

## ESSAY

### REVISITING JUDICIAL REVIEW IN FOREIGN AFFAIRS

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I.	INTRODUCTION.....	1263
II.	DRAWING ON ADMINISTRATIVE LAW .....	1267
	A. Explaining Greater Judicial Involvement .....	1271
	B. Justifying Judicial Review .....	1275
III.	TESTING INSTITUTIONAL COMPETENCE .....	1276
IV.	CONCLUSION.....	1282

#### *I. INTRODUCTION*

Professor Flaherty's *Restoring the Global Judiciary* revisits a longstanding debate among legal scholars and practitioners: <sup>1</sup> should courts intervene in foreign affairs and national security? Can they do so effectively?

Roughly two diverging approaches to these questions have emerged over time. <sup>2</sup> One camp has doubted the democratic legitimacy of judicial interference with foreign affairs. <sup>3</sup> Judges are not elected, members of that camp point out. They are therefore unaccountable to the public. They should not opine on matters that implicate high diplomacy and core national interests—the kinds of issues that frequently arise in the foreign and security domain.

Additionally, skeptics of judicial review in foreign affairs and national security have advanced functional arguments to explain

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1. See *generally* MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* (2019).

2. For an overview of these arguments and related scholarship, see Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 *YALE J. INT'L L.* 1, 1-3 (2019).

3. *Id.*

why courts should stay out. Courts, they have argued, simply lack the institutional competence to resolve complex foreign and security matters. They do not have the necessary expertise.<sup>4</sup> The nature of judicial adjudication is such that it simply cannot keep up with fast evolving, time sensitive foreign and security decisions. Another common argument is that there is simply no law to apply in this area. Proponents of this approach also underscore that courts lack access to classified material, which tends to be essential for understanding the full scope of the matter being adjudicated and the implications of a ruling on the merits.<sup>5</sup>

In national security emergencies in particular, the argument goes, courts know that they have no choice but to defer to the political branches.<sup>6</sup> Judges risk disobedience if they venture into foreign affairs and national security in such circumstances because of the high stakes of emergencies. The concern is that policymakers would be so convinced of the necessity of their actions for protecting the nation and swayed by public expectation for bold measures that they might violate a judicial order. Such disobedience would damage the separation of powers and undermine the stability of the already delicate balance among government branches.

The opposing camp, which seems to have grown since the September 11 attacks,<sup>7</sup> rejects these premises. Members of that camp, including scholars like Harold Koh and Thomas Franck, assert that there is no analytical or practical difference between foreign and security policy and domestic policy, which courts review all the time.<sup>8</sup> They stress that foreign and domestic matters have become increasingly indistinguishable in an age of globalization and deep penetration of foreign factors and international law into the domestic sphere. Furthermore, they criticize judicial abdication in an area that often involves

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4. *Id.*

5. *Id.*

6. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS* 18 (2007) (“In emergencies, the judges have no sensible alternative but to defer heavily to executive action, and the judges know this”).

7. *See infra* Section II.A.

8. *See, e.g.*, THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 43 (1992); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 146-48, 218-24 (1990).

significant harm to individual liberties and broad, ever more ambitious assertions of executive power.

This debate has become rather stagnant. The same arguments are constantly repeated without resolution, and the chasm between the two camps seems at times to defy compromise. What is more, different kinds of foreign affairs and national security matters are often lumped together under the broad categories of “political questions” and other strands of non-justiciability and non-reviewability doctrine. The time has come to move this debate forward.

New arguments are necessary in order to do so. It is also essential to disaggregate the category of foreign and security matters. From a court’s point of view, a decision to start a war with another nation is not the same as a decision to target an AQAP operative in Yemen with lethal force. A decision with respect to sovereign immunity from judicial process is not the same as a decision to recognize a foreign state. And as *Zivotofsky v. Clinton* has established,<sup>9</sup> even decisions of the latter kind—quintessential foreign policy decisions predominantly guided by politics—may have perfectly justiciable aspects. While the Supreme Court was not ready to decide the status of Jerusalem as a matter of US policy, it concluded that it was entirely capable of resolving the run-of-the-mill separation of powers question of who has the authority to make and enforce such a policy—Congress or the President. The Court subsequently did just that in *Zivotofsky v. Kerry*.<sup>10</sup>

Professor Flaherty’s comprehensive book contributes to moving the debate forward by offering new and creative justifications for judicial review in foreign affairs. For instance, Flaherty draws on Anne-Marie Slaughter’s work about international networks to argue that courts should be more, not less engaged in reviewing executive action in foreign affairs. By nature, he maintains, the executive is far more active in international networks of regulators and other policymakers than legislators or judges. International networks thus serve as a power multiplier for the already powerful executive. They exacerbate the problem of executive overreach and widen the power discrepancy

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9. 566 U.S. 189 (2012) (holding that the political question doctrine does not bar the Court’s jurisdiction to decide whether Congress could require the President to indicate Israel as the place of birth on a passport of an individual born in Jerusalem).

10. 135 S. Ct. 2076, 2087 (2015).

among the branches. According to Flaherty, this structural advantage justifies robust judicial oversight of executive action in foreign affairs and national security, even more so than in domestic policy.<sup>11</sup>

One could challenge this argument, but I will leave that for another day. Instead, I briefly consider other underexplored avenues for advancing the conversation about judicial review in foreign and security matters, building on my previous work in this area. One such avenue is testing the validity of the functional arguments against judicial review through empirical research. The other is developing administrative law approaches to judicial review in foreign affairs, which remain underdeveloped in current US scholarship.

It is important to note that these approaches bracket the normative question of whether courts should review foreign and security measures as a matter of democratic legitimacy. This is not a question that can be fully resolved with purely empirical or doctrinal tools. The answer depends on one's normative priors. There is something almost mythical about how many in the legal community—especially judges—perceive and talk about foreign affairs and national security. From the idea of “raison d'état” and its European provenance<sup>12</sup> through Justice Sutherland's famous *Curtiss-Wright*<sup>13</sup> dicta to countless paragraphs in modern-day federal court decisions and executive branch opinions,<sup>14</sup> many

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11. See FLAHERTY, *supra* note 1, at 149-66.

12. For an overview, see Walter Carlsnaes, *Foreign Policy*, HANDBOOK OF INTERNATIONAL RELATIONS 298, 299-301 (Walter Carlsnaes et al. eds., 2013).

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

14. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018) (“when the President adopts ‘a preventive measure . . . in the context of international affairs and national security,’ he is ‘not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions’”) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010)).

We are one with the dissent that the Government's ‘authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals.’ But when it comes to collecting evidence and drawing factual inferences in this area, ‘the lack of competence on the part of the courts is marked,’ and respect for the Government's conclusions is appropriate. One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess . . . In this context, conclusions must often be based on informed judgment rather than concrete evidence, and that

have consistently portrayed these matters as *sui generis*. This quasi-axiom has proved incredibly difficult to change. Nevertheless, fact-based and administrative law-focused approaches do allow us to move forward from abstract assertions about judicial institutional incompetence and dearth of doctrinal tools to a more nuanced and empirically informed approach. Even if they cannot resolve the key normative question and fail to persuade the adherents of the democratic legitimacy critique, they could undermine (or, indeed, support) important elements of the conventional wisdom.

## II. DRAWING ON ADMINISTRATIVE LAW

Until fairly recently, administrative law was almost entirely absent from the scholarly conversation about judicial review in foreign affairs and national security. The debate has largely focused on constitutional concepts: separation of powers, executive power, Article III constraints on justiciability and federalism. In certain areas, such as international human rights litigation and foreign sovereign immunity, the debate has centered on particular statutory frameworks such as the Alien Tort Statute<sup>15</sup> and the Foreign Sovereign Immunities Act.<sup>16</sup> Moreover, the field of foreign relations law has generally tended to focus on traditional forms of foreign and security policymaking such as international agreements and relatively large-scale use of military force. Attention in the field to novel foreign and security policy measures that increasingly characterize modern practice has thus far been limited.<sup>17</sup>

Consequently, administrative law has remained on the sidelines of the conversation. Important contributions from

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reality affects what we may reasonably insist on from the Government (citations omitted).

See also Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT. 149 (2016).

15. 28 U.S.C § 1350 (2012).

16. 28 U.S.C § 1602-11 (2016).

17. For instance, a recent comprehensive edited volume on comparative foreign relations law focuses on traditional questions of international agreements, federalism, domestic application of international law, engagement and disengagement from international institutions, immunity and comity, and use of military force. See THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW (Curtis A. Bradley ed., 2019).

several scholars, including Curtis Bradley,<sup>18</sup> Jean Galbraith, David Zaring,<sup>19</sup> and Ganesh Sitaraman,<sup>20</sup> have begun to explore administrative law in relation to judicial review in foreign policy and national security matters. Adrian Vermeule drew on examples in the areas of foreign affairs and national security to illustrate how flexible administrative law doctrine can be when courts wish to defer to the executive.<sup>21</sup> Still, there is much more work to be done.

One of the reasons why administrative law may prove useful in thinking about judicial review in foreign affairs and national security is the evolving nature of foreign and security policy in the 21st century. One aspect of this evolution is the significance of international soft law and informal regulatory cooperation in modern governance. Galbraith and Zaring have argued that judicial oversight of these practices requires modification of general administrative law doctrine in light of foreign relations law principles to allow the executive greater flexibility than administrative law would otherwise allow.<sup>22</sup>

Other key trends in how US foreign and security policy has been conducted in the past two decades have also expanded the role of administrative agencies in designing and implementing related measures. This new role goes beyond the traditional diplomatic and military work of foreign and security policy-dedicated agencies like the State and Defense Departments and the intelligence community. In previous work I have argued that US foreign and security policy has become increasingly individualized in the past two decades.<sup>23</sup> I show that the United States has applied a growing number of measures that target natural and legal persons directly to advance a variety of foreign and security policy goals, from counterterrorism to combatting Russian election interference and Chinese nefarious cyber operations against US

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18. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

19. Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735 (2014).

20. Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489 (2014).

21. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

22. Galbraith & Zaring, *supra* note 19, at 736.

23. Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1063 (2020) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3440760](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440760) [https://perma.cc/WG4H-RBLQ]).

companies and institutions. These measures include targeted killings, detentions, targeted economic sanctions, no fly lists and other travel restrictions, as well as individualized cyber countermeasures such as indictments of individual hackers and targeted offensive cyber action.

The individualization of US foreign and security policy has coincided with greater participation of a range of administrative agencies in designing and implementing individualized measures.<sup>24</sup> Agencies like the Treasury Department, the Homeland Security Department, the Justice Department and many others operate in this area within broad legal frameworks that Congress or the President have put in place over time. This has created increasingly independent bureaucratic mechanisms that have persisted across administrations.

I call this type of government action—administrative agencies repeatedly imposing individualized foreign and security policy measures within broad legal frameworks—*administrative national security*. Administrative national security resembles ordinary administrative adjudication in that it involves application of law to fact in individual cases. The constant development of technology that allows for precision targeting of individuals at relatively little cost is likely to further expand this practice.

Presidential supervision of administrative national security has largely decreased over time. Presidents have laid the groundwork for these administrative mechanisms through executive orders and directives at a certain point in time. But the bureaucracies that grew out of these actions have gradually come to function with limited direct presidential oversight and engagement.<sup>25</sup>

For example, sanctions executive orders issued by President Bush in the areas of counterterrorism and non-proliferation now serve as standing authorities that the Treasury and State Departments rely upon to impose individual sanctions against suspected terrorists and proliferators. A vast interagency watchlisting system that grew out of Bush-era directives and orders was expanded and entrenched under the last two administrations. Interagency targeted killings practices

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24. *Id.*

25. Chachko, *supra* note 23, Section III.A.1.

introduced by the Obama administration survived, with important modifications, under the Trump administration.<sup>26</sup> Internal oversight of targeted cyber action has become looser under the Trump administration.<sup>27</sup> The policies that the individualized measures aim to advance have no expiration date and could continue indefinitely.

The administrative national security bureaucracy creates a path dependency in the trajectory of US foreign and security policy.<sup>28</sup> Calibrated measures for addressing key challenges at relatively little economic and strategic cost are appealing tools for administrations to use in addressing hard policy problems. They can be applied within existing legal frameworks without further congressional approval—a significant feature in an era of political gridlock. Over time, public scrutiny of these practices has atrophied, although once highly controversial individualized measures like blacklisting and targeted killings continue to be applied under the public radar.<sup>29</sup> Administrative national security therefore gives the executive options that have become convenient fallbacks for dealing with a wide variety of foreign and security challenges. In addition, administrations might continue relying on individualized measures simply by virtue of bureaucratic inertia. These factors create structural incentives for reliance on administrative national security going forward. Presidents are likely to default into using those measures.

What does all of this have to do with judicial review and administrative law? First, the foregoing illustrates that individualized foreign policy and national security measures applied by administrative agencies have become an important

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26. *Id.* Section III.A.1.a.

27. See Robert Chesney, *The Law of Military Cyber Operations and the New NDAA*, *LAWFARE* (July 26, 2018), <https://www.lawfareblog.com/law-military-cyber-operations-and-new-ndaa> [<https://perma.cc/6FRL-6QMB>]; *National Cyber Strategy of the United States of America*, WHITE HOUSE (Sept. 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/09/National-Cyber-Strategy.pdf> [<https://perma.cc/86G7-HAW6>]. See also, e.g., Ellen Nakashima, *White House Authorizes 'Offensive Cyber Operations' to Deter Foreign Adversaries*, *WASH. POST* (Sept. 20, 2018), [https://www.washingtonpost.com/world/national-security/trump-authorizes-offensive-cyber-operations-to-deter-foreign-adversaries-bolton-says/2018/09/20/b5880578-bd0b-11e8-b7d2-0773aa1e33da\\_story.html](https://www.washingtonpost.com/world/national-security/trump-authorizes-offensive-cyber-operations-to-deter-foreign-adversaries-bolton-says/2018/09/20/b5880578-bd0b-11e8-b7d2-0773aa1e33da_story.html) [<https://perma.cc/TBE6-FLK9>].

28. Chachko, *supra* note 23, Section III.A.2.

29. *Id.*

feature of the US policy landscape. This is true across policy areas and different kinds of measures. Technological developments and path dependency make it likely that administrative national security will remain an important feature of US policy for the foreseeable future. Hence, courts are likely to face related legal issues. Administrative law, I suggest below, seems to provide relevant frameworks and vocabulary for courts in reviewing them. Second, conceiving of administrative national security as a distinct category of foreign and security policymaking allows us to both explain and justify the relatively greater involvement of courts in reviewing foreign affairs and national security measures in the past two decades. Prospectively, past experience places a spotlight on relevant doctrinal tools from administrative law for the courts to use.

#### *A. Explaining Greater Judicial Involvement*

Scholars like Shirin Sinnar,<sup>30</sup> Andrew Kent,<sup>31</sup> Ganesh Sitaraman and Ingrid Wuerth,<sup>32</sup> Ashley Deeks,<sup>33</sup> and Steve Vladeck<sup>34</sup> have agreed that courts have become more involved in foreign and security matters than they were prior to 9/11, even if they still often avoid deciding related cases on the merits. Studying administrative national security helps explain why this is so. The main features of administrative national security—the targeting of individuals and the central role of administrative agencies—make measures in this category more likely to be reviewable in court. In particular, administrative national security measures have greater chances of meeting APA reviewability requirements.

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

31. See generally Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029 (2015).

32. See generally Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

33. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 873-74 (2013).

34. Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035, 1040 (2016) (“Even by conservative estimates, there have been hundreds of civil lawsuits brought over the past 14-plus years challenging some aspect of post-9/11 national security or counterterrorism policies.”).

First, individuals targeted by administrative national security measures are more likely to take legal action than a group of indirect victims of less specific foreign and security policy action in the first place. Second, plaintiffs in administrative national security cases are more likely to have constitutional standing, which requires a concrete, particularized “injury in fact” that affects the plaintiff in a personal way;<sup>35</sup> a causal connection between the injury and the wrongful behavior; and redressability.<sup>36</sup> As several federal courts have already recognized, deprivation of access to assets,<sup>37</sup> restriction of liberty and movement,<sup>38</sup> and deprivation of life<sup>39</sup> all satisfy the injury in fact condition. Because administrative national security measures are tailored to individual targets, resulting injuries are relatively easy to trace back to government action.

Furthermore, the APA grants statutory standing to individuals directly affected by agency action. Section 702 of the APA waives the federal government’s sovereign immunity for natural and legal persons challenging wrongful agency action.<sup>40</sup> This includes aliens without substantial ties to the United States—the typical targets of individualized US measures. Therefore, administrative national security expands the class of potential plaintiffs able to sue the government in federal court over foreign and security policy action. Even when they cannot benefit from the protection of constitutional provisions like the due process clause because they lack sufficient ties to the United States,<sup>41</sup> the APA still allows them

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

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

37. *See, e.g., Al Haramain Islamic Found., Inc. v. U.S. Dep’t of the Treasury*, 686 F.3d 965 (9th Cir. 2012).

38. *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019); *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014).

39. *Zaidan v. Trump*, 317 F. Supp. 3d 8 (D.D.C. 2018).

40. 5 U.S.C. § 702 (2012) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

41. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“[A]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country.”); *see also Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 421 (2013) (noting that an attorney’s “foreign client might not have a viable Fourth Amendment claim” (citing *Verdugo-Urquidez*, 494 U.S. at 261)); *32 Cty. Sovereignty Comm. v. U.S. Dep’t of State*, 292 F.3d 797, 799 (D.C. Cir. 2002)

to seek review under the APA's arbitrary and capricious and substantial evidence standards.<sup>42</sup>

For instance, although alleged al-Qaeda financier Yassin Abdullah Kadi did not have US citizenship, he was able to challenge his designation by the Treasury Department as a "Specially Designated Global Terrorist" before the D.C. District Court. He relied on the APA, the International Emergency Economic Powers Act (IEEPA) and Executive Order 13,224. The District Court dismissed his substantive claims in 2012.<sup>43</sup>

Third, administrative national security measures are more likely to meet the "agency action" reviewability requirement under the APA. A government measure must constitute final agency action to be reviewable.<sup>44</sup> The term "agency" is defined in Section 701(b) of the APA as "each authority of the Government of the United States," with eight enumerated exceptions.<sup>45</sup> Those exceptions encompass action by Congress, the courts, as well as the exercise of military authority on the battlefield.<sup>46</sup>

The term "agency action" is contested,<sup>47</sup> but the courts have provided some guiding principles. First, the President is not an agency. His actions are therefore non-reviewable under the APA. The case law suggests that this exclusion also extends to agency action that requires the President's final approval.<sup>48</sup> Furthermore, the challenged agency "action" cannot be general conduct. It must

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(concluding that foreign organizations designated as Foreign Terrorist Organizations under AEDPA for links to the IRA lacked a sufficient presence in the United States, and could not assert constitutional due process rights); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (same).

42. See 5 U.S.C. § 706(2) (1996).

43. *Kadi v. Geithner*, 42 F. Supp. 3d 1 (D.D.C. 2012).

44. See 5 U.S.C. § 704 (1996).

45. 5 U.S.C. § 701(b) (1996).

46. 5 U.S.C. § 701(b) (2011). Under 5 U.S.C. § 551(13) (2011), "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

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

48. See *Dalton v. Specter*, 114 S.Ct. 1719, 1724-25 (1994) (finding a challenge to the implementation of the President's decision to close a Philadelphia naval shipyard unreviewable under the APA); *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2774-75 (1992) (holding that the APA does not apply to the President because the President is not an agency within the meaning of the APA).

be “circumscribed” and “discrete”.<sup>49</sup> Foreign and security policy often involves the President, and it is generally difficult to identify sufficiently discrete agency action to challenge. These factors, among others, have protected this area from judicial review under the APA.

These features are present in administrative national security, but they are significantly diminished. Therefore, administrative national security measures have greater chances of meeting the “agency action” requirement. As I have argued before,

Whatever the outer limits of “agency action” may be, it is difficult to think of more discrete action than a measure that targets a specific person or entity by name, depriving them of liberty, property, and even their lives. Moreover . . . the President is only peripherally involved in the application of many of the individualized measures that form this category. He has delegated significant policymaking and execution power to administrative agencies that *do* qualify as “agencies” under the APA. The President may be above the APA, but most agencies that apply administrative national security measures—including the Departments of Treasury, State, Homeland Security, and Defense—are not.<sup>50</sup>

For example, in *Zaidan v. Trump*,<sup>51</sup> a case brought by individuals who claimed that the US government had designated them for targeted killing, the D.C. District Court concluded that the case was reviewable under the APA. The Court found that a decision to place the plaintiffs on the so-called government “Kill List” was not covered by the military authority exception to the APA’s definition of “agency.”<sup>52</sup> This conclusion relied in large part on the Washington, D.C.-centered, bureaucratic nature of the targeted killings process—an elaborate, multiagency process that was put in place by the Obama administration and maintained with modifications by his successor.<sup>53</sup> In other words, the court framed a decision that one could think of as traditional military action as ordinary agency actions covered by the APA.

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49. See *Dalton*, 114 S.Ct. at 1724-25. But see Chachko, *supra* note 23, at 1133-34.

50. Chachko, *supra* note 23, at 1133.

51. *Zaidan v. Trump*, 317 F. Supp. 3d 8 (D.D.C. 2018).

52. *Id.* at 22.

53. For further analysis of the case, see Chachko, *supra* note 23, at 1079-80.

Finally, cases pertaining to individuals should be harder to dismiss on political question grounds than generalized challenges to policy. In *Zivotofsky v. Clinton*, Chief Justice Roberts highlighted two factors that should govern the application of the political question doctrine: the existence of a “textually demonstrable constitutional commitment of the issue to a coordinate political department” and “judicially discoverable and manageable standards” for resolving the question at issue.<sup>54</sup> There is in principle law to apply in the area of administrative national security, where the key issue is the legality of the outcome of an agency adjudication of an individual case. If the individual is protected by the Constitution, applicable law includes the APA and relevant statutes, due process, and possibly other constitutional provisions. If the targeted individual is an alien not protected by the Constitution, there remains APA arbitrary and capriciousness review. These standards are arguably judicially manageable.

#### *B. Justifying Judicial Review*

Accounting for administrative national security also offers a justification for judicial review in this category. It challenges functional assumptions the conventional wisdom about the role of courts in foreign affairs and national security has long relied upon. First, government action in this category directly affects individuals and resembles ordinary administrative adjudication. Resolving related cases does not necessarily require unique expertise, but rather application of run-of-the-mill administrative law and due process doctrine. This task is hardly foreign to the judiciary.

Second, arguments for increased deference related to expertise, secrecy, and dispatch lose much of their force in cases pertaining to administrative national security. As for dispatch, individuals are generally only able to challenge the measures targeting them after the fact—that is, after their assets were frozen, or after they were blacklisted, detained, or shot at from a drone.<sup>55</sup> The measures presumptively remain in place throughout the judicial proceedings. Consequently, judicial review in administrative national security is unlikely to impede any urgent

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54. 566 U.S. 189, 195 (2012).

55. See, for example, the cases cited *supra* notes 37-39.

foreign policy or national security action. It does not require a quick decision that courts have been said to be incapable of.

With respect to expertise and secrecy, the universe of evidence that the government might be required to provide, and courts need to process, in administrative national security cases is relatively narrow. It should include the facts rendering a person targetable under the relevant authorities. It does not require courts to understand complex international dynamics and interests and grapple with abstract policy problems. Concerns about “sacrificing” classified information are mitigated by the availability of *ex parte*, in camera consideration.

To be sure, these functional arguments do not go to the democratic legitimacy and accountability prong of the argument for increased judicial deference in foreign affairs and national security. I do not suggest that debate. “These arguments do, however, call for a more nuanced approach to the judicial role when it comes to administrative national security—and offer a justification for judicial review in related cases.”<sup>56</sup>

### III. TESTING INSTITUTIONAL COMPETENCE

Do courts have sufficient expertise to decide foreign and security matters? Can they do so despite not having full access to classified material or the necessary personnel to assess its validity and meaning? Can courts move fast enough to ensure that no harm would come to national foreign and security interests due to delayed action? What are the broader policy implications of judicial review in foreign affairs?

These questions lend themselves to empirical investigation, yet few comprehensive studies have been conducted thus far to attempt to shine new light on them. Much of the existing empirical scholarship focuses on explaining why courts defer to the political branches on foreign and security policy and gauging how often they do so.<sup>57</sup> In other words, the focus has been on explaining and

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56. Chachko, *supra* note 23, at 1137.

57. See, e.g., LEE EPSTEIN ET AL., *THE SUPREME SILENCE DURING WAR* 71 (2003); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-war Cases*, 80 N.Y.U. L. REV. 1 (2005); 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 (2008); Cass R. Sunstein, *Judging National Security Post-9/11*, 2008 SUP. CT. REV. 269. See also Deeks, *supra* note 33, at 876-79.

documenting judicial behavior, not gauging its external implications. I am aware of only a handful of US empirical studies that assess the impact of judicial review on policy outside the courts, which is essential for evaluating the common institutional arguments against judicial review in foreign affairs and national security.<sup>58</sup>

One of the reasons for this relative lack of research is the dearth of case law in which courts have in fact weighed in on the merits of foreign affairs and national security questions. Rarer still are examples of sustained judicial engagement with such issues over sufficiently long periods of time to allow for comprehensive analysis of the policy impact of judicial review. The great variety of foreign and security cases and their uneven procedural postures also make it difficult to draw any general conclusions through systematic inquiry.

In addition, it is not easy to measure the full impact of judicial engagement on policy in this area. Unlike domestic policy, where policymakers are required by law to meet certain publication and transparency requirements, foreign and security action is notoriously non-transparent. Government action in this area is protected by layers of covert or secret interactions, classification and statutory exemptions, from the APA's foreign affairs and military functions exception to exemptions from disclosure in Freedom of Information Act ("FOIA").<sup>59</sup> Nevertheless, case studies exist and can be better utilized by researchers.

In previous work I took on this task, albeit outside the US context.<sup>60</sup> I focused on the case study of the Court of Justice of the European Union's ("CJEU") targeted economic sanctions jurisprudence. The EU courts have been conducting vigorous judicial review of hundreds of individualized targeted sanctions that the European Union has levied against natural and legal persons to advance its Common Foreign and Security Policy ("CFSP"). These sanctions typically freeze the assets of those

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58. See, e.g., Aziz Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385 (2010) (empirically studying the impact of the Supreme Court decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), on US detention policy). Compare Yoav Dotan, *Legalizing the Unlegalizable: Terrorism, Secret Services and Judicial Review in Israel 1970-2001*, JUDICIAL REVIEW AND BUREAUCRATIC IMPACT 190 (Marc Hertogh & Simon Halliday eds., 2004).

59. See 5 U.S.C. § 553(a)(1) (1966); 5 U.S.C. § 554(a)(4) (1978); 5 U.S.C. § 552(b)(1) (2016).

60. See Chachko, *supra* note 2.

designated, impose related financial restrictions, or ban designated persons from entering the EU.

As I previously wrote, “[t]he EU courts have walked a fine line between protecting designated persons and entities from arbitrary designation and overtly interfering with EU foreign policy.” The courts have consistently deferred to the EU political institutions when it came to foreign and security policy decisions, such as designing sanctions criteria or selecting whom to target with sanctions. “When the courts struck down sanctions,” I observed, “they did so only on due process grounds, such as the European Union’s failure to state the reasons supporting its decision to place a particular entity under sanctions or to provide sufficient evidence to substantiate those reasons.”<sup>61</sup>

By limiting intervention to the procedural aspects of sanctions decisions, the EU courts have preserved the Council of the European Union’s (“the Council”) policy discretion. They have allowed the Council to maintain its policy decisions by fixing the procedural flaws identified by the courts and re-imposing sanctions that the courts previously struck down. This procedure-oriented approach provided a useful case study for assessing the impact of process-focused judicial review of foreign and security matters.

The EU sanctions case study is illuminating because it has rare attributes as far as foreign and security judicial adjudication goes: it offers a large number of EU sanctions cases decided on the merits over several years, as well as constant and relatively transparent back-and-forth between EU policymakers and courts over sanctions thanks to the institutional mechanics of the European Union. This allowed for both a comprehensive and granular analysis of the political-judicial dialogue around this issue and the practical implications of the EU courts’ form of intervention in the foreign and security space—due process review.

The study relied on an original dataset that included 204 decisions issued by EU courts between July 2009 and March 2017. The decisions reviewed the legality of individual financial sanctions the EU imposed in the framework of its Iran and Syria sanctions regimes—both salient issues at the top of the EU and the global agenda during the research period. The study traced how

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61. *Id.* at 4.

the EU Council responded to judicial intervention. It did not only document the Council's specific response to each judicial decision; the study also explored how judicial intervention influenced the general policy principles behind the individual sanctions.

The study produced several key findings. The rate of individual EU Iran and Syria sanctions that the EU courts struck down on due process grounds was very high. Seventy-three percent of the sanctions challenged in court for the first time were struck down. If we account for repeat-challenges—sanctions challenged for the second or third time after being struck down in previous litigation—invalidated sanctions constituted sixty-four percent of all reviewed sanctions in the dataset. The results of second and third challenges, however, were better for the EU Council. It successfully defended most of the sanctions that the courts had previously struck down (twenty-five out of thirty-two sanctions).

Policymakers pushed back in response to the judicial decisions by relisting many of the persons and entities that won in court. Sixty-two percent of the persons and entities whose designation the courts struck down remained listed despite judicial intervention. At the same time, the EU Council did not reimpose thirty-two percent of the annulled sanctions, and more sanctions were probably eliminated in the shadow of judicial review.

In other words, a substantial number of the reviewed sanctions were eliminated in the process of judicial review. This fact suggests that the process of reconsideration triggered by judicial review led the EU Council to forgo non-essential sanctions in the general scheme of its Iran and Syria sanctions policies.<sup>62</sup> Because the courts only annulled sanctions on procedural grounds, the relisting option was always available to the EU Council in cases in which it deemed the sanctions important enough to maintain.

Finally, the Council expanded listing criteria in both the Iran and Syria sanctions regimes, at least in part to reduce the risk of further judicial intervention. The broader the criteria, the less challenging it should be for the Council to meet the procedural requirements of reasons and evidence without exposing sources

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62. *Id.* at Part 4.B. There are, of course, other plausible interpretations of these findings. I discuss them at greater length. *Id.* at 37-40.

and methods. It is much easier to prove that someone is “providing support to the government of Iran” or is a prominent businessperson in Syria than it is to prove that they are directly involved in covert nuclear proliferation or specific human rights violations.

One could argue that the courts’ approach created an incentive structure that eventually resulted in greater potential harm to individual rights, even if it somewhat improved compliance with due process in individual cases and helped weed out non-essential sanctions. By forcing the Council to expand listing criteria in order to maintain certain sanctions, the courts ended up exposing a significantly larger category of individuals to sanctions. This critique has some force, but it seems to be exaggerated. Other incentives counterbalance the incentive to expand listing criteria solely for the instrumental reason of shielding sanctions from judicial invalidation.<sup>63</sup>

The empirical study suggests, then, that judicial review had an impact on both substantive EU policy decisions and the EU Council’s compliance with due process obligations. Granted, judicial annulment of sanctions ultimately did not help designated persons and entities in the majority of the cases in the dataset, as they remained on the sanctions lists. Nevertheless, sanctions were not re-imposed in almost a third of the cases. As I elaborate in the study, the fact that the Council did not reimpose judicially-invalidated sanctions in about one third of the cases indicates that judicial review successfully “elicited policymakers preferences as to which individual sanctions were actually essential to achieving EU policy goals with regard to Iran and Syria, [eliminated] excessive sanctions, and [encouraged] the Council to adhere to more robust procedures before imposing sanctions.”<sup>64</sup> The findings of the empirical study lend support to the claim that procedural judicial review could “reconcile some degree of oversight of foreign policy and national security measures with institutional concerns that have long stood in the way of judicial review in those areas.”<sup>65</sup> By leaving substantive policy judgments to the EU Council while enforcing strict due process requirements, procedural review “facilitated a dynamic of accountability without

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63. *Id.* at 41-33.

64. *Id.* at 5.

65. *Id.* at 6.

substantially hindering the Council's ability to achieve its policy goals."<sup>66</sup>

Of course, this study has clear limits. The findings might be a product of the different constitutional structure of the EU, which explicitly grants standing to designated persons and entities, and a more interventionist inclination of the EU courts compared to their American counterparts. They may have been an artifact of the subject matter—individual economic sanctions—and would therefore not translate very well to other areas of foreign affairs and national security. Further research is undoubtedly required.

Yet, the EU case study does allow us to study general questions of administrative law and institutional competence in foreign affairs that are relevant for the US debate. It lends support to the claim that procedural judicial review might be an acceptable compromise between oversight and policy discretion in certain areas of foreign affairs and national security. Many scholars have advanced a similar claim in other areas of administrative and constitutional law.<sup>67</sup>

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66. *Id.*

67. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183-98 (2d ed. 1986) (describing how courts “can avoid constitutional adjudication without causing hardship to litigants, by resort to special rules of procedure or to techniques of statutory construction, or both”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-74, 87-88 (Harvard University Press 1980) (advocating “a participation-oriented representation-reinforcing approach to judicial review”). See also WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 336-42 (1988) (describing various legal process theories); Ittai Bar-Siman- Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1958-62 (2011) (critiquing the resistance to judicial review of the legislative process); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1587 (2001) (describing nine types of structural rules that “[facilitate] a judicial ‘remand’ of a challenged program for reevaluation by nonjudicial government employees”); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 200 (1976) (examining the meaning of due process in lawmaking in the context of judicial review); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 4 (2008) (arguing that courts should “raise the costs to government decisionmakers of enacting constitutionally problematic policies rather than attempting to designate certain government actions . . . as impermissible”); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C. R.-C. L. L. REV. 269, 269; Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871 (2001).

In the national security context, see generally Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. L. 1 (2004) (demonstrating that US courts

The study suggests that courts are capable of addressing pressing foreign and security matters without excessively taxing policymakers and their preferred policy choices. It is an example of relatively aggressive judicial review in foreign affairs and national security that has created what seems to be a sustainable equilibrium of cooperation between courts and policymakers around individual sanctions decisions. The EU courts have invalidated dozens of sanctions imposed to address critical issues, and the sky did not fall.

Due to the procedural focus of the courts, policymakers were able to maintain their original policy choices where they deemed them necessary for advancing EU interests. They also managed to reduce judicial intervention by learning and improving the due process aspects of their decisions. Judicial intervention did not seem to discourage the use of targeted sanctions in EU foreign policy, which has relied heavily on targeted sanctions for well over a decade despite constant judicial intervention.

#### IV. CONCLUSION

Professor Flaherty's book revisits a debate that has become stagnant: whether courts should weigh in on foreign affairs and national security matters. The book advances this debate by looking beyond traditional arguments and drawing on other disciplines.

Similarly, this Essay invites scholars to think creatively about judicial review in the foreign and security space and pursue underexplored avenues for assessing and challenging the conventional wisdom in this area. In particular, it calls for more careful empirical evaluation of the functional arguments against judicial intervention in foreign and security matters, and building on administrative law to approach such matters in light of

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have in fact applied procedural review in emergencies); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661 (2009) (arguing that US courts have conditioned deference in the national security context on the executive's compliance with procedural requirements); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 (2004) (defending a judicial minimalism approach to national security cases that focuses on procedural requirements such as congressional authorization and hearing rights); Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1 (2006). For discussion of this theory, see Chachko, *supra* note 2, at 33-37.

developments in the nature of US foreign and security policy in the 21st century.

Pursuing these research agendas would broaden our perspective and allow us to move beyond the traditional constitutional vocabulary that both skeptics and supporters of judicial review in foreign affairs and national security have long framed their arguments around. It would also provide courts with more sophisticated doctrinal tools with which to address related cases—and perhaps cast foreign policy and national security in a slightly less mythical light.

