entities as well.[44] The types of regulation that receive the most attention are activities by agencies that impose a concentrated cost on a regulated subject.[45] The Environmental Protection Agency (EPA), for example, imposes caps on emissions, requiring polluters to spend money, either by producing less and forgoing profits, or by upgrading their equipment.[46] The criminal justice system is made up of agencies—including police departments, sentencing commissions, and prosecutor's offices—

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costs of drone strikes increases political pressure to regulate).

43. *See* Barak Orbach, *What Is Regulation?*, 30 YALE J. ON REG. ONLINE 1, 10 (2013) (discussing uncertain and contested definitions of "regulation" in American legal history). *Compare* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2621–25 (2012) (Ginsburg, J., concurring in part and dissenting in part) (arguing that the power to regulate includes the power to compel activities), *with id.* at 2644 (joint dissent) (arguing that the phrase "to regulate" "can mean to direct the manner of something but not to direct that something come into being"). *See generally* ORBACH, *supra* note 1 (defining regulation as government intervention in the private domain).

44. *See* 5 U.S.C. § 551(2) (2012) (defining "person" to include a public or private organization).

45. *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 721 (2005) [hereinafter Barkow, *Administering Crime*] (describing a typical agency regulation under which the subject of the regulation suffers a concentrated cost). Regulation should impose the concentrated costs on the entities that are externalizing them to society, forcing those entities to re-internalize the costs. *See* Victor B. Flatt, *Should the Circle Be Unbroken?: A Review of the Hon. Stephen Breyer's* Breaking the Vicious Circle: Toward Effective Risk Regulation, 24 ENVTL. L. 1707, 1707 (1994) (book review) ("The goal is to internalize externalities so that everyone makes economically logical choices concerning their decisions and innocent persons are not unfairly burdened.").

46. These costs may also be passed on to consumers. *See* Arnold W. Reitze, Jr., *State and Federal Command-and-Control Regulation of Emissions from Fossil-Fuel Electric Power Generating Plants*, 32 ENVTL. L. 369, 375–76 (2002) (noting that utility companies pass the costs of complying with environmental regulations directly to consumers or incorporate the costs into the base rate).

that regulate by restricting the public's freedom and by arresting, fining, and incarcerating individuals.[47]

Most significant agency regulatory activities fall into one of two categories—rulemaking or adjudication.[48] Adjudication is an individualized determination based on specific facts; rulemaking, in contrast, is a proceeding, often involving broad participation by interested parties, that results in a policy of widespread application.[49] The Administrative Procedure Act (APA) defines both types of proceedings.[50] But even activities that fall outside statutory definitions, or do not qualify as "agency action" at all,[51] can still generally be categorized as either rulemaking or adjudication.[52] For example, the Social Security Administration

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47. *See* Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 91 (2016) ("Police agencies should be governed by the same administrative principles that govern other agencies."); Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, *supra* note 36, at 273 (analyzing the Department of Justice as an agency that regulates corrections, clemency, and forensics); *see also* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810–11 (2015) (describing how agencies in immigration enforcement, public housing, licensing, and child protective services use arrest information as a regulatory tool). *See generally* Barkow, *supra* note 45 (evaluating sentencing commissions as regulating agencies).

48. *See* Eric E. Johnson, *Agencies and Science-Experiment Risk*, 2016 U. ILL. L. REV. 527, 558 (2016) ("Based on the statutory attention lavished on [rulemaking and adjudication], it is clear that the APA sees these activities as the two most important modes of agency work."); Christopher DeMuth, *Can the Administrative State be Tamed?*, 8 J. LEGAL ANALYSIS 121, 122 (2016) (observing that "regulation" also includes other activities, such as rule enforcement, licensing, and producing guidance documents).

49. *See* Johnson, *supra* note 48, at 558 (describing adjudication as the quasi-judicial and rulemaking as the quasi-legislative function of agencies); *see also, e.g.*, Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1540 (9th Cir. 1993) ("Where an agency's task is to 'adjudicate disputed facts in particular cases,' an administrative determination is quasi-judicial. By contrast, rulemaking concerns policy judgments to be applied generally in cases that may arise in the future . . . .").

50. *See* 5 U.S.C. § 551(5) (2012) ("[R]ulemaking means agency process for formulating, amending, or repealing a rule."); 5 U.S.C. § 551(7) (2012) ("[A]djudication means agency process for the formulation of an order.").

51. *See* 5 U.S.C. § 551(13) (2012) ("[A]gency 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.").

52. *See* Sean Croston, *It Means What It Says: Deciphering and Respecting the APA's Definition of "Rule"*, 53 WASHBURN L.J. 27, 40–42 (2013) (discussing

conducts rulemaking when it issues handbooks to its employees to guide them in the application of the agency's regulations.[53] And a police department engages in adjudication when an officer arrests a criminal suspect.[54]

The U.S. government's most significant national security activities also fit within the definition of regulation. Like agencies that regulate drug manufacturers or polluters, the national security state's core mission is to limit risk—to provide safety to American society by imposing concentrated costs on potential or actual enemies and the public.[55] And like criminal justice agencies, the national security state often imposes those costs through the application of coercive power directly upon individuals—both enemies and the public.[56]

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opinions in which courts have interpreted the APA's definition of "rule" narrowly to exclude many rule-type determinations).

53. *See* Timothy H. Gray, *Manual Override?* Accardi*,* Skidmore*, and the Legal Effect of the Social Security Administration's Hallex Manual*, 114 COLUM. L. REV. 949, 950–51 (2014) (criticizing the reasoning and conclusion in *Moore v. Apfel*); *see also* Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (holding that the SSA's internal guidance manual "does not have the force and effect of law . . . [and] is not binding on the [agency]").

54. *See* Jain, *supra* note 47, at 818 (observing that the decision to arrest a suspect is an individualized determination in which police officers or magistrates exercise broad delegated discretion in applying the probable cause standard to a specific set of facts); Slobogin, *supra* note 47, at 96 ("In administrative law parlance, the suspicion-based model of policing could be characterized as a form of 'adjudication' by the officer on the street.").

55. *See* PHILIP BOBBITT, TERROR AND CONSENT 12 (2008) (arguing that most democracies today have evolved into "market states," whose "strategic raison d'être . . . is the protection of civilians, not simply territory or national wealth or any particular dynasty, class, religion, or ideology"); BREYER, *supra* note 24, at 9–10 (1993) (explaining that the regulatory system can be divided into two parts—"risk assessment," and "risk management"); Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3, 6–7 (2014) (proposing that the risk-management literature be utilized to develop a more rights-protective approach to the regulation of domestic intelligence collection); Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 908 (2010) ("Contemporary regulation is concerned almost exclusively with the mitigation of risks . . . to human health and the environment; risks to the solvency of financial institutions; and risks from hazardous products, automobiles, workplace conditions, and so on.").

56. *See* Slobogin, *supra* note 47, at 96 (comparing agency adjudication to the discretionary decision a police officer makes to "stop, arrest, or search someone").

Moreover, when the national security state regulates, most of its actions fall within the general definition of either rulemaking or adjudication.[57] The Transportation Security Administration (TSA) engages in rulemaking when it prescribes security-screening measures for airline passengers.[58] The NSA engages in rulemaking when it determines the parameters of search terms that will yield individuals' private information for analysis.[59] A combatant command conducts rulemaking when it formulates rules of engagement, which dictate when and how military personnel may use lethal force against an enemy.[60] And the National Counterterrorism Center (NCTC) engages in adjudication when it vets and validates the "nomination" of an individual for the "kill list."[61]

Scholars and the general public have long recognized that the modern national security state consists of a vast, complex, and often-dysfunctional bureaucracy.[62] But until recently, it was rare

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57. This is obscured by the several ways in which the APA makes national security rulemaking and adjudication exempt from its procedural requirements. *See, e.g.*, Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 904–05 (2014) (describing the national security exceptions).

58. *See, e.g.*, Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287-01 (Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540) (providing that the TSA may use "advanced imaging technology" to screen airline passengers).

59. *See United States Signals Intelligence Directive 18: Legal Compliance and Minimization Procedures*, NAT'L SECURITY AGENCY (July 22, 1993), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-01.htm (last visited Nov. 12, 2017) (prescribing NSA rules for protecting constitutional rights of U.S. persons and the collection, processing, and dissemination of information concerning U.S. persons) (on file with the Washington and Lee Law Review); U.S. DEP'T OF DEF., DIRECTIVE 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (1982), http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/524001r.pdf (detailing the role of DOD personnel and resources in the NSA programs).

60. *See, e.g.*, NATO INT'L SEC. ASSISTANCE FORCE, COMISAF'S TACTICAL DIRECTIVE (Nov. 30, 2011), http://www.rs.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20(releaseable%20version)%20r.pdf (prescribing directions for lowering civilian causalities in Afghanistan).

61. McNeal, *supra* note 25, at 728.

62. Criticism of the national security bureaucracy since the 1960s has emphasized its entanglement with the defense industry and members of Congress seeking federal largesse for their constituents. *See, e.g.*, GORDON ADAMS, THE IRON TRIANGLE: THE POLITICS OF DEFENSE CONTRACTING 24–26

for scholars to analyze the functioning of agencies within this bureaucracy.[63] And the regulatory nature of that bureaucracy has received little-to-no attention.[64] Debates about the proper scope and mode of federal regulation from the 1960s onward focused on domestic matters—economic regulation, such as the markets for air transportation and telecommunications; and quality of life, such as the workplace and the environment.[65] When scholarly analysis touched on the government's national security activities, it discussed how efficiently and effectively that bureaucracy delivers the service of national security rather than on how, in delivering this service, national security activities also regulate.[66]

Since 9/11, legal scholars have paid more attention to the workings of the national security bureaucracy and the subsequent reorganization of many agencies involved in intelligence-gathering, homeland security, and immigration.[67] As part of the broader debate about how national security laws and institutions can strike the correct balance between liberty and

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(1981) (asserting that key national security policy decisions are made by a close-knit and exclusive group of federal bureaucrats, key members of Congress, and private business officials); *see* Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 288 ("'National security' is the system made up of state bureaucracies (the Pentagon, CIA, NSA, National Security Council ('NSC'), etc.) and market bureaucracies (Boeing, Lockheed Martin, Booz Allen Hamilton, Halliburton).").

63. *See* AMY ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, NSA, AND JCS 2 (1999) ("[E]xisting work in political science provides little help [in understanding national security agency interaction]. U.S. foreign policy agencies in general and national security agencies in particular have been vastly understudied in the discipline.").

64. *See* John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2282 (2009) ("To the extent that administrative law scholars touched on the military, they have tended to focus on the question of delegated authority . . . .").

65. Jerry Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 23, at 24–26.

66. *See* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 18 (1971) (limiting the scope of his analysis of public bureaus to the services they provide, rather than their regulatory functions). In this highly influential work, Niskanen briefly suggested that military strategy was driven by demand and budget constraints. *See generally id.* at 76.

67. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified at 50 U.S.C. § 401 (2012)).

security,[68] legal scholars began exploring the ways administrative law principles can or should be applied to the government's national security activities.[69] Relatedly, in the spirit of earlier analysis of domestic regulation, some scholars are beginning to draw on insights from public choice theory to consider which types of procedures and institutional designs are most effective in fighting terrorism.[70] Deborah Pearlstein and Samuel Rascoff have separately observed family resemblances between the development of the national security bureaucracy and what Pearlstein calls the "broader administrative state."[71]

But legal scholars still hesitate to treat the national security state as a bureaucracy that regulates. They still draw sharp distinctions between the work civil bureaucrats do and the work

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68. *See* Evan Fox-Decent & Evan J. Criddle, *Interest-Balancing Vs. Fiduciary Duty: Two Models for National Security Law,* 13 GERMAN L.J. 542, 542 (2011) ("By all accounts, interest balancing has provided the primary model for making national security law and policy worldwide since September 11, 2001."). *See generally* POSNER & VERMEULE, *supra* note 11.

69. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1176 (2007) (applying *Chevron* to foreign relations law, both directly and by analogy); *see* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1233 (2007) (rejecting the presumptive application of *Chevron* deference to any executive interpretation in the foreign affairs context); Knowles, *supra* note 57, at 891 (arguing for scaling back the scope of exceptions for national security rulemaking carved out in the APA); Radsan & Murphy, *supra* note 38, at 1235 (observing that in U.S. Administrative Law, the "hard look" and *Chenery* doctrines in particular, are useful for "fleshing out" the procedures for ex-post review of CIA drone strikes); Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 492 (2014) (proposing that foreign relations law be viewed "as akin to an area of domestic regulatory law" so that judicial review will involve the application of administrative law principles); Yoo, *supra* note 64, at 2281 ("Administrative law scholarship has generally passed over the study of the military in favor of the domestic agencies.").

70. *See generally* Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 705 (2016); Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information Sharing*, 78 GEO. WASH. L. REV. 279, 282 (2010); Yoo, *supra* note 64, at 2283.

71. *See* Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 799 (2012) ("[T]he modern military in many ways enjoys the functional advantages, now long embraced, of administrative agencies."); Rascoff, *supra* note 70, at 637–38 ("[T]here is a lot to recommend the analogy between the intelligence apparatus and the administrative state . . . .").

of "spies and soldiers,"[72] and treat the government's warmaking activities as a system separate from, if entangled with, the law.[73] Proposals to introduce more discipline, accountability, and deliberation into the targeted killing process, for example, are pitched as efforts to prevent officials from acting "with impunity,"[74] "operating unchecked,"[75] or "being issued a general hunting license."[76] When legal scholars refer to "regulating warfare," they are interested in ways that the law can or should impose restrictions on the activities of the national security state, in the same way that government restricts the activities of individual citizens or firms.[77]

In other words, the paradigm that dominates the legal and professional discourse is about the regulation of warmaking, not

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72. David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1374 (2007).

73. *See* Carla Crandall, *If You Can't Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing*, 43 SETON HALL L. REV. 595, 598 (2013) [hereinafter Crandall, *If You Can't Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing*] (describing the "nonlinear dynamic systems of warfare and national security law").

74. *See* Carla Crandall, *Ready . . . Fire . . . Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes*, 24 FLA. J. INT'L L. 55, 58 (2012) (arguing that due process requires the establishment of "review tribunals" comparable to Combatant Status Review Tribunals (CSRTs)).

75. *See* Toren G. Evers-Mushovic & Michael Hughes, *Rules for When There Are No Rules: Examining the Legality of Putting American Terrorists in the Crosshairs Abroad*, 18 NEW ENG. J. INT'L & COMP. L. 157, 159–60, 179–82 (2012) (proposing presidential sign-off on all targeted killings of Americans and independent ex-post investigation that reports to Congress).

76. Radsan & Murphy, *supra* note 38, at 1209.

77. *See id.* at 1232 (analogizing military operations during traditional wars to the actions of private citizens, whose typical decisions are not subject to official scrutiny unless "the relevant authorities . . . have grounds for believing a serious violation has occurred"); Oona A. Hathaway, Rebecca Crootof, Daniel Hessel, Julia Shu & Sarah Weiner, *Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. PA. L. REV. 1, 17 (2016) ("[*Jus ad bellum* rules] create a potential loophole in the legal regulation of the use of military force that could leave consent-based interventions dangerously under-regulated."); McNeal, *supra* note 25, at 781–83 (describing the process of targeted killing as being carried out by a bureaucracy and discussing internal and external control mechanisms); Sales, *supra* note 70, at 282–83 (analogizing intelligence-collection agencies to private firms). *But cf.* Rascoff, *supra* note 70, at 662 (describing how the telecommunications industry "has now taken a stance against 'overregulation' by the intelligence state").

about warmaking as regulation. Although I focus here on one mode of warfare, the analytical problems I discuss generally apply to the whole panoply of national security activities, including surveillance, covert action, border control, and foreign affairs. I call this dominant paradigm *the regulated-war-machine.* Below, I discuss reasons why this paradigm came to dominate and why it persists. I then explain why it falls short in accurately modeling today's national security regulatory activities.

A. The Conceptual Difficulty

The American public, the Congress, and the courts are accustomed to treating national security as a unique and separate sphere of government activity.[78] Areas like health care and banking, for example, saw fierce debates on the propriety of government intervention in the private marketplace.[79] But national security was the first, and is the essential, government function, necessary to the very existence of society and the state.[80] Government is, if nothing else, the entity with a monopoly on the use of force.[81] Americans never debated whether the U.S. government should conduct national security activities at all—it always has and it always will.[82]

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78. *See generally* Crandall, *supra* note 73.

79. *See, e.g.*, THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 153–205 (1992) (describing failed Nineteenth Century efforts to centralize federal government functions in a health and welfare ministry). *See generally* JAMES WILLARD HURST, LAW AND MARKETS IN UNITED STATES HISTORY (2010) (describing the rise of market regulation in the U.S.).

80. *See* Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 390 (2006) ("Probably no function of government is deemed more quintessentially a 'state' function than the military protection of the state itself . . . .").

81. *See id.* (arguing that privatizing military functions could "threaten" the government's "existence" by reducing its control of the use of force); Kristen Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 475 (2017) (observing that crime control, foreign policy, and national defense closely relate "to the modern understanding that the state's function is to monopolize the legitimate use of force within a territory and to protect its citizens from both internal and external threats").

82. *See* DELEUZE & GUATTARI, *supra* note 9, at 352–54 (theorizing that the

Because the private realm could not exist or survive without national security, it is difficult to conceptualize national security activities as intervening in that private realm. Instead, it has been easier to conceptualize other public entities—legal frameworks including international law, the Congress, the courts, internal oversight organizations—as intervening to correct errors in the functioning of an ever-present war machine.[83]

B. The Nature of Traditional Warfare

Moreover, the *regulated-war-machine* paradigm has dominated because the nature of traditional warfare made national security activities an uneasy fit with common notions of what regulation is.[84] Most forms of domestic regulation are observable, concern matters accessible to the trained professional in the field, involve public participation, govern activities inside the United States, and impose concentrated costs primarily on U.S. citizens and corporations.[85]

Traditional warfare was, in several fundamental respects, just the opposite. First, it was difficult to conceive of traditional warfare as government intervention in the private domain.[86] Traditional warfare was primarily "characterized by amassed armies on pitched battlefields" or "tank battalions maneuvering to break through enemy lines."[87] The goal of warfare has always

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"war machine" preceded the existence of government and has been co-opted by it).

83. *See id.* at 354 (arguing that it is necessary to conceptualize the "war machine" as something different and separate from the "State apparatus").

84. *See id.* at 352 ("As for the war machine in itself, it seems to be irreducible to the State apparatus, to be outside its sovereignty and prior to its law: it comes from elsewhere.").

85. *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174 (1997) ("[U.S.] Administrative law has somewhat of a fetish for public participation in agency decision-making."); Michael P. Vandenbergh, *From Smokestack to SUV: The Individual As Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 523–33 (2004) (describing the forms and processes of domestic environmental regulation).

86. *See generally* Crandall, *supra* note 73.

87. GANESH SITARAMAN, THE COUNTERINSURGENT'S CONSTITUTION: LAW IN

been to destroy the enemy's capacity or will to fight.[88] Traditionally, this was accomplished through "kill-capture"—destroy the enemy's capacity by killing or capturing a sufficient number of its soldiers and neutralizing its weaponry.[89] The enemy was identifiable: the distinction between uniformed combatants and non-combatants was usually easy to draw.[90] This type of warfare does not resemble regulation—i.e., government intervention in the private domain—so much as multiple governments struggling for dominance.

By the Twentieth Century, with the rise of air power, "total war" became the objective—"smashing the material and moral resources of a people . . . until the final collapse of all social organization."[91] The principles of international humanitarian law developed in response, intended to constrain the destructiveness of the war machines and prevent extreme suffering.[92] But this development only reinforced assumptions that warfare was a phenomenon to be regulated. The practice of total war, although it involves the private realm and is regulated by law, seems alien to the concept of regulation—total war is annihilation, not intervention.[93]

THE AGE OF SMALL WARS 3 (2012).

88. *See id.* at 23 ("Though killing and capturing does take place, it is not the primary goal . . . .").

89. *Id.* at 32–33.

90. *See id.* at 36 (explaining that a key difference between the approaches required of the counterinsurgent and the "conventional warrior" is that enemy combatants are now "embedded in the local community").

91. *See* WILLIAM C. MARTEL, VICTORY IN WAR: FOUNDATIONS OF MODERN MILITARY POLICY 71 (2006) (quoting Italian military strategist Giulio Douhet).

92. *See* SITARAMAN, *supra* note 87, at 44 (explaining that the humanitarian principle to not attack civilians developed from a "shift in military strategy"); Eyal Benvenisti & Amichai Cohen, *War Is Governance: Explaining the Logic of the Laws of War from A Principal-Agent Perspective*, 112 MICH. L. REV. 1363, 1367 (2014) ("Modern militaries and their civilian leaderships need IHL—indeed, a kind of IHL that is specifically tailored to control the agents—because they collectively face a daunting challenge of controlling their respective troops, whose interests may diverge from their own.").

93. *See* MARTEL, *supra* note 91, at 71 ("'War must be total because the decision,' according to Douhet, 'must depend upon smashing the material and moral resources of a people . . . until the final collapse of all social organization.'").

Second, traditional warfare, and national security activities more generally, have always involved a great deal of secrecy.[94] This aspect has only become more pronounced over time. By 2009, 1,074 U.S. government organizations worked on programs at the top-secret level alone.[95] The number of agencies and employees working on merely "secret" level programs is surely much larger.[96] Secret government activities, by their very nature, cannot involve the broad participation and corresponding accountability—either to the public or Congress—that we expect from regulatory activities.[97]

Third, military experts with unique expertise carried out traditional warfare with scant public consultation.[98] It is a well-established legal trope that even the most complex and technically obscure domestic regulatory subject is more comprehensible to outside observers, and susceptible to second-guessing, than foreign relations and national security matters.[99] Many modern developments—such as the end of

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94. *See* DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 59–74 (1998) (tracing secrecy in the context of warfare from World War I to the Cold War). *See generally,* GEOFFREY R. STONE, TOP SECRET: WHEN OUR GOVERNMENT KEEPS US IN THE DARK chs. 1–3 (2007).

95. PRIEST & ARKIN, *supra* note 4, at 86.

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

97. *See* Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141, 2144 (2016) ("In some instances, the debate over secret law . . . [focuses on] executive branch efforts to treat congressional delegations as invitations to develop broad and malleable standards that provide sufficient elasticity to respond to heterogeneous, often rapidly developing events."); Knowles, *supra* note 57, at 885–87 (explaining that secret national security rulemaking does not undergo traditional APA notice-and-comment rulemaking).

98. *See* Pearlstein, *supra* note 71, at 849–50 (commenting on the growing differences between civilians and the military).

99. *See* ZEGART, *supra* note 63, at 27 ("Whereas domestic policy is fairly out in the open, much of national security agency activity is conducted in secret."); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1366–85 (2009) (describing how courts defer to the executive branch's factual national security assertions in different contexts); Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 61, 71 (2014) (describing the lack of guidelines governing the FBI's conduct under J. Edgar Hoover); Jonathan Masur, *A Hard Look or A Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441,

conscription in the U.S., the professionalization of the military,[100] and the dominance of technology in warfare—have widened the military-civilian divide[101] and enhanced the perceived uniqueness of national security expertise.

Finally, and perhaps most importantly, the United States waged traditional warfare almost exclusively abroad, and its most concentrated costs were imposed on foreign citizens and property.[102] In other words, the U.S. government regulates foreign citizens through its extraterritorial national security activities, yet that concept is difficult to reconcile with theories of regulation that justify government intervention in the private realm on some version of a social contract model.[103]

C. Vague Grants of National Security Authority

These aspects of traditional warfare and the *regulated-war-machine* paradigm they have inspired are reflected in the post-World War II institutional design of the national security state.[104] Congress exempted much of the state's

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444 (2005) (analyzing "courts' deference to the Executive's wartime factual determinations" and how this has "short-circuited the process of judicial review"). *Cf.* Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1568 (2016) (discussing the constitutionality of the "reasonable suspicion" threshold for adding individuals to terrorist watch lists).

100. *See* Pearlstein, *supra* note 71, at 849–50 (describing the transition from the "citizen-soldier" to a professionalized military).

101. *Id.*; *see* DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER 76–77 (2010) (discussing how the military has become more politically partisan); THOMAS E. RICKS, MAKING THE CORPS 23 (1997) (describing a military that has become "Republicanized" and features officers who "seem to look down on American society in a way that the pre-World War II military didn't").

102. *See* Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 39 (2005) (observing that, because the United States primarily conducts warfare abroad, its reputation is insulated at home).

103. *See id.* at 34 ("On the global level, there is no public that can . . . ground the justification for accountability mechanisms of a democratic type.").

104. *See* DOUGLAS T. STUART, CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA 110–11 (2008) (describing how the U.S. government's organizational failures prior to, and during, World War II

regulatory activity from the APA's procedural requirements.[105] While the organic statutes establishing domestic agencies such as the Federal Communications Commission (FCC), the SEC, and the EPA defined agencies' missions in broad terms, the National Security Act of 1947 is the most vague organic statute of them all, vesting the CIA, the NSA, and the NSC with little more than simple mandates to gather intelligence for the purpose of protecting national security.[106] The Federal Bureau of Investigation (FBI), which has long conducted a substantial portion of national security activities, has had no statutory mandate to do so for most of its history.[107] These agencies operated with minimal oversight until the 1970s, when Congress finally began to intervene to regulate intelligence collection.[108]

Moreover, when the national security state engages in the use of force, the source and scope of its mandate to do so has typically been even murkier.[109] The President may order the use

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influenced the design of the National Security Act). *See* ZEGART, *supra* note 63, at 17–19 (providing an overview of the new institutionalism theory of bureaucracy).

105. *See, e.g.*, 5 U.S.C. § 553(a)(1) (2012) (stating that notice-and-comment requirements apply to rulemaking "except to the extent that there is involved a military or foreign affairs function of the United States"); *see* Knowles, *supra* note 57, at 919–32 (discussing the legislative history of, and historical context for, the APA's national security exceptions); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (describing "black and gray holes" in Administrative Law that enable Executive discretion during emergencies).

106. *See* Rascoff, *supra* note 70, at 699 ("[A]lthough Congress initially regulated the intelligence community with an exceedingly light touch—the CIA's organic law is breathtakingly short on detail . . . .").

107. *See id.* at 700 ("[T]he FBI lacks a basic legislative charter altogether . . . ."); Dalal, *supra* note 99, at 70–71 ("[T]he FBI gradually expanded its mission from strictly federal law enforcement, to domestic intelligence gathering for wartime national security, and finally to domestic intelligence gathering to preserve social and political order within the United States.").

108. Zachary K. Goldman and Samuel J. Rascoff, *Introduction—The New Intelligence Oversight, in* GLOBAL INTELLIGENCE OVERSIGHT xvii, xvii (Zachary K. Goldman & Samuel J. Rascoff eds., 2015).

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

of force in some circumstances without specific statutory authorization and with minimal congressional involvement.[110] Even when Congress explicitly authorizes the use of military force by statute, it typically grants authority in broad, vague terms.[111] The Uniform Code of Military Justice, with certain important exceptions, focuses on the internal governance of the military bureaucracy, rather than the ways in which the military uses force.[112] In general, the national security bureaucracy has enormous discretion to regulate with the use of force as it sees fit, so long as it complies with the President's relevant orders and its own interpretations of international law.[113]

As Professor Jonathan Hafetz has observed, the national security bureaucracy takes these vague grants of authority as "invitations to develop broad and malleable standards" and "strip rules of their ordinary meaning, causing their *sub rosa* transformation into standards."[114] Unlike rules and standards in other areas, where agency interpretations are regularly subject to judicial interpretation and other forms of external scrutiny, national security delegations of authority "resist particularization" and tend to expand over time.[115]

Because "much of the study of administrative law has focused on formal authority, at the expense of actual or effective

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110. *See id.* at 691 ("Even though the Constitution assigns to Congress the power to declare war, as well as a variety of other powers relating to war, presidents have on numerous occasions initiated the use of military force without obtaining specific congressional authorization.").

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

112. *See* McNeal, *supra* note 25, at 761 (detailing how accountability and punishment operate under the Uniform Code of Military Justice).

113. *See id.* at 763 ("The process [of targeted killing] is unaccountable because the killings are beyond the reach of courts, making Executive Branch officials 'judge, jury[,] and executioner.'").

114. Hafetz, *supra* note 97, at 2144.

115. *Id.*; *see also* Dalal, *supra* note 99, at 132 (remarking that scholars have cautioned about the growing power of unfettered executive discretion in matters of national security).

power,"[116] such malleable and expanding grants of formal authority contributed to administrative law scholars neglecting the national security bureaucracy. In addition, because Congress's more recent specific statutory interventions, since FISA, sought to either expand or restrain existing discretion,[117] it was natural for legal scholars to focus on how external constraints might limit agency discretion in the national security realm, rather than the equally important question of how and why that discretion is empowered and constituted.[118] In other words, administrative law scholarship has been working almost exclusively within the *regulated-war-machine* paradigm.

D. The Structure of the National Security Bureaucracy

Two unusual structural features of the national security bureaucracy also make the *regulated-war-machine* paradigm initially attractive. The first feature is that bureaucracy's sheer size and complexity. No other area of government activity is populated by so many nested agencies with intricate relationships of authority.[119] The Director of National Intelligence

116. Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 215 (2015).

117. *See, e.g.*, USA FREEDOM Act of 2015, Pub. L. No. 114–23, 129 Stat. 268 (codified at 50 U.S.C. § 1842 (2012)) (imposing some new limits on the bulk collection of telecommunication metadata on U.S. citizens by American intelligence agencies); 50 U.S.C. § 1842(c) (2012) (lowering the standard for obtaining internet metadata so that the FBI need only certify to the Foreign Intelligence Surveillance Court (FISC) that the information likely to be obtained is "relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities"); 50 U.S.C. § 1861 (2012) (the so-called "business records" provision); 50 U.S.C. § 1881(a) (2012) (allowing the government to acquire foreign intelligence by obtaining the content of communications by non-U.S. persons "reasonably believed" to be outside U.S. borders, and interpreted to authorize the collection of phone and Internet content of Americans in the process).

118. *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1470 (2010) ("Forgetting that administrative law both constitutes and empowers administrative action at the same time that it structures and constrains administrative behavior, administrative law is often thought of as just that set of external constraints that limit agency discretion.").

119. *See* LAURA K. DONOHUE, THE COSTS OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY 11 (2008) (explaining the expansion of the executive's

(DNI), for example, is the titular "head" of the intelligence community and responsible for coordinating intelligence gathering across hundreds of agencies.[120] However, the DNI possesses little actual authority to control those agencies.[121] The fragmenting of authority frustrates oversight and public participation in these agencies' activities.[122]

The second unusual feature of the national security bureaucracy is the proliferation of mandates with a high degree of overlap—so many agencies and sub-agencies tasked with accomplishing the same or similar missions.[123] This overlap creates a close-knit bureaucratic environment prone to both unusually intense agency competition and unusually frequent opportunities for close cooperation when agencies' immediate goals align.[124]

These features make the national security bureaucracy resemble, in some ways, a marketplace.[125] Indeed, a fruitful

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authority regarding issues of national security and counterterrorism). *See generally* Jean Tirole, *Hierarchies and Bureaucracies: On the Role of Collusion in Organizations*, 2 J.L. ECON. & ORG. 181 (1986) (describing different types of bureaucratic structures).

120. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011, 118 Stat. 3638 (codified at 50 U.S.C. § 403 (1)(a) (2012)).

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

122. *See* DICKINSON, *supra* note 27, at 107 (observing that outsourcing "significantly worsens" these problems).

123. *See* ZEGART, *supra* note 63, at 23 ("Whereas domestic policy agencies tend to have discrete jurisdictions, foreign policy agencies intersect, overlap, and interact.").

124. *See id.* at 37 ("[N]ational security agencies live in a much more tightly knit, stable bureaucratic world than their domestic policy counterparts."); Sales, *supra* note 70, at 285–86 (explaining how the "wall" between intelligence officials and criminal investigations demonstrates why administrative agencies do not readily share information with one another).

125. The classic model of a market is a decentralized, atomistic process in which individual firms conduct innumerable transactions to produce, in the aggregate, an inadvertent social result. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 98 (1994). However, actual markets may have small numbers of firms with long-term relationships who conduct transactions intending a particular

branch of recent administrative law scholarship has zeroed in on the ways agencies (both inside and outside the national security state) interact.[126] These analyses often use market models to depict agency behavior—reinforcing the influence of the *regulated-war-machine* paradigm.

E. Limited Judicial Review

Another significant reason for the dominance of the *regulated-war-machine* paradigm is the limited role of the courts in national security matters. Legal analysts have typically begun examining regulatory action by agencies where it is most accessible—through the lens of judicial review.[127] But largely for the reasons discussed above, U.S. courts have historically been reluctant to review the government's national security activities.[128] Courts have relied on several doctrines—political question,[129] standing,[130] immunity,[131] and the state secrets

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aggregate result. *Id.* at 99; *see* Sales, *supra* note 70, at 282–83 (analogizing national security agency actions to private firms protecting trade secrets).

126. *See, e.g.*, Sales, *supra* note 70, at 282–83 (describing the various "analytical frameworks" through which administrative law scholars are studying agency actions with regard to information "hoarding"); *see* Renan, *supra* note 116, at 213 ("Through pooling, the executive augments capacity by mixing and matching resources dispersed across the bureaucracy."); Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78, 78–83 (2012) (examining the new focus on agency interactions in administrative law scholarship).

127. *See* Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259, 261–62 (2015) (observing that OIRA is not subject to judicial review).

128. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 329 (1936) (prescribing exceptional deference to executive branch claims in foreign affairs); *see* Chesney, *supra* note 99, at 1362 (discussing the weight of "factual deference" in national security claims); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099–101 (2008) (describing exceptional national security deference); Vermeule, *supra* note 105, at 1097 (describing the ways in which courts scale back scrutiny during emergencies). *But see* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1901 (2015) (arguing that this form of exceptionalism is fading).

129. *See* Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV.

privilege,[132] among others—to avoid reviewing exercises of agency discretion. When courts have engaged in review, they typically have given exceptional deference to the national security state on matters of both fact and law.[133]

These factors—the fundamental necessity of national security activities, the nature of traditional warfare, vague mandates, and judicial deference—have not operated in isolation. They are mutually reinforcing, which makes national security regulatory activities seem especially difficult to depict and analyze. For example, Congress, with modes of traditional warfare in mind, gives agencies conducting national security activities broad and vague mandates, while also exempting those activities from the procedural requirements imposed on the rest of the administrative state.[134] The national security bureaucracy, operating in secret and not burdened by the APA's procedural requirements—which were designed to ensure deliberation and public participation in regulatory activities—need not, and does not, produce a record suitable for meaningful judicial review.[135]

941, 941 (2004) ("This Article attempts to explain and justify the exceptional treatment that courts accord foreign affairs issues under the political question doctrine.").

130. *See* Clapper v. Amnesty Int'l, 568 U.S. 398, 402 (2013) (holding that a group of U.S. reporters, attorneys, activists, and workers lacked standing to challenge the constitutionality of Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA)).

131. *See* Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to* Bivens, 28 A.B.A. NAT'L SEC. L. REP. 1, 4 (2006) ("[B]ecause of the qualified immunity doctrine, federal officers are seldom held directly liable even where courts *do* find a *Bivens* remedy.").

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

133. *See* Chesney, *supra* note 99, at 1366–85 (detailing numerous instances of national security fact deference in judicial decisions post-9/11); Eskridge & Baer, *supra* note 128, at 1099–101 (cataloguing the Supreme Court's various deference regimes); Vermeule, *supra* note 105, at 1098–99 (arguing for greater examination of the lower federal courts' showing deference to administrative agency action pertaining to national security matters post-9/11).

134. *See supra* note 102 and accompanying text (contemplating what "effective accountability" measures would look like that increase participation and transparency).

135. *See* Stephen F. Williams, *"Hybrid Rulemaking" Under the*

The courts, without clear statutory principles against which to evaluate the legality of agency action or a useful record, and believing in the unique expertise of national security bureaucrats, shy away from reviewing agency decision-making in the national security realm. And the national security bureaucrats, in turn, without significant judicial (or congressional) scrutiny, have few incentives to alter their regulatory processes to make them accessible or susceptible to judicial review. And so on.

Since World War II, the national security state has operated under these conditions, except when some exogenous shock—Watergate, 9/11—has caused serious re-thinking and efforts to impose more oversight.[136] But this oversight was always conceived of as an attempt to alter the national security state's behavior without disturbing the *regulated-war-machine* paradigm.

III. Regulating National Security Bureaucracy

However, most of the factors discussed above, which led to the current dominance of the *regulated-war-machine* paradigm, are not permanent.[137] They are, in fact, becoming less and less salient. The last wave of globalization did much to blur the distinctions between the foreign and the domestic—distinctions that had given the government's national security activities their

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Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 456 (1975) ("[Courts] may demand that agencies develop a record that enables a reviewing court to find an intelligible answer for each substantial challenge posed.").

136. *See* BOBBITT, *supra* note 55, at 248 (discussing the unconstitutional executive practices pre-Watergate); Dalal, *supra* note 99, at 78 (observing that revelations in the early 1970s about widespread national security-related abuses of power forced the nation "into a national dialogue about the constitutional boundaries of executive power . . . and the appropriateness of domestic intelligence gathering").

137. *See* Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 127 (2009) ("[I]t is evident that in today's topsy-turvy world governments can topple and relationships can change in a moment." (quoting Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 554–56 (2d Cir. 1988))).

most compelling claim to uniqueness.[138] Also as a result of globalization, the nature of warfare has changed in fundamental ways so that it looks much more like what we have always conceived of as regulation.[139] And surprisingly, the unique bureaucratic features of the national security state make it easier to construct a simple model of how it regulates than agencies regulating in other areas.

In the first subpart below, I describe the political, technological, and legal changes that have created fertile ground for a shift to a *warfare-as-regulation* paradigm. In the second subpart, I describe this new paradigm and explain its advantages over the predominant *regulated-war-machine* paradigm.

A. Laying the Groundwork for the Warfare-as-Regulation Paradigm

1. The Expanding Scope of National Security

The distinction in law and policy between the foreign and the domestic—and between what is and is not "national security"—is fading.[140] Because people, products, and information cross national borders as never before, national security concerns continue to expand to new areas of government policymaking.[141]

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138. *See id.* at 127 (2009) ("[D]rawing a sharp distinction between domestic and foreign relations issues creates boundary problems . . . .").

139. *See* BOBBITT, *supra* note 55, at 178–79 (quoting Henry Kissinger's observation that the wars against non-state actors "signal . . . an inevitable transformation of the international order resulting from changes in the internal structure of many key participants, and from the democratization of politics, the globalization of economics, and the instantaneousness of communications").

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

141. *See* Ivo H. Daalder & James M. Lindsay, *The Globalization of Politics: American Foreign Policy for a New Century*, BROOKINGS INSTITUTION (Jan. 1, 2013), https://www.brookings.edu/articles/the-globalization-of-politics-american-foreign-policy-for-a-new-century/ (last visited Nov. 12, 2017) ("Globalization is not just an economic phenomenon, but a political, cultural, military, and

The gravest security threats come primarily from small groups and individuals, rather than nation-states.[142] In response, government more closely monitors the public to learn about and stop these threats.[143] In the era of high-tech global surveillance, a mere search algorithm can determine the difference, for a U.S. agency, between what is foreign and domestic.[144] These changes have led to increasing entanglement of the government's national security activities with the lives of ordinary Americans.[145]

With the expansion of national security regulating into previously "domestic" domains, its concentrated costs are being imposed, with greater frequency, on American citizens and individuals inside the United States.[146] These costs include not only the appropriation of private information,[147] but also, for certain targeted communities, the higher costs associated with greater scrutiny of their activities, infiltration by government agents, and even detention.[148]

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environmental one as well.") (on file with the Washington and Lee Law Review).

142. *See* Huq, *supra* note 70, at 908 (describing the shift from "state-based enemies" to "new threats in the more fragmented international environment").

143. *See* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1938 (2013) (observing that democracies have "invested heavily in surveillance technologies in the aftermath of the September 11 attacks in America, the London subway bombings of 2005, and other atrocities").

144. *See* William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633, 1634 (2010) ("Instead of building toward an individual FISA application by developing leads on individuals[,] . . . officials now develop algorithms that search thousands or even millions of collected e-mail messages and telephone calls for indications of suspicious activities.").

145. *See id.* at 1635 ("[M]ore Americans than ever are engaged in international communications, and there is far greater intelligence interest in communications to and from Americans. Both circumstances increase the likelihood that the government will be intercepting communications of innocent Americans . . . .").

146. *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1678 (2009) (observing that "every government action is redistributive; the 9/11 response had different effects on Muslim Americans and on other Americans").

147. *See* Derek E. Bambauer, *Privacy Versus Security*, 103 J. CRIM. L. & CRIMINOLOGY 667, 678 (2013) (observing that firms retain consumer data because of the costs associated with destroying it).

148. *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND

2. The Changing Nature of Warfare

As I discussed above, traditional warfare—its clashing armies and total-war modes—is hard to model as regulation. But these modes of warfare are quite rare today.[149] "Kill-capture" is still part of the strategy for defeating non-state, terrorist, enemies.[150] Yet without a uniformed military to target or an easily-identifiable battlefield, kill-capture requires the U.S. national security bureaucracy to expend considerable resources in intelligence gathering and deliberation simply to identify the enemy and, once identified, decide whether he is worth targeting or capturing.[151] This process is an individualized determination, a "quasi-adjudicative" one.[152] In other words, the process is a form of agency adjudication.

With enemy responsibility individuated,[153] "kill-capture" looks very much like—in fact is—a form of regulation. More

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CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 22–46 (2003) (describing the federal government's preventative detention campaign targeting Muslim Americans that ensued after the terrorist attacks on September 11, 2001); Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 369 (2010) (explaining that Muslim Americans cooperate with law enforcement in an effort to avoid intrusive policing strategies, such as intensive frisks and detention).

149. *See* SITARAMAN, *supra* note 87, at 1 ("Rather [than traditional warfare], insurgents hibernate in the shadows, emerging only when ready for devastating attack . . . .").

150. *See* BOBBITT, *supra* note 55, at 18 (observing in 2008 that the U.S. strategy was "to kill or capture the terrorists before a catastrophic attack happens").

151. *See* Issacharoff & Pildes, *supra* note 20, at 1524 ("[T]he government is individuating the responsibility of specific enemies and targeting only those engaged in specific acts or employed in specific roles."); McNeal, *supra* note 25, at 684 ("Bureaucrats help create lists of people to be killed . . . . The process is called targeted killing . . . .").

152. *See* Issacharoff & Pildes, *supra* note 20, at 1560; (discussing the Detention Review Board's procedures once an enemy combatant is detained); Stephen Vladeck, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. 11, 26 (2014) ("[T]he U.S. [is] increasingly moving toward a paradigm in which the use of force is based upon individualized determinations made thousands of miles away from any battlefield utilizing secret and otherwise unreviewable criteria.").

153. *See* Issacharoff & Pildes, *supra* note 20, at 1527 ("[I]t is difficult to

generally, warfare has become suffused with legality: commanders, with assistance from omnipresent judge advocates, must constantly apply complex sets of legal rules when planning operations and engaging the enemy.[154] Law enforcement—the traditional regulatory means for addressing individuated responsibility that triggers serious legal consequences—works alongside the national security bureaucracy to such an extent that warfare is becoming more like law enforcement, and law enforcement more like warfare.[155]

Moreover, as scholars have documented, years of experience in Iraq and Afghanistan have reminded the national security bureaucracy that "kill-capture" is often an inadequate strategy, by itself, for defeating a terrorist enemy.[156] The focus of U.S.

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know that an individual is part of a terrorist organization on any basis other than his own individual acts of terrorism.").

154. *See* Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1423–24 (2008) ("In contemporary U.S. operations, judge advocates are fully integrated members of military staffs. The senior judge advocate assigned to a unit serves as a personal advisor to the commander, ensuring that the commander receives sufficient timely and accurate advice to conduct operations in accordance with law and policy."); U.S. AIR FORCE, AIR FORCE DOCTRINE DOC. 3-60, TARGETING, 95 (2006) (defining the "Role of the Judge Advocate" to include "an affirmative duty to provide legal advice to commanders and their staffs that is consistent with the international and domestic legal obligations"). Lawyers are increasingly present in every aspect of the government's national security activities. *See* Schlanger, *supra* note 21, at 118 ("Intelligence legalism brings lawyers' rule-of-law commitment into the realm of national security . . . .").

155. *See* Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 148 (2010) ("[T]he fact that all targeted killing operations in combating terrorism are directed against particular individuals makes the tactic more reminiscent of a law enforcement paradigm, where power is employed on the basis of individual guilt rather than status (civilian/combatant)."); John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 767 (2007) ("[W]ar has changed in its functions, to become more like policing, [and] that policing too has changed, to become more like war."); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008) (arguing that the traditional criminal model and the traditional military model have converged in the context of counterterrorism detention efforts).

156. Counterinsurgency strategy, or COIN, was a key feature of U.S. military strategy long before 9/11. *See* SITARAMAN, *supra* note 87, at 5 ("[Counterinsurgency operations] include killing and capturing insurgents and also reconciling with them, arming local militias and also training state-run

military policy has focused more and more on the progressive branch of counterinsurgency strategy—a mode of warfare that seeks to incapacitate the enemy by undermining its support among the people it depends on for resources.[157] Progressive counterinsurgency holds that kill-capture may do more harm than good because it causes "destruction that creates backlash among the population and fuels their support for the insurgency."[158] The progressive counterinsurgent instead attempts to build popular support by shoring up the rule of law and essential services, "ensuring civilian security," and, if necessary, revising public policies or even a nation's basic law.[159]

Progressive counterinsurgency strategy and traditional domestic regulation are so similar that the former qualifies as a type of regulation. Like domestic regulation, counterinsurgency is "a set of interventions, those policies that society uses to structure the interactions and behaviors of its people."[160] Both are concerned with striking the correct balance between technocratic effectiveness and accommodating political interests.[161] And the weapons in the progressive counterinsurgent's arsenal closely resemble—indeed, overlap with—the key features of effective traditional domestic regulation. The progressive counterinsurgency must establish legitimacy by complying with the sources of, and limits to, its own authority—its domestic law

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security forces, working with local power brokers and rooting out corruption.").

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

158. SITARAMAN, *supra* note 87; *see also* COUNTERINSURGENCY FIELD MANUAL, *supra* note 157, at 1–31 ("[I]f a population does not see outside forces as legitimate, this can undermine the legitimacy of the host-nation government trying to counter an insurgency.").

159. SITARAMAN, *supra* note 87, at 38.

160. *Id.* at 18.

161. *See id.* at 6 (discussing whether counterinsurgency is a "technocratic enterprise" or "policy choice"); Rascoff, *supra* note 70, at 644 (viewing the concern that presidential control will "politicize" intelligence "as a species of concern that overhangs all administrative law: how to strike the right balance between technocratic detachment and expertise on the one hand, and political control on the other").

and international law.[162] It must make rule-of-law development accessible to popular participation.[163] It must be as transparent as possible.[164] And once it has established a strong and legitimate rule of law, it may need to maintain it by punishing individuals or entities who refuse to comply.[165]

One fundamental aspect of traditional warfare that remains salient, however, is secrecy.[166] Overclassification of national security information has been a serious problem for decades,

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162. *See* COUNTERINSURGENCY FIELD MANUAL, *supra* note 157, at 13-1 (outlining the sources of legal authority for U.S. counterinsurgency efforts); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 171 (3d ed. 1991) (observing that the doctrine of *ultra vires* "is the root principle of administrative power. The statute is the source of agency authority as well as of its limits"); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003) (describing "concern for administrative arbitrariness . . . [as] an important obstacle to agency legitimacy"); s*ee also* 5 U.S.C. § 706(2)(C) (2012) (authorizing a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

163. *See* SITARAMAN, *supra* note 87, at 14 ("When it comes to building the rule of law . . . counterinsurgents must focus . . . on supporting institutions that work at the local level . . . ."); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975) ("Increasingly, the function of administrative law is . . . the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.").

164. *See* SITARAMAN, *supra* note 87, at 16 (positing that counterinsurgency efforts should be both legally and sociologically legitimate by following processes that are "transparent" and "fair"); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075 (2005) ("[T]rue accountability, in the realm of law and politics, involves many of the features that are central to the administrative state and that people find so unattractive about it—hierarchy, monitoring, reporting, internal rules, investigations, and job evaluations.").

165. *See* SITARAMAN, *supra* note 87, at 20 (concluding that counterinsurgency strategy, once established, enables the host-state to "fight and punish criminals and insurgents"); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1344 (2013) (justifying the Office of Information and Regulatory Affairs assertion of control over agency decision making).

166. *See* PRIEST & ARKIN, *supra* note 4, at 86–87 (discussing the predominance of the U.S. government's intelligence gathering in the War on Terror).

despite attempts at reform.[167] Since September 11, the number of government employees and contractors with security clearances and the number of documents—including agency rules—that were subject to some form of classification grew dramatically.[168]

Nonetheless, the secrecy pandemic in the national security bureaucracy is not inconsistent with the *warfare-as-regulation* paradigm. As Daniel Patrick Moynihan observed, government secrecy is itself a form of regulation.[169] Likewise, there may be more method than madness behind the massive, regular leakage of classified national security information—that phenomenon, too, is a form of regulation.[170] And even while the national security bureaucracy's penchant for secrecy has grown unabated, its capacity to keep secrets may be diminishing.[171]

3. Declining Judicial Deference

Courts' reluctance to scrutinize the national security state's activities has historically contributed to the difficulty of modeling those activities as regulation.[172] However, since the end of the

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167. *See id.* at 80–81 (describing the "indiscriminate overproduction" of data that renders intelligence difficult for government agencies to use).

168. *See id.* at 86 ("[Arkin] discovered that 263 of these organizations had been established or refashioned in the wake of 9/11.").

169. *See* MOYNIHAN, *supra* note 94, at 59 ("Secrecy is a form of regulation.").

170. *See* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 514–16 (2013) (describing the "regulatory regime applicable to leaking" as "an intricate ecosystem" in which the informal tolerance of leaking serves executive and bureaucratic purposes); Rascoff, *supra* note 70, at 687 (labeling "selective disclosure" of classified information "a form of regulation").

171. *See* Mark Fenster, *The Implausibility of Secrecy*, 65 HASTINGS L.J. 309, 316 n.30 (2013) ("[L]egal and bureaucratic systems of control fail and . . . information can and will escape in a myriad of ways . . . ."); Peter Swire, *The Declining Half-Life of Secrets and the Future of Signals Intelligence*, at 3 (New Am. Cybersecurity Fellows, Paper Ser. No. 1, 2015), https://static.newamerica.org/attachments/4425-the-declining-half-life-of-secrets/Swire_DecliningHalf-LifeOfSecrets.f8ba7c96a6c049108dfa85b5f79024d8.pdf (arguing that secrets have a "declining half-life" and that intelligence agencies should be prepared for their activities to be revealed to the public).

172. *See supra* Part I.E (discussing the legal doctrines that restrict judicial review of national security matters).

Cold War and the last wave of globalization, and continuing through the post-9/11 period, the U.S. Supreme Court has shown an increased willingness, in some situations, to review those activities and give less deference to the national security state's legal and factual determinations.[173] In doing so, it has limited the scope of earlier, more deferential, precedent.[174]

In *Zivotofsky v. Clinton*,[175] for example, the Court rejected the government's argument that the political question doctrine barred courts from deciding whether U.S. citizens born in Jerusalem may designate their birthplace on U.S. passports as "Israel" or "Jerusalem."[176] Similarly, in *Bond v. United States* (*Bond I*)[177] the Court recognized an individual's standing to challenge, on Tenth Amendment grounds, a statute implementing the Chemical Weapons Convention.[178] And in several other recent cases, the Court has declined to apply extraordinary deference to the President's and agencies' interpretations of treaties and statutes on issues deeply implicating foreign affairs and national security.[179]

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173. *Compare, e.g.*, Sitaraman & Wuerth, *supra* note 128, at 1924 (discussing the Roberts Court's rejection of the political question doctrine in recent cases), *and* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 785 (2011) (citing a number of recent Supreme Court decisions that embrace judicial review of international law issues, including national security), *with* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from "Exceptionalism"*, 128 HARV. L. REV. F. 294, 294 (2015) (disagreeing with the scholarship that posits that the Roberts Court increasingly treats international law cases like "run-of-the-mill" domestic law cases).

174. *See* Sitaraman & Wuerth, *supra* note 128, at 1902 (noting the historical norm that the judiciary defers to the political branches of government on issues of international law).

175. 566 U.S. 189 (2012).

176. *Id.* at 194.

177. 564 U.S. 211 (2011).

178. *Id.* at 225–26.

179. *See* Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2258 (2014) (affirming the lower court's decision that Argentina's foreign assets are not immune from discovery under the Foreign Sovereign Immunities Act); Bond v. United States (*Bond II*), 134 S. Ct. 2077, 2081–82 (2014) (holding that a treaty about chemical warfare and terrorism does not reach local criminal defendants); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013) (concluding that there is a presumption against extraterritoriality with respect to granting

But the Court's most striking departure from its past deference occurred in the quartet of Guantanamo cases.[180] Most significantly, in *Boumediene v. Bush*,[181] the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review.[182] In doing so, the Court pointedly declined to defer to the executive branch's factual assessments of military necessity.[183]

Moreover, the Court's refusal to defer to Executive Branch legal and factual determinations in the Guantanamo cases altered national security policy. After *Hamdi v. Rumsfeld*,[184] the Department of Defense (DOD) established a process, the Combatant Status Review Tribunals (CSRTs), for making an individual determination about the enemy combatant status of all detainees at Guantanamo.[185] After the Court recognized statutory habeas jurisdiction there, Congress passed the Detainee

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aliens jurisdiction in U.S. federal courts under the Alien Tort Statute); Morrison v. National Australia Bank Ltd., 561 U.S. 247, 261 (2010) ("[A]pply[ing] the presumption [against extraterritoriality] in all cases," including suits that arise under Securities Exchange Commission regulations); Medellín v. Texas, 552 U.S. 491, 498–99 (2008) (holding that an International Court of Justice decision was not domestically enforceable).

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

181. 553 U.S. 723 (2008).

182. *See id.* at 771 ("If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.").

183. *See id.* at 727 ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.").

184. 542 U.S. 507 (2004).

185. *See* Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967, 1015–16 (2005) (observing critical due process defects in the CSRTs, but noting that the order establishing them was "inspired" by Justice O'Connor's opinion in *Hamdi*).

Treatment Act,[186] establishing direct judicial review of CSRT determinations in lieu of habeas.[187] Similarly, after the Court declared the military commissions unlawful in *Hamdan v. Rumsfeld*,[188] the Administration was obligated to seek congressional approval for commissions that restored some of the rights afforded at courts martial.[189] The ruling also altered interrogation policy, compelling the government to acknowledge the application of Common Article 3 of the Geneva Conventions,[190] which prompted closure of CIA black sites. And overall, these judicial interventions helped trigger a shift away from capture altogether and toward an emphasis on targeted killing.[191]

This decline in deference, however nascent and sporadic,[192] has been driven in part by the Court's recognizing the developments noted above—the dissolving boundaries between domestic and foreign affairs, and the changing, differentiated nature of warfare.[193] If this trend continues, it would provide

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186. Pub. L. No. 109-148, 119 Stat. 2739, 2739–44 (2005) (codified as amended in scattered sections of 10 U.S.C., 28 U.S.C., and 42 U.S.C.).

187. The DTA review process was held by the Supreme Court in *Boumediene* to be an inadequate substitute for habeas, and quickly fell into disuse. *Boumediene*, 553 U.S. at 728.

188. 548 U.S. 557 (2006).

189. *See* Jack M. Balkin, *Hamdan as a Democracy-Forcing Decision*, BALKINIZATION (June 29, 2006, 1:07 PM), http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html (last visited Nov. 12, 2017) (describing how Article 36 of the Uniform Code of Military Justice forces the president to seek congressional approval before creating specialized military tribunals) (on file with the Washington and Lee Law Review).

190. *See Hamdan*, 548 U.S. at 563 ("Common Article 3's requirements are general, crafted to accommodate a wide variety of legal systems, but they are *requirements* nonetheless.").

191. *See* Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 804 (2011) [hereinafter Chesney, *Who May Be Held?*] (concluding that the scrutiny of U.S. military detention via habeas proceedings led to a dramatic increase in drones strikes as a means of incapacitating enemies); Crandall, *supra* note 73, at 598 (arguing that the increased use of targeted killing was an unintended consequence of courts' limiting authority over military detention).

192. *See* Bradley, *supra* note 173, at 297 (arguing that a trend in international law toward "normalization" has not been established).

193. *See supra* notes 138–142 and accompanying text (noting changes in the

more fertile soil for developing a body of administrative law regarding warfare-as-regulation.[194]

B. The Warfare-as-Regulation Paradigm and its Advantages

The developments discussed above make constructing a *warfare-as-regulation* paradigm a viable and useful project, even if it would not have been a generation ago. Yet the fact remains that the national security state has always regulated. It has a long history of intervention in the private domain, both at home and abroad—through conscription, occupation, surveillance, and other activities. What has changed is only the degree and scope of the intervention. The *warfare-as-regulation* paradigm opens up the mysterious war machine to reveal the regulatory mechanisms that have always existed within.

As with domestic agencies, the most important questions about the national security state's regulating concern, not only its compliance with legal authority, but its effectiveness and efficiency. Is it regulating less or more than necessary to successfully manage risks to the United States, its citizens, and its interests abroad? Is it regulating through the most efficient means?

In the domestic context, the degree of regulation is typically measured by the financial costs it imposes on regulated entities—businesses and individuals.[195] But regulation also implicates many costs that are harder to measure—such as human life, health, liberty, and happiness.[196]

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nature of warfare and the subsequent expansion of presidential authority). For analysis attributing the Court's lack of deference in the Guantanamo cases to its recognition that the U.S. plays a unique geopolitical leadership role, see Knowles, *supra* note 138, at 782. For alternative explanations for the outcomes in these cases, see generally Bradley, *supra* note 173.

194. *See* Hafetz, *supra* note 97, at 2144–45 (arguing that national security law fits within the broader category of administrative law).

195. *See* Richard G. Morgan & James H. Holt, *Measuring the Costs of Regulation*, 59 TEX. L. REV. 623, 623–24 (reviewing PAUL W. MACAVOY, MEASURING THE COSTS OF REGULATION: THE REGULATED INDUSTRIES AND THE ECONOMY (1979), and agreeing with his approach to evaluating the efficacy of regulation through economic analysis).

196. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON

In the national security context, the simplest way to measure the degree of regulation is by examining the degree of force or coercion that the government applies. For example, how many will be killed from the use of lethal force? What is the value of the property that will be destroyed? How long will detainees be deprived of liberty? How coercive will interrogation methods be? How intrusive will surveillance or border screening be?

But like its domestic counterparts, the national security bureaucracy's regulating also imposes costs that are more difficult to measure.[197] How should the U.S. government estimate the value of foreign lives lost?[198] Will the number of deaths and the level of property destruction from targeting operations demoralize enemy armed groups or instead build support for those groups?[199] Will scrutinizing Muslim communities in the U.S. increase or decrease cooperation with law enforcement?[200] Will regulating foreign citizens through the use of force increase or diminish U.S. "soft power"?[201]

An accurate regulatory model of national security activities should depict the true costs and benefits of a regulatory method—e.g., targeted killing operations using drones or military detention at Guantanamo—by comparing it to the costs of

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KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 9 (2005) ("[T]here is no reason to think that the right answers will emerge from the strange process of assigning dollar values to human life, human health, and nature itself, and then crunching the numbers.").

197. *See, e.g.*, Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 502 (2014) (exploring "the question of how a government should allocate domestic resources for foreign benefit" and identifying it as "a discrete analytical category").

198. *See id.* at 554 (arguing for a comprehensive approach to the valuation of foreign lives).

199. *See id.* at 541 ("[S]tates may benefit from complying with or exceeding their international valuation obligations by winning the hearts and minds of other populations.").

200. *See* Tyler, Schulhofer & Huq, *supra* note 148, at 388–89 (concluding that whether Muslim Americans believe law enforcement treats them fairly "influence[s] cooperation in the successful accomplishment of counterterrorism goals").

201. *See* JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS x (explaining that soft power "is the ability to get what you want through . . . the attractiveness of a country's culture, political ideals, and policies").

regulating through other means or not regulating at all.[202] This cost-benefit analysis should reveal whether the regulatory model efficiently accomplishes the goal of managing risk.[203]

Indeed, some weighing of costs and benefits is a feature of international law principles governing national security activities.[204] Under core principles of international humanitarian law, for example, military commanders planning lethal operations must conduct a proportionality analysis—they must determine whether the degree of force they use is justified, given the military necessity and the risk of collateral harm.[205]

Accurately weighing costs and benefits of regulation in the national security context is difficult. Yet the *warfare-as-regulation* paradigm has several advantages over the *regulated-war-machine* paradigm—whether the objective is to reduce costs for the United States government and its taxpayers, to ensure better compliance with domestic and international law, or to discourage the overreliance on modes of warfare with long-term harmful consequences.[206]

First, viewing warfare as regulation ties together several developments that, to this point, lack a cohesive explanatory model. The first is the well-founded concern that national security activities are insufficiently protective of individual rights

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202. *See supra* note 55 and accompanying text (summarizing literature about regulators' goal of mitigating risk).

203. *See* DeMuth & Ginsburg, *supra* note 55, at 878 (critiquing scholarship that analyzes common fallacies of cost-benefit analysis in administrative law).

204. *See* Amos N. Guiora, *Targeted Killing: When Proportionality Gets All Out of Proportion*, 45 CASE W. RES. J. INT'L L. 235, 252 (2012) (discussing the concept of proportionality in the context of national security decision-making).

205. *See* Protocol Additional for the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (providing that International Humanitarian Law prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated").

206. My working assumption here is that a more accurate weighing of costs and benefits will, on balance, lead to better compliance with substantive principles of domestic and international law. I am not arguing, however, that either U.S. domestic or international law strictly requires the application of the robust cost-benefit analysis I propose.

guaranteed by U.S. constitutional and international law.[207] The second is the infusion of legality and lawyers into the process of war-making.[208] The third is the frequent introduction, by analysts and scholars, of proposed reforms seeking to require more deliberation, justification, and accuracy in those activities.[209] And the fourth are recent efforts by the President to centralize and coordinate many national security activities and expose them to stronger White House control.[210]

These developments strongly suggest there is a widespread, if not universal, impression that the national security state overregulates.[211] But that impression should be tested through a model that maps power dynamics and incentives in the same way that other models have mapped domestic regulation.

Indeed, the *warfare-as-regulation* model offers an alternative method of evaluating reform proposals that is better attuned to the specific bureaucratic pathologies those proposals are really intended to address. Scholars and analysts have proposed numerous procedural reforms to the targeted killing process, such as adding some form of judicial, inter-agency, congressional, or intra-agency review.[212] These proposals are generally aimed at requiring better deliberation, improving targeting accuracy, and ensuring compliance with due process and international law.[213]

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207. *See, e.g.*, Guiora, *supra* note 204, at 242 (taking issue with U.S. counterterrorism policy that relies on "ends-based decision making rather than decision making based on morality and law").

208. *See supra* note 154 and accompanying text (describing the role of judge-advocates within the U.S. military's judicial process).

209. *See, e.g.*, Matthew Craig, *Targeted Killing, Procedure, and False Legitimation*, 35 CARDOZO L. REV. 2349, 2378–83 (2014) (describing several proposals for targeted killing procedures).

210. *See* Rascoff, *supra* note 70, at 635 ("The tectonic shift toward presidential control of agencies has reverberated throughout the federal bureaucracy, including a large swath of the national security state . . . .").

211. *See* Michael Jo, Note, *National Security Preemption: The Case of Chemical Safety Regulation*, 85 N.Y.U. L. REV. 2065, 2016 (2010) (arguing that "the reclassification of seemingly domestic regulatory concerns as matters of national security" expanded the government's regulatory authority).

212. *See* Craig, *supra* note 209, at 2378–83 (summarizing proposals to reform extrajudicial targeted killing).

213. *See id.* (describing three particular proposals, but questioning "whether, and to what degree, different targeting procedures stand to confer

The problem is that these worthy goals cannot be effectively pursued without analyzing how and why the targeting bureaucracy may, or may not, fail to prioritize them. Instead, reforms become mired in the endless debate about locating the correct point of balance between vaguely-formulated values of liberty and security.[214]

Moreover, it is far too easy for the national security bureaucrat to claim that it already takes due process values into account in its decision-making, or to accede to procedural changes that do little to alter outcomes.[215] It may, in other words, offer merely the veneer of due process by employing "rule of law tropes"[216] that result in "false legitimation."[217]

In contrast, a regulatory model that maps bureaucratic incentives can reveal to the reformer how those incentives may be channeled, altered or counter-balanced.[218] Adjusting bureaucratic behavior is the shortest path to changing policy.[219]

Second, the *warfare-as-regulation* paradigm shifts the focus of the reform debate from the rights possessed by targets of national security activities to the sources of authority for those activities and their effectiveness.[220] Most targets and collateral

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legitimacy on targeted killing at all").

214. *See* RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 31 (2006) ("[O]ne would like to locate . . . the point of balance [which] shifts continuously as threats to liberty and safety wax and wane."); DONOHUE, *supra* note 119, at 3 (arguing that the "security or freedom framework" creates the risk that "the true cost" of exercises of counterterrorism powers "will go uncalculated").

215. *See generally* Sinnar, *supra* note 99 (quoting Attorney General Holder that due process does not necessitate judicial process).

216. *Id.* at 1618.

217. *See generally* Craig, *supra* note 209 (discussing how the government can avoid false legitimation in the context of targeted killing).

218. *See* Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513, 519 (1980) ("To fashion effective changes in policy and administration, decision-makers must be able to collect information, assess various alternatives, monitor the implementation process, and secure the compliance of the targeted bureaucracies.").

219. *See id.* at 519 ("The implementation of new policies and procedures often involves changing the behavior of public bureaucracies . . . .").

220. *See* Schlanger, *supra* note 21, at 118 ("[The] relentless focus on rights and compliance and law (with a definition of law that includes regulation, executive orders, court orders, etc.) has obscured the absence of what should be

victims of the U.S. drone program are "strangers to the Constitution[:]"[221] they have no rights that flow from citizenship, presence on U.S. territory, or any prior connection to the U.S.[222] Although they have rights derived from international law, those rights are vaguely formulated and often contested, and some may not apply in wartime.[223] The exercise of U.S. national security authority, by contrast, despite vague statutory grants, actually involves complex sets of internal rules embedded in a hierarchical structure.[224] Decades of counterinsurgency warfare have acculturated the military to constantly checking the use of force against sources of lawful authority.[225] Analysis that investigates and critiques interpretation of that authority is more likely to alter military practice than explorations of rights that may or may not apply.[226]

At the same time, the *warfare-as-regulation* paradigm actually focuses more attention on those targets and communities affected by national security activities because it treats them as

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an additional focus on interests, or balancing, or policy.").

221. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 189 (1996) (describing efforts to deny constitutional rights to aliens and immigrants inside the U.S. and U.S. citizens outside U.S. borders and arguing that "no human being subject to the governance of the United States should be a stranger to the Constitution").

222. *See* Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851, 854 (2010) (arguing for a constitutionally-grounded limited government approach to U.S. national security activities worldwide, under which the exercise of power will be constrained regardless of the targeted individual's entitlement to rights).

223. *See* Mark V. Vlasic, *Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT'L L. 259, 277–81 (discussing the differences in international and U.S. domestic law on the legality of targeted killing).

224. *See* McNeal, *supra* note 25, at 681–83 (discussing the comprehensive processes for creating a kill list).

225. *See* SITARAMAN, *supra* note 87, at 89 (describing how the U.N. Charter Article 2(4) that serves as an authority for a state's use of force affects counterinsurgency strategy); Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. 549, 554 (2011) (analyzing legal compliance of military detention policies from After Action Reports produced by judge-advocates).

226. *See* Schlanger, *supra* note 21, at 172 (arguing that gaps in civil liberties during wartime would be better addressed by governmental entities outside the NSA).

regulated entities. Rather than viewing them as passive victims, the *warfare-as-regulation* paradigm is interested in their incentives and how they will respond to being "regulated."[227] In doing so, the *warfare-as-regulation* paradigm humanizes military targets and their communities. And the paradigm expands analysis beyond the narrow question of whether the targets qualify as "combatants" to the broader context—the effects regulation has on the communities where national security activities occur and the implications for long-term U.S. interests.

IV. Targeted Killing as Regulation

This section introduces a model of the U.S. government's national security activities as regulation, using the targeted killing process as a case study. The purpose of this model is to identify the key participants in the regulatory process, map their relative degrees of influence and incentives, and hypothesize how these variables affect the regulatory process.

This model is limited to the targeted killing process. Each category of the U.S. government's national security endeavors—other exercises of military force and intelligence gathering, progressive counterinsurgency, border control, military detention, interrogation, the prosecution of war crimes, and covert action—constitutes a different form of regulation with its own set of institutional players, power dynamics, and incentives.[228] Modeling these other regulatory processes is a project for another day. However, given the common identity of the players and their oft-aligned incentives, I expect that the conclusions I draw about targeted killing as regulation will apply, to a greater or lesser extent, to most other national security activities.

This model will strike many as too simple because it relies on a handful of assumptions from the economic branch of public choice theory, all of which have been subjected to formidable

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227. *See infra* Part III.C (identifying innocent communities inadvertently affected by drone strikes as akin to a regulated entity because they have almost no power compared to the other key players).

228. *Cf.* Barkow, *supra* note 45, at 717–18 (noting the various ways in which the criminal justice system regulates).

criticism.[229] It assumes, for starters, that all of the players in the process are rational actors.[230] I do not discuss, for example, how behavioral biases may affect the players' decisions.[231]

I begin with this model for several reasons. First, in charting new territory, it is best to start with a simple model, test its predictive value, then move on to more sophisticated models as necessary.[232] Second, the assumptions I rely on are quite popular in the legal scholarship analyzing agency functions;[233] they form the basis for many legal and institutional reform proposals, which it is important to engage with.[234] Finally, for reasons I discuss below, some unusual features of the national security bureaucracy actually lend themselves better to a simple economic public choice model than bureaucracies performing other regulatory functions.[235]

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229. *Cf.* Mashaw, *supra* note 65, at 20 ("[T]he crucial unifying thread in public choice theory is the assumption that all actors in political life . . . behave rationally to maximize or optimize some objective function (wealth, status, power).").

230. *See id.* at 33 (critique public choice theory with the observation that voters are often irrational).

231. *See, e.g.*, Daniel Kahneman & Jonathan Renshon, *Hawkish Biases*, *in* AMERICAN FOREIGN POLICY AND THE POLITICS OF FEAR: THREAT INFLATION SINCE 9/11 79 (A. Trevor Thrall & Jane K. Cramer eds., 2009); *see* Lieutenant Commander Luke A. Whittemore, *Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law*, 7 HARV. NAT'L SEC. J. 577, 614 (2016) (applying Kahneman's literature to the targeted killing context).

232. *See* Mashaw, *Public Law and Public Choice*, *supra* note at 65, at 23 (describing the early research in public choice theory and how it influences today's scholarship).

233. *See, e.g.*, Barkow, *supra* note 45, at 717–20 (comparing regulation of traditional industries to criminal justice); Sales, *supra* note 70, at 323–32 (recounting national security agencies' historical failures in sharing counterterrorist intelligence data).

234. *See, e.g.*, Sales, *supra* note 70, at 348–51 (encouraging reform of national security agencies' intelligence gathering related to counter terrorism); Barkow, *Prosecutorial Administration*, *supra* note 36, at 335 (proposing that some DOJ functions be moved to an executive agency to "add a layer of protection from prosecutorial pressure").

235. *See infra* Part III.B (introducing an analysis of power dynamics in national security using public choice theory).

A. The Targeted Killing Process

Targeted killing is "the intentional, premeditated, and deliberate use of lethal force, by States or their agents acting under color of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator."[236] Drones are the vehicle of choice for most targeted killing operations.[237] Indeed, they have become crucial to the exercise of U.S. air power: even manned aircraft are likely to have drone accompaniment on targeting missions.[238] By 2009, the Air Force was training more pilots to fly drones than conventional aircraft.[239]

The U.S. government has been conducting two types of targeted killing using drones aimed at members of armed groups that, the U.S. government asserts, it is authorized to use force against under U.S. and international law.[240] The first type are

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236. *See* Alston, *supra* note 22, at 298 (noting that the use of drone strikes outside war zones has been criticized as unlawful "extrajudicial killings" and "assassinations"); Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 331 (2003) (quoting critics such as Amnesty International and the U.N. Special Rapporteur on extrajudicial killing). *See generally* SCAHILL, *supra* note 25 (analyzing documents that reveal aspects of the American government's assassination program using drones).

237. *See* Jaffer, *supra* note 2, at 9 ("Very quickly the armed drone—touted as distant, efficient, and precise—became identified with [Obama] . . . .").

238. *See, e.g.*, Barbara Starr, *Obama Last Strike Kills Over 100 al Qaeda in Syria*, CNNPOLITICS (Jan. 20, 2017, 6:25 PM), http://www.cnn.com/2017/01/20/politics/us-strike-syria-al-qaeda/index.html (last visited Nov. 12, 2017) (describing a strike against "core al Qaeda" in western Syria carried out by a B-52 bomber accompanied by drones) (on file with the Washington and Lee Law Review).

239. *See* SCAHILL, *supra* note 25, at 103 (quoting a top-secret NSA document stating that, "'for the first time in the history of the U.S. Air Force, more pilots were trained to fly drones . . . than conventional fighter aircraft'").

240. For a small sample of the extensive literature on the legal authority for, and limitations on, drone warfare, see U.N. General Assembly, *Extrajudicial, Summary or Arbitrary Executions, Addendum: Rep. of the Special Rapporteur*, ¶ 18–22 U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 447–504 (2008); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346–400 (Benjamin Wittes ed., 2009); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, *in* YEARBOOK OF INTERNATIONAL

"personality strikes" at identified individuals who, after a multi-agency intelligence-gathering and deliberation process, are determined to be members of the groups and meet other criteria.[241] "Signature strikes," in contrast, target individuals whose identities may or may not be known at the time they are targeted, but who exhibit a pattern of behavior that, the government believes, indicates they are members of the groups.[242]

Both types of strikes take place after considerable intelligence gathering and assessment, as well as the application of rules under predetermined procedures.[243] The government has revealed far more information about the procedures leading to personality strikes, and the bureaucracy involved is presumably more robust. Each personality strike results from two adjudicatory proceedings—the first ends with the decision to place a potential target on the "kill list," and the second ends with the strike decision.[244]

The two types of strikes occur as part of a single drone program, conducted (often jointly) by the CIA and the DOD with the assistance of numerous intelligence-gathering agencies.[245]

HUMANITARIAN LAW 13–27 (2010).

241. *See generally* Drone Playbook, *supra* note 25 (prescribing rules for the nomination and approval of targets for personality strikes and conducting signature strikes); McNeal, *supra* note 25, at 701–58 (describing the process in more detail, based on interviews with participants).

242. *See generally* Craig, *supra* note 209, at 2368; Marty Lederman, *The Presidential Policy Guidance for Targeting and Capture Outside Afghanistan, Iraq and Syria*, JUST SECURITY (Aug. 6, 2016, 2:40 PM), https://www.justsecurity.org/32298/presidential-policy-guidance-targeting-capture-afghanistan-iraq-syria/ (last visited Nov. 12, 2017) (observing from analysis of the Drone Playbook that signature strikes are conducted against both known and unknown individuals) (on file with the Washington and Lee Law Review).

243. *See generally* Drone Playbook, *supra* note 25 (outlining general operating procedures for when and how the United States can use force against terrorists); McNeal, *supra* note 25, at 701–58.

244. *See* McNeal, *supra* note 25, at 701–58. (explaining how targeting killings are conducted). I discuss the interagency approval process for personality strikes in more detail in Part V.A.

245. *See* Adam Entous & Gordon Lubold, *Obama's Drone Revamp Gives Military Bigger Responsibility, Keeps CIA Role*, WALL ST. J. (June 16, 2016, 5:04 PM), https://www.wsj.com/articles/barack-obamas-long-awaited-drone-program-revamp-preserves-a-cia-role-1466088122 (last visited Nov. 12, 2017) (discussing

Private contractors play a critical and influential role in the process—from collecting intelligence, to analyzing it, to the remote piloting of drones.[246] The drones themselves are expensive and built by companies with decades of experience selling weaponry and other equipment to the U.S. government.[247] The government measures the success of the drone program primarily by the number of those killed who can be identified as armed group members.[248]

B. The Key Players

Economic public choice models of U.S. government regulatory activities typically include the following players—the regulating agencies; the regulated entities; the President; the Congress; the courts; and the American public. Often models will also include public interest organizations and any other institutions interested in the products of the regulatory process.[249] In the targeted killing process, the model should include the private firms who help staff the program's operation and those who

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the shift in control over drone programs to the U.S. military) (on file with the Washington and Lee Law Review).

246. *See* COCKBURN, *supra* note 27, at 48–50 (describing examples of specific services private contractors provide and the ways in which these contractors interact with and influence military officials); Michael S. Schmidt, *Air Force, Running Low on Drone Pilots, Turns to Contractors in Terror Fight*, N.Y. TIMES (Sept. 5, 2016), https://www.nytimes.com/2016/09/06/us/air-force-drones-terrorism-isis.html?mcubz=1&_r=0 (last visited Nov. 12, 2017) (discussing the recent increase in the United States' use of private contractors for drone attacks) (on file with the Washington and Lee Law Review).

247. *See* COCKBURN, *supra* note 27, at 51–72 (discussing the historical role equipment companies have had in U.S. military conflicts).

248. *See id.* at 68–72 (describing the testing accuracy of drones and the drones' efficiency in locating Osama bin Laden); SCAHILL, *supra* note 25, at 10–12. The government also assesses the effect of strikes on enemy activities and the long-term effects on U.S. foreign policy. *See* Drone Playbook, *supra* note 25, § 1.G ("When considering a proposed operational plan, Principals and Deputies shall evaluate . . . [t]he implications for the broader regional and international political interests of the United States . . . .").

249. *See* Farber & O'Connell, *supra* note 23, at 5–6 (discussing the broadening of recent public choice models); Mashaw, *Public Law and Public Choice*, *supra* note 65, at 19–20 (describing the various lenses through which public choice theory can be viewed).

provide the necessary equipment. It should also include the small number of U.S. public interest organizations that pay close attention to, and are generally critical of, the drone program.[250]

In addition, extraterritorial regulatory activities, such as targeted killing, involve a "two-level game," in which U.S. institutions must be responsive to both domestic and international politics.[251] So a model for targeted killing as regulation must also include foreign nations, their citizens, and international organizations with an interest in the targeted killing process.[252]

C. The Power Dynamics

The most notable aspect of the power dynamics in the targeted killing process is the dominance of the agencies—especially the DOD and the CIA, which have been engaged in a power struggle for years over control of the program.[253] Agency dominance in a national security regulatory process is neither unusual nor surprising. Secrecy and the complex, yet close-knit, structure of the bureaucracy give agencies vast coordination and information advantages which make congressional oversight

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250. The most influential U.S. organization has probably been the American Civil Liberties Union (ACLU). *See The Lawfare Podcast: Jameel Jaffer on the "The Drone Memos"*, LAWFARE (Jan. 14, 2017, 1:30 PM), https://www.lawfareblog.com/lawfare-podcast-jameel-jaffer-drone-memos (last visited Nov. 12, 2017) (discussing the ACLU's efforts to hold the U.S. government accountable for its targeted killing practices) (on file with the Washington and Lee Law Review).

251. *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988) (discussing the political complexities of international negotiations world players face in balancing domestic and international interests).

252. *See* Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1363 (2014) ("[O]ne may presume that the United States, like many other nation-states, responds to external pressures from the international system as well as domestic institutions, interests, and public priorities.").

253. *See generally* Entous & Lubold, *supra* note 245 (describing President Obama's active role in attempting to settle a "three-year turf battle" between the CIA, the DOD, and Congress over the CIA's role in drone campaigns following the September 11, 2001 attacks).

extremely difficult.[254] Accordingly, Congress has conducted very little oversight of the drone program.[255] For similar reasons, the American public has even less capacity to assess, or even know about, regulation in the national security realm than the members of Congress who represent them.[256] Elections rarely hinge on national security issues. For these reasons, the public also tends to be a weak institutional player.[257]

Even the President, who has far better access to secret information and expert advice than members of Congress, has a limited ability to influence the trajectory of national security policies that are already in place.[258] The President appoints only

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254. *See* GLENNON, *supra* note 5, at 17–18 (observing that national security bureaucrats "face no need for hearings or markups or floor debates"); ZEGART, *supra* note 63, at 27 (noting the distinction between the secrecy of national security agency activity and the relative openness of domestic policy agency activity); Damien Van Puyvelde, *Intelligence Accountability and the Role of Public Interest Groups in the United States*, 28 INTELLIGENCE & NAT'L SECURITY 139, 147 (2013) ("[I]ncreased secrecy has impacted upon the legislative and judiciary branches' ability to oversee and review intelligence activities.").

255. One exception was President Obama's nomination of John Brennan as CIA Director. Protests interrupted the hearings, and Brennan was questioned by senators about the targeted killing process. *See* McNeal, *supra* note 25, at 777 (discussing Brennan's confirmation hearings and how Senators used the nomination to hold President Obama politically accountable); Mary Ellen O'Connell, *The Questions Brennan Can't Dodge*, N.Y. TIMES (Feb. 7, 2013), http://www.nytimes.com/2013/02/07/opinion/the-questions-brennan-cant-dodge.html (last visited Nov. 12, 2017) (arguing that Senators should "hold Mr. Brennan to account for one of the administration's gravest failings: its refusal to openly discuss the legal basis for America's campaign of targeted killings of terrorism suspects") (on file with the Washington and Lee Law Review).

256. *See* GLENNON, *supra* note 5, at 16–17 (discussing the expansive yet tight-knit nature of the U.S. national security culture); McNeal, *supra* note 25, at 789 ("There are few incentives for elected officials to exercise greater oversight over targeted killings, and interest group advocacy is not as strong in matters of national security and foreign affairs as it is in domestic politics.").

257. *See* GLENNON, *supra* note 5, at 8–9 (discussing the public's general lack of focus on national security issues); McNeal, *supra* note 25, at 775 (noting that congressional political incentives generally favor support for targeted killing); ZEGART, *supra* note 63, at 26 ("[T]he relatively weak interest group environment substantially reduces Congress's interest and role in creating new national security agencies. With interest groups largely out of the picture, the average member has little incentive to expend significant time and political capital in designing foreign policy agencies.").

258. *See* GLENNON, *supra* note 5, at 58–59 (discussing the President's weaknesses in forging national security policy); Theodore Sorensen, *You Get to*

several hundred civilian officials to oversee a national security bureaucracy that, with contractors included, employs millions.[259] When NSC members are united on a particular policy—which they usually are—it is especially difficult for the President to say "no."[260] In 2009, four members of the NSC—the Secretary of Defense, Director of National Intelligence (DNI), CIA Director, and National Security Advisor—formed a united front to persuade President Obama to continue and expand the drone program begun under President Bush. Crucially, at the same time, they leveraged their control over information to "curtail discussion of the policy's broader ramifications."[261] Although the President exercises direct supervisory authority over the program, and is involved in many of the ultimate decisions to conduct a strike, he must rely on the intelligence provided by the bureaucracy and the advice of the officials who lead it.

Private firms, on the other hand, are so intimately involved in nearly every stage of the targeted killing process that their ability to influence regulatory policy is quite strong.[262] The success of the program depends on the performance of their personnel and equipment.[263] And a robust revolving door between the private and public sectors in this area contributes to the private firms' power.[264] Note that this is not a case of regulatory

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Walk to Work, N.Y. TIMES MAG. (Mar. 19, 1967) ("Presidents rarely, if ever, make decisions—particularly in foreign affairs—in the sense of writing their conclusions on a clean slate . . . . [T]he basic decisions, which confine their choices, have all too often been previously made.").

259. GLENNON, *supra* note 5, at 16.

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

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

262. DICKINSON, OUTSOURCING WAR AND PEACE, *supra* note 27, at 40–44.

263. *See id.* at 32–33 (discussing the drawbacks of the DOD cutting personnel and equipment).

264. *See id.* at 123 (discussing "the revolving door for government contracting officials and senior management and board members at contracting firms" and the ways in which congressional oversight fails to curb corruption). Because the interests of private contractors and the military are so closely aligned, it may be that contractors rarely actually influence policy. *See* Scott M.

capture in the now commonly understood sense—a scenario in which the regulated entities control the regulating agency.[265] Private firms here are more regulators than regulated.

In fact, the targeting regulatory process harkens back to a different capture scenario—pro-regulatory capture by entities who are not themselves regulated, but stand to benefit, and in which the regulated entities have comparatively little influence in the process.[266] An enormous asymmetry exists between the U.S. national security bureaucracy that regulates through targeted killing and the entities who are most directly regulated—(1) the targets themselves and (2) civilians who are mistakenly killed or whose lives and property are affected by the strikes. By the traditional measures, these individuals have almost zero influence in the regulatory process. As regulated entities, they most closely resemble those arrested or convicted of crimes,[267] but their power position is even worse.[268] Those affected by drone strikes live in remote areas where territory is often contested and governance is weak. Unlike most arrestees or convicts in the U.S. criminal justice system, they are, with rare exceptions, not citizens of the nation that is regulating them.[269]

Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 856 (2010) (arguing that private military companies' values and characteristics reflect a penchant for legal and regulatory compliance). But this could be changing as contractors seek to expand into nonmilitary markets. *See infra* Part IV.C (discussing the political pressures national security bureaucrats face concerning regulations).

265. *See* Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO 1, 2 (2010) (defining capture as a "shorthand for the phenomenon whereby regulated entities wield their superior organizational capacities to secure favorable agency outcomes at the expense of the diffuse public"); Livermore & Revesz, *supra* note 165, at 1340 (listing sources and their definitions of regulatory capture).

266. *See infra* notes 301–304 and accompanying text (discussing the antiregulatory orientation of the public choice field).

267. *See* Barkow, *Administering Crime*, *supra* note 45, at 726 ("[I]ndividuals who have been convicted of a crime are not a powerful interest group. The families and communities of these offenders may oppose the harsh sentencing laws, but they currently lack the political pull to present strong opposition.").

268. *See* McNeal, *supra* note 25, at 775 (observing that "[t]here is no large [domestic] constituency that is impacted by the targeted killing program").

269. *See* Grant & Keohane, *supra* note 1032, at 40 (noting that "[e]ven democratic states will act in a biased way toward noncitizens" and that domestic "mechanisms of accountability . . . can work against the interests of noncitizens affected by government policies"). In the extremely rare instance when a U.S.

Nor are they citizens of major global powers like China, or close U.S. allies, which could conceivably wield real influence in the regulatory process on their behalf.[270] Even their own governments, for reasons of internal and global power politics, are usually unwilling or unable to advocate for them.[271]

The only significant way the regulated entities may influence the targeting process relates to counterinsurgency strategy and blowback. Under a pure capture-kill approach, drone strikes that kill innocent civilians are simply imposing collateral damage. That collateral damage may exceed legal norms or be ethically abhorrent. But under a public choice model, these aspects alone have little potential to affect the targeting regulatory process. In contrast, if drone strikes are conducted as part of a progressive counterinsurgency strategy, where winning the population is the key to victory, those most affected by the targeting process can wield influence by shifting their support to the insurgency.[272] If targeted killing as a tactic makes it more difficult to reach the strategic goal, policymakers may be persuaded to limit its use—in other words, to regulate less.

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citizen is targeted, the Drone Playbook requires that the President personally approve the strike decision. *See* Drone Playbook, *supra* note 25, §§ 19, 3.E.2. (discussing the presidential review procedures for drone strikes).

270. *See* Ashley Deeks, *Checks and Balances from Abroad*, 83 U. CHI. L. REV. 65, 67 (2016) (discussing the wide range of foreign actors who may influence domestic policy). The nations where strikes occur, or from which attacks are launched, may exercise meaningful negotiation constraints on U.S. drone policy if they choose. *See* Grant & Keohane, *supra* note 1032, at 37 (recognizing the potential of negotiation constraints as a limit on the global abuse of power); McNeal, *supra* note 25, at 779 (noting similar limits). But for the most part, they have not chosen to do so. In addition, the handful of targets who are citizens of allied nations tend to be outlaws, who could be punished under the criminal justice systems of their home nations or the United States if they could be arrested.

271. *See* Grant & Keohane, *supra* note 1032, at 40 (observing that "[a]ccountability in world politics is inextricably entangled with power relationships" and that "[w]eak actors—including small, poor countries in the Global South and, more, their often disenfranchised publics—–lack the capacity systematically to hold powerful actors accountable").

272. *See supra* notes 154–163 and accompanying text (discussing the "kill-capture" method as a form of regulation).

As for the courts, they have demonstrated the potential to influence agencies' national security regulating.[273] By recognizing the due process rights of military detainees[274] and constitutional habeas jurisdiction at Guantanamo Bay,[275] the Supreme Court essentially forced agencies to create a combatant status review process[276] and discouraged the use of the naval base as an offshore detention-interrogation center.[277] The procedural difficulties this created for detention programs pressured policymakers to shift to a targeted killing strategy instead.[278] And it was a successful Freedom of Information Act (FOIA) lawsuit that forced the Obama Administration to release the Drone Playbook.[279] However, despite a nascent shift toward increased judicial scrutiny of national security activities in recent years,[280] the courts are affecting most policies only at the margins, if at all. Their interventions are far too infrequent and timid.[281] The

273. *Compare* McNeal, *supra* note 25, at 760 (observing that, "when triggered, legal accountability [through judicial review] imposes a high degree of externally based control over the targeted killing process"), *with* Craig, *supra* note 209, at 2364–65 (arguing that judicial review may reduce accountability by endowing the targeting process with "false legitimation").

274. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (discussing the due process rights of a U.S. citizen being held as an enemy combatant).

275. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008) (recognizing habeas rights for detainees being held as enemy combatants at Guantanamo).

276. *See supra* notes 185–191 and accompanying text (discussing the ways in which the Court's refusal to defer to the Executive branch in the Guantanamo cases altered national security policy).

277. *See* Chesney, *Who May Be Held?*, *supra* note 191, at 804 (discussing the relative ineffectiveness of offshore interrogation techniques for intelligence gathering).

278. *See id.* (noting the recent increase in lethal drone strikes).

279. *See* Charlie Savage, *U.S. Releases Rules for Airstrike Killings of Terror Suspects*, N.Y. TIMES (Aug. 6, 2016), https://www.nytimes.com/2016/08/07/us/politics/us-releases-rules-for-airstrike-killings-of-terror-suspects.html?mcubz=1 (last visited Nov. 12, 2017) (discussing the declassification of the "drone strike playbook" and the drone program's increased legitimacy as a result of the playbook's release) (on file with the Washington and Lee Law Review).

280. *See supra* Part III.A.3 (describing the ways in which several Supreme Court decisions have increased scrutiny of the national security state's activities).

281. *See* Charles J. Dunlap, Jr., *Drones Versus Their Critics: A Victory for*

courts have declined to review the merits of drone strikes, either the substantive standards or procedures.

The remaining institutional players are (1) United States and international public interest organizations with strong views about the targeted killing process and (2) foreign governments, who may see the process as affecting their national interests.[282] There is some evidence that relentless pressure by anti-targeting non-governmental organizations (NGOs) caused the President and the agencies to rethink the targeted killing regulatory process—at least in the sense of introducing some transparency.[283] In 2016, under pressure from NGOs, the Obama Administration finally released the official death toll—civilian and combatant—from drone strikes for the period of 2009–2016.[284] As with public interest groups that advocate for criminal justice reform, however, these NGOs face a steep uphill climb, and the progress they have made has been agonizingly slow in coming.[285]

President Obama's War Powers Legacy?, SMALL WARS J. (Oct. 14, 2015, 11:09 PM), http://smallwarsjournal.com/jrnl/art/drones-versus-their-critics-a-victory-for-president-obama's-war-powers-legacy (last visited Nov. 12, 2017) (noting U.S. courts' general unwillingness to intervene in the targeted killing process) (on file with the Washington and Lee Law Review). *But see* Craig, *supra* note 209, at 2364–65 (noting that, when the Supreme Court has intervened in detention cases, it has resulted in an increase in public acceptance of the military detention system).

282. *See* Deeks, *supra* note 270, at 66–67 (observing that "a variety of foreign actors—including leaders, courts, citizens, and corporations—have the capacity to affect either the quantum of power within a single branch or the allocation of power among the three branches of the U.S. government, particularly in the area of intelligence activity").

283. In public statements, President Obama was ambiguous about the influence of these organizations. *See* Jonathan Chait, *Five Days That Shaped a Presidency*, N.Y. MAG. (Oct. 2, 2016, 9:00 PM), http://nymag.com/daily/intelligencer/2016/10/barack-obama-on-5-days-that-shaped-his-presidency.html (last visited Nov. 12, 2017) (observing that, while "the critique of drones has been important," internal reforms were prompted by the "routineness" of agency attitudes toward targeted killing and the increase in drone strikes) (on file with the Washington and Lee Law Review).

284. *See* Jaffer, *supra* note 2, at 13 (noting that, "over the seven-year period ending on December 31, 2015, 'counterterrorism strikes outside the areas of active hostilities' had killed between 64 and 116 noncombatants").

285. *See* Dalal, *supra* note 99, at 105 (describing the imbalance between the lobbying power of "underrepresented and underfunded activist groups" and the

Most foreign governments have, so far, demonstrated little interest in influencing the targeting process. Many have, in fact, tacitly supported it by providing much of the intelligence used to select and locate targets.[286] This includes U.S. allies and other nations who may face domestic terrorist attacks from the armed groups, and who therefore may see the United States as providing a global public good.[287]

For obvious reasons, the governments of the nations where strikes occur have a more complex relationship with the process. They have a strong interest in the outcome of warfare conducted on their territory, and they theoretically have the power to make it difficult for the United States to carry out strikes: they could deny consent or publicly denounce the operations.[288] So far, however, they have played a double game—often condemning, yet tolerating, or even assisting, targeting operations—because they face conflicting incentives.[289] They are themselves conducting counterinsurgency operations against the same armed groups the United States is targeting, but perceived cooperation with the

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"powerful defense contractor lobby and the national security war hawks"); Dunlap, *supra* note 281 (noting that, despite "robust criticism by significant parts of the legal, academic, and political communities, neither the courts nor Congress have evinced much inclination to curtail or even publically scrutinize the Administration's use of drones").

286. *See* COCKBURN, *supra* note 27, at 230–34 (discussing Pakistan's role in providing intelligence for, and taking credit for, certain drone strikes).

287. *See* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1167 (2011) (positing that "the United States provides a public good through its efforts to combat terrorism").

288. *See* Martin S. Flaherty, *The Constitution Follows the Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards*, 38 HARV. J.L. & PUB. POL'Y 21, 29 (2015) (noting that "publically available information suggests that states [where strikes occur] have granted their consent, though at least Pakistani officials have recently made statements to the contrary"); McNeal, *supra* note 25, at 779–80 (noting that allies such as Pakistan and nations whose territory is used for military operations may, if they choose, exert pressure on the United States to alter targeting policy).

289. *See, e.g.*, INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC (STANFORD LAW SCH.) GLOB. JUSTICE CLINIC (N.Y. UNIV. SCH. OF LAW), LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM U.S. DRONE PRACTICES IN PAKISTAN 15–17 (2012) [hereinafter INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC] (discussing Pakistan's divided role with respect to drone use in its northwestern territory).

United States may be politically poisonous, even among the population that does not support the insurgency.[290]

As with the targets and victims of the strikes, the ability of NGOs and foreign governments to influence the targeting process depends on whether it is being used as part of, or in conjunction with, a progressive counterinsurgency strategy. Successful progressive counterinsurgency hinges on establishing legitimacy.[291] If these institutional players regard drone strikes as illegitimate and are able and willing to advocate for that view with the relevant population, they could have a more substantial influence on the targeting process.

Through 2016, however, that process has clearly been dominated by the agencies and private firms who carry out the program, with the direct involvement of the President himself, who, under current rules, must approve many personality strikes.[292] The remaining institutional players are quite weak, especially compared to their power positions in the domestic regulatory context.[293]

D. The Key Players' Incentives

1. The Regulating Agencies and Private Firms

Because the agencies and private firms who conduct targeting operations also dominate the process of targeting as regulation, their incentives are the most important determinants of the direction that regulation is likely to take.

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290. *See* COUNTERINSURGENCY FIELD MANUAL, *supra* note 157, at 1–9 ("[I]f a population does not see outside forces as legitimate, this can undermine the legitimacy of the host-nation government trying to counter an insurgency.").

291. *See supra* notes 154–163 and accompanying text (discussing the "kill-capture" method as a form of regulation).

292. *See infra* Part IV.A (discussing institutional reform as a possible method for altering national security bureaucrats' current bent towards overregulation).

293. *See* ZEGART, *supra* note 63, at 21–28 (discussing the stark differences between domestic policy and national security agencies and the ways these differences weaken the influence of outside players).

This is where economic public choice theory is most useful. It is an influential view of regulation that developed in the 1960s and 1970s as a challenge to the then-prevailing assumption that agencies regulate in the public interest.[294] Many core insights of public choice theory concern bureaucrats' incentives. William Niskanen, in an influential 1971 study, proposed that bureaucrats seek to maximize their own utility by increasing their agencies' budgets.[295] Flowing from increased budgets were increases in "salary, perquisites of the office, public reputation, power, patronage, [and the] output of the bureau."[296] Other theorists offered variations of Niskanen's portrait of the rational bureaucrat.[297] Some proposed that bureaucrats are also motivated by a zeal for the agency's mission.[298] Some seized on Justice Stephen Breyer's observation that bureaucrats engaged in risk management tend to overregulate concerning rare, high-profile risks.[299] But the common thread was that bureaucrats' incentives drove them to overregulate.[300]

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294. *See* Farber & O'Connell, *supra* note 23, at 2–8 (tracing the development of economic public choice theory from its inception to present day).

295. *See* NISKANEN, *supra* note 66, at 39 ("It is *impossible* for any one bureaucrat to act in the public interest, because of the limits on his information and the conflicting interests of others, regardless of his personal motives."); Benjamin H. Barton, *Harry Potter and the Half-Crazed Bureaucracy*, 104 MICH. L. REV. 1523, 1525 (2006) (observing that popular fantasy author J.K. Rowling, in *Harry Potter and the Half-Blood Prince*, "depict[s] a Ministry of Magic run by self-interested bureaucrats bent on increasing and protecting their power, often to the detriment of the public at large"); *see also* William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 293–94 (1968) (discussing how bureaucrats maximize utility). The figure of the empire-building bureaucrat has had lasting influence in the public imagination as well.

296. NISKANEN, *supra* note 66, at 38.

297. *See* Farber & O'Connell, *supra* note 23, at 4–5 (describing the modern expansion of Niskanen's model to include a broader range of players and structures).

298. *See* DeMuth & Ginsburg, *White House Review*, *supra* note 26, at 1081–82 (noting the challenge in using traditional social cost and benefit analyses given agencies' tendency to favor their own mission).

299. *See* BREYER, *supra* note 24, at 9–10; (describing the risk assessment process and the potential for different risks to arise due to regulations); Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 142–43 (2016).

300. Although Niskanen focused on the inefficiency produced by

Indeed, although many public choice theorists simply advocated for better or more efficient regulation, the field generally had an antiregulatory bent.[301] Murray Weidenbaum, an influential member of Ronald Reagan's 1980 campaign team, flipped conventional wisdom on its head, arguing that business firms actually represented the general public interest (as proxies for consumers) and that environmentalists were a "special interest group."[302] In fact, one popular version of capture theory during the 1970s and 1980s was not the now-familiar one about regulated private firms manipulating regulating bureaucrats to their advantage:[303] instead, it told the story of public interest groups working hand-in-hand with zealous, prestige-seeking agency bureaucrats to overregulate the hapless private sector at the public's expense.[304]

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bureaucratic incentives, this became conflated, in the minds of reformers, with the assumption that these bureaucrats were, at the same time, overregulating. *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263 (2006) (criticizing agency regulation and calling for a reform of the Office of Management and Budget's review).

301. *See id.* at 1261–62 ("OMB's advocates were frank that its primary function was to create a 'rebuttable presumption against regulation' in order to curb agencies' supposed instincts to overregulate.").

302. RICHARD REVESZ & MICHAEL LIVERMORE, RETAKING RATIONALITY 22–23, 163–64 (2009).

303. *See* Bagley & Revesz, *supra* note 300, at 1284 ("In [capture theory's] classic form . . . [i]n order to secure favorable regulations, the interest group . . . will aggressively lobby committee members and provide support, financial or otherwise, for the members' reelection efforts. Those committee members will then pressure the agencies to enact favorable regulations.").

304. *See id.* at 1264–65 (discussing Reagan's supporters' promotion of centralized review of agency decision-making in order to promote a "coordinated and cost-effective regulatory state" and to curb excessive regulation); DeMuth & Ginsburg, *White House Review*, *supra* note 26, at 1081–82 (arguing that rule-makers should be held accountable to the President for costs and benefits of their rules because this would "force regulators to confront problems of covert redistribution and overzealous pursuit of agency goals, which experience has shown to be common in regulatory programs"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2279 (2001) ("Proponents of [Reagan's executive review process] stressed the need . . . to guard against regulatory failures—in particular, excessive regulatory costs imposed by single-mission agencies with ties to special interest groups and congressional committees.").

These conservative anti-regulatory public choice theorists had domestic market and quality-of-life regulation in mind when they developed their critiques.[305] As it turned out, many of their approaches fell apart under scrutiny or had poor success at predicting actual agency behavior in those areas.[306] For example, due to collective action problems, public interest groups seeking benefits for the general public are frequently outgunned by narrow business interests when influencing agency regulation.[307] And those business interests are likely to favor less regulation.[308] Moreover, as Daryl Levinson has argued, domestic agencies do not always behave as empire-building, budget-maximizers—in fact, they actively avoid regulating in some instances.[309]

However, there is plenty of evidence that regulation by national security bureaucrats is different—that the 1970s fable of the empire-building, overregulating bureaucrat urged on by a small group of pro-regulatory private firms is, in the unique national security context, accurate. First, analysts of the national security state, some of whom served in it, describe its bureaucrats as motivated, even obsessed with, expanding their agencies' budgets, authority, autonomy, and prestige.[310] These bureaucrats

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305. *See* Bagley & Revesz, *supra* note 300, at 1289 (criticizing agencies for failing to prioritize health and safety in rulemaking).

306. *See id.* at 1287–300 (discussing studies and analyses that call into question fundamental tenets of public choice theory relating to domestic regulation).

307. *See id.* at 1288–89 (noting that "if any group has disproportionate access to the administrative state, it is industry"). *But see* Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 910 (2010) (arguing that this analysis "obscur[es] the inconvenient fact that environmentalists and consumers . . . have managed to organize themselves into highly effective lobbying groups").

308. *See* Bagley & Revesz, *supra* note 300, at 1282–304 (arguing that the public choice assumptions about bureaucratic incentives often do not hold up when the behavior of quality-of-life regulators is examined).

309. *See* Levinson, *supra* note 12, at 932–34 (discussing empire-building in the context of non-elected government officials).

310. National security bureaucrats see these goals as interrelated. *See* SCAHILL, *supra* note 25, at 51 (quoting a former CIA official's observation that, "[i]f you get the budget, then you control the decisions"); Sales, *supra* note 70, at 282 (arguing that "[i]ntelligence agencies seek to maximize their influence over senior policymakers" and "autonomy—i.e., the ability to pursue agency priorities without outside interference").

believe that the most effective way to do so in most situations is to advocate for aggressive intelligence collection and the muscular, "hard-hitting" military options.[311] They are therefore incentivized both to inflate threats and to conclude that their agency's particular weaponry and skill sets are the best tools for meeting those threats.[312] They gain bigger budgets, more authority, and greater prestige when their weapons and personnel are deployed.[313]

Second, national security bureaucrats are true believers in their agencies' missions, which today is counterterrorism.[314] Attempts to introduce a secondary, rights-protecting mission into such agencies by adding an office of civil liberties, for example, typically fail as the rights-protecting bureaucrats are redirected toward fulfilling the agency's primary counterterrorism mission.[315]

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311. *See* GLENNON, *supra* note 5, at 19 (noting the government's, and particularly the President's, fear of appearing "soft" or "weak" in military policy); SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 65–66 (1957) (describing "the military mind" as "skeptical of institutional devices designed to prevent war," particularly including those of international law).

312. *See* GLENNON, *supra* note 5, at 19–22 (discussing threat inflation in military policy); SCAHILL, *supra* note 25, at 51 (quoting a former CIA official's observation that "everybody thinks that whatever toys they control are the toys that need to be used and therefore you need more of them").

313. *See infra* notes 339–352 and accompanying text (discussing reasons for the drone program's prevalence).

314. *See* GLENNON, *supra* note 5, at 26–27 (noting the remarkable unanimity among national security bureaucrats, especially at the upper levels).

315. *See* Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 289, 294–300 (2015) (detailing the prevalence and function of internal rights oversight offices); *see also* Alston, *supra* note 22, at 283 (concluding that, with respect to the drone program, "[t]he CIA's internal control mechanisms, including its Inspector General, have had no discernible impact"); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21–24 (2010) (observing that, when an agency is assigned two conflicting missions, one of the missions will usually swallow the other); J.R. DeShazo & Jody Freeman, *Public Agencies As Lobbyists*, 105 COLUM. L. REV. 2217, 2220 (2005) ("Agencies frequently resolve . . . interstatutory conflicts by prioritizing their primary mission and letting their secondary obligations fall by the wayside.").

Third, national security bureaucrats are incentivized to take the approach to risk management that was believed to afflict domestic regulators in the 1970s: they overregulate with respect to high-profile, low probability risks.[316] For national security bureaucrats, the paradigmatic high-profile risk is the mass-casualty terrorist attack.[317] Unlike domestic bureaucrats at agencies like the EPA or the Food and Drug Administration (FDA), however, the national security bureaucrat has greater difficulty externalizing costs to the regulated entities. When the EPA imposes emissions caps, it spends some money conducting the rulemaking process, but most of the costs of regulating are borne by the polluters.[318] National security bureaucrats, in contrast, need to spend much more money to regulate. They spend billions on costly equipment and skilled personnel. Moreover, when they regulate through the use of force, the costs may include, not only the lives of noncombatant civilians, but also the lives of service members and private contractors.[319]

The primary defense mechanism against the potential prestige threat created by these costs is to hide them. Within the national security bureaucracy, there are strong incentives to bury or ignore policy failures—from continuing to pay for expensive weapons that do not work[320] to undercounting collateral deaths

316. *See supra* notes 299–300 and accompanying text (discussing the bureaucratic tendency to overregulate in favor of an agency's mission).

317. *See* BOBBITT, *supra* note 55, at 18 (discussing the United States' fear of terrorist attacks which has resulted in short-term action rather than long-term strategic planning).

318. *See* Reitze, *supra* note 46, at 375–76. (noting that while some of the financial burden of regulations is shifted to the consumer, market forces limit the extent to which the burden can be shared). One large, catastrophic, exception is climate change resulting from externalizing the costs of carbon dioxide emissions.

319. *See* Linda J. Bilmes, *The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets* 1 (Harvard Kennedy Sch., Working Paper RWP13-006, 2013), https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=8956&type=WPN (calculating that "[t]he Iraq and Afghanistan conflicts, taken together, will be the most expensive wars in U.S. history—totaling somewhere between $4 to $6 trillion") (on file with the Washington and Lee Law Review).

320. *See* COCKBURN, *supra* note 27, at 168–88 (describing massive spending on expensive and ineffective equipment for targeting operations).

from the use of force[321] to conducting missions "off the books."[322] Scaling back the level of regulation is rarely considered because it is viewed as an admission of failure, which actually increases the threat to bureaucratic prestige.[323]

Nonetheless, under some conditions, depending on the degree of public attention to the costs of war activities, the national security bureaucracy will face significant pressure to scale back the level of regulation.[324] Uses of force that result in the deaths of service members are especially likely to become unpopular over time.[325]

However, the rational national security bureaucracy, given its incentives, will first respond to this type of threat to its authority and prestige by shifting to a different type of regulation—i.e., a different mode of warfare—if possible, rather than scaling back the level of regulation.[326] For example, in response to increased scrutiny of military detention at Guantanamo via habeas proceedings, transfers to Guantanamo

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321. *See infra* notes 353–367 and accompanying text (discussing ways in which agencies overregulate using drone strikes).

322. *See* Andrew de Grandpre & Shawn Snow, *The U.S. Military's Stats on Deadly Airstrikes are Wrong. Thousands Have Gone Unreported*, MIL. TIMES (Feb. 5, 2017), https://www.militarytimes.com/news/your-military/2017/02/05/the-u-s-military-s-stats-on-deadly-airstrikes-are-wrong-thousands-have-gone-unreported/ (last visited Nov. 12, 2017) (discussing the "potentially thousands" of lethal airstrikes that the U.S. military has failed to publically disclose) (on file with the Washington and Lee Law Review).

323. *See* Dalal, *supra* note 99, at 105 ("[C]hanging course implies that the existing course is incorrect—an admission of failure that might expose the agency to unwanted scrutiny and negatively implicate the agency's top brass.").

324. *See supra* note 136 and accompanying text (discussing the ways in which public opinion has contributed to the regulation of the national security state).

325. *See* Gregory P. Noone, *The War Powers Resolution and Public Opinion*, 45 CASE W. RES. J. INT'L L. 145, 147–48 (2012) (observing that, "[n]o matter how popular an exercise of American power may be at the beginning, support will erode," and that the "duration of the conflict and the number of casualties directly impacts the level of support").

326. *See* Chesney, *Who May Be Held?*, *supra* note 191, at 804 (observing that, "like squeezing a balloon, . . . when one of these coercive powers becomes constrained in new, more restrictive ways, the displaced pressure to incapacitate may simply find expression through one of the alternative mechanisms").

virtually stopped, and the use of targeted killing, and detention was largely outsourced to foreign governments.[327] Interagency rivalry within the national security state also incentivizes national security bureaucrats to find a different means of regulating when the costs of one method become too apparent. If one agency faces criticism for its regulating, another agency will be happy to point out that its method of regulating is more effective and efficient.[328] And in general, the national security bureaucrat is far more fearful about being blamed by the public for a catastrophic failure than for spending too much money.[329] This fear provides another incentive to inflate threats.[330]

Fourth, national security bureaucrats work side-by-side with private contractors whose incentives are slightly different—they center more on profit than prestige—but also point in the direction of overregulation.[331] Many of these firms have worked with the national security bureaucracy for decades.[332] Private firms profit when the national security state uses their products or services, of course. But the revolving door between public and private[333] means that contractors—Edward Snowden

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327. *See id.* (discussing the pressure the U.S. government has faced over military detention and its impact on military strategy).

328. *See* ZEGART, *supra* note 63, at 38 ("[N]ational security agencies have powerful incentives to worry about the design and operation of organizations other than their own . . . . [B]ureaucratic interconnectedness guarantees that changes to any one organization will affect others.").

329. *See* GLENNON, *supra* note 5, at 19–20 (discussing the incentives for national security bureaucrats to exaggerate existing threats and to create new ones to protect themselves against public backlash in the event of an attack).

330. *See id.* (concluding that a rational actor in the national security bureaucracy would inflate risks for this reason).

331. *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 748–49 (2010) (discussing contractors' motivations to maximize remuneration and prestige).

332. *See* COCKBURN, *supra* note 27, at 34–38 (describing one example of a Canadian defense contractor appointed by President Carter who has exerted significant influence on U.S. defense policy in the subsequent decades); DICKINSON, OUTSOURCING WAR AND PEACE, *supra* note 27, at 23 (discussing the U.S. military's increased use of private contractors in the decades since the Vietnam War).

333. According to a 2007 Government Accountability Office (GAO) report, fifty-two major defense contractors employed 86,181 of the 1,857,004 former military and civilian personnel who had left DOD service since 2001, including

notwithstanding—are likely to possess the national security bureaucrats' qualities—zeal for the counterterrorism mission, prestige-seeking, tendency to inflate threats, and belief that aggressive intelligence collection and use of force are the best solutions.[334] And even if the contractor does not share these qualities with the bureaucrat, it is in her financial interest to act as though she does.[335] In addition, the revolving door provides an "incentive[] [for regulators] to expand the market demand for services they would be providing when they exit the government."[336]

In light of these incentives, it is clear why the drone program became a centerpiece of U.S. counterterrorism strategy. In theory, drones are an ideal weapon of war because they reduce the costs of regulating.[337] First, drones impose fewer direct costs on the national security bureaucracy than other methods of warfare.[338] The drones themselves are now pricey pieces of

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2,345 former DOD officials hired between 2004 and 2006. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-485, DEFENSE CONTRACTING: POST-GOVERNMENT EMPLOYMENT OF FORMER DOD OFFICIALS NEEDS GREATER TRANSPARENCY 4 (2008). *See* DICKINSON, OUTSOURCING WAR AND PEACE, *supra* note 27, at 118–19 & n.100 (discussing the high numbers of former DOD employees who go to work for military contractors, and observing that "many of the companies that won contracts in Iraq and Afghanistan boasted top brass or former members of Special Forces teams as corporate board members or senior executives"). Dickinson points out that, because Congress repealed a statute requiring that DOD report turnover numbers, the percentage of former DOD employees working for national security contractors is likely much higher than the GAO number. *Id.* at 119 n.100.

334. DICKINSON, OUTSOURCING WAR AND PEACE, *supra* note 27, at 118–20.

335. *See* Michaels, *supra* note 331, at 748–49 ("Enticements of remuneration or prestige may be enough to influence even apolitical contractors, leading them to tell the agency chiefs what they want to hear. That is, the contractors' advice is colored by their desire to be 'go-to' contractors on other, or continuing, programs.").

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

337. *See* Tung Yin, *Game of Drones: Defending Against Drone Terrorism*, 2 TEX. A&M L. REV. 635, 646–47 (2015) (comparing the cost advantage of drone usage over that of a manned aircraft as well as the continued benefits of drone usage as technology advances).

338. *See id.* at 639–40 (comparing the high cost of a typical fighter plane with that of the much cheaper drone that serves virtually the same function).

equipment,[339] but their use dramatically lowers costs in many important ways.[340] No American service members' lives are put at immediate risk.[341] No enemy territory need be occupied and controlled.[342] In other words, the death, property destruction, and other harms that may result from drone strikes are externalized to foreign citizens and communities.[343] And in part because the drone strikes occur in remote areas, intense media scrutiny and high-profile backlash have been slow to gain traction.[344]

Moreover, drone strikes boost agency prestige by appearing, at least, to reduce costs overall. When strong intelligence and the right opportunity overlap, the drone operator may cleanly and swiftly eliminate an enemy without the civilian deaths and property damage other types of attacks typically cause.[345] By reducing such costs, the national security bureaucracy gains even more prestige—it can credibly claim to be achieving crucial military objectives while honoring the core principles of international humanitarian law.[346] Indeed, the glossary of the

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339. The "backbone" of the drone fleet is the Reaper, which costs $30 million per copy to produce, and each copy costs $5 million per year to maintain. *See* COCKBURN, *supra* note 27, at 177. But they are being replaced by much more expensive models. *See id.* at 253–55 (describing the newest generation of drones that cost from $140 to $300 million per copy).

340. *See* Jo Becker & Scott Shane, *Secret 'Kill List' Tests Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?mcubz=1 (last visited Nov. 12, 2017) (listing the other costs associated with drones) (on file with the Washington and Lee Law Review).

341. *See* Judah A. Druck, *Droning on: The War Powers Resolution and the Numbing Effect of Technology-Driven Warfare*, 98 CORNELL L. REV. 209, 211 (2012) ("[L]ess is at stake when drones, not human lives, are on the front lines, limiting the potential motivation of a legislator, judge, or antiwar activist to check presidential action. As a result, the level of nonexecutive involvement in foreign military affairs has decreased.").

342. *Id.*

343. *Id.*

344. *Id.*

345. *See, e.g.*, Radsan & Murphy, *supra* note 38, at 1203 (describing the capabilities of drones to zero in on narrow targets from a significant distance).

346. *See id.* at 1204 ("Over time, a consensus will likely evolve that targeted killing of suspected terrorists under some circumstances is legal under [International Humanitarian Law]."); Becker & Shane, *supra* note 340 (quoting former DNI Blair's statement that the drone program was "the politically advantageous thing to do—low cost, no U.S. casualties, gives the appearance of

drone bureaucracy is filled with triumphalist terms like "jackpot"—when the intended target is killed—and "touchdown"—when a target's phone is neutralized after a drone strike.[347] And after the Bush Administration's detention policies caused massive legal and public relations problems,[348] drone technology enabled the shift away from capture to targeting.[349] The program's perceived effectiveness in killing members of enemy armed forces helped restore morale at the CIA, which was still suffering a crisis of confidence from past intelligence disasters.[350] In sum, with the drone program, the national security bureaucrats' agencies gained prestige, a morale boost among its personnel, and a larger budget.[351] Contractors who supply the drones and the staff to pilot them got bigger contracts.[352]

The problem, however, is that agencies with the incentive to overregulate will, in fact, overregulate.[353] In the targeted killing context, the national security bureaucrat is incentivized to overregulate because he maximizes his agency's prestige by producing enough targets and conducting enough strikes to justify its budget and maintain the program's primacy as a counterterrorism tool.[354] The demand for targets creates a market, which the intelligence community and private

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toughness, . . . plays well domestically, and . . . is unpopular only in other countries").

347. *See* Betsy Reed, *Preface* of JEREMY SCAHILL, THE ASSASSINATION COMPLEX: INSIDE THE GOVERNMENT'S SECRET DRONE WARFARE PROGRAM ix (2016) (referring to terms Scahill uncovered in his investigative drone research which were then used in this book to illustrate U.S. drone tactics).

348. *See supra* note 180 and accompanying text (describing the litigation challenging the legality of military detention at Guantanamo Bay).

349. *See* SCAHILL, *supra* note 25, at 5 (highlighting drones' ability to aim at targets from remote distances without need of support from ground forces).

350. *See id.* (referencing past intelligence failures like September 11).

351. *See id.* (describing a boost in morale).

352. COCKBURN, *supra* note 27, at 173.

353. *See* Jaffer, *supra* note 2, at 7 ("Eight years ago the targeted-killing campaign required a legal and bureaucratic infrastructure, but now that infrastructure will demand a targeted-killing campaign.").

354. *Id.*; COCKBURN, *supra* note 27, at 223 (describing how officials loosened targeting rules to increase the number of targets and therefore justify the program's budget).

contractors in turn have an incentive to supply.[355] This overregulating bureaucracy has an incentive to nominate targets or attack individuals based on insufficient intelligence;[356] to use drones to attack targets on the kill list when a personnel operation would be more effective;[357] to establish a low threshold for conducting signature strikes;[358] or to attack the target when the risks of civilian casualties are likely to be disproportionate to the military necessity.[359] If the civilian death toll is in fact disproportionate, or strikes fail to kill an intended target, the bureaucracy has an incentive to counter this prestige threat by labeling those killed as "enemies" and finding intelligence to support such a determination if necessary.[360] In general, the entire bureaucracy is incentivized to keep its decisions as secret as possible.[361]

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355. *See* SCAHILL, *supra* note 25, at 104 (quoting a former anonymous JSCOC drone operator's observation that, "[b]ecause there is an ever-increasing demand for more targets to be added to the kill list, the mentality is '[j]ust keep feeding the beast'").

356. *See id.* at 118 (discussing observations from high-level participants in the drone program that SIGINT (signals intelligence), is "an inferior form of intelligence [that], . . . account[s] for more than half the intelligence collected on targets" and that there is an overreliance on less-reliable partner-nation intelligence); COCKBURN, *supra* note 27, at 201–04 (discussing overreliance on intelligence provided by rival armed groups seeking to weaken each other).

357. *See id.* at 114–18 (noting that targeted killing "short-circuits" the "find-fix-finish-exploit-analyze" intelligence cycle because the dead target cannot be exploited for intelligence).

358. *See* Becker & Shane, *supra* note 340 (reporting the State Department officials' "joke . . . that when the C.I.A. sees 'three guys doing jumping jacks,' the agency thinks it is a terrorist training camp").

359. *See* Guiora, *supra* note 204, at 242 (describing the burden of distinguishing combatants from civilians and the necessity of making this distinction prior to carrying out an attack).

360. *See* Becker & Shane, *supra* note 340 (reporting that the U.S. government "counts all military-age males in a strike zone as combatants . . . unless there is explicit intelligence posthumously proving them innocent"). *See generally* SCAHILL, *supra* note 2527, at 47–48.

361. *See* Jack Serle, *Obama Drone Casualty Numbers a Fraction of Those Recorded by the Bureau*, BUREAU INVESTIGATIVE JOURNALISM (July 1, 2016), https://www.thebureauinvestigates.com/2016/07/01/obama-drone-casualty-numbers-fraction-recorded-bureau/ (last visited Nov. 12, 2017) (noting the impetus to keep drone strike information secret because leaked government records indicated the U.S. was sometimes unaware of the identities of people they were killing, which would reflect negatively on drone operations) (on file

And indeed, critics at NGOs, in academia, and elsewhere have long contended that the drone program overregulates in precisely these ways.[362] In other words, it has many hidden costs.[363] Strikes typically kill far fewer enemies and far more civilians than the government will admit;[364] they inflict other kinds of harm on the populations living in the areas where strikes occur;[365] and they have become recruiting tools for the very armed groups they are attempting to disrupt.[366] In more general terms, its critics contend, the drone bureaucracy systematically underestimates the long-term costs to America's interests when calculating the costs and benefits of adding a name to the kill list or launching a strike.[367]

Although secrecy makes it difficult to assess the accuracy of critics' claims,[368] they are more or less consistent with the

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with the Washington and Lee Law Review).

362. *See id.* (detailing the discrepancy between the number of casualties the U.S. government reported and the much higher casualty numbers independent entities documented).

363. *See id.* (suggesting that there are more costs to drone operations than the public is aware of due to lack of government transparency).

364. *See id.* (describing how the U.S. is sometimes unaware of who they are killing); *see also* Jaffer, *supra* note 2, at 16–18 (explaining how drones often destroy innocent civilians in their private dwellings or even in open public spaces).

365. *See* Jaffer, *supra* note 2, at 16–18 (depicting the incessant drone attacks that destroyed homes, cars, and public spaces and the resulting trauma experienced in the Pakistani communities). *See generally* INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC, *supra* note 289 (reporting the misleading characteristics of the U.S. government narrative on drone usage and drone strikes); COCKBURN, *supra* note 27, at 225–26 (noting that life in North Waziristan, where drone attacks were frequent, had changed such that weddings and funerals no longer took place because people were afraid to gather); *id.* at 227 (describing frequent drone attacks as "devastat[ing] the life of the society as comprehensively as if it had been subjected to a World War II-style carpet bombing").

366. *See* Jaffer, *supra* note 2, at 15–16 (describing how drone attacks increased anti-American sentiment in Pakistan and Yemen).

367. *See, e.g.*, Becker & Shane, *supra* note 340 (quoting former United States Director of National Intelligence Dennis Blair's statement that "any damage" the drone program "does to the national interest only shows up over the long term"); Jaffer, *supra* note 2, at 17–18.

368. *See* McNeal, *supra* note 25, at 756 ("[O]ne of the most obvious challenges to the public debate over targeted killings is the lack of agreement

above-described *warfare-as-regulation* model's predictions. Furthermore, unless the criticism can be successfully refuted, it could put the national security bureaucrat, and the President himself, in a bind.[369] A drone program in which attacks routinely fail to kill the enemy and which cause a disproportionate amount of civilian casualties would seriously damage the prestige of the agencies involved.[370] At the same time, however, if the drone bureaucracy scaled back substantially the number of strikes to kill more actual enemies and fewer civilians, it would risk relinquishing its status as the crown jewel of counterinsurgency strategy.[371] Either way, an entire bureaucracy invested in the program's dominance and success would suffer a devastating loss of prestige and power.[372] The Obama Administration's response to this prestige threat was to emphasize the substantive limits it had imposed on drone strikes as a matter of policy and the procedural aspects of the targeting process—its sheer complexity, the numerous factors weighed in decision-making, and the number and type of decision makers involved, including the President himself.[373] Leaks and the Drone Playbook revealed that, over time, targeted killing procedures became quite formalized and robust.[374] The Administration emphasized that

about even the number of persons killed."); Douglas Cox & Ramzi Kassem, *Off the Record: The National Security Council, Drone Killings, and Historical Accountability*, 31 YALE J. ON REG. 363, 364–65 (2014) ("Uncertainty over the legal standards for the drone killing program and a lack of transparency highlight the need for thorough documentation as a prerequisite for meaningful oversight and accountability.").

369. *Cf.* McNeal, *supra* note 25, at 777 (arguing that "successes and failures" in targeting operations "are imputed directly to the President" because of his personal involvement in the process).

370. *Id.* at 778.

371. *See* Glennon, *supra* note 5, at 26 (suggesting any decrease in drone activity would risk the U.S. losing its foothold as a leader in drone counter insurgency efforts).

372. *Id.*

373. *See generally* Drone Playbook, *supra* note 25 (outlining the various roles governmental agencies and officers play in the drone decision-making process).

374. *See* McNeal, *supra* note 25, at 701 (observing that kill lists "are vetted through an elaborate bureaucratic process that allows for verification of intelligence information before a person is added"). *See generally* Drone Playbook, *supra* note 25.

multiple agencies are involved in producing and analyzing the intelligence supporting "nomination" and strikes decisions.[375] These procedures require either unanimous approval from the heads of several agencies or approval from the President, who also must personally approve certain strike decisions.[376] And importantly, agencies insist that the targeting process does include consideration of the more long-term costs and benefits its critics accuse it of ignoring—the effect of the strike on U.S. reputation, whether it will weaken or strengthen the enemy groups, and the intelligence value of capturing the target instead.[377]

However, these features of the process likely do little to diminish the bureaucrats' and contractors' general incentives to overregulate. Agencies "tend to choose the goals that are more easily measured so they can demonstrate progress, . . . [and t]his often means taking an approach that focuses on short-term concerns with tangible outputs, as opposed to long-term effects that might be harder to predict and quantify . . . ."[378] In the targeting process, "enemies killed in action" is as tangible an output as they come. "Jackpots" and "touchdowns" are what the bureaucracy wants to report to outsiders, not the careful weighing of long-term foreign relations impacts.[379] The long-term objectives, such as the costs to U.S. reputation or blowback, are much harder to measure and are therefore less likely to be prioritized in the assessments leading up to a final strike decision.

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375. McNeal, *supra* note 25, at 701–29. *See generally* Drone Playbook, *supra* note 25, § 3.

376. *See* Drone Playbook, *supra* note 25, §§ 2.E.1, 3.E.1, 3.E.2 (describing the situations in which the President must make the ultimate decision whether to approve lethal action against an individual).

377. *See* McNeal, *supra* note 25, at 724–25 (quoting the military doctrinal requirements that must be weighed as a part of the "target validation consideration" process).

378. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, *supra* note 36, at 310.

379. *See supra* notes 341–350 and accompanying text (discussing the remote nature of drone strikes and the resulting lack of media attention); *see also* Reed, supra note 347, at ix (noting the terminology used in drone strikes).

Given the incentives and power dynamics in the targeting regulatory process, then, it is quite doubtful that this robust internal deliberative process—though designed with the best intentions—has limited the overall momentum of the drone program.[380] The rational national security bureaucrat is more likely, again, to change the means of regulation rather than reduce its level.[381] For example, there is evidence that the number of personality strikes has dropped, but the number of signature strikes, which do not require the same lengthy deliberative process, has increased.[382] It is more likely that such reforms help legitimize the program by endowing it with the empty vessel of "due process," through which the same incentives are ultimately channeled.[383]

2. The Other Players

As discussed above, the Congress and the public are relatively weak institutional players with respect to national security regulating because, in most situations, they lack the information and expertise to evaluate its success.[384] The President possesses more power, but also faces some disadvantages in grappling with the national security bureaucracy.[385] The courts have demonstrated the potential to influence the regulatory process, but have rarely exercised that influence.[386] In addition, courts reviewing national security decision-making, in the absence of countervailing influences, may be vulnerable to capture by the agencies who are repeat players before them.[387]

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380. *See* Chesney, *Who May Be Held?*, *supra* note 191, at 804 (noting that drone strikes have greatly increased over the last two years).

381. *Supra* note 326 and accompanying text.

382. *See* Jaffer, s*upra* note 2, at 12–13 (describing the decision to expand a form of signature strikes to Yemen in 2012).

383. *Supra* notes 212–213 and accompanying text.

384. *Supra* notes 254–258 and accompanying text.

385. *Supra* notes 259–261 and accompanying text.

386. *Supra* notes 369–383 and accompanying text.

387. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 67–68 (1991) ("[T]he same interest

However, there are rare situations in which a clear national security regulatory failure occurs that triggers increased pressure on the bureaucracy from the President, Congress and the public.[388] The 9/11 attacks are the paradigmatic example of such a failure, but in the wake of 9/11, even minor failures can have enormous political effects.[389] On Christmas Day, 2009, Umar Farouk Abdulmutallab, a Nigerian with connections to al Qaeda in the Arabian Peninsula, attempted to detonate plastic explosives taped to his leg while on board a flight from Amsterdam to Detroit.[390] After his abortive attack, it emerged that Abdulmutallab had been allowed to board the flight despite being on the Terrorist Identities Datamart Environment (TIDE), a database that gathers terrorism information from sensitive military and intelligence sources around the world and is managed by the National Counterterrorism Center.[391] Admitting that there had been a "systemic failure," President Obama "gave increased powers and responsibilities to the agencies that nominate individuals to the [watch] lists, putting pressure on them to add names."[392] Because Abdulmutallab had trained in Yemen, Obama also halted detainee transfers of Yemenis from Guantanamo, perhaps fearing the political disaster of a released

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groups that have an organizational advantage in collecting resources to influence legislators and agencies generally also have an organizational advantage in collecting resources to influence the courts."); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–104 (1974) (noting that repeat players have advantages over parties that utilize the judiciary less frequently).

388. *See* DONOHUE, *supra* note 119, at 2 (describing the Executive Branch's typical response to a terrorist attack as (1) assuming that the government lacked information that it could have used to thwart the preceding attack (2) seeking an expansion of power).

389. *See* Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES, http://www.nytimes.com/2009/12/26/us/26plane.html?mcubz=1 (last updated Jan. 9, 2010) (last visited Nov. 13, 2017) (discussing a prevented terrorist attack that spurred questions about plane security and the failures of the current system) (on file with the Washington and Lee Law Review).

390. *Id.*

391. *Id.*; SCAHILL, *supra* note 25, at 18–20.

392. SCAHILL, *supra* note 25, at 20.

detainee engaging in attacks.[393] Congress, for its part, imposed new, onerous restrictions on Guantanamo transfers.[394]

This example illustrates that the politics of national security, when they become salient, also tend to make overregulation more likely. In the absence of attacks, the public and Congress pay relatively little attention to regulation of national security activities.[395] But when an attack occurs, or there is an increased perception of threats, the renewed interest is expressed almost exclusively in calls for more regulation.[396] The President knows this and acts accordingly, whipping the national security state to regulate more aggressively.[397]

V. Reforming Warfare As Regulation

The *warfare-as-regulation* model of targeted killing reveals a regulatory environment in which pro-regulatory forces are incredibly strong and anti-regulatory forces are quite weak.[398] It is a significant challenge to formulate proposals that may

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393. *See White House: No Detainees to Yemen for Now*, USA TODAY (Jan. 5, 2010), http://www.usatoday.com/news/world/2010-01-05-Yemen_N.htm (last visited Nov. 13, 2017) (justifying Obama's decision to stop transfers out of Yemen because of bipartisan political scrutiny resulting from fears of increased terror activity amid prison releases in Yemen) (on file with the Washington and Lee Law Review).

394. *See* JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, WARTIME DETENTION PROVISIONS IN RECENT DEFENSE AUTHORIZATION LEGISLATION (2016), *available at* https://fas.org/sgp/crs/natsec/R42143.pdf (describing legislative restrictions on releases of detainees from Guantanamo Bay).

395. *Supra* notes 255–258 and accompanying text.

396. DONOHUE, *supra* note 119, at 2 (observing that attacks almost always spur efforts to increase national security authority).

397. *See* Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, 110 AM. J. INT'L L. 680, 686–87 (2016) ("[A] president inclined to make aggressive claims of power may be more willing . . . to circumvent some of the long-standing norms and institutional features of the executive branch in order to consolidate political control for the purpose of effectuating those executive power ends.") (on file with the Washington and Lee Law Review).

398. The imbalance may not be as large in other areas of national security regulation, such as domestic surveillance, where the American people may sense that they are directly affected. *See generally* Rascoff, *supra* note 70, at 662–63.

successfully compensate for this imbalance and the incentives to overregulate it produces.[399] But there is substantial value in simply recognizing the existence and origins of this imbalance.[400] Doing so should help reformers focus on the subset of possible changes that are most likely to address the imbalance—the institutional, doctrinal, and political tools that could, in this context, have an anti-regulatory effect.[401]

Scholars have grappled with a similar imbalance in criminal justice regulation and some of their reform proposals are applicable to, or have already been proposed for, the targeted killing context.[402] In other ways, however, the targeted killing process—and national security regulating more generally—presents unique challenges that require emphasizing different tools.[403] Reform proposals tend to fall into three categories—(1) institutional reforms, such as separating functions within an agency or the reassignment of potentially conflicting missions to different agencies; (2) accountability mechanisms, such as external or internal review; and (3) political engagement, such as lobbying efforts or providing lawmakers, the President, and the public with information that may soften their pro-regulatory views.[404]

A. Institutional Changes

Because national security bureaucrats operate within a context in which their incentives point in the direction of overregulation, altering that context through institutional reform is one potentially effective way of altering the incentives the context creates. In the criminal justice realm, Professor Rachel Barkow has proposed that the incentives for prosecutors to

399. *See supra* Part IV (describing the incentives that lead to the imbalance).

400. *See supra* Part III.B. (describing the benefits of the warfare-as-regulation paradigm).

401. *See infra* Parts V.A–C (discussing these possible changes).

402. *Infra* notes 412–417 and accompanying text.

403. *Id.*

404. *Supra* Parts IV.A–C.

overregulate can be mitigated through internal separation of functions within agencies—specifically, that prosecutors "who make investigative and advocacy decisions should be separated from those who make adjudicative decisions."[405] Barkow also observed that the Department of Justice's "tough-on-crime" mission influences and distorts its clemency, forensics, and corrections decisions.[406] The most effective institutional reform, Barkow argues, would be re-assigning these functions to other agencies or creating new independent agencies to carry them out.[407]

The targeted killing process is enshrouded in secrecy, but it is characterized, to some extent, by separation of functions within agencies and the assignment of different tasks to different agencies. Many agencies may be involved in gathering intelligence on a single person.[408] The NSA provides the "signals intelligence"—e.g., tracking targets' locations through phone numbers and SIM cards—while the CIA and military intelligence agencies are more likely to provide human intelligence.[409] Joint Special Operations Command (within DOD) and the CIA (the "operating agencies") conduct the strikes with the assistance of private contractors.[410] This division of labor does avoid pro-regulatory incentives that would exist if one agency official both collected intelligence on an individual and approved the strike

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405. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874 (2009) [hereinafter Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*].

406. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, *supra* note 36, at 277–78.

407. *See id.* at 334–35 (suggesting the formation of direct lines of communication with Congress and the media without requiring approval from the Department of Justice would better secure political support); *see also* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520 (2015) ("[T]he constitutional tradition of employing rivalrous institutional counterweights to promote good governance, political accountability, and compliance with the rule of law.").

408. *See generally* McNeal, *supra* note 25, at 701–30.

409. *Id.*; *see* SCAHILL, *supra* note 25, at 22–40 (arguing that the lists relied on in assessing individuals are over-inclusive).

410. *See generally* McNeal, *supra* note 25, at 730–48.

decision—or even if a single agency conducted the process from start to finish.[411]

The nomination and approval process also culminates in inter-agency review designed to include high-level input and perspectives from several different agencies, any of which may nominate an individual for targeting—the "nominating agencies."[412] The NCTC coordinates information on nominees, which it organizes and presents to a "deputies committee" made up of the seconds-in-command at the DOJ and the major agencies within the national security state.[413] The nominee can be subject to a strike only after consideration by a "principals committee" of nominating agencies and other officials on the National Security Council.[414] If the principals are unanimous, the nominee is added to the kill list.[415] The President must approve an addition to the list when the principals committee is not unanimous or the target is a U.S. citizen.[416] Personality strikes are executed by either the DOD's Joint Special Operations Command (JSOC), the CIA, or the two in combination—with government personnel working alongside private contractors.[417]

However, there are several reasons why these features are not likely to constrain the over-regulatory dynamics. They have little potential to alter bureaucratic incentives.[418] Checks and balances are "mechanisms designed to *prevent* action that

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411. The CIA's drone program may be characterized by this problem, however, when the agency gathers most of the intelligence for strikes that it also executes. *Id.* at 707–08.

412. These agencies include the State Department, the Treasury, the Defense Department, the Justice Department, the Department of Homeland Security, the CIA, the Joint Chiefs of Staff and the National Counterterrorism Center. *See generally* Drone Playbook, *supra* note 25, §§ 19, 3.D.

413. These agencies are the Department of State, DOD, JCS, DOJ, DHS, DNI, CIA, and NCTC. *Id.* § 3.D.2.

414. *Id.* § 3.D. The officials at lower levels need not be unanimous for a nominee to be forwarded to the principals. *See generally* McNeal, *supra* note 25, at 727.

415. Drone Playbook, *supra* note 25, § 3.E.1.

416. *Id.* § 3.E.2.

417. COCKBURN, *supra* note 27, at 32.

418. *See supra* Part III.D (discussing incentives among key players in the drone regulatory scheme).

oversteps legitimate boundaries by requiring the cooperation of actors with *different institutional interests* to produce an authoritative decision."[419] Of the principals who ultimately approve a decision to add a name to the kill list, only the State and Treasury Secretaries head agencies that do not have counterterrorism as their primary institutional missions.[420] But their involvement in the process is unlikely to be influential in most cases.[421] These agencies do not typically collect intelligence, and the intelligence on the kill list nominees is compiled and presented by a single agency, the NCTC.[422] In other words, the State and Treasury Secretaries must generally rely only on other agencies' presentation of the facts in making a decision.[423] And in deliberations on whether to add a name to the kill list, prospective voices of dissent from Treasury or State, if they exist, are likely to be overwhelmed by the others'.[424]

Indeed, the separation of functions in a multi-stage process involving intelligence gathering can actually create new pro-regulatory incentives. Those who ultimately approve targets and those who conduct the targeting operations must make life-and-death decisions based on intelligence they did not gather and are not well-positioned to evaluate.[425] They face strong incentives to suppress doubts about the strength of that intelligence.[426]

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419. Grant & Keohane, *supra* note 1032, at 30 (emphasis added).

420. McNeal, *supra* note 25, at 693.

421. *See id.* at 728–29 (describing legal advisors and the NCTC as two of the more influential players in the decision-making process).

422. *See id.* at 727 (describing the NCTC's role as scrutinizing the names that come to it and ensuring the names on the list meet applicable standards before the list proceeds to the next step).

423. *See id.* (noting that some senior level bureaucrats will abstain from voting on whom should be added to a target list because these individuals "'do not have independent information or have not made an independent assessment' of the target").

424. *See* GLENNON, *supra* note 5, at 86–87 (noting the unanimity of views among bureaucrats in the Defense and State Departments).

425. *See* SCAHILL, *supra* note 25, at 99 (observing that the process is "highly compartmentalized" and that "drone operators taking shots at targets on the ground have little idea where the intelligence is coming from").

426. *See* GLENNON, *supra* note 5, at 86–87 (describing an expectation that group members express loyalty to group decisions).

B. Review Mechanisms and Doctrinal Changes

The establishment of a review mechanism is another way incentives to over-regulate could potentially be dampened, by requiring the agencies involved in the targeted killing process to be held accountable for decision-making and its results. Numerous proposals have been made, including some form of judicial,[427] inter-agency,[428] congressional,[429] or intra-agency review.[430]

A truly independent review mechanism could have value, but not necessarily in the way these reform proposals suggest.[431] It is important, of course, to promote accountability, compliance with rules, and genuine deliberation.[432] But the greatest value of these mechanisms as applied to national security activities lies in the brute anti-regulatory pressure they exert on over-regulating bureaucrats.[433]

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427. *See, e.g.*, Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 440, 446 (2009) (proposing *Bivens*-style judicial review of targeting operations); Stephen Vladeck, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11, 26 (2014) (proposing, as the "least-worst [procedural] solution," an ex post judicial remedy created by Congress similar to the cause of action under the Foreign Intelligence Surveillance Act).

428. *See, e.g.*, Neal K. Katyal, Opinion, *Who Will Mind the Drones?*, N.Y. TIMES, Feb. 20, 2013, at A27 (proposing a review panel made up primarily of national security advisors).

429. *Cf.* McNeal, *supra* note 25, at 790 (proposing that Congress create

> an independent review board . . . [appointed] by the minority and majority leadership of the House and Senate . . . drawn from the ranks of former intelligence and military officers . . . [and] responsible for publishing an annual report analyzing how well the government's targeted killing program is performing.

430. *See* Crandall, *If You Can't Beat Them, Kill Them: Complex Adaptive Systems Theory and the Rise in Targeted Killing*, *supra* note 73, at 626 (proposing the use of CSRT-type proceedings); *see also* Radsan & Murphy, *supra* note 38, at 1230 (proposing an internal review process within the CIA for its targeting operations); *see also* Craig, *supra* note 209, at 2353 (listing recent proposals to reform the targeted killing process).

431. *See* Radsan & Murphy, *supra* note 38, at 1208 (suggesting independent reviews that are "as public as national security permits").

432. *Id.*

433. *Supra* notes 427–430 and accompanying text.

Given the incentives that drive agency, presidential, and congressional decision-making in the national security realm,[434] it is unlikely that more frequent congressional or intra-agency review would exert anti-regulatory pressure on those agencies conducting targeted killing operations. As discussed above, interagency review—which already exists—is unlikely to be successful unless the reviewing agency has both a different mission than the agencies conducting targeting operations and the resources and expertise to evaluate targeting decisions.[435] No such agency currently exists,[436] but an OIRA[437]-type entity empowered to review national security bureaucratic decision-making—at least the rules that govern targeting decisions and their costs and benefits, if not the individualized determinations—could potentially alter bureaucratic behavior if it employed a strong cost-benefit analysis requirement borrowed from Executive Order 12,866.[438] OIRA review was conceived as an anti-regulatory device, and has in fact slowed down the pace of rulemaking in the domestic context.[439]

The Executive Order requires agencies to submit proposed rules to OIRA and include a cost-benefit analysis of the rule.[440]

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434. *See supra* Part III.B (listing the key players in the drone decision-making process).

435. *Supra* note 36 and accompanying text.

436. *See* Rascoff, *supra* note 70, at 657–58 (noting that "quasi-independent" intelligence oversight boards lack resources and are riven by political disagreements). *See generally* Schlanger, *supra* note 21, at 166.

437. Executive Order 12,866, which establishes, over all U.S. government agency rulemaking, centralized review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), echoes the APA by exempting "[r]egulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations." Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2012).

438. *See* Rascoff, *supra* note 70, at 674 (discussing the potential effectiveness of OIRA-type review of intelligence-gathering). *See generally* Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2012).

439. *See generally* Bagley & Revesz, *supra* note 300 (analyzing the centralized review of agency rulemaking resulting from a mistaken assumption that domestic agencies tend to overregulate).

440. *Supra* note 437, § 3(f).

For "significant regulatory actions," however, the Executive Order requires much more. The agency must submit not only a cost-benefit analysis of the proposed action, but it also must consider and provide cost-benefit analyses of "potentially effective and reasonably feasible alternatives to the proposed action," including taking no regulatory action at all.[441] In the targeted killing context, the application of these principles would require the drone bureaucracy to consider, and demonstrate to the reviewing body that it had in fact considered, the benefits of taking no action, other means of neutralizing a proposed target, including capture, and the intelligence value that the target could provide if detained and interrogated.[442]

Judicial review of targeting decisions—either ex ante or ex post—has strong anti-regulatory potential, even in the national security realm.[443] But aside from the military detention context, the judiciary's capacity to influence regulation by the national security bureaucracy has been overshadowed by its reluctance to do so.[444] The courts have so far rejected plaintiffs' attempts to introduce judicial scrutiny into the targeting process either ex ante or ex post: they have declined to review kill list nominations or consider claims for damages after a strike.[445]

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441. *Id.* § 6(a).

442. According to the Drone Playbook, these factors are already part of the interagency process for targeted killing nominations and approval. Drone Playbook, *supra* note 25, §§ 1C, 2, 3B. *See also* McNeal, *supra* note 25, at 701, 730 (confirming this from interviews). But there are reasons to doubt how seriously, in practice, the detention option is considered. *See* SCAHILL, *supra* note 25, at 63 (noting that the

> slide illustrating the chain of approval makes no mention of evaluating option for capture. It may be implied that those discussions are part of the target development process, but the omission reflects the brute facts beneath the Obama administration's state preference for capture" and that "detention of marked targets is now incredibly rare.

443. *Supra* Part II.C.

444. *See* Craig, *supra* note 209, at 2364–68 (expressing skepticism about the effectiveness of judicial review of targeting decisions in light of the highly deferential approach to Guantanamo habeas cases in the D.C. Circuit); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1017 (2008) (observing that U.S. courts' involvement in national security cases has focused heavily on procedural issues "at a human cost").

445. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (rejecting—

As a way of addressing concerns about Article III courts lacking the competence or willingness to evaluate targeted killing decisions, scholars have proposed that a special court or quasi-adjudicative body be established to take on the task.[446] Whatever the forum, however, altering bureaucratic behavior requires that the reviewing body impose greater scrutiny on the decision-making process.[447] As in the criminal justice context,[448] review of targeted killing decisions would have a greater chance of altering bureaucratic behavior if it applied administrative law principles, such as hard look, that are recognized as having an anti-regulatory effect. Courts use the hard-look doctrine to test the legitimacy of agency action by scrutinizing the agency's reasoning—asking whether there is a rational connection between the facts found and the policy choice made.[449]

However, given the frequent use of post-hoc intelligence gathering to justify strikes, reviewing bodies should do more. The hard-look doctrine works best when paired with a second principle, the *Chenery* doctrine.[450] *Chenery* requires that an

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on standing, political question, and other justiciability grounds—a challenge to the nomination of a U.S. citizen to the "kill list" without first allowing the plaintiff any judicial process); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 837–38 (D.C. Cir. 2010) (upholding dismissal, on political question grounds, of a suit by owners of a Sudanese pharmaceutical destroyed in a targeting operation for "unjustifiably destroying the plant, failing to compensate them for its destruction, and defaming them by asserting they had ties to Osama bin Laden").

446. *See* Craig, *supra* note 209, at 2378–83 (discussing proposals).

447. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, *supra* note 405, at 893–94.

448. *Id.* at 871.

449. The APA requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (1947). The Supreme Court has interpreted "arbitrary and capricious" review as requiring courts to review the record and "satisfy themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of . . . information." Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378 (1989). "Hard look" review describes the way the courts enforce the "arbitrary and capricious" standard, so the terms are usually considered interchangeable. *See generally* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2009).

450. SEC v. Chenery Corp., 318 U.S. 80, 94–95 (1943).

agency defend its policy only on the grounds articulated by the agency when the policy was developed.[451] The hard-look *Chenery* combination would prevent the drone bureaucracy from seeking post-hoc justifications for strikes that killed disproportionate numbers of civilians or failed to kill the enemy at all.[452]

Like OIRA review, *Chenery* and hard-look have been criticized for having an anti-regulatory bias and imposing significant costs on agency decision-making.[453] However, what is viewed by many as a liability in the domestic context becomes an asset in the national security context.[454] Because the power dynamics and incentives push the drone bureaucracy to over-regulate—to conduct too many strikes based on insufficient intelligence—doctrines that impose more regulatory costs on the drone bureaucracy are necessary to push it back toward the optimal level of regulation.[455]

C. Political Pressure

As I discussed above, national security bureaucrats face relatively little political pressure, under ordinary circumstances, to reduce the level of regulation. Their greatest concern, in fact, is that the public and Congress will view them as

451. *Id.*; *see, e.g.*, Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 958–59 (2007) ("[A] reviewing court may uphold an agency's action only on the grounds upon which the agency relied when it acted.").

452. *Supra* notes 364–365 and accompanying text. Professors Radsan and Murphy have proposed the application of these principles to internal review of CIA drones strikes. *See generally* Radsan & Murphy, *supra* note 38, at 1234. However, for reasons discussed above, use of these principles in an internal review process is unlikely to have a meaningful anti-regulatory effect given the CIA's institutional mission and bureaucratic incentives. *Supra* notes 310–330 and accompanying text.

453. *See, e.g.*, Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 501 (2014) (discussing the popularity of the idea "that hard look review had contributed to a slowing, even 'ossification,' of agency action").

454. *Id.* at 513.

455. *Cf.* Laurence Tai, *Harnessing Industry Influence*, 68 ADMIN. L. REV. 1, 1 (2016) (proposing that capture may be "harnessed" by "making regulation preliminarily biased against industry, with the aim of ultimately unbiased policy as industry influences policy to cancel out the initial bias").

underregulating.[456] Nonetheless, the same trends that have made the *warfare-as-regulation* paradigm viable—the expanding scope of national security activities, the changing nature of warfare, and the declining half-life of secrets[457]—also create new possibilities for exerting anti-regulatory political pressure on the national security bureaucracy.

The Snowden revelations demonstrated that there exists a genuine potential for domestic public backlash against overregulation by the national security state.[458] Although public support for NSA surveillance actually spiked immediately after the Snowden revelations, support slowly ebbed as the public absorbed the details about the scope and intrusiveness of the surveillance.[459] Similarly, in January 2017 an aggressively implemented executive order banning entry for non-citizens from seven Muslim-majority countries led to public outrage, demonstrations at airports throughout the United States, and swift judicial intervention to block it.[460] In addition, the public has periodically demonstrated concern about overspending and inefficiency in the national security state.[461] More transparency

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456. *Supra* notes 329–330 and accompanying text.

457. *See supra* Part II (discussing the trends that make the *warfare-as-regulation* paradigm a useful project).

458. *See* Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. TIMES, June 10, 2013, at A1 (examining Snowden's leak of large amounts of classified information, and the reaction the leaks caused in Washington); Rascoff, *supra* note 70, at 642 (discussing how the Snowden leaks caused the President to reshape his outlook on intelligence gathering).

459. *See* Dalal, *supra* note 99, at 113 (detailing the public outrage after the Snowden scandal).

460. *See* Colin Dwyer, *Of Courts And Confusion: Here's The Reaction To Trump's Immigration Freeze*, NPR (Jan. 29, 2017, 9:17 AM), http://www.npr.org/sections/thetwo-way/2017/01/29/512272524/of-courts-and-confusion-heres-the-reaction-to-trumps-immigration-freeze (last visited Nov. 13, 2017) (describing the protests and political backlash that occurred after Trump's immigration freeze); Washington v. Trump, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam) (denying the U.S. government's emergency motion for stay pending appeal of the district court's nationwide injunction halting enforcement of Trump's executive order banning entry into the United States of individuals from seven Muslim-majority countries).

461. *See* Jeanne Sahadi, *Why Debt is a Threat to the National Security*, CNN (October 22, 2012, 11:24 PM),

about the costs of the drone program could create pressure to scale back its scope.[462]

However, perhaps the most underappreciated opportunities for domestic anti-regulatory pressure involve the private firms that the national security state depends on to regulate. As I discussed above, private firms have traditionally shared the national security bureaucrat's pro-regulatory incentives, which the profit motive tends to enhance.[463] Nonetheless, the profit motive can exert anti-regulatory pressure, too. This is most likely to happen when a firm supplies both the national security bureaucracy and the consumer market, and when its national security activities are exposed to public scrutiny.[464] The Snowden revelations caused previously quiescent telecommunications and high technology companies to be less cooperative in collection activities and to begin lobbying the President and Congress to scale back the scope of NSA surveillance.[465]

Intelligence collection is a significant component of the targeted killing process, so U.S. consumer pressure on the private firms that assist in the collection process could, or perhaps already has, produce anti-regulatory effects.[466] But, anti-regulatory pressure could also result from the expansion of

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http://money.cnn.com/2012/10/22/news/economy/national-security-debt/index.html (last visited Nov. 13, 2017) ("The concern: If the debt continues to grow unbridled, the U.S. government will be constrained in its ability to pay for what it wants to do militarily and diplomatically.") (on file with the Washington and Lee Law Review).

462. *See* McNeal, *supra* note 25, at 788 (noting that publishing the costs associated with government activity is a proven accountability technique).

463. *See supra* notes 292–325 and accompanying text (discussing private contractors' incentives when working with national security bureaucrats).

464. *See* Rascoff, *supra* note 70, at 662 (describing the shift in technology firms' regulatory incentives after the Snowden revelations because of the firms' worry about the "reputational and economic harms that could result from being identified with the putative misdeeds of the NSA").

465. *See* Rascoff, *supra* note 70, at 660–66 (detailing the ways in which the Snowden revelations changed the incentives of technology companies).

466. *See* Michael R. Siebecker, *Bridging Troubled Waters: Linking Corporate Efficiency and Political Legitimacy Through a Discourse Theory of the Firm*, 75 OHIO ST. L.J. 103, 104–05 (2014) (demonstrating how investor, shareholder, and consumer concerns can affect a company's corporate governance actions).

the drone market to the domestic realm.[467] Firms that supply drones to the military and law enforcement will also be supplying a significant chunk of the sales and maintenance for commercial and private use.[468] This fundamentally alters these private firms' incentives and increases their power while reducing the government's.[469] Moreover, like voracious personal data collection, when drones are a ubiquitous tool for not only warfare, but also commercial and personal use, it will be easier for the public to see the costs they impose.[470]

The potential for increased anti-regulatory pressure extends to the global level, from both private firms and foreign governments.[471] As a dominant military and economic power, the

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467. *See* Troy A. Rule, *Drone Zoning*, 95 N.C. L. REV. 133, 137–38 (2016) (describing the civilian drone industry as serving "one of the most rapidly expanding markets in the world" and noting that the markets "for both recreational and commercial drones are expanding at breakneck pace"); COCKBURN, *supra* note 27, at 178–79 (describing the influence of the "increasingly potent drone lobby").

468. *See* Peter W. Singer, *The Predator Comes Home: A Primer on Domestic Drones, their Huge Business Opportunities, and their Deep Political, Moral, and Legal Challenges*, BROOKINGS *(Mar. 8, 2013),* https://www.brookings.edu/research/the-predator-comes-home-a-primer-on-domestic-drones-their-huge-business-opportunities-and-their-deep-political-moral-and-legal-challenges/ (last visited Dec. 7, 2017)

> [I]f you are a maker of small tactical surveillance drones in the U.S. right now, your client pool numbers effectively one: the U.S. military. But when the airspace opens up, you will have as many as 21,000 new clients—all the state and local police agencies that either have expensive manned aviation departments or can't afford them."

(on file with the Washington and Lee Law Review).

469. *See id.* (predicting what will happen when manufacturers have a wider set of clients than just the government).

470. *See The Future of Unmanned Aviation in the U.S. Economy: Safety and Privacy Considerations*: *Hearing Before the S. Comm. on Commerce, Sci. and Transp.*, 113th Cong. 24–25 (2014) (statement of Christopher Calabrese, Legislative Counsel, American Civil Liberties Union) (describing, among other concerns, potential privacy invasions from domestic drone use); Rule, *supra* note 467, at 137–39 (highlighting the growth of the civilian drone industry, and its effects on the growing number of conflicts between drone operators and landowners); INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC, *supra* note 289, at 77–79 (describing how surveillance by drones caused property damage and economic hardship on communities in Pakistan).

471. *See* Grant & Keohane, *supra* note 102, at 37 (listing peer accountability and public reputational accountability as two means of regulatory accountability

U.S. remains largely resistant to many forms of global accountability for its activities.[472] But the potential cleavages between military contractors and the national security bureaucrats could play out internationally: those firms supply drone equipment to other governments and will also supply them for non-military uses worldwide.[473]

In addition, U.S. government policy can be affected by reputational concerns and pressure from foreign governments.[474] Some U.S. allies have refused to extradite accused terrorists to the U.S. in light of the revelations about abusive interrogation practices during the Bush Administration and due process flaws in the military commissions at Guantanamo.[475] Moreover, the U.S. national security state's intelligence collection activities extend, not only to foreign citizens, but to their governments as well—including the governments of influential allies.[476] Revelations about surveillance of European allied governments pressured the Obama Administration to scale back its surveillance, and even its human intelligence gathering, in Europe.[477] Some foreign governments have even avoided U.S. technology firms when awarding important contracts due to

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mechanisms).

472. *See id.* at 39 (observing that because "large and powerful states" like the U.S. "do not depend on subventions from others or on markets, and there is no strong international legal structure governing their actions . . . such states often resist international legal accountability").

473. *See id.* at 37 ("Overlapping . . . interest areas may require actors to compromise with one another to secure the cooperation necessary to define or implement policy.").

474. *See id.* (describing accountability that arises as a result of reputational concerns and peer pressure).

475. *See Background on Guantanamo Bay Prison,* HUMAN RIGHTS FIRST (Jan. 20, 2017), http://www.humanrightsfirst.org/resource/background-guantanamo-bay-prison (last visited Nov. 13, 2017) ("Because of the questionable legitimacy of the Guantanamo military commissions and the human rights concerns over indefinite detention at the prison, countries have refused to extradite terrorism suspects to the United States . . . .") (on file with the Washington and Lee Law Review).

476. *See* Rascoff, *supra* note 70, at 665–66 (discussing pushback from European allies on U.S. surveillance practices, including surveillance of heads of state).

477. *See id.* (discussing pushback from European allies on U.S. surveillance practices).

concerns about the firms' cooperation in U.S. surveillance.[478] This has thrown those firms' and the national security bureaucrats' incentives further out of alignment.[479]

Finally, it is possible that changing political dynamics and the costs of drone strikes could cause the governments in the countries where targeting occurs to exert significant anti-regulatory pressure. After botched operations in 2014, the Yemen government temporarily withdrew permission for further drone attacks.[480] Again in February 2017, Yemen withdrew permission for further U.S. ground operations in the country after a U.S. raid killed a number of civilians.[481]

In the end, there is no single solution to the massive power imbalance in favor of pro-regulatory forces in the targeted killing process and in national security regulating in general. What is most likely to be effective in addressing this power imbalance is a combination of anti-regulatory pressures: the willingness of an independent review body to apply the same scrutiny to national security regulating that it applies to domestic regulation, consumer activism aimed at private firms, and retaliation from foreign governments. These efforts, alongside the efforts by NGOs to force transparency about targeted killing and the efforts, can reinforce one another in the same way that pro-regulatory forces have.

VI. Conclusion

The national security state occupies a central role in American governance. Its interventions in the private lives of both citizens and non-citizens will only grow as the boundaries

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478. *See id.* at 663 (observing how the recent Snowden revelations caused the German government to transfer an important contract from Verizon to Duetsche Telecom).

479. *See id.* at 664 (detailing how American firms have "taken a stance against 'overregulation' by the intelligence state").

480. David E. Sanger & Eric Schmitt, *Yemen Withdraws Permission for U.S. Antiterror Ground Missions*, N.Y. TIMES, Feb. 8, 2017, at A1.

481. *Id.*

between the foreign and domestic realms, and between military and law enforcement functions, continue to erode.

Yet state's activities have been viewed, for too long, as existing somehow outside the bureaucracy that regulates American life. The national security state is treated as the war machine—a leviathan, which advocates of stronger rights-protective legal regimes seek to reign in, to oversee, and to regulate. Advocates of rights-focused legal regimes have been effective in many ways, but without a model of how national security bureaucrats actually regulate, analyses of those bureaucrats' activities are incomplete and may misidentify the source of key problems.

This Article begins the project of modeling national security activities as regulation. This model is a simple one and can and should be complicated by future assessments that move beyond classic public choice assumptions and address other specific national security activities. However, this model does reveal that the most important driver of agency behavior in the national security state—in the targeted killing context, at least—are bureaucrats' incentives. From this insight it follows that the most effective means of influencing the regulating national security bureaucracy is to find ways to alter bureaucrats' incentives. This is a promising place for reformers to focus their attention.