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Obama's National Security Exceptionalism

Sudha Setty
Western New England University School of Law, ssetty@law.wne.edu

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SUDHA SETTY*

INTRODUCTION

One of the premises of this symposium is that the Obama administration, in undertaking various executive actions that protect some of the vulnerable immigrant populations in the United States, is acting in a more rights-protective manner than Congress has explicitly authorized. This Essay juxtaposes this perceived dynamic with policies in the counterterrorism and national security realm, areas in which the Obama administration has acted directly in contrast to its more rights-protective stance taken in other areas.

National security is arguably an exceptional context when compared to other issues that touch on domestic and international law and policy, such as immigration. This Essay considers the exceptionalism of Obama administration national security policies, which have undercut civil and human rights in ways that disparately impact racial and religious minorities. Included in this analysis are the non-prosecution of those who endorsed torture of detainees, use of drones for targeted killings of citizens and noncitizens, invocations of the state secrets privilege, and use of immigration authorities to detain and remove those accused of having a connection with terrorist activity.

The latter part of this Essay situates the Obama administration's national security policies in the context of this symposium's examination of the horizontal and vertical separation of powers. In doing so, this Essay concludes that the rule of law distortion at both the domestic and international level is enabled by a pronounced lack of judicial engagement and review of most rights-denigrating national security

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programs, political enabling by Congress, and lack of sustained public pressure for reform.

I. EXAMPLES OF NATIONAL SECURITY EXCEPTIONALISM

The label of national security exceptionalism fits the Obama administration in two ways: first, although the administration has actively sought to address and improve the protection of human rights and civil rights of racial minorities suffering disparate negative treatment in a variety of contexts, those moves toward rights protection generally do not extend to the realm of counterterrorism abuses. Notably, in the post-9/11 counterterrorism context, almost all of those who have suffered from violations of human and civil rights are racial and/or religious minorities.[1] One of the justifications for this type of exceptionalism is based on the widespread view that national security is an area in which ordinary legal and constitutional constraints do not apply because of the strong deference that ought to be afforded to the president in foreign policy matters;[2] related to this type of exceptionalism is the outsized perception of the threat of terrorism by politicians and the public, which makes it difficult for the government to shift away from its exceptionalist footing.[3] The second mode of exceptionalism is predicated on the view that the United States plays an

1. By "rights protection" in the counterterrorism context, 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—or appearing to hail 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 noncitizens); 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, 1–02 (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 Counter-Terrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 366 (2010).

2. *E.g.*, John Yoo, *The Terrorist Surveillance Program and the Constitution*, 1714 GEO. MASON L. REV. 565 (2007) (arguing that national security surveillance is largely beyond the purview of Congress and the judiciary); *Cf.* Aziz Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225 (2010) (arguing that, in some cases, the assumption that national security-related cases are treated in an exceptional manner does not bear out).

3. *See* Paul Campos, *Undressing the Terror Threat*, WALL ST. J. (Jan. 9, 2010), http://www.wsj.com/articles/SB10001424052748704130904574644651587677752 (arguing

exceptional role on the world stage in terms of its responsibility to police global actions by exercising its hard and soft power; as such, it has the right to act in ways that would arguably not be tolerated by the United States if undertaken by a different nation.[4]

A. *Improving Rights Protection in Some Non-security Contexts*

Looking at almost seven years of his presidency, it is clear that President Obama has prioritized improving the government's footing on several human and civil rights issues, a number of which have focused on areas in which a racially disparate impact is obvious. For many of these areas, the Obama administration has undertaken its efforts unilaterally, despite a reluctant or sometimes contrary Congress. Immigration is one of these contexts, but other examples reflect presidential efforts toward better protections for racial minorities as well.[5] In the context of voting rights, President Obama immediately pushed back against the Supreme Court's gutting of Section 5 of the Voting Rights Act of 1965 in its *Shelby County v. Holder*[6] decision of 2013, ordering the Justice Department to continue litigating voting rights cases aggressively and creatively while pushing Congress to

that the risk of death from terrorism versus other causes is comparatively infinitesimal, yet government resources are not proportionately allocated); Nate Silver, *Crunching the Risk Numbers*, WALL ST. J. (Jan. 8, 2010), http://www.wsj.com/articles/SB10001424052748703481004574646963713065116 (same as Campos).

4. President Obama's 2014 commencement address at West Point embodied a variety of arguably complementary, arguably conflicting thoughts on the notion of American exceptionalism. At one point, he noted, "I believe in American exceptionalism with every fiber of my being. But what makes us exceptional is not our ability to flout international norms and the rule of law, it is our willingness to affirm them through our actions." President Barack Obama, Commencement Address at the United States Military Academy in West Point, N.Y. (May 28, 2014), *in* U.S. GOV'T PUBL'G OFFICE, DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS, 2014, at 3, 7. At another point, he offered that "America must always lead on the world stage. If we don't, no one else will," *Id.* at 3, and continued this theme with the following:

The United States will use military force, unilaterally if necessary, when our core interests demand it: when our people are threatened, when our livelihoods are at stake, when the security of our allies is in danger. In these circumstances, we still need to ask tough questions about whether our actions are proportional and effective and just. International opinion matters, but America should never ask permission to protect our people, our homeland, or our way of life.

Id.

5. The following list of activities is meant to be selective, not exhaustive; further, if the scope of analysis were broadened to include issues for which racially disparate impact is not facially obvious, other unilateral rights-protective measures undertaken by the Obama administration could be considered, such as the broadening of workplace, health care, and marital tax filing protections for LGBTQ federal employees.

6. Shelby County, Ala. v. Holder, 133 S. Ct. 2612 (2013).

restore the protections removed by the *Shelby* decision.[7] On the issue of racially disparate sentencing for non-violent drug-related crimes, President Obama not only signed the Fair Sentencing Act of 2010[8] and encouraged the reduction in mandatory minimum sentences,[9] but has also exercised unilateral executive action to encourage those sentenced under the prior racially disparate sentencing framework to seek clemency,[10] and continued to use his clemency power to order the release of some of those convicts.[11] With regard to unarmed racial minorities being harassed, abused, or killed by police, President Obama has spoken out forcefully, moved toward the demilitarization of local police forces,[12] ordered better training and controls when federal military equipment is transferred to state and local police departments,[13] emphasized the need to improve community policing,[14] and created a task force to "strengthen public trust and foster strong relationships between local law enforcement and the communities that they protect, while also promoting effective crime

7. *See* Press Release, White House, President Barack Obama, Statement by the President on the Supreme Court Ruling on Shelby County v. Holder (June 25, 2013) (on file at https://www.whitehouse.gov/the-press-office/2013/06/25/statement-president-supreme-court-ruling-shelby-county-v-holder); *see also* Jackie Calmes, *Obama Reassures Leaders on Enforcing Voting Rights*, N.Y. TIMES (July 29, 2013), http://www.nytimes.com/2013/07/30/us/politics/obama-reassures-leaders-on-enforcing-voting-rights.html (describing conversations among President Obama, Attorney General Holder and civil rights leaders on ways in which the Obama administration would seek to maintain protection of voting rights despite the *Shelby* ruling).

8. Fair Sentencing Act, Pub. L. No. 111-220.

9. *See* Matt Apuzzo, *Holder Endorses Proposal to Reduce Drug Sentences in Latest Sign of Shift*, N.Y. TIMES (Mar. 13, 2014), http://www.nytimes.com/2014/03/14/us/politics/holder-endorses-proposal-to-reduce-drug-sentences.html.

10. *See* Matt Apuzzo, *Justice Dept. Starts Quest to Find Inmates to be Freed*, N.Y. TIMES (Jan. 30, 2014), http://www.nytimes.com/2014/01/31/us/politics/white-house-seeks-drug-clemency-candidates.html.

11. Michael S. Schmidt, *U.S. to Release 6,000 Inmates from Prisons*, N.Y. TIMES (Oct. 6, 2015), http://www.nytimes.com/2015/10/07/us/us-to-release-6000-inmates-under-new-sentencing-guidelines.html (describing plans to commute the sentences of some offenders convicted of non-violent drug-related crimes).

12. *See* Tonya Somanader, *Why President Obama is Taking Steps to Demilitarize Local Police Forces*, WHITE HOUSE: BLOG (May 18, 2015, 7:44 PM), https://www.whitehouse.gov/blog/2015/05/18/why-president-obama-taking-steps-demilitarize-local-police-forces.

13. *See generally* EXEC. OFFICE OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION (2014).

14. *Fact Sheet: Strengthening Community Policing*, WHITE HOUSE (Dec. 1, 2014), https://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing.

reduction."[15] In these contexts and others, President Obama has made clear that he intends to use political capital and resources to address some of the civil and human rights challenges in which racial minorities have been negatively impacted by government policies and actions.

B. Security Contexts with a Mixed Record of Rights Protection

In response to human and civil rights abuses occurring during the George W. Bush administration as a result of national security and counterterrorism programs, President Obama initially promised[16] substantial shifts in policy to better protect rights.[17] Although the lofty goals he set forth on the campaign trail in 2008 and early in his administration in 2009 have largely not been met, he has taken some steps to better protect human and civil rights in some areas. Well-known examples include his issuance of executive orders in early 2009 to end the use of torture on detainees[18] and to close the detention facility at Guantánamo Bay, Cuba.[19] These moves toward improved rights protection were laudable, but were tempered by other

15. *Fact Sheet: Task Force on 21st Century Policing,* WHITE HOUSE (Dec. 18, 2014), https://www.whitehouse.gov/the-press-office/2014/12/18/fact-sheet-task-force-21st-century-policing.

16. President Barack Obama, Inaugural Address, *in* 1 PUB. PAPERS, Jan. 20, 2009, at 2. https://www.whitehouse.gov/blog/inaugural-address (rejecting the idea that there must be a trade-off between protection of civil liberties and national security).

17. The need to increase rights protections in the national security context operates from the premise that such changes are necessary to comport with the rule of law and human rights law and norms. Many thoughtful scholars have argued that the current structures in place with regard to security policies, such as the use of drones for targeted killing, have achieved a positive, if not ideal, balance of individual rights and security imperatives. *See, e.g.*, Robert M. Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK INT'L HUMANITARIAN L. 3 (2010), 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); Matthew Waxman, *Going Clear*, FOREIGNPOLICY (Mar. 20, 2013), 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); *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).

18. Exec. Order No, 13491—Ensuring Lawful Interrogations, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

19. Exec. Order No. 13492—Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009). The Guantánamo Bay detention facility is still open, but the number of detainees has dropped from 242 at the beginning of the Obama presidency to 116 as of summer 2015. *See*

policies or aspects of the administration's decision making. In rare instances, the Obama administration has paid compensation to individuals who were abused in some way due to national security overzealousness during the Bush administration,[20] but this has been more of an exception than the general practice of the administration, which has been to use a variety of tactics to seek dismissal of lawsuits seeking recompense for national security abuses and to cover up abuses when possible.[21]

For example, despite President Obama's statement affirming the illegality of torture, a continuing United Nations investigation into U.S. torture,[22] and ample evidence made public by the Senate that torture was committed by U.S. government agents under the George W. Bush administration,[23] the Obama administration has made no moves toward seeking accountability for those who authorized, supervised, ordered, or carried out the torture. This is particularly noteworthy in the context of this symposium, which considers whether and the extent to which the Obama administration has gone above and beyond congressional authorization in granting protections and rights to certain immigrants; in the case of torture, we see not only a lack of accountability over the responsible individuals, but also a years-long fight by the Obama administration to keep the detailed findings of the Senate Select Committee on Intelligence secret and out of public

Guantánamo by the Numbers, HUMAN RIGHTS *FIRST*, http://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf (last updated Oct. 7, 2015).

20. In early 2015, the Obama administration settled a lawsuit with Abdullah al-Kidd, who had been detained for sixteen days in 2003 under the federal material witness statute based on gross misrepresentations made by a federal agent on his warrant for detention. As a result of the settlement, al-Kidd was paid $385,000 and was issued an apology by the government. *See* Rebecca Boone, *US Citizen Settles Lawsuit Over Post-9/11 Arrest with FBI*, SEATTLE TIMES (Jan. 16, 2015, 3:53 PM), http://www.seattletimes.com/nation-world/us-citizen-settles-lawsuit-over-post-9-11-arrest-with-fbi/.

21. *See infra* Part 2, *Why Not National Security Exceptionalism?*.

22. The United States has followed up its periodic reports to the UN Committee Against Torture with testimony as to how U.S. policies have changed such that torture is no longer committed in the name of national security, but has not gone further in promising accountability over prior acts of torture. *See* Tom Malinowski, Assistant Sec'y, State for Democracy, Human Rights and Labor, U.S. Dep't of State, Opening Statement before the United Nations Committee Against Torture (Nov. 12, 2014), *on* U.S. MISSION GENEVA, https://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions/ (last visited Oct. 24, 2015).

23. *See* SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288 (2014) [hereinafter Senate torture report] (detailing the many known instances of torture against detainees, as well as the cover up attempted by individuals within the Central Intelligence Agency).

view.[24] Where the Senate acted forcefully to detail human rights abuses, the administration continues to remain conspicuously silent as to its obligation to hold perpetrators accountable. Statements denouncing torture and promises that this administration will not use such tactics on detainees are better than the Bush administration's actions, but they remain insufficient and the failure to prosecute serious allegations of torture remains in violation of the United States' international obligations.

Another example of the Obama administration's marginal shifts towards rights protection is its movement of some cases from military commissions to Article III courts under the theory that federal courts are an effective venue for prosecutors to secure convictions, and they obviate the rule of law concerns concomitant with the use of specialized military commissions for terrorist acts.[25] Using Article III courts as opposed to military commissions is a shift that moves toward greater rights protection for those on trial, but the reality also includes the fact that federal prosecutors of terrorism acts have the deck stacked in their favor in terms of being able to suspend Miranda rights

24. *See* Connie Bruck, *Dianne Feinstein v. the CIA*, NEW YORKER (June 22, 2015), http://www.newyorker.com/magazine/2015/06/22/the-inside-war (detailing the lengthy arguments between Senator Dianne Feinstein, chair of the Senate committee that researched and wrote the Senate torture report, and the administration as to the release of the unclassified portion of the report to the public); Charlie Savage, *U.S. Tells Court That Documents From Torture Investigation Should Remain Secret*, N.Y. TIMES (Dec. 10, 2014), http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?_r=0 (describing protracted litigation over FOIA requests for information about the DOJ torture investigation, and administration efforts to keep information secret). *See also* Dan Froomkin, *Holder, Too Late, Calls for Transparency on DOJ Torture Investigation*, INTERCEPT (Oct. 15, 2015), https://theintercept.com/2015/10/15/holder-too-late-calls-for-transparency-on-doj-torture-investigation/ (noting that former Attorney General Holder lamented the lack of transparency over the DOJ torture investigation only after he left office).

25. *See* Eric H. Holder, Jr., Att'y Gen., Speech at the University of California Berkeley School of Law Commencement (May 22, 2013) (transcript at http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-university-california-berkeley-school-law). Holder noted that:

[T]hose who claim that our federal courts are incapable of handling terrorism cases are not registering a dissenting opinion. They are simply wrong. Their assertions ignore reality. And attempting to limit the use of these courts would weaken our ability to incapacitate and to punish those who target our people and attempt to terrorize our communities. Throughout history, our federal courts have proven to be an unparalleled instrument for bringing terrorists to justice. They have enabled us to convict scores of people of terrorism-related offenses since September 11.

Id.; see also Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 MAINE L. REV. 131 (2010) (arguing that the use of military commissions or other specialized terrorism courts is problematic from a rule of law perspective).

for a lengthy time,[26] use an extremely broad material support statute to convict or as leverage in plea bargain negotiations,[27] and defend against claims of entrapment with virtually guaranteed success.[28] Despite these significant limitations, some argument can be made that the Obama administration has shifted at least marginally in a rights-protective direction on these matters; the same cannot be said for a number of other national security contexts.

C. *Security Contexts in Which Exceptionalism Is at its Highest*

Numerous contexts exist in which the Obama administration has either actively undermined attempts at accountability over human and civil rights abuses committed under the auspices of a national security or counterterrorism program, or has kept secret the arguably abusive programs in order to shield them from accountability. In this section, three such contexts are discussed:[29] (1) the use of unmanned aerial

26. *See F.B.I. Memorandum*, N.Y. TIMES (Mar. 25, 2011), http://www.nytimes.com/2011/03/25/us/25miranda-text.html (detailing the circumstances under which Miranda warnings can be delayed when interrogating terrorism suspects). This Justice Department policy came under public scrutiny in conjunction with the interrogation of the 2013 Boston marathon bomber, Dzhokhar Tsarnaev, who was detained and questioned for a prolonged period of time before being read his Miranda rights. *See* Charlie Savage, *Debate Over Delaying of Miranda Warning*, N.Y. TIMES (Apr. 20, 2013), http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html.

27. *See Counterterrorism Efforts*, OFFICES OF THE U.S. ATT'YS, U.S. DEP'T OF JUSTICE, http://www.justice.gov/usao/priority-areas/national-security/counterterrorism-efforts (last updated Dec. 8, 2014) (discussing the importance of the material support statute to federal prosecutors); Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543 (2011) (critiquing the breadth and vagueness of the material support statute as allowing for too much discretion in prosecuting Muslims with views that are contrary to U.S. foreign policy interests). The material support statute is so useful to prosecutors in the United States that the Department of Justice has provided advice to other nations on how they can import a similar prosecutorial model for domestic use. *See Attorney General Holder Urges International Effort to Confront Threat of Syrian Foreign Fighters, Justice News,* U.S. DEP'T OF JUSTICE (July 8, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-urges-international-effort-confront-threat-syrian-foreign-fighters.

28. *See* CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001-SEPTEMBER 11, 2011 26 (2011), http://www.lawandsecurity.org/portals/0/documents/ttrc%20ten%20year%20issue.pdf (noting that post-9/11 entrapment defenses in terrorism prosecutions have never been successful); Paul Harris, *Fake Terror Plots, Paid Informants: The Tactics of FBI 'Entrapment' Questioned*, GUARDIAN (Nov. 16, 2011), http://www.theguardian.com/world/2011/nov/16/fbi-entrapment-fake-terror-plots.

29. These three contexts are by no means inclusive of all of the ways in which the Obama administration's counterterrorism activities have had a disparate negative impact on people who are Muslim, or Arab or South Asian descent, or those perceived to fall into one of those categories. *See* Sudha Setty, *Country Report on Counterterrorism: United States of America*, 62 AM. J. COMP. L. 643 (2014) (offering a more comprehensive accounting of the Obama administration's counterterrorism activities).

vehicles (UAVs or drones) for targeted killings, (2) the invocation of the state secrets privilege to seek dismissal of civil lawsuits involving sensitive government information, and (3) the use of immigration law to detain and remove noncitizens accused of a connection to terrorist activity. Each of these embodies at least one aspect of the national security exceptionalism identified above: that the type of authority claimed by the president is appropriate because it is within his unilateral purview, that terrorism poses an exceptional and unacceptable threat to the United States that must be countered forcefully, and that the United States must play an exceptional role within the counterterrorism sphere and this role may justify excessive behavior in some instances.

1. Drones

President Obama expanded the use of drones for targeted killings[30] of suspected terrorists during his administration.[31] Administration officials have repeatedly emphasized the necessity, efficacy, and legality of targeted killings as a counterterrorism tool,[32] and have resisted the idea that other branches of government should play a significant role over the question of who is killed by drones (citizen vs. noncitizen) and under what circumstances. Nonetheless, the program has prompted much debate over the basic question of whether such a program ought to exist,[33] the moral calculus of extrajudicial killings by remote control,[34] the legal parameters and authorities for such a

30. 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 (Mar. 25, 2010) (transcript 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 v. Panetta, No. 1:12-cv-01192-RMC (D.D.C. July 18, 2012).

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

32. *See* Koh, *supra* note 30, at 7–8.

33. *See, e.g.*, U.N. Human Rights Council, *Report 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) [hereinafter U.N. Human Rights Council] (questioning the legality of the CIA drone program).

34. *See generally* Samuel Issacharoff & Richard H. Pildes, *Drones and the Dilemma of Modern Warfare* (N.Y.U. Sch. of Law, Working Paper No. 13-34, 2013) (theorizing the moral

program,[35] and specific questions regarding the legality of its scope in terms of geographic location and citizenship of the target.[36] The Obama administration took two positions as to the nature of the war being waged with drones that raised additional concerns: first, the assertion that the theater of war for U.S. counterterrorism efforts encompasses the entire globe;[37] 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 counterterrorism efforts to last at least ten to twenty years longer.[38] Despite the boundless geographic and extremely broad durational scope around the targeted killing program, its parameters remain largely shielded from public view except at points at which it serves the Obama administration to make such information public.[39] Limited information has been disclosed in occasional speeches by

dilemma of drone use in the context of warfare in which geographic and other traditional boundaries of violence are distorted).

35. *See* U.N. Human Rights Council, *supra* note 33, at ¶ 28–92 (discussing international law of war principles with regard to targeted killings); Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, Speech at Northwestern University School of Law (Mar. 5, 2012) (transcript 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); Jeh C. Johnson, Gen. Counsel, U.S. Dep't of Defense, Speech on National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012) (transcript 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 30, at 7–8 (arguing that the Obama administration's use of targeted killing as a counterterrorism tool complied with international and domestic legal obligations).

36. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9, 54 (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).

37. Spencer Ackerman, *Pentagon Spec Ops Chief Sees '10 to 20' More Years of War Against Al-Qaida*, WIRED.COM (May 16, 2013, 11:49 AM), 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).

38. *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).

39. *See* David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information,* 127 HARV. L. REV. 512, 625–26 (2013); *see, e.g.*, Stephanie Condon, *Obama: Anwar al-Awlaki's Death a "Major Blow" to al Qaeda and Affiliates*, CBS NEWS (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).

administration officials[40] and a classified Department of Justice memorandum that was leaked in early 2013.[41] That leak prompted a May 2013 speech in which President Obama looked to defend the legality of the targeted killings program.[42] At the same time that the administration discussed and leaked aspects of the program, it also used the classified[43] nature of the program to shield itself from media inquiry[44] and from judicial accountability, using the standing doctrine and state secrets privilege to secure the dismissal of a suit challenging the constitutionality of the program. That suit was brought on behalf of U.S. citizen Anwar al-Awlaki, who had been placed on the government's targeted killings list,[45] and who was later killed by a drone.[46] This hypocrisy undermined the credibility of the administration as the restorer of the rule of law and protector of human and civil

40. *E.g.*, Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to Patrick J. Leahy, Chairman, U.S. Senate Comm. on the Judiciary, *in Holder Letter on Counterterror Strikes Against U.S. Citizens*, N.Y. TIMES (May 22, 2013), http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-lettter.html?_r=1& (detailing the administration's legal basis for the use of targeted killings against Anwar al-Awlaqi and other U.S. citizens overseas); John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks of John O. Brennan: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011), http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an; Johnson, *supra* note 35; Koh, *supra* note 30, at 7–8.

41. *See* U.S DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2011),
http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ White Paper].

42. *See* President Barack Obama, Remarks at National Defense University (May 23, 2013), *in* U.S. GOV'T PUBL'G OFFICE, 2013, DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS, at 5–6 [hereinafter May 2013 NDU Speech].

43. *See* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=0 (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. 8, 2011), http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html (offering details of a still-classified Office of Legal Counsel memorandum justifying the targeted killings of U.S. citizens).

44. *See, e.g.*, N. Y. Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508 (S.D.N.Y. Jan. 3, 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).

45. *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).

46. Anwar al-Awlaki was killed by a drone strike in September 2011. *See* Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. TIMES (June

rights, and instead invited comparisons to the Bush administration that the Obama administration likely wished to avoid for the purposes of garnering domestic and international support.[47]

In his May 2013 speech, President Obama focused largely on the parameters for targeted killings, reiterating known positions of the administration that drone strikes were legal under international law standards[48] because they defended against "imminent" threats,[49] stating that U.S. citizenship is no protection against being targeted for a drone strike,[50] and making clear that he could keep as much of the drone program secret as he deemed.[51] Throughout the Obama presidency, the administration has offered only two rights-protective concessions with regard to the drone program, and neither provides significant comfort: first, in 2013, President Obama announced a plan to curtail sharply the use of signature strikes[52] in Yemen and instead use drone strikes only for those individuals targeted by the administration,[53] likely in response to media coverage of tragic civilian deaths[54] and criticism over administration prevarications as to how

23, 2014), http://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html.

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

48. *Compare* May 2013 NDU Speech, *supra* note 42, at 5, *with* Holder, *supra* note 35, *and* Koh, *supra* note 30, at 7–8 (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).

49. May 2013 NDU Speech, *supra* note 42, at 6 (articulating similar definitions as to the "imminence" of a perceived threat for the purposes of ordering a targeted killing).

50. *Compare id.*, *supra* note 42, at 8 (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 35, at 6.

51. *See* May 2013 NDU Speech, *supra* note 42, at 7, 10.

52. *See* Becker & Shane, *supra* note 43 (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).

53. *See* May 2013 NDU Speech, *supra* note 42, at 4–5.

54. *See, e.g.*, Becker & Shane, *supra* note 43 (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"); *Eye of the Drone*, HARPER'S MAG. (June 2012), 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).

many civilians had been killed by drone strikes.[55] However, in the first half of 2015, the administration had used signature strikes in Yemen at least twelve times.[56] Second, in 2013, then-Attorney General Eric Holder conceded to Senator Rand Paul that the president does not have the authority to use a weaponized drone to kill an American not engaged in combat on American soil,[57] apparently leaving open the possibility of noncitizens being killed anywhere, U.S. citizens being killed outside of the United States, and U.S. citizens being killed within the United States if the administration believes that they are engaged in "combat."

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, it would seem that instituting proper accountability measures—by Congress and/or the judiciary—would be essential to protect against and provide redress for arbitrary or abusive decision-making in the process of extra-judicial killings. Yet this area persists as one in which national security exceptionalism has prevailed. Congress has expressed little will in setting meaningful parameters on the program,[58] and the judiciary has shied away from adjudicating the legality of placing targets for extrajudicial killings on a government list, even if those targets are U.S. citizens who are not "imminently" attacking the United States in any conventional sense of the word.[59] Actual protection of rights

55. *See* Scott Shane, *C.I.A. is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES (Aug.11, 2011), http://www.nytimes.com/2011/08/12/world/asia/12drones.html (relating evidence from various sources that the civilian toll of drone strikes was significantly higher 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 43 (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).

56. *See* Greg Miller, *CIA Didn't Know Strike Would Hit al-Qaeda Leader*, WASH. POST (June 17, 2015), https://www.washingtonpost.com/world/national-security/al-qaedas-leader-in-yemen-killed-in-signature-strike-us-officials-say/2015/06/17/9fe6673c-151b-11e5-89f3-61410da94eb1_story.html.

57. Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to Senator Rand Paul, PAUL.SENATE.GOV (Mar. 7, 2013) (on file at http://www.paul.senate.gov/files/documents/WhiteHouseLetter.pdf).

58. To date, Congress has not taken any action on curbing the Obama administration's use of drones for targeted killings. Administration lawyers have taken the position that disclosure to, consultation with, or approval from Congress is unnecessary and unwarranted with regard to drone strikes. *See* DOJ White Paper, *supra* note 41.

59. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 54 (D.D.C. 2010).

would necessitate more than rhetoric about the efficacy and legality of the drone program that cannot actually be examined and verified because of executive branch secrecy.[60]

2. State Secrets Privilege

Focus on invocations of the state secrets privilege ramped up during President Bush's second term with the emergence of a pattern of the administration seeking dismissals of lawsuits during the pleadings stage, even when the suits dealt with allegations of extraordinary rendition, unlawful detention and torture, and the suits were the last attempts of gravely injured individuals to vindicate their rights.[61] Despite substantial evidence that citizens of Germany[62] and the United Kingdom,[63] among others, were rendered by the United States government to other nations and were subsequently abused by the security forces in the nations to which they were rendered, their civil suits have been dismissed on state secrets grounds.[64] Congress discussed reining in the executive's increasing reliance on the state secrets privilege as a means of escaping the possibility of accountability several times: it debated the State Secrets Protection Act of 2008[65] and reintroduced nearly identical reform legislation in February

60. Leaking of government information continues to be the primary method by which the media, the public and Congress has been able to prompt further government disclosures about the drone program. In October, 2015, the Intercept media organization used leaked information to report on numerous aspects of the U.S. targeted killing program. *See The Drone Papers*, INTERCEPT, https://theintercept.com/drone-papers (last visited Oct. 24, 2015). As of this writing, the U.S. government has not issued a response.

61. Press Release, Office of Sen. Edward M. Kennedy, Sen. Kennedy Introduces State Secrets Protection Act (Jan. 22, 2008) (internal quotation marks omitted), *in* NEWSROOM, 2008 WLNR 1256008; William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 109 (2005) (claiming that the Bush administration is using the state secrets privilege with "offhanded abandon"); *cf.* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1252 (2007) (claiming that a survey of the invocation of the state secrets privilege since the 1950s indicates that "recent assertions of the privilege are not different in kind from the practice of other administrations").

62. *See* JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 282–87 (2008) (detailing Khalid El-Masri's plight).

63. *See* Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 WM. MITCHELL L. REV. 1630, 1634–35 (2012) (detailing the claims of Binyam Mohamed).

64. *E.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1092–93 (9th Cir. 2010) (en banc); El-Masri v. United States, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).

65. 154 CONG. REC. S198-201 (daily ed. Jan. 23, 2008) (statement of Sen. Kennedy on the State Secrets Protection Act).

2009[66] after the Obama administration appeared to adopt the Bush administration's stance in favor of a broad invocation and application of the privilege.[67]

Legislative reform efforts lost momentum after the Obama administration released a new policy for the Department of Justice in September 2009 that mandated a more rigorous internal administrative review prior to invoking the state secrets privilege.[68] That policy has been in effect for six years, but it appears that the internal review process has resulted in little visible difference between the Bush and Obama administrations with regard to the invocation of the privilege at the pleadings stage in cases that often allege serious constitutional violations and human rights abuses.[69] More rigorous due process within the executive branch may indeed be more rights-protective, but because such evaluations have been kept secret and Congress and the public are not privy to that information, it appears that the Obama administration has adopted the "just trust us" view of due process that in some respects mirrors the actions of the Bush administration.[70] Further, any future administration could easily undo any rights-protective due process measures that do exist, since the current process was not undertaken legislatively and does not engage Congress or the judiciary in a meaningful way.

The use of the state secrets privilege becomes a matter of national security exceptionalism because, as in the case of torture, the

66. *See* Press Release, Office of U.S. Sen. Patrick Leahy, Leahy, Specter, Feingold, Kennedy Introduce State Secrets Legislation (Feb. 11, 2009) (on file at http://www.leahy.senate.gov/press/press_releases/release/?id=81a196e2-692e-498d-bf80-96ba81e252b5).

67. Editorial, *Continuity of the Wrong Kind*, N.Y. TIMES (Feb. 11, 2009), http://www.nytimes.com/2009/02/11/opinion/11wed2.html (disagreeing with the Obama administration's decision to continue the Bush administration invocations of the state secrets privilege to try to have litigation against the government dismissed at the pleadings stage).

68. *See* Memorandum from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to Heads of Exec. Dep'ts & Agencies, Policies and Procedures Governing Invocating of the State Secrets Privilege (Sept. 23, 2009) (on file at http://legaltimes.typepad.com/files/ag-memo-re-state-secrets-dated-09-22-09.pdf) [hereinafter Holder Memorandum] (establishing layers of internal review within the Department of Justice and including a new executive branch policy to report to Congress any invocations of the state secrets privilege).

69. *See* Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 257–58 (2009) (identifying the continuity between the Bush and Obama administrations in their approach to the state secrets privilege).

70. Most recently, the Obama administration invoked the state secrets privilege as a third party in a defamation suit, securing dismissal without disclosing to either party the basis on which the privilege was invoked. *See US Government Invokes State Secrets Privilege to Have Iran Lawsuit Thrown Out*, GUARDIAN (Mar. 23, 2015), http://www.theguardian.com/world/2015/mar/23/us-government-lawsuit-iran-state-secrets.

Obama administration has suppressed the ability of individuals to litigate their rights and hold government actors accountable for their past abuses. Further, a variety of political and structural incentives have created a situation where exceptionalism reigns and accountability from Congress or the courts does not exist: ideological alignment with the president, concern that national security is an issue within the president's sole jurisdiction, complacency, and an overly formalistic judiciary that chooses to defer to the president instead of engaging in its counter majoritarian obligation to protect fundamental rights[71] have all contributed to the lack of engagement on the question of redress for violations of human and civil rights.

3. Use of Immigration Law in the National Security Context

The government has, to some extent, conflated immigration and counterterrorism programs and has encouraged use of the immigration system as an important tool in counterterrorism efforts.[72] The result has been a system that, although legal under U.S. domestic law,[73] arguably violates international law and norms with regard to the treatment of migrants,[74] and most certainly is not rights-protective of the noncitizens caught in its framework. Juxtaposed against the unilateral executive action that has attempted to offer additional protection to some immigrant populations that is the subject of other articles in this symposium, the administration has leveraged the lowered due process protections afforded to immigrants to conduct heightened surveillance, engage in racial and religious profiling, and detain and remove immigrants on a sometimes specious basis.

The government is authorized to detain any person for whom it has certified that reasonable grounds exist to believe that the person

71. *See generally* Setty, *supra* note 63 (discussing the overly formalistic approach of the judiciary with regard to government invocations of the state secrets privilege).

72. *See, e.g.*, John Ashcroft, Att'y Gen., & James W. Ziglar, Comm'r, Immigration & Naturalization Serv., Announcement of INS Restructuring Plan (Nov. 14, 2001) (transcript at http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks11_14.htm ("The INS will also be an important part of our effort to prevent aliens who engage in or support terrorist activity from entering our country.").

73. *See* OFFICE OF INSPECTOR GEN., DEP'T. OF HOMELAND SEC., OIG-11-81, SUPERVISION OF ALIENS COMMENSURATE WITH RISK 1 (2011) [hereinafter DHS 2011 IG Report] (noting that immigration authorities had generally complied with applicable domestic laws).

74. *See* CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ASIAN AM. LEGAL DEF. & EDUC. FUND, UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DENIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS 18 (2011), http://aaldef.org/UndertheRadar.pdf [hereinafter UNDER THE RADAR) (citing the conclusion of the U.N. Special Rapporteur on the Rights of Migrants that U.S. immigration enforcement policies violate international laws that bar arbitrary detention).

has engaged in espionage,[75] opposition by violence,[76] or terrorist activity,[77] or is involved with an organization that is suspected of terrorist activity.[78] Since September 11, 2001, the federal government has relied heavily on immigration law and policy to detain, interrogate, control and remove suspected terrorists.[79] With fewer checks and balances, it is much easier for the government to arrest, detain, and investigate an individual under immigration law than criminal law. Unlike the U.S. criminal justice system, where defendants have the right to an attorney, the right to a speedy trial, and the presumption of innocence until guilt is proven beyond a reasonable doubt, immigration law does not afford detainees ample protections. For example, a noncitizen is permitted to have an attorney in immigration proceedings, but counsel is not provided for the 80% of detainees in removal proceedings who are indigent.[80] Furthermore, a noncitizen can be mandatorily detained for months or years before being released or removed from the United States, and the standard for removal is that of "clear and convincing evidence," a much lower standard than the criminal justice conviction standard of beyond a reasonable doubt.[81]

These lesser protections have allowed federal officials to undertake several initiatives that have targeted immigrants, primarily those from Muslim-majority countries, in the name of national security. Mus-

75. Immigration and Nationality Act (INA) § 237(a)(4)(A)(i), 8 U.S.C. § 1227(a)(4)(A)(i) (2012) (authorizing detention for those suspected of engaging in espionage, sabotage, or export control).

76. 8 U.S.C. § 1227(a)(4)(A)(iii) (authorizing detention for those expressing opposition by violence or overthrow of the U.S. government).

77. INA § 212236(a), 8 U.S.C. § 1226(a) (2012) (authorizing detention for those suspected of terrorist activity); 8 U.S.C. § 1182(a)(3)(B)(i)(III), (iv)(I) (2012) (authorizing removal of those indicating an intention to cause death or serious bodily harm or have incited terrorist activity); 8 U.S.C. § 1182(a)(3)(B)(i)(VIVII) (making inadmissible aliens who endorse or espouse terrorist activity or persuade others to endorse or espouse terrorist activity).

78. *See* 8 U.S.C. § 1182(a)(3)(B)(vi)(II)–(III); *see also* U. N. Sec. Council, *Letter dated June 15, 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-terrorism addressed to the President of the Security Council*, U.N. Doc. S/2006/397 (June 16, 2006) (noting that "if a group is designated or treated as a terrorist organization. . .[for immigration purposes,] aliens having certain associations with the group (including persons who knowingly provide material support to the group) become inadmissible to and deportable from the United States.").

79. In 2009, Immigration and Customs Enforcement (ICE) had over 1.6 million aliens in its scope of monitoring: in ICE detention centers, in other jails or prisons, or under a released monitoring system. *See* DHS 2011 IG Report, *supra* note 73, at 3.

80. *See* UNDER THE RADAR, *supra* note 74, at 3.

81. 8 U.S.C. § 1229a(c)(3)(A).

lims in the immigration system have been subjected to possibly abusive[82] preventive detention,[83] exclusion based on political views, heightened surveillance and arguably unconstitutional racial profiling.[84] Detainees in the immigration system face serious hurdles in challenging the government's case for removal due to the lower removal standard of "clear and convincing evidence" as well as the inability to access and challenge the secret evidence presented and alleged by the government.[85]

Additionally, the Federal Bureau of Investigation (FBI)'s police powers have generated a high level of scrutiny and surveillance of immigrant populations within the United States. The lowered due process protections accorded to immigrants allow for a more searching and less privacy-protective approach. Lawyers cite the presence of FBI agents during immigration proceedings, Immigration and Custom Enforcement's reliance on statements made in old FBI interviews in its decisions, and the FBI's submission of prejudicial affidavits raising national security concerns without providing the basis of the allegations. FBI agents have used the structural power imbalances inherent in the immigration processes to coerce Muslim immigrants into becoming informants, or retaliate if they refuse.[86]

II. WHY NOT NATIONAL SECURITY EXCEPTIONALISM?

The preceding section offered both the rationales for national security exceptionalism and several examples of it. The next question must then be, why not stick with national security exceptionalism? Beyond President Obama's exhortations that national security ought not

82. *See* Ashcroft v. Iqbal, 556 U.S. 662, 667–69 (2009).

83. Another category of detained aliens are those subject to an additional interagency screening called, Third Agency Check. This system to screen aliens in ICE custody who are from specially designated countries (SDCs) that have "shown a tendency to promote, produce, or protect terrorist organizations or their members." *See* DHS 2011 IG Report, *supra* note 73, at 5. The SDC list is largely comprised of majority Muslim nations. *See ICE List of Specially Designated Countries (SDCs) that Promote or Protect Terrorism*, PUBLIC INTELLIGENCE (July 2, 2011), http://publicintelligence.net/specially-designated-countries/.

84. *See* UNDER THE RADAR, *supra* note 74, at 4 (discussing various programs targeting noncitizens, including Absconder Apprehension Initiative, NSEERS special registration policy, and Operation Frontline). Another controversial immigration policing program is Secure Communities, which requires state and local police to send fingerprints of arrestees to ICE so that undocumented immigrants can be identified and possibly detained, prosecuted and removed. *See Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., http://www.ice.gov/secure_communities/ (last visited Nov. 9, 2015) (describing the Secure Communities program).

85. *See* UNDER THE RADAR, *supra* note 74, at 3, 4.

86. *See* id. At 8.

be an exceptional context, the focus here should be on the compelling problem of a lack of accountability over the commission of human and civil rights abuses. Both legal and pragmatic problems arise by categorizing national security matters as being fundamentally separate from other areas in which the administration has worked to protect or improve human and civil rights.

For example, the United States has long been party to international treaties prohibiting torture and cruel, degrading, and inhuman treatment, as well as extra-judicial killing and the disparate treatment of individuals based on race, ethnicity, and religious expression. Among them are the Universal Declaration of Human Rights,[87] the Geneva Conventions,[88] the International Covenant on Civil and Political Rights,[89] the American Convention on Human Rights,[90] and the Convention Against Torture.[91] On the domestic level, the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution have been interpreted as prohibiting torture,[92] and various domestic laws codify the obligations in the Convention Against Torture: the federal Torture Statute,[93] the Torture Victim Protection Act of 1991,[94] the Alien Tort Claims Act,[95] and the Foreign Affairs Reform and Restructuring Act of 1998.[96] There are no loopholes in international and domestic law that allow for torture, even in times of emergency. Further, international law demands that government-sanctioned torture must be investigated and prosecuted where found. The exceptionalism for the Bush administration was redefining the underlying acts so as to claim

87. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

88. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

89. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

90. American Convention on Human Rights, O.A.S. Treaty Series No. 36, July 18, 1978, 1144 U.N.T.S. 123.

91. U. N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

92. *See generally* Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

93. Foreign Relations Authorization Act of 1994, Pub. L. No. 103-236, § 506, 108 Stat. 382 (codified at 18 U.S.C. §§ 2340–2340B (2006)).

94. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350)).

95. Alien Tort Claims Act, 28 U.S.C. § 1350.

96. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681 (codified at 8 U.S.C. § 1231 (2006)).

that whatever techniques were being used by interrogators on detainees did not constitute torture.[97] For the Obama administration, the exceptionalism was deciding that, despite international law obligations to the contrary, the administration would not conduct an investigation into Bush-era torture[98] and ultimately would not prosecute any of those involved.[99] The administration has remained steadfast in this position despite the evidence made public through the Senate Torture Report,[100] and has aggressively sought dismissal of civil suits alleging torture, as described above.

For targeted killings, the international legal standards are murkier. The Obama administration's stated limits on the use of drones reflect a unilateralist legal interpretation of the applicable international and domestic legal constraints; as with much of the counterterrorism power that has aggregated in the executive branch since September 2001, there is no venue for challenging the administration's legal position other than through public pressure.[101] In his May 2013 speech,

97. Memos prepared by the Office of Legal Counsel in 2002 and 2003 advised the President and the military that detainees who were suspected members of Al Qaeda were not protected by international and domestic prohibitions against torture and, furthermore, that abuse of detainees would not constitute "torture" unless the interrogators intended to cause the type of pain associated with death or organ failure. *See* Memorandum from Jay S. Bybee, Asst. Att'y. Gen., to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002); Memorandum from Jay S. Bybee, Asst. Att'y. Gen., to John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency, Interrogation of al Qaeda Operative (Aug. 1, 2002). Those memos were subsequently rescinded, and several members of the military were convicted at courts-martial for detainee abuse. *See* Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES (Oct. 4, 2007), http://www.nytimes.com/2007/10/04/washington/04interrogate.html?pagewanted=all.

98. David Johnston & Charlie Savage, *Obama Reluctant to Look into Bush Programs*, N.Y. TIMES (Jan. 11, 2009), http://www.nytimes.com/2009/01/12/us/politics/12inquire.html (noting President Obama's statement that "we need to look forward as opposed to looking backwards").

99. Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES (Aug. 30, 2012), http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html.

100. Jennifer Bendery & Ali Watkins, *Despite Torture Uproar, DOJ Still Says No to Prosecutions*, HUFFINGTON POST (Dec. 9, 2014), http://www.huffingtonpost.com/2014/12/09/doj-torture_n_6298276.html.

101. 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) (same). For similar assessments of presidential power during the Obama administration, see generally Afsheen John Radsan, *Bush and Obama Fight Terrorists Outside Justice Jackson's Twilight Zone*, 26 CONST. COMMENT. 551 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684720; Aziz Rana, *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. 5099 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193084.

President Obama stated that he welcomed a conversation with Congress about a potential drone court, but noted that, given the scope of executive power in the area of foreign policy and counterterrorism, such a court may not be constitutional.[102] Such a view provides little more than cold comfort to those seeking to protect the rights of citizens and noncitizens being targeted for extrajudicial killings in the name of counterterrorism.

For these contexts, exceptionalism cannot be justified from a purely legal perspective, so the fallback justification turns on pragmatic concerns such as whether the administration thinks particular actions—like targeted killings or the non-prosecution of those involved in torturing detainees—benefit U.S. security interests or make sense from the perspective of political viability. And in this respect, President Obama is unexceptional; many presidents have used these pragmatic, non-legal justifications for their national security actions. Perhaps the only thing exceptional about this situation is that President Obama had promised a return to a non-emergency footing for the government and a return of the primacy of the rule of law.

CONCLUSION

Some parts of President Obama's national security exceptionalism should not be surprising; he advertised as early as his first presidential campaign that, if elected, he would send drones into Pakistan to target individuals there.[103] Yet his shift on the issues identified here have created two problematic dynamics with regard to rights protection: first, President Obama's rhetoric about restoring the rule of law and curtailing the perceived abuses of executive power[104] 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.[105] But repeated invocations of broad executive power and the excessive secrecy that has

102. *See* May 2013 NDU Speech, *supra* note 42, at 8.

103. *E.g.*, *Presidential Debate Transcript, Sept. 26, 2008*, MSNBC (Oct. 2, 2008), http://www.nbcnews.com/id/26990647/ns/politics-the_debates/t/presidential-debate-transcript-sept/#.VbeeCvlcCSo.

104. *See* Editorial, *Mr. Obama and the Rule of Law*, N.Y. TIMES (Mar. 21, 2009), http://www.nytimes.com/2009/03/22/opinion/22sun1.html (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).

105. *See* Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 KAN. L. REV. 579, 596–98 (2009) (discussing the ways

surrounded many of the Obama administration's policies, combined with excessive deference from the judiciary[106] and a lack of action in Congress on many of these matters, has essentially given a bipartisan imprimatur to claims of extremely broad executive power, a lack of rights-protective action on behalf of those subject to unfair disparate impact by the government, and a lack of accountability for past abuses.

Second, this exceptionalism has taken and continues to take a toll on the view of the United States in the international sphere. Even before he became president, Obama signaled the desire to reengage with the international community as a matter of legal compliance (e.g., outlawing the use of so-called "enhanced interrogation techniques"),[107] as good foreign policy (i.e., restoring America's moral authority in the world)[108] and as a matter of restoring the rule of law.[109] At least since 2009, the U.S. government has looked to garner the support and loyalty of allied nations that were skeptical of Bush-era U.S. counterterrorism efforts perceived to be dismissive of the countries' own priorities and cultural norms.[110] President Obama's signing of the executive orders outlawing torture and closing the Guantánamo Bay detention facility on his first day in office were meant as strong signals that the U.S. government was responding to concerns that the United States flouted its own human rights standards, disregarded the rule of law, and lacked sensitivity to Muslims around the world. These

in which the Bush administration employed a unilateralist unitary executive theory of power with regard to national security).

106. *See* Setty, *supra* note 63, at 1633–39 (detailing the overly deferential attitude of courts to invocations of the state secrets privilege by the Obama administration).

107. *See* Exec. Order No. 13491—Ensuring Lawful Interrogations, 74 Fed. Reg. at 4893–94 (reiterating the international and domestic law parameters for interrogations of detainees suspected of terrorist activity).

108. *Obama: 'We've Restored America's Standing'*, CNN (Nov. 18, 2009, 10:03AM), 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).

109. Adam Cohen, *Democratic Pressure on Obama to Restore the Rule of Law*, N.Y. TIMES (Nov. 14, 2008), http://www.nytimes.com/2008/11/14/opinion/14fri4.html.?pagewanted=print&_r=0 (noting that Democratic legislators were planning to hold then President-Elect Obama to his campaign promises to restore the rule of law).

110. *See* Brennan, *supra* note 40 (stating that maintaining strong alliances through upholding the rule of law was imperative).

changes have served not only moral interests, but the realpolitik interests of rebuilding trust and loyalty from traditionally-allied nations.[111]

But continued national security exceptionalism engenders a view of the United States as considering itself to be above international obligations to investigate and prosecute torturers and war criminals, and the view by the global community that the United States is willing to apply one standard for itself, and another for the rest of the world. As such, the exceptionalism not only poses real challenges in terms of law, morality and building useful relationships with allied nations, but it acts as a step backward for the creation of enforceable international norms and standards, and a step backward in efforts to restore a balance in the rule of law when it comes to national security matters.

111. Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SEC. J. 185, 212 (2012).