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### Targeted Killings and the Interest Convergence Dilemma

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## TARGETED KILLINGS AND THE INTEREST CONVERGENCE DILEMMA

SUDHA SETTY\*

### ABSTRACT

*In the 1980s, Professor Derrick Bell posited a theory of interest convergence as part of his critical race theory work, arguing that the major strides forward in civil rights law and policy that benefited African Americans in the 1950s and 1960s only occurred because of the perceived benefits of those changes to white elites during that time. In Bell's view, it was only at the point at which the interests of powerful whites converged with those of marginalized racial minorities that significant changes in civil rights law could occur. Twelve years after the terrorist attacks of September 11, 2001, numerous lawmakers, scholars, activists, and policy makers find themselves entrenched in a different struggle for civil and human rights: combating counterterrorism laws and policies that overreach in their efforts to detain, interrogate, surveil, and kill suspected terrorists. In this Symposium Essay, I use Professor Bell's theory of interest convergence to frame the debate over an increasingly common counterterrorism tool: the use of unmanned aerial vehicles ("drones") to target and kill individuals suspected of encouraging or planning terrorist acts.*

*Interest convergence theory can help us examine the shifting parameters of the drone program in several ways: first, to map the areas of interest convergence between politically powerful groups and those interested in protecting marginalized groups such as Muslims and Arabs, which can help explain why certain limitations on the use of targeted killings have been put into place already; second, to consider the plausibility of the fulfillment of the promises made by President*

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\* Professor of Law, Western New England University School of Law. J.D., Columbia Law School, 1999; A.B., Stanford University, 1995. This symposium paper is based in part, an adapted from, a full-length article: Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SEC. J. 185 (2012). I thank my colleagues, particularly Professor Bridgette Baldwin, for organizing the symposium, *Building the Arc of Justice: The Life and Legal Thought of Derrick Bell*, in September 2012, at which I presented the original version of this paper. I thank the editors at the Western New England Law Review, particularly John Paul Callahan, for their work on this Article.

*Obama in his May 2013 speech on the administration's national security policies, in which he stated that the parameters of the targeted killings program will be narrowed; and third, in a limited fashion, to consider whether interest convergence can offer guidance on pushing for further limitations on the use of drones for targeted killings.*

#### INTRODUCTION

The terrorist attacks of September 11, 2001, transformed the landscape of national security law and policy in the United States. Nations around the globe stepped up their counterterrorism laws and policies, making the consequences of being labeled a terrorist by domestic governments more severe.<sup>1</sup> In the post-9/11 era—one marked by tensions over indefinite detentions, extraordinary rendition and torture, racial and religious profiling, and the use of targeted killings—lawmakers, scholars, activists, and policymakers have routinely confronted the question of whether and to what extent robust counterterrorism laws and policies should be curtailed to protect against the abuse or potential abuse of civil rights and liberties.<sup>2</sup> Fear of future attacks, the allocation of power without robust oversight of the executive

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1. See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (mandating that all UN member nations take proactive steps to combat terrorism, including increasing criminalization and implementing harsher sentencing for terrorist acts, freezing funds of those financing terrorist acts, sharing intelligence information with other member nations, and tightening border controls to prevent the migration of terrorists). See generally Kim Lane Scheppele, *Other People's Patriot Acts: Europe's Response to September 11*, 50 LOY. L. REV. 89, 91-92, 97-98 (2004) (detailing UN Security Council Resolution 1373, which mandated that countries institute laws combating terrorism, and noting significant shifts in domestic counterterrorism laws as a result).

2. By "rights protection," I mean those actions taken to protect, improve, or expand the civil and human rights of those most negatively impacted by the U.S. government's post-September 11, 2001, counterterrorism policies. Although judges, scholars, and lawyers can argue as to the efficacy and legality of such measures, within the United States, the disparate impact of post-September 11 counterterrorism laws and policies has been borne heavily by Muslims, Arabs, and people hailing from South Asia, the Middle East, and North Africa. See, e.g., David Cole, *Enemy Aliens*, 54 STAN L. REV. 953, 957 (2002) (couching the disparate treatment of counterterrorism policies as falling on "Arab non-citizens"); Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1073 (2005) (analyzing how "liberal democratic systems might evolve . . . to counter the socially and politically pernicious effects of . . . religiously-inflected, all-or-nothing warfare"); Natsu Taylor Saito, *Beyond the Citizen/Alien Dichotomy: Liberty, Security, and the Exercise of Plenary Power*, 14 TEMP. POL. & CIV. RTS. L. REV. 389, 391-92 (2005) (defining otherness as based on race, national origin, ethnicity, and other factors apart from citizenship); Girardeau A. Spann, *Terror and Race*, 45 WASHBURN L.J. 89, 101-02 (2005) (observing that "the sacrifice of racial minority interests for majoritarian gain appears to be an intrinsic feature of United States culture"); Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365 (2010).

branch, fear of appearing “soft on terror,” and political intransigence have often derailed or severely limited efforts to enhance protections of civil rights and liberties, although robust debate on these issues continues.<sup>3</sup>

In May 2013, President Obama gave his second<sup>4</sup> major national security policy speech, discussing a number of national security and foreign policy priorities, but focusing in large part on the parameters of the administration’s targeted killing program.<sup>5</sup> In it, he argued that the use of unmanned aerial vehicles (“drones”) to kill suspected terrorists is effective, legal, and necessary, yet also acknowledged legal, foreign policy, and political constraints on the program.<sup>6</sup> Some critics were disappointed that the speech did not place additional meaningful limits on the president’s authority to use drones, and that the president’s promises of transparency and adequate oversight were unsupported by specific details or plans.<sup>7</sup>

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3. The need to create additional limitations on national security policies operates from the premise that such limitations are necessary. Many thoughtful scholars have argued that the current structures in place with regard to numerous security policies, including targeted killings, have achieved a positive, if not ideal, balance of individual rights and security imperatives. See, e.g., Matthew C. Waxman, *Going Clear*, FOREIGNPOLICY.COM (Mar. 20, 2013), [http://www.foreignpolicy.com/articles/2013/03/20/going\\_clear](http://www.foreignpolicy.com/articles/2013/03/20/going_clear) (arguing that greater transparency with regard to the drone program may not be an improvement over the current situation); Robert M. Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, in 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW (M. N. Schmitt et al., eds., 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1754223](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754223) (arguing that the Obama administration has satisfied its international law obligations with regard to the targeted killing of U.S. citizen Anwar al-Awlaki); see also JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENT AFTER 9/11 (2012) (arguing that executive power has been appropriately constrained by various factors in the post-9/11 era).

4. President Obama gave his first major speech on national security in 2009. See Barack Obama, President of the U.S., Remarks on National Security (May 21, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

5. Barack Obama, President of the U.S., Remarks at the National Defense University (May 23, 2013) [hereinafter “May 2013 NDU Speech”], available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

6. *Id.*

7. E.g., Glenn Greenwald, *Obama’s Speech: Seeing What You Want to See*, THEGUARDIAN.COM (May 27, 2013), <http://www.theguardian.com/commentisfree/2013/may/27/obama-war-on-terror-speech> (arguing that President Obama’s speech was mostly rhetoric meant to appease critics from a variety of political perspectives); Fred Kaplan, *Obama’s Post-9/11 World*, SLATE.COM (May 23, 2013), [http://www.slate.com/articles/news\\_and\\_politics/war\\_stories/2013/05/barack\\_obama\\_national\\_defense\\_university\\_speech\\_nothing\\_new\\_about\\_drones.html](http://www.slate.com/articles/news_and_politics/war_stories/2013/05/barack_obama_national_defense_university_speech_nothing_new_about_drones.html) (noting that President Obama’s speech outlined limits that were almost identical to those already in place and that the Justice Department had defined those limitations in ways that rendered the restrictions “meaningless”). Some politically

This Paper draws on Professor Derrick Bell's theory of interest convergence to frame the debates over limitations on the Obama administration's use of drones to target and kill individuals suspected of encouraging and planning terrorist acts. Interest convergence can be understood as the process by which the divergent self-interests of different groups overlap to the degree necessary to enable serious policy change. Where Bell used interest convergence theory to analyze judicial and political decision-making during the African-American civil rights movement of the mid-twentieth century, this paper applies the same theoretical lens to the post-9/11<sup>8</sup> program of targeted killings by the United States, in which members of Muslim and Arab communities are disparately impacted.<sup>9</sup>

Interest convergence theory can help us examine the shifting parameters of the drone program in several ways: first, to map interest convergence between powerful groups and less politically powerful groups, which can help explain existing limitations on the use of targeted killings; second, to consider the likelihood that the parameters of the targeted killings program will be narrowed as suggested by President Obama in his May 2013 national security policy speech; and third, in a limited fashion, to consider whether interest convergence can offer guidance in the future on pushing for further limitations on the use of targeted killings.

Part I considers how interest convergence theory reflects the realities of the post-9/11 political decision-making process, and how the theory should be used to evaluate the targeted killings program and the shifts in policy that have already occurred. Part II considers the targeted killings program in terms of foreign policy pressures and domestic political dynamics to understand how and why the program has developed to its current point. Part III considers the limits of interest

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conservative critics argued that President Obama's speech largely consisted of rhetoric to appease liberal voters concerned about the administration's use of drones, but that Obama's substantive policy and approach to executive power was similar to that of President George W. Bush. See, e.g., Ross Douthat, *Obama's Artful Anguish*, N.Y. TIMES, May 26, 2013, at SR11; Benjamin Wittes, *The President's Speech: A Quick and Dirty Reaction—Part 1 (Are We At War?)*, LAWFARE BLOG (May 23, 2013), <http://www.lawfareblog.com/2013/05/the-presidents-speech-a-quick-and-dirty-reaction-part-1/>.

8. Scholars recognized but did not focus on the potential application of interest convergence theory soon after September 11. See, e.g., Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1331–33 (2003).

9. For a detailed discussion of the theory of "national security interest convergence" that can be used to frame the larger issue of post-9/11 decision making and identify potential bases on which legislative coalitions may form, see Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SECURITY J. 185 (2012).

convergence as a frame for considering these issues and offers some sense of how lawmakers and policy experts interested in curtailing the targeted killings program can find opportunities to generate support for rights-protective policies.

### I. INTEREST CONVERGENCE THEORY AND TARGETED KILLINGS

Elected politicians, by the very nature of their position, will generally act in their political self-interest to get re-elected, maintain influence within their party, and satisfy influential constituents and interest groups.<sup>10</sup> These political imperatives may subsequently compromise their ability to follow their ideological convictions.<sup>11</sup> In the current political environment, in which being labeled as “soft on terrorism”<sup>12</sup> can cause significant damage and jeopardize a politician’s chance for re-election,<sup>13</sup> politicians interested in rights protection must

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10. JUDITH SHKLAR, *LEGALISM* 111 (1964) (describing politics as “the uncontrolled child of competing interests and ideologies”).

11. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 244 (Harvard 1991) (“[A]s a politician/statesman, each representative is interested in getting reelected. Subject to this constraint, they will try to use their influence on behalf of the ‘public good,’ as they conscientiously define it. But they will be reluctant to play the role of politician/*statesman* when it seriously endangers their reelection chances.”).

12. Prominent members of the Republican Party, for example, criticized President Obama’s May 2013 national security speech on just such grounds. See Khalid Kattak and Janet Hook, *Verdict From the GOP: Obama is Wrong*, WASH. WIRE, WALL ST. J. (May 23, 2013, 5:06 PM), <http://blogs.wsj.com/washwire/2013/05/23/verdict-from-the-gop-obama-is-wrong/> (offering critique from various GOP politicians that President Obama’s plans for scaling back on military operations in foreign countries, potentially setting stricter parameters for the use of drones and closing the Guantanamo Bay detention facility would weaken U.S. security). For almost a decade, a politician’s ability to be perceived as “tough on terrorism” is seen as a predicate of a successful political campaign. President George W. Bush governed and ran for re-election in 2004 based largely on the promise that he would continue to be “tough on terror.” This strategy was obviously successful, as evidenced by Bush’s re-election and the maintenance of a Republican majority in the House and Senate that year. See DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE* 99 (2007) (citing CNN exit polls from the 2004 presidential election which suggested that voters trusted Republicans in the area of national security); see also David E. Sanger & Jodi Wilgoren, *Bush Adds Teeth to His Attacks on Kerry*, N.Y. TIMES, Oct. 19, 2004, <http://www.nytimes.com/2004/10/19/politics/campaign/19-bush.html> (describing Bush’s presidential campaign tactics during the last 15 days of the campaign, including his “scathing attack on Mr. Kerry’s national security record” and capitalizing on “the perception that [President Bush] is strong against terrorism—and . . . continuing doubts about whether Mr. Kerry is tough enough”).

13. Efforts to avoid the label of “soft on terror” have effectively disallowed straightforward discourse on rights protection in the United States since President Obama took office. When rights-protective proposals are brought forward, various interest groups frame those initiatives as a weakness that generates political vulnerability. The 2009 debates over the closure of the prison facility at Guantanamo Bay, Cuba, illustrate this dynamic. See David M. Herszenhorn, *Senate Leaders Balk at Closing Guantanamo Prison*, N.Y. TIMES (May 19, 2009, 11:48 AM), <http://the caucus.blogs.nytimes.com/2009/05/19/senate-leaders-balk-at->

find ways to make such initiatives politically viable. The moral imperative to make a political decision may not serve as the primary motivation for a politician to cast a vote in favor of a rights-protective choice if that choice is unpopular but protects politically powerless groups.<sup>14</sup> Casting such a vote may require that the choice be politically advantageous, as well as progressive in terms of rights protection.<sup>15</sup> If enough politicians are so persuaded, Congress can fulfill its obligation and potential to enact rights-protective laws.<sup>16</sup> Political interest convergence occurs when different political groups aggregate to form an issue-specific coalition that is large enough to effect serious policy change in this regard.<sup>17</sup>

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closing-guantanamo-prison/ (noting that although Democratic leaders had initially supported closure of the Guantanamo facility due to concerns over detainee treatment there, they retreated from that position after partisan rhetoric that emphasized the danger of coddling “terrorists”). This makes it difficult for politicians to promulgate rights-protective proposals that benefit these minority populations.

14. Madison, on the eve of the 1787 Constitutional Convention, wrote that politicians can be motivated by political interest, ambition, and public good, but are largely motivated by the interest and ambition, not by moral imperatives. James Madison, *Vices of the Political System of the United States*, ¶ 11 (Apr. 1787), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html>. Madison noted that ordinary citizens were even more prone to act without regard for the greater good. He suggested that although individuals motivated by the good of the community, character, and religious conviction would be ideal, in reality none of these factors would likely prevail over acting in one’s self-interest. *Id.*; see also THE FEDERALIST NO. 10 (James Madison) (noting that “we well know that neither moral nor religious motives can be relied on as an adequate control” on political interests).

15. Likewise, commentators have noted that political competition reliably involves accusations that a political opponent’s claims of acting to further a just cause are, in reality, simply a political ploy to garner support from certain constituents. See Nancy L. Rosenblum, *“Extremism” and Anti-Extremism in American Party Politics*, 12 J. CONTEMP. LEGAL ISSUES, 843, 877 (2002); cf. REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 9, 58–59, 164 (2006) (arguing that Congress has acted in rights-protective ways as a matter of principle, such as the passage of post-Civil War legislation like the Civil Rights Act of 1866).

16. Rebecca Zietlow considers this kind of legislation to protect “rights of belonging,” which she describes as “those rights that promote an inclusive vision of who belongs to the national community of the United States and that facilitate equal membership in that community.” ZIETLOW, *supra* note 15, at 6.

17. However, some political philosophers have questioned whether the law or the mere exercise of brute political power is even an appropriate mechanism to achieve the policy goals of security, democracy, and human rights. See, e.g., JÜRGEN HABERMAS, *Does the Constitutionalization of International Law Still Have a Chance?*, in THE DIVIDED WEST 115–16 (Ciaran Cronin ed., 2007). Nonetheless, the effect of legal realist thinking among the legislative and executive branches with regard to national security is that legal comfort and structures serve as the architecture for any number of rights-denigrating policies, the brunt of which have been borne by outsider groups. See Sudha Setty, *No More Secret Laws: How Disclosure of Executive Branch Legal Policy Doesn’t Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 580–81 (2009) (arguing that Bush administration policies regarding detainee

### A. *Interest Convergence Theory*

This kind of political self-interest allows for a valuable application of Professor Derrick Bell's interest convergence theory. Bell, a prominent critical race theorist, developed his interest convergence theory in the 1980s to better understand key Supreme Court decisions and legislative actions in the African-American civil rights movement of the mid-twentieth century. Bell's interest convergence theory in that context held that politically powerful groups in the United States (namely elite whites) would only support racial justice initiatives at the point where an instrumentalist analysis suggested such support to be worthwhile.

Bell posited that a decision such as *Brown v. Board of Education*,<sup>18</sup> often hailed as a seminal case demonstrating the judicial commitment to equal protection in the United States, is rather a reflection of a need to fulfill interests of the white majority population, which incidentally benefit blacks.<sup>19</sup> In particular, Bell viewed *Brown* as part of the U.S. government's effort to improve its human rights record during the Cold War, an era in which the United States was battling the Soviet Union for influence in postcolonial emerging democracies.<sup>20</sup> Bell concluded that without such motivations appealing to government and elite white interests, decisions like *Brown* likely would never have been made.

Bell's Cold War interest convergence hypothesis relied upon some

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treatment would not exist without legal comfort offered by Justice Department lawyers). Therefore, considering the nature of how political power is aggregated becomes an important aspect of determining potential means to curb overreaching policies.

18. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that the racial segregation of public schoolchildren was in violation of the Equal Protection Clause of the Fourteenth Amendment).

19. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Bell queries why, in 1954, the principle of "separate but equal" became constitutionally untenable, when segregation laws similar to those challenged in *Brown* had been upheld consistently for the prior 100 years. *Id.* at 523-24. He concludes that:

[T]he availability of Fourteenth Amendment protection in racial cases may not actually be determined by the character of harm suffered. . . . Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.

*Id.* at 523. For powerful analyses supporting the applicability of interest convergence theory to *Brown v. Board of Education*, see generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes: Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002).

20. See Bell, *supra* note 19, at 524; see also DUDZIAK, *supra* note 19.



of the same foreign policy dynamics that have raised concerns about U.S. counterterrorism programs in the post-9/11 context. First, the racist domestic policies of the United States during World War II and early Cold War eras, such as Jim Crow segregation, were widely publicized by the Soviet Union in anti-American messaging to emerging, post-colonial democracies that were in the process of forming their geopolitical allegiances.<sup>21</sup> A modern analogy is considering the need of the United States to win over the “hearts and minds” of the Muslim world, a stated priority from the early days of the Obama administration.<sup>22</sup> Second, the Truman administration argued that the improvement of the U.S. civil rights record was essential as part of the overall Cold War strategy.<sup>23</sup>

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21. DUDZIAK, *supra* note 19, at 12 (describing extensive international attention given to racial discrimination sanctioned by the U.S. Government, and the use of U.S. racial problems by the Soviet Union in the late 1940s to stoke foreign relations problems for the United States in Asia, Africa, and Latin America). Dudziak asserts that “[c]oncern about the effect of U.S. race discrimination on Cold War foreign relations led the Truman administration to adopt a pro-civil rights posture as part of its international agenda to promote democracy and contain communism.” *Id.* at 27. This thinking was reflected in contemporaneous media accounts, such as a New York Times Magazine article published in 1948 in which the author laments that although “the nation finds itself the most powerful spokesman for the democratic way of life . . . [i]t is unpleasant to have the Russians publicize our continuing lynchings, our Jim Crow statutes and customs, our anti-Semitic discriminations and our witch-hunts; but is it undeserved?” *Id.* at 29 (internal citations omitted). Dudziak offers further evidence in the reports of diplomats and State Department officials expressing concern as to the extent to which U.S. racial discrimination undermined U.S. foreign policy efforts. *Id.* at 29–39.

22. *See, e.g.,* Christian Brose, *From One Cairo Speech to Another*, FOREIGNPOLICY.COM (June 4, 2009, 7:08 PM), [http://shadow.foreignpolicy.com/posts/2009/06/04/from\\_one\\_cairo\\_speech\\_to\\_another](http://shadow.foreignpolicy.com/posts/2009/06/04/from_one_cairo_speech_to_another) (noting Obama’s patent efforts to appeal to the hearts and minds of Muslim listeners).

23. *See* PRESIDENT’S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 100-01 (1947) [hereinafter TO SECURE THESE RIGHTS] (noting that “our civil rights record has growing international implications. These cannot safely be disregarded by the government at the national level which is responsible for our relations with the world” and arguing that powers usually left to the states such as law enforcement, voting, and education, may need to be shifted to the federal level to deal with the international implications of U.S. racial discrimination). The Committee report bluntly stated the need for improving race relations in the United States as a foreign policy and security matter:

Our position in the postwar world is so vital to the future that our smallest actions have far-reaching effects. We have come to know that our own security in a highly interdependent world is inextricably tied to the security and well-being of all people and all countries. Our foreign policy is designed to make the United States an enormous, positive influence for peace and progress throughout the world. We have tried to let nothing, not even extreme political differences between ourselves and foreign nations, stand in the way of this goal. But our domestic civil rights shortcomings are a serious obstacle.

*Id.* at 146; *see also* Harry S Truman, President of the U.S., Special Message to the Congress on Civil Rights (Feb. 2, 1948) (emphasizing the need to improve race relations in the United States as part of a national security imperative). The Truman administration also offered moral and economic justifications for improving the U.S. civil rights record. *See* DUDZIAK,

The Truman administration simultaneously argued that the judiciary should play an active role in improving and enforcing racial equality.<sup>24</sup> President Truman's Justice Department filed an amicus brief in *Brown v. Board of Education* that explicitly contextualized the case in the Cold War era imperative of spreading democracy throughout the world.<sup>25</sup> In the post-9/11 context, the relevant elite interest is to build coalitions among peer nations and, particularly as President Obama took office, the need to repair frayed alliances with European nations skeptical of some U.S. counterterrorism programs during the George W. Bush administration.<sup>26</sup>

Bell's interest convergence theory was not limited to judicial decision-making. He argued that executive action can also be understood through interest convergence theory, citing President Abraham Lincoln's use of the Emancipation Proclamation<sup>27</sup> to undermine Confederate troop strength by empowering Southern blacks to stop fighting and working for the Confederacy.<sup>28</sup> In terms of legislative action at the time, Bell contended that the post-Civil War amendments not only protected the interests of the newly emancipated slaves, but also helped solidify the political prospects of the Republican Party.<sup>29</sup>

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*supra* note 19, at 79–80.

24. See TO SECURE THESE RIGHTS, *supra* note 23, at 105–10 (citing the constitutional responsibilities of the judiciary to improve and enforce racial justice).

25. Brief for the U.S. as Amicus Curiae at 6, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), 1952 WL 82045 at \*6. The Truman administration describes the government's interest in the case in blunt foreign policy terms:

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.

The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.

*Id.*

26. See Robin Wright, *U.S. Struggles to Win Hearts, Minds in the Muslim World*, WASH. POST, Aug. 20, 2004, at A1 (noting the struggles of the Bush administration to combat anti-American sentiment in Muslim nations); Brose, *supra* note 22 (considering the differing approaches of Obama and Bush to the question of soft power among peer nations).

27. Bell, *supra* note 19, at 524.

28. Derrick A. Bell, *Brown v. Board of Education: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 24 (2004).

29. *Id.* at 23. Bell's interest convergence theory has been applied to modern legislative actions as well, such as the recent efforts to cut back the prison population—a move that will

Although Bell's interest convergence work focused largely on African-American civil rights, his framework for evaluating judicial and political decision-making lends itself to the post-9/11 security context in which Muslims and Arabs are the disparately impacted groups, and are the only groups whose members are known to have been included on the government's targeted killings list.<sup>30</sup> Bell recognized that some whites who worked toward racial justice in the 1950s and 1960s were motivated by the morally-driven recognition that racial equality was an important goal regardless of ancillary benefits in terms of international or domestic relations. However, Bell believed that the number of whites motivated solely by racial justice was simply insufficient to effect reform.<sup>31</sup>

The same may be said for politicians in the post-9/11 context. Rights-protective arguments that were once championed by Democrats in Congress—for example, complying with the best practices under international law with regard to counterterrorism operations, demanding transparency of counterterrorism programs, and creating a more robust due process for terrorism suspects<sup>32</sup>—have, as Bell might have observed, collapsed due to a lack of political will absent broad public support that

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undoubtedly benefit the poor people of color who make up a disproportionately large sector of the prison population, but also appeals to fiscal conservatives. See Michelle Alexander, *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES, May 15, 2011, at WK9, available at <http://www.nytimes.com/2011/05/15/opinion/15alexander.html>; Jesse Washington, *NAACP Joins With Gingrich in Urging Prison Reform*, ASSOCIATED PRESS (April 7, 2011), <http://cnsnews.com/news/article/naacp-joins-gingrich-urging-prison-reform>. The article described the interest of fiscal conservative Grover Norquist as follows: "Norquist said his group got involved because when it comes to making the argument for reducing the number of prisoners, 'liberals can't do it. People say, 'You just want to let all the murderers out.'" But we are spending a great deal of money keeping people in prison, and for many of them it doesn't make sense to keep them there year after year." *Id.*

30. The government's targeted killing list is kept secret, so knowledge of the background of the targets is not verifiable. See Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1. However, all of the targets who have been identified thus far have been Muslim and/or Arab, and signature strikes against groups of individuals (without a specific named target in the group), have only been used in Pakistan and Yemen. *Id.*

31. See Bell, *supra* note 19, at 525 (asserting that "the number [of whites] who would act on morality alone was insufficient to bring about the desired racial reform.").

32. E.g., *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight? Before the Subcomm. on Terrorism, Tech. and Homeland Sec., S. Committee on the Judiciary*, 110th Cong. 231-32 (2007) (statement of Sen. Russ Feingold, Subcomm. on Terrorism, Tech. and Homeland Sec., S. Judiciary Comm.) (arguing that due process rights have been compromised); see John J. Farmer, Jr., *Introduction: Awaiting "the Authorities": 9/11 and National Security Doctrine After Ten Years*, 63 RUTGERS L. REV. 1085, 1092 (2010) (stating that although Democrats initially supported rights-protective measures, they began in 2009 to reverse and decided to keep Guantanamo Bay open indefinitely, with detainees being held preventatively without charges or a trial, and to reauthorize the Patriot Act's surveillance provisions).

might have conferred a benefit on the politicians.<sup>33</sup>

I have posited elsewhere that there are numerous areas in which political interest convergence can occur in ways that may benefit those groups most negatively impacted by overreaching counterterrorism policies. Specifically, I argued that U.S. foreign policy interests may serve to compel more rights-protective laws and policies;<sup>34</sup> that politically conservative libertarians may demand restrictions on oppressive counterterrorism policy that may affect right-wing constituencies, which may in turn benefit Arabs and Muslims as an ancillary matter;<sup>35</sup> and that the public—and by extension, some politicians—would object to counterterrorism policies once it became clear that those policies negatively affected the majority of the U.S. population and not only certain racial and religious minorities.<sup>36</sup> These dynamics have, in fact, helped to shape the parameters of U.S. targeted killings program in its current state.<sup>37</sup>

#### B. *Targeted Killings as an Exemplar*

The United States' use of drones for targeted killings<sup>38</sup> of suspected

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33. See Max Fisher, *Why Democrats Should Run on National Security*, ATLANTIC (Feb. 22, 2010, 2:37 PM), <http://www.theatlantic.com/politics/archive/2010/02/whydemocratsshould-run-on-national-security/36367/> (arguing that Democrats should frame the issue of national security on their own terms even though “specific policies—civilian trials for terrorists, banning torture—poll poorly,” but recognizing the administration’s reluctance because “[t]he White House likely fears that tying Obama too publicly to his unpopular policies will tarnish his generalized popularity on national security.”).

34. See Setty, *supra* note 9, at 211-12 (arguing that “government responses to concerns that the United States has flouted its own human rights standards, disregarded the rule of law, and lacked sensitivity to Muslims around the world, have served not only moral interests, but realpolitik interests as well”) (internal citations omitted).

35. See *id.* at 219-23 (noting the sustained efforts of libertarians to curtail the applicability of lone wolf provisions of the Patriot Act from possibly applying to right-wing gun enthusiasts).

36. See *id.* (noting that “at the point that the mainstream public finds that it is impacted negatively by the creep of national security measures on constitutionally guaranteed freedoms and liberties, opposition tends to grow dramatically”) (internal citations omitted).

37. See *infra* Part II.

38. Although targeted killing is not defined under international law, it is often considered to encompass “premeditated acts of lethal force employed by states in times of peace or during armed conflict to eliminate specific individuals outside their custody.” See Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN RELATIONS (May 23, 2013), <http://www.cfr.org/counterterrorism/targeted-killings/p9627>. Although the governments that utilize targeted killings differentiate them from assassinations, see Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (March 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>, critics view them as similar actions in terms of illegality. See, e.g., Complaint at 1, *Al-Aulaqi, et al. v. Panetta*, No.

terrorists has expanded significantly since President Obama took office in 2009.<sup>39</sup> The Obama administration has consistently emphasized the necessity, efficacy, and legality of targeted killings as an important counterterrorism tool.<sup>40</sup> However, the program has prompted much debate over the threshold question of whether such a program ought to exist,<sup>41</sup> the moral calculus,<sup>42</sup> legal parameters and authorities for such a program,<sup>43</sup> and specific questions regarding the legality of its scope in terms of geographic location of the target and citizenship of the target.<sup>44</sup> The parameters and future of the targeted killings program should be considered in the context of two Obama administration positions as to the nature of the battle being fought: first, the assertion that the theater of war for U.S. counterterrorism efforts is not restricted geographically and, therefore, encompasses the entire globe;<sup>45</sup> and second, statements made by administration officials in early 2013 that although the country should not remain on a war footing permanently, we should expect the current

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1:12-cv-01192-RMC (D.D.C. July 18, 2012).

39. See *Drone Database*, NEW AM. FOUND., <http://natsec.newamerica.net/about> (last visited Feb. 4, 2014) (detailing the number of drone strikes by the United States in Yemen and Pakistan since 2004).

40. See Koh, *supra* note 38; Eric Holder, Attorney General, U.S., Speech at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (outlining the parameters used by the Obama administration to determine whether a targeted killing comports with international and domestic legal obligations).

41. See, e.g., U.N. Human Rights Council, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) (questioning the legality of the CIA drone program).

42. See generally Samuel Issacharoff & Richard H. Pildes, *Drones and the Dilemma of Modern Warfare*, available at <http://ssrn.com/abstract=2268596> (theorizing the moral dilemma of drone use in the context of warfare in which geographic and other traditional boundaries of violence are distorted).

43. See U.N. Human Rights Council, *supra* note 41, at ¶¶ 28-92 (discussing international law of war principles with regard to targeted killings); Holder, *supra* note 40; Jeh C. Johnson, Gen. Counsel, Dep't of Def., Speech on National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012), available at <http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448> (echoing previous administration legal justifications for targeted killing); Koh, *supra* note 38 (arguing that the Obama administration's use of targeted killing as a counterterrorism tool complied with international and domestic legal obligations).

44. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.C. Cir. 2010) (dismissing, based on standing grounds, the suit of Nasser al-Aulaqi to enjoin the U.S. government from keeping his son, U.S. citizen Anwar al-Aulaqi, on its targeted killing list).

45. Spencer Ackerman, *Spec Ops Chief Sees '10 to 20 Years' More for War Against al-Qaida*, WIRED.COM (May 16, 2013), <http://www.wired.com/dangerroom/2013/05/decades-of-war/> (discussing the Senate testimony of Michael Sheehan, the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, with regard to the global theater of war).

counterterrorism efforts to last at least ten to twenty years longer.<sup>46</sup>

The parameters of the targeted killing program remain largely shielded from public view, with limited information being disclosed in occasional speeches during President Obama's first term<sup>47</sup> and the leak of a classified Department of Justice memorandum detailing some of the legal bases for the program.<sup>48</sup> In his May 2013 speech, President Obama looked to both defend the legality of the targeted killings program and arguably to narrow its parameters.<sup>49</sup>

Given the boundless geographic scope and lengthy predicted duration of this conflict, alongside the administration's robust defense of both the effectiveness and legality of the program, interest convergence can help us understand why the Obama administration has placed the specific restrictions on the program that it has, and what the potential of those restrictions might be.

## II. FOREIGN POLICY CONCERNS AND DOMESTIC PRESSURES

Two key areas identified by Bell in his original interest convergence work were the promotion of foreign policy interests<sup>50</sup> and the protection against domestic discontent.<sup>51</sup> Both dynamics are key to understanding how the Obama administration's targeted killing policy has evolved thus far.

### A. Foreign Policy Concerns

As in the early years of the Cold War, when effective foreign policy depended heavily on the ability to garner and maintain the respect and allegiance of other nations, preserve the willingness of our allies to

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46. *Id.* (relating the Senate testimony of Michael Sheehan, the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, with regard to the probable duration of the U.S. counterterrorism effort against al-Qaida).

47. *E.g.*, John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks concerning strengthening our security by adhering to our values and laws (Sept. 16, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; Koh, *supra* note 38.

48. *See* U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE WHITE PAPER: LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE [hereinafter "DOJ White Paper"], *available at* [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

49. *See* May 2013 NDU Speech, *supra* note 5.

50. *See* Setty, *supra* note 9, at 211-13.

51. *See id.* at 213 (discussing Bell's evaluation of the need for U.S. racial policies to protect against a domestic uprising).

cooperate on policy and security matters, and polish the image of the United States as vanguard of human rights,<sup>52</sup> the foreign policy interests of the United States in the post-9/11 context are clear. Even before he became president, Obama signaled the desire to re-engage with the international community as a matter of legal compliance (e.g., outlawing the use of so-called “enhanced interrogation techniques”),<sup>53</sup> as good foreign policy (i.e., restoring America’s moral authority in the world)<sup>54</sup> and as a matter of restoring the rule of law.<sup>55</sup>

These themes were and are an important part of President Obama’s view of his administration: they permeated Obama’s campaign rhetoric in 2008;<sup>56</sup> his first national security policy speech in May 2009;<sup>57</sup> a March 2010 speech on the legality and efficacy of drone warfare given by Harold Koh, then-Legal Advisor to the State Department;<sup>58</sup> a speech on security and upholding the rule of law given by John Brennan, then-Assistant to the President for Homeland Security and Counterterrorism, in September 2011;<sup>59</sup> a speech by Jeh C. Johnson, then General Counsel to the Department of Defense, in February 2012;<sup>60</sup> and a speech of Eric Holder, Attorney General, in March 2012.<sup>61</sup>

The relationship between foreign policy and rights-protective interest convergence has two key aspects. First, the U.S. government, at least since 2009, has looked to garner the support and loyalty of allied nations that were skeptical of Bush-era U.S. antiterrorism efforts that were perceived as dismissive of the countries’ own priorities and cultural

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52. *See id.* at 211.

53. *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) (reiterating the international and domestic law parameters for interrogations of detainees suspected of terrorist activity).

54. *Obama: We’ve Restored America’s Standing*, CNN (Nov. 18, 2009), <http://www.cnn.com/2009/POLITICS/11/18/obama.henry/> (President Obama describing the ways in which the global community has improved its impression of United States foreign policy in the time since he took office).

55. Adam Cohen, *Democratic Pressure on Obama to Restore the Rule of Law*, N.Y. TIMES, Nov. 14, 2008, at A32, available at <http://www.nytimes.com/2008/11/14/opinion/14fri4.html> (noting that Democratic legislators were planning to hold then President-Elect Obama to his campaign promises to restore the rule of law).

56. *See id.*

57. *See* Obama, *supra* note 4.

58. *See* Koh, *supra* note 38.

59. *See* Brennan, *supra* note 47 (stating that “President Obama has directed that all our actions—even when conducted out of public view—remain consistent with our laws and values”).

60. *See* Johnson, *supra* note 43.

61. *See* Holder, *supra* note 40.

norms.<sup>62</sup> This, in many respects, reflects the most natural application of Bell's interest convergence theory, which addressed the interests of the U.S. political elites in the context of the Cold War. The *Brown v. Board of Education* decision helped the United States market itself as a post-World War II moral authority, responsive to the concerns of emerging democracies and to the growing international focus on human rights treaties and protocols.<sup>63</sup> In the post-9/11 context (and, more specifically here, the post-Bush administration context), the U.S. government has made various rights protective changes in response to concerns that the United States has flouted its own human rights standards, disregarded the rule of law, and lacked sensitivity to Muslims around the world. These changes have served not only moral interests, but also the realpolitik interests of rebuilding trust and loyalty from traditionally allied nations.<sup>64</sup>

Second, the U.S. government has steadfastly held that military and homeland security readiness depends on cooperative security efforts and shared intelligence from allied nations.<sup>65</sup> Military leaders have opined that unilateral action, although possible, is less desirable and often less successful than joint operations.<sup>66</sup> Further, a majority of the American public desires that the government continue seeking multilateral solutions to transnational issues,<sup>67</sup> which provides popular support for working with allied nations on issues like counterterrorism, even if the result is sometimes a compromise in American foreign policy goals to build such a coalition.

Fulfillment of these interests, however, demands more than rhetoric

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62. See Brennan, *supra* note 47 (stating that maintaining strong alliances through upholding the rule of law was imperative).

63. Bell argues that white elites, in government and in the powerful strata of U.S. society, benefited immediately from the *Brown* decision in that it provided immediate credibility to U.S. efforts to counter Communist threats and increase its sphere of influence in developing nations. See Bell, *supra* note 19, at 524 (citing a *Time* magazine article in which the *Brown* decision is described as having a profound international impact in terms of improving the perception of U.S. leadership and moral standing).

64. See Setty, *supra* note 9, at 212.

65. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 122 (2010).

66. See ADMIRAL MICHAEL G. MULLEN, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 2011: REDEFINING AMERICA'S MILITARY LEADERSHIP 1 (Feb. 2011) (noting that allied nations face similar security challenges from similar threats, and that cooperation is preferable to attempting to safeguard homeland security unilaterally).

67. See PEW RESEARCH CTR FOR THE PEOPLE & THE PRESS, BEYOND RED VS. BLUE: THE POLITICAL TYPOLOGY 90 (May 2011) [hereinafter PEW POL. TYPOLOGY] (finding that 53% of the public supports the U.S. taking into account the interest of allies, despite the possible resultant policy compromises).



about the efficacy and legality of the drone program that cannot actually be examined and verified because of executive branch secrecy. After all, the goals of restoring America's standing in the world and reasserting the primacy of the rule of law vis-à-vis counterterrorism policies cannot be achieved if there is significant evidence that the United States is actually undermining those principles. For example, since 2009,<sup>68</sup> the media has reported on villages in Pakistan and Yemen in which many innocent people, including children in several cases, have been killed or maimed by drone strikes,<sup>69</sup> despite previous administration assurances that no or few civilians have been killed by such strikes.<sup>70</sup> These narratives, reports, photos, and video only serve to undermine efforts to engender trust in the United States as a moral leader concerned about the rule of law and human rights, and instead have led to terrorist organizations using evidence of civilian casualties as a recruiting tool.<sup>71</sup>

Compounding the problematic aspects of the accuracy, efficacy, and legality of the drone program is the incredibly high level of secrecy that the administration has maintained around the program. The administration has referenced and explained only certain aspects of the targeted killings programs numerous times<sup>72</sup> prior to President Obama's

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68. See Becker & Shane, *supra* note 30 (discussing a 2009 drone strike that "killed not only its intended target, but also two neighboring families, and left behind a trail of cluster bombs that subsequently killed more innocents . . . . Videos of children's bodies and angry tribesmen holding up American missile parts flooded YouTube, fueling a ferocious backlash that Yemeni officials said bolstered Al Qaeda").

69. See, e.g., Rebecca Murray, *Anger at US Drone War Continues in Yemen*, ALJAZEERA (June 7, 2013, 12:25 PM), <http://www.aljazeera.com/indepth/features/2013/06/201365122319329623.html> (describing the local anger at the U.S. drone strike that killed members of a family in a village); *Eye of the Drone*, HARPER'S MAGAZINE, June 2012, at 17, available at <http://harpers.org/archive/2012/06/eye-of-the-drone/> (describing those killed by a drone strike in a Pakistani village and the reluctance of families to congregate for fear of being killed by drones).

70. See Scott Shane, *C.I.A. is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 12, 2011, at A1 (relating evidence from various sources that the civilian toll of drone strikes was significantly than the C.I.A. had claimed); Micah Zenko, *Why Won't the White House Say How Many Civilians Its Drones Kill?*, ATLANTIC (June 5, 2012, 8:45 AM), <http://www.theatlantic.com/international/archive/2012/06/why-wont-the-white-house-say-how-many-civilians-its-drones-kill/258101/> (noting that John Brennan affirmed in 2011 that "[t]here hasn't been a single collateral death because of the exceptional proficiency, precision of the capabilities we've been able to develop"); see also Becker & Shane, *supra* note 30 (noting that the C.I.A. had previously counted all military-age males killed by drone strikes as combatants, thereby drastically reducing the number of individuals possibly counted as part of the civilian death toll).

71. See Murray, *supra* note 69 (noting that anti-American protests and rhetoric have increased because of drone strikes); Becker & Shane, *supra* note 30 (noting that al-Qaeda has used drone strikes as an effective recruiting tool).

72. See, e.g., Letter from Eric H. Holder, Jr., Attorney General, U.S., to Patrick J.

May 2013 speech, particularly when it was politically expedient to do so.<sup>73</sup> However, it also used the classified<sup>74</sup> nature of the program to attempt to shield itself from media inquiry<sup>75</sup> and from any type of judicial accountability.<sup>76</sup> This hypocrisy undermined the credibility of the administration as the restorer of the rule of law, and instead invited comparisons to the Bush administration that the Obama administration likely wanted to avoid for the purposes of garnering international support.<sup>77</sup>

These factors likely influenced President Obama to imply during his May 2013 speech that the parameters for targeted killings will be narrowed. There are three areas in which President Obama basically reiterated known positions of the administration, meaning little significant change is likely: first, he articulated essentially the same international law standards<sup>78</sup> and “imminence” standard for issuing an order for a targeted killing that his administration’s representatives had

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Leahy, Chairman, Commission on the Judiciary (May 22, 2013), *available at* [http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-letter.html?\\_r=1&](http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-letter.html?_r=1&) (detailing the administration’s legal basis for the use of targeted killings against Anwar al-Aulaqi and other U.S. citizens overseas); Brennan, *supra* note 47; Holder, *supra* note 40; Johnson, *supra* note 43; Koh, *supra* note 38.

73. *See, e.g.*, Stephanie Condon, *Obama: Anwar al-Awlaki’s Death a “Major Blow” to al Qaeda and Affiliates*, CBSNEWS.COM (Sept. 30, 2011, 4:40 PM), <http://www.cbsnews.com/news/obama-anwar-al-awlakis-death-a-major-blow-to-al-qaeda-and-affiliates/> (relating comments by President Obama about the strategic importance of the targeted killing Anwar al-Awlaki, an American citizen in Yemen).

74. *See* Becker & Shane, *supra* note 30 (discussing internal administration debates as to whether to declassify the legal justifications for the drone program, and noting that the administration decided not to do so); Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1 (offering details of a still-classified Office of Legal Counsel memorandum justifying the targeted killings of U.S. citizens).

75. *See, e.g.*, *New York Times Co. v. U.S. Dep’t of Justice*, 915 F.Supp.2d 508 (S.D.N.Y. 2013) (dismissing requests made under the Freedom of Information Act for documents regarding the targeted killing program, based on the administration’s claim of necessary secrecy surrounding counterterrorism programs).

76. *See* *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing the suit brought by the father of U.S. citizen Anwar al-Awlaki, which sought an injunction against the targeted killing of his son, based on a lack of standing and administration claims of necessary secrecy surrounding counterterrorism programs).

77. *See, e.g.*, Jack Goldsmith, *How Obama Undermined the War on Terror*, NEW REPUBLIC (May 1, 2013), <http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism> (arguing that Obama’s lack of transparency on drones on other issues has undermined U.S. efforts to build alliances that would bolster U.S. foreign policy and counterterrorism goals).

78. *Compare* May 2013 NDU Speech, *supra* note 5, with Holder, *supra* note 72, and Koh, *supra* note 38 (President Obama articulated proportionality and distinction principles that largely reflected the standards offered by Attorney General Holder and State Department Legal Adviser Koh in previous speeches).

offered previously.<sup>79</sup> Second, President Obama reiterated the administration's position that U.S. citizenship is no protection against being targeted for a drone strike.<sup>80</sup> Third, President Obama made clear that secrecy would continue to surround the drone program at the level that the administration chose to establish.<sup>81</sup>

However, President Obama offered one potential change in the administration's approach that may help ameliorate some of the negative media narrative surrounding the killing of civilians by drone strikes and help bolster foreign support for the U.S. program: he stated that the administration plans to move away from the use of signature strikes<sup>82</sup> in Yemen, focusing solely on using drone strikes for those individuals targeted by the administration.<sup>83</sup> Although this is merely an aspirational limitation in Yemen, and President Obama did not indicate that a decline in the use of signature strikes is a likely possibility for Pakistan in the near future, this self-imposed goal of attempting to reduce or eliminate the use of signature strikes in Yemen—many of which have led to well-publicized and tragic civilian deaths<sup>84</sup>—is an indication that the Obama administration is attempting to shift its strategy in ways that help fulfill its foreign policy objectives.

#### B. *Domestic Boundaries and the Need to Protect Insider Groups*

Since the attacks of September 11, 2001, the majority population in the United States has been more likely to accept the use of oppressive or intrusive national security measures so long as the effects of those measures do not impinge on the rights and privileges of the majority population,<sup>85</sup> but instead are limited to outsider groups whose welfare is of diminished concern to majority groups.<sup>86</sup> However, at the point that

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79. See sources cited *supra* note 78 (articulating similar definitions as to the "imminence" of a perceived threat for the purposes of ordering a targeted killing).

80. Compare May 2013 NDU Speech, *supra* note 5 (noting that "the high threshold that we've set for taking lethal action applies to all potential terrorist targets, regardless of whether or not they are American citizens"), with Holder, *supra* note 72.

81. See May 2013 NDU Speech, *supra* note 5.

82. See Becker & Shane, *supra* note 30 (explaining that the Obama administration used "signature strikes" in Pakistan, in which groups of people engaging in apparently suspicious behavior were allowed to be targeted for a drone strike, even if no terrorists or terrorist supporters were known to be in the group).

83. See May 2013 NDU Speech, *supra* note 5.

84. See *supra* notes 68-71 and accompanying text (discussing civilian deaths from drone strikes in Yemen).

85. See David Cole, *Enemy Aliens*, 54 STAN L. REV. 953, 988-89 (2002) (noting that U.S. citizens are complacent about the deprivation of liberty because of explicit or implicit assurances that citizens' rights will be left intact).

86. The differential reaction of those within a societal majority to policies that affect

the mainstream public finds that it is impacted negatively by the creep of national security measures on constitutionally guaranteed freedoms and liberties, opposition tends to grow dramatically.<sup>87</sup> At that point, a rights-protective shift in policy may occur primarily for the benefit of the politically powerful group, with the outsider group gaining the ancillary benefits of that shift, akin to Bell's theory with regard to interest convergence in the context of the mid-twentieth century civil rights movements.<sup>88</sup>

The debate over domestic drone use in early 2013 exemplified this dynamic. In early 2012, Attorney General Holder's public statement on drone use made clear that the administration was not bound geographically,<sup>89</sup> that U.S. citizenship was no protection against being included on the list of targets for a drone strike,<sup>90</sup> and that no judicial process was constitutionally necessary to target U.S. citizens so long as the administration followed its own careful procedures of determining whether to target a citizen.<sup>91</sup> Scrutiny of this standard increased dramatically after the February 2013 leak<sup>92</sup> of a 2011 Justice Department

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outsider groups has been well-documented. See Muneer I. Ahmad, *A Rage Shared By Law: Post September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1262 (2004) (noting that "hate violence against Arabs, Muslims, and South Asians . . . [received] short shrift in governmental, media, or public attention"); Keith Aoki, "Foreign-ness" & Asian American Identities: *Yellowface, World War II Propaganda and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 5-6 (1996) (discussing the disparate legal, societal, and media treatment of Asian Americans). Some have couched this perspective on national security laws as part of postcolonial theory. See, e.g., Nick J. Sciallo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561, 575 (2011). For a finding that hate crimes toward Muslims and Arabs increased dramatically since September 11 highlights the perceived "otherness" of these groups, see William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1234-40 (2004) (documenting and analyzing the surge in post September 11 hate crimes). Adrien K. Wing has thoughtfully analyzed how the current "otherness" of Arabs and Muslims is part of a long trend in U.S. history of marginalizing particular groups depending on public sentiment at the time. See Adrien Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 721, 728-29 (2003).

87. See, e.g., PEW POL. TYPOLOGY, *supra* note 67, at 96 (finding that 68% of those surveyed opined that Americans should not have to forgo privacy for national security reasons, and that this belief was relatively consistent across all political groups).

88. See Bell, *supra* note 19, at 524.

89. See Holder, *supra* note 43 (stating "[o]ur legal authority is not limited to the battlefields in Afghanistan").

90. See *id.* ("United States citizenship alone does not make such individuals immune from being targeted.")

91. See *id.* ("'Due process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.")

92. See Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone*

white paper<sup>93</sup> that outlined legal standards for drone strikes that largely mirrored Holder's 2012 statements. After the leak of the white paper, libertarian-leaning Republican senator Rand Paul wrote a letter to Holder seeking clarification as to the limits of the administration's power to target and kill U.S. citizens who back causes that the government deems to be unpopular, invoking in particular the image of celebrity Vietnam War protester, Jane Fonda, being potentially hit in a drone strike.<sup>94</sup> Holder wrote a reply stating, in effect, that the administration had no plans to kill U.S. citizens within the United States using a drone strike, but that it was within the administration's power to do so if warranted.<sup>95</sup>

This exchange set the stage for Paul's much-publicized filibuster of the confirmation vote on John Brennan for the position of C.I.A. director on March 6, 2013, in which he demanded further clarification of the administration's power to use drones against U.S. citizens in the United States.<sup>96</sup> In response, on March 7, 2013, Holder wrote a brief letter to Paul, posing Paul's question as, "Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil?" and responding, "The answer to that question is no."<sup>97</sup>

Two observations with regard to this exchange and the application of interest convergence theory are applicable here. First, Paul had little support from other politicians initially, but was later supported by those Republicans with libertarian tendencies or perhaps just the desire to get in their jabs at President Obama,<sup>98</sup> and by a few Democrats, perhaps

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*Strikes on Americans*, NBC NEWS (Feb. 4, 2013, 5:57 PM), [http://investigations.nbcnews.com/\\_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite](http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite).

93. See DOJ White Paper, *supra* note 48 (offering similar standards for the use of drone strikes on U.S. citizens to those articulated by Attorney General Holder in his March 2012 remarks).

94. See Amy Davidson, *Rand Paul Gets a Letter from Eric Holder*, NEW YORKER (Mar. 7, 2013), <http://www.newyorker.com/online/blogs/closetread/2013/03/rand-paul-gets-a-letter-from-eric-holder.html> (detailing the correspondence between Paul and Holder). In invoking the image of Fonda, certainly an elite insider by virtue of her race, citizenship, and public stature, being potentially hit by a Hellfire missile sent from a drone, Senator Paul focused on the fear that one of "us" may be impacted by the administration's counterterrorism policies.

95. See Letter from Eric H. Holder, Jr., Attorney General, U.S., to Rand Paul, Senator, U.S. (Mar. 4, 2013), available at <http://www.paul.senate.gov/files/documents/BrennanHolderResponse.pdf>.

96. See Ashley Parker, *Rand Paul Leads Filibuster of Brennan Nomination*, N.Y. TIMES (Mar. 6, 2013, 4:59 PM), <http://thecaucus.blogs.nytimes.com/2013/03/06/rand-paul-filibusters-brennan-nomination/>.

97. Letter from Eric H. Holder, Jr., Attorney General, U.S., to Rand Paul, Senator, U.S. (Mar. 7, 2013), available at <http://www.washingtonpost.com/blogs/post-politics/files/2013/03/Senator-Rand-Paul-Letter.pdf>.

98. See Parker, *supra* note 96 (noting later support for the filibuster from Republican

those committed to pushing for any rights protection in the area of drone use and unbowed by the political danger of being perceived as “soft on terror.”<sup>99</sup> This exemplifies a convergence of interests from different parts of the political spectrum, something that Bell predicted when the interests of insider groups are negatively impacted by a policy.<sup>100</sup>

Second, Paul’s “success”<sup>101</sup> in securing Holder’s admission of boundaries to the government’s power to use a drone was a rather limited one: Holder admits that the President does not have the authority to use lethal drone strikes against *U.S. citizens who are on U.S. soil*, if those citizens are *not engaged in combat*.<sup>102</sup> As a libertarian-leaning politician who has repeatedly voiced concern that counterterrorism powers may be used to target right-wing gun owners,<sup>103</sup> this limited protection may be sufficient for Senator Paul’s constituency (assuming they are not engaged in “combat” per Holder’s letter), but the letter offers no protection to U.S. citizens overseas or non-citizens anywhere in the world, including on U.S. soil. On the one hand, those interested in increased rights protection may celebrate Holder’s post-filibuster letter as acknowledging at least some limit on the legal authority of the President to order a drone strike; on the other hand, the placement of that limit exemplifies Bell’s point that when the interests of the powerful majority are satisfied, it is unlikely that a minority group needing additional protection will be successful in its efforts.

### III. LIMITS AND OPPORTUNITIES

Interest convergence analysis allows us to consider how the interests of powerful elites can, as an ancillary matter, inure to the benefit of outsider groups, but there are some serious limitations to considering interest convergence as a prospective approach to rights-protective policy making. When reflecting on the phenomenon of interest convergence, Professor Bell concluded with some disappointment that civil rights groups like the NAACP allowed the fight for racial justice to be compromised and perhaps co-opted by a government focused primarily on foreign policy and anti-communist

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senators Marco Rubio and Ted Cruz).

99. *See id.* (noting support for the filibuster from Democratic senator Ron Wyden).

100. *See* Bell, *supra* note 19, at 524.

101. *See* Davidson, *supra* note 94 (noting Senator Paul’s comment, “I’ve kind of won my battle”).

102. Holder, *supra* note 97 (emphasis added).

103. *See* Setty, *supra* note 9, at 219 (detailing Rand Paul’s libertarian argument against the renewal of Patriot Act amendments that might allow for the targeting of right-wing gun owners).

concerns.<sup>104</sup> Although I appreciate Bell's disappointment on the lack of will to focus fully on rights protection, the NAACP's motivation in aligning its work with the government's anti-communist platform makes sense from a realpolitik approach: even a limited victory in the realm of racial justice would be achieved only through the garnering of some measure of political and popular support; this support was highly vulnerable to attacks based on perceived communist sympathies; and without the support, courts were unlikely to support civil rights measures, no matter how important racial justice was.

Likewise, in the post-9/11 landscape in which significant political support for those marginalized by the national security state is hard to marshal, focusing on specific issues where interest convergence allows for the achievement of political victories without the vulnerability of being labeled "soft on terror" is a matter of negotiating otherwise precarious political realities.<sup>105</sup> Yet leveraging interest convergence to realize rights-protective gains is not a straightforward affair.<sup>106</sup>

Bell recognized the natural limitation of interest convergence, namely, when the interests of the majority diverge from that of the outsider group, then the majority will no longer spend its political capital on a measure that happens to be rights-protective. Bell argued in the education context that truly effective desegregation remedies were unavailable in the line of school segregation cases following *Brown* because whites eventually believed that they may suffer substantial negative effects, or may not inure any benefits, from large-scale desegregation measures.<sup>107</sup> Therefore, at the point at which the cost to the white majority of desegregation outweighed its benefits, desegregation no longer became a priority. As such, the promise of integration—as opposed to the mere removal of *de jure* segregation—

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104. See Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 509-10 (2008) (reviewing RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007)) (lamenting the NAACP's refusal to provide legal assistance to individuals such as Paul Robeson and W.E.B. Du Bois, who were perceived as being "too involved with far-left groups," that intimidated potential communist ties).

105. The May 2013 NDU Speech was critiqued immediately by some Republicans as reflecting Obama being "soft on terror." See Doyle McManus, *Rebooting the War on Terror*, L.A. TIMES (May 26, 2013), <http://articles.latimes.com/2013/may/26/opinion/la-oe-mcmanus-obama-drones-gitmo-20130526> (citing Republican senator Saxby Chambliss and others as characterizing the president as weak on counterterrorism issues).

106. Amartya Sen's theory of justice predicated on guiding "reasoned choice of policies, strategies or institutions" apart from identifying "fully just social arrangements" is particularly useful here, given that agreement—legal, moral or political—on what constitutes a fully just social arrangement is not possible for those coming from different philosophies and perspectives. AMARTYA SEN, *THE IDEA OF JUSTICE* 15 (2009).

107. Bell, *supra* note 19, at 526-33.

contemplated in *Brown* was never achieved.<sup>108</sup> Extrapolating from Bell's point, certain issues of social justice—whether in the realm of civil rights or national security—that are not ripe for interest convergence but raise serious rights concerns may never be addressed, even in a limited fashion.<sup>109</sup>

Along those same lines, thus far the few limitations that have been articulated with regard to the targeted killings program end at the point where interest convergence no longer exists: outside of the United States (and, therefore, not a popular cause of libertarians); when the insider group of U.S. citizens on U.S. soil is seen to be adequately protected; and where the foreign policy concerns are seen to be at least adequately handled in the short term, such as aspiring to limit the highly visible and damaging signature strikes in some regions where they are used.<sup>110</sup>

Further, the administration's stated limits on the use of drones reflect a unilateral legal interpretation of the applicable international and domestic legal constraints, meaning that the debate has had little effect on the vast scope of the counterterrorism power that has aggregated in

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108. See Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 548 (1994) (arguing that *Brown* accomplished relatively little in terms of reducing *de facto* segregation).

109. This is clear in the context of the Obama administration limiting the obligation to read Miranda rights for those suspected of terrorism. See Internal Memorandum, Fed. Bureau of Investigation, Custodial Interrogation for Pub. Safety and Intelligence-Gathering Purposes of Operational Terrorists Arrested Inside the U.S. (Oct. 21, 2010), printed in *F.B.I. Memorandum*, N.Y. TIMES (Mar. 25, 2011), <http://www.nytimes.com/2011/03/25/us/25miranda-text.html> (providing an internal memorandum from the F.B.I. that recommends withholding Miranda rights from terrorism suspects). Although the larger criminal defense bar may have had strong objections to the chipping away of Miranda rights if the FBI policy applied to a broader group of suspects, limitation of the policy to terrorism suspects has defused strong objections from the non-terrorism defense bar. The use of this limitation in the context of Dzhokar Tsarnaev's interrogation in conjunction with the Boston Marathon bombings of April 2013 sparked some debate. See Devlin Barrett, Siobhan Gorman & Tamer El-Ghobashy, *Judge Made Call to Advise Suspect of Rights*, WALL ST. J. (Apr. 25, 2013), <http://online.wsj.com/article/SB10001424127887323789704578444940173125374.html> (reporting the debate over the reading of Miranda rights that displaced the FBI's plan to interrogate Tsarnaev further without reading him Miranda warnings).

110. See Anup Kaphle, *How Pakistanis Reacted to Obama's New Guidelines for Drone Strikes*, WASH. POST (May 24, 2013, 12:58 PM), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/05/24/how-pakistanis-reacted-to-obamas-speech-on-drones/> (noting that the speech may mollify some concerns of the Pakistani government and allow for better communication between the U.S. and Pakistan, but that many human rights advocates and government officials remained disappointed by the continuation of the targeted killing program); J. Dana Stuster, *Pakistan Says Obama Drone Speech Too Little, Too Late*, FOREIGNPOLICY.COM (May 24, 2013, 5:10 PM), [http://blog.foreignpolicy.com/posts/2013/05/24/pakistan\\_yemen\\_obama\\_drone\\_guantanamo\\_terrorism\\_speech](http://blog.foreignpolicy.com/posts/2013/05/24/pakistan_yemen_obama_drone_guantanamo_terrorism_speech) (offering similar mixed reactions to the May 2013 NDU Speech from Pakistan and Yemen).



the executive branch since September 2001.<sup>111</sup> In his May 2013 speech, President Obama stated that he welcomed a conversation with Congress about a potential drone court—akin to the FISA court<sup>112</sup>—but noted that, given the scope of executive power in the area of foreign policy and counterterrorism, such a court may not be constitutional.<sup>113</sup>

Ironically, given the excessive deference of the judiciary to the executive branch in the last decade,<sup>114</sup> it is possible that more rigorous oversight of the targeted killing program would be found unconstitutional. In 2009, President Obama's rhetoric about restoring the rule of law and curtailing the perceived abuses of executive power<sup>115</sup> arguably could have translated into meaningful reform that differentiated the Obama administration from the Bush administration's approach on the exercise of unilateral executive power.<sup>116</sup> But repeated invocations of broad executive power and the excessive secrecy that has surrounded many of the Obama administration's policies, combined with excessive deference from the judiciary<sup>117</sup> and a lack of action in Congress has essentially given a bipartisan imprimatur to an extremely broad executive power with regard to national security matters.

Interest convergence would not enable a change in the scope of executive power, or for political will to be marshaled in favor of further

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111. For comprehensive treatment of the aggregation of presidential counterterrorism power in during the Bush Administration, see generally JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2009) (addressing the problematic aggregation of executive power during the Bush administration); FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* (2007). For similar assessments of presidential power during the Obama administration, see generally Aziz Rana, *Ten Questions*, 37 WM. MITCHELL L. REV. 5099 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2193084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193084); Afsheen John Radsan, *Bush and Obama Fight Terrorists Outside Justice Jackson's Twilight Zone*, 26 CONST. COMMENT 551 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1684720](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684720).

112. See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511 (1978) (establishing a Foreign Intelligence Surveillance Court to deal with surveillance requests for intelligence gathering).

113. See May 2013 NDU Speech, *supra* note 5.

114. See generally Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 WM. MITCHELL L. REV. 1629 (2012) (critiquing the judiciary for unwarranted deference to the administration with regard to the state secrets privilege).

115. See Editorial, *Mr. Obama and the Rule of Law*, N.Y. TIMES, Mar. 22, 2009, at WK 7 (detailing the ways in which the Obama administration had already deviated from campaign promises to curtail executive power and restore the rule of law with regard to national security policies).

116. See Setty, *supra* note 17, at 596-98 (2009) (discussing the ways in which the Bush administration employed a unilateralist unitary executive theory of power with regard to national security).

117. See Setty, *supra* note 114, at 1633-39 (detailing the overly deferential attitude of courts to invocations of the state secrets privilege by the Obama administration).

limitations on targeted killings unless the interests of the majority appear to be affected more directly by the program, as was perceived in the context of Senator Paul's filibuster, or unless another interest of the majority is met by a curtailing of the program.<sup>118</sup>

#### CONCLUSION

Professor Bell posited that African Americans achieved some measure of racial justice primarily as third-party beneficiaries of government actions meant to fulfill the goals of more politically powerful constituents. The Emancipation Proclamation helped the Union recruit freed slaves as soldiers and disrupt the Confederate work force; the post-Civil War amendments solidified political power for the Republican Party; *Brown v. Board of Education* buttressed U.S. efforts to improve its international standing and foreign policy during the Cold War.<sup>119</sup>

As of this writing, it is too early to evaluate whether the promises of President Obama's May 2013 speech will translate into substantive changes in the administration's policy with regard to targeted killings.<sup>120</sup> Perhaps interests such as foreign policy or the need to protect powerful insider groups will move the debate over the limits of drone use in the future; perhaps a desire for President Obama to establish his own legacy as the president who restored the rule of law to the U.S. post-9/11 counterterrorism efforts will lead to the courts and Congress becoming more meaningfully involved in the decision-making process with regard to drones. In using interest convergence to evaluate the ways in which the parameters of the drone program have evolved this far, we can better understand the possibilities and ramifications for future debates.

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118. See Setty, *supra* note 9, at 211-25 (detailing various aspects of interest convergence that may pertain to national security policies).

119. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 71 (2004). Certainly this historical account is not without opposition. Bruce Ackerman categorizes the political momentum behind the post-Civil War amendments as legislators acting in a statesmen-like "higher lawmaking" capacity. BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 207 (1998).

120. Organizations committed to civil liberties continue to critique the Obama administration with regard to its targeted killings policy, seeking greater transparency as to the legal foundation and operations of the program, accountability for civilian casualties, and clarifications as to policy changes that may have developed since the May 2013 NDU Speech. See, e.g., Letter from American Civil Liberties Union et al., to Barack Obama, President of the U.S. (Dec. 4, 2013), published in *Joint Letter to President Obama on Drone Strikes and Targeted Killings*, HUMAN RIGHTS WATCH (Dec. 5, 2013), <http://www.hrw.org/news/2013/12/05/joint-letter-president-obama-drone-strikes-and-targeted-killings>.