Counter-Terrorism Policies and Challenges to Human Rights and Civil Liberties

A Case Study of the United States of America

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Contents

Introduction 2
Historical Review: Counter-Terrorism in the US Pre-9/11 4
US Presidents 4
The US Counter-Terrorism in the Immediate Aftermath of 9/11 6
The PATRIOT Act 6
Presidential Order 7
The National Security Strategy Document 13
Counter-Terrorism Measures in the Obama and Trump Administrations 14
Drone Policy 14
Suspected Terrorists and Miranda Rights 18
The Trump Administration 20
Topics in the United States Counter-Terrorism 21
Surveillance and Privacy 21
Policing and Profiling 23
Interrogation and Torture 24
Conclusion 27
References 27

Abstract

The United States has confronted terrorism for decades. President's Nixon, Ford, Carter, Reagan, Bush, and Clinton responded to terrorism before September 11, 2001. In the aftermath of 9/11, President's Bush, Obama, and Trump have developed and implemented counter-terrorism policy. The United States'

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counter-terrorism policy has broad repercussions for human rights and civil liberties both domestically and internationally, repercussions felt by both allies and terrorists. The Executive branch has had the greatest impact on the United States' counter-terrorism policy, as Congress has granted ever-increasing powers and the Supreme Court has done little to challenge Executive action. Both the extension of Executive power and its implementation have been largely reactionary, leading to increased tensions – including violations – with human rights and civil liberties, either after terrorist attacks or in response to a perceived threat of attack. These reactionary policies are rarely revoked during times with lowered threat levels. National security and international interests are prioritized as individual rights are sacrificed. The United States' policy regarding drone policy, intelligence gathering practices, interrogation methods, and treatment of suspected terrorists who have been detained have raised significant questions regarding the preservation of civil and human rights.

Keywords
The US counter-terrorism policy · Human Rights · September 11 · PATRIOT Act · Enhanced interrogation · Military commissions · Drone policy · Miranda rights and suspected terrorists · The US Supreme Court · FISA

Introduction

The chapter presents a retrospective accounting of the US counter-terrorism policy. It begins by describing the US counter-terrorism policy with President Richard M. Nixon; while 9/11 is considered the most dramatic moment in the US experience with terrorism, previous American governments were also forced to address terrorism.

While these administrations did not interact with counter-terrorism strategy to the same extent as President George W. Bush, and subsequently President Barack Obama and President Donald Trump (all of whom operated/continue to operate within the post-9/11 context), history is important in an effort to better understand the US policy.

In addressing the US counter-terrorism policy, it is necessary to reference terrorist attacks that occurred both on the US soil and internationally. It is, after all, well-neigh impossible – or at least not recommended – to view terrorism exclusively through the silo of domestic events as that provides a limited perspective, at best.

Analyzing the US counter-terrorism through the lens of human rights and civil liberties suggests a "mixed bag" reflective of tactical, rather than strategic, responses. There is a sense, when examining the US policy – particularly post-9/11 – of lurching measures devoid of careful analysis. Perhaps this pattern is understandable in the face of an anxious public that signals the expectation that "something" be done in order to "defeat" terrorism. The illusion of defeating terrorism directly contributes to policy decisions that impact individual rights. In addition, the failure to engage the public in frank discussions regarding the limits of counter-terrorism

creates a false sense of government capability and a resulting public willingness to tolerate excess in the name of the anticipated "victory."

Examining the US policy, in the context of separation of powers and checks and balances, requires delving into the interaction between the Executive branch, Congress, and the Supreme Court. That interaction, unfortunately, does not reflect well on either the Congress or the Court. Both fall prey to overwhelming deference to the Executive branch and a misbegotten respect for executive privilege in the context of national security. That is most unfortunate, for as the retired President (Chief Justice) of the Israel Supreme Court, Professor Aharon Barak, wrote, "national security is not a magical phrase" (Barak 2002).

The lack of rigorous and consistent judicial review and Congressional engagement ill-serves both the public and principles of civil liberties and human rights. The discussion below reflects this failure; rather than developing, articulating, and implementing a consistent and nuanced counter-terrorism policy, successive US Presidents – from Nixon to Trump – have, overwhelmingly, gone for the "quick win" and a "consequences be damned" approach. The failure of Congress to fully engage the executive branch in the face of danger and threat, real or perceived, directly impacts protection of civil and individual rights. Similarly, the Supreme Court's traditional deference on matters of national security – Korematsu is but the most obvious of examples – leaves the "playing field" to the Executive branch. While some, including Professor John Yoo, forcefully advocate the "unitary executive," a careful review of the US counter-terrorism history clearly highlights the danger of this approach (Yoo 2009).

A counter-terrorism policy predicated on the rule of law – including the utmost respect for the separation of powers and checks and balances – must reflect balancing legitimate national security requirements with equally legitimate rights and freedoms of the individual. While responses are justified in the face of an actual or perceived threat, the question is what the response seeks to achieve and what alternatives are available to decision makers. These two questions are particularly relevant when considering how a legitimate target is defined and when the identified target is a legitimate target. That, in many ways, is the relevant point of inquiry when analyzing counter-terrorism, for it defines state power and how – and when – it is exercised.

These are questions that must give pause to decision makers before authorizing a counter-terrorism operation, whether through physical engagement, violating protected privacy, limiting movement and freedom of an individual, or any other method intended to enhance public safety and order.

To address these issues, the chapter is organized in the following sections: "Introduction," "Historical Review: Counter-Terrorism in the US Pre-9/11," "The US Counter-Terrorism in the Immediate Aftermath of 9/11," "Counter-Terrorism Measures in the Obama and Trump Administrations," "Topics in the United States Counter-Terrorism" and "Conclusion."

Historical Review: Counter-Terrorism in the US Pre-9/11

While September 11, 2001, would strike most Americans as the starting date for terrorism, the truth is very different, from both the national and international perspective. However, the scope and intensity of the attacks that Tuesday morning dramatically reshaped the US understanding of and response to terrorism both in the short- and long term. The shift in America's response has deeply impacted American politics and way of life. How a nation responds to such a terrorist attack offers insight into its unique worldview. This outlook is shaped by numerous factors including political infrastructure, culture, and history. To best understand the US policy today, we briefly examine how Presidents, since Richard Nixon, have responded to terrorism.

US Presidents

President Richard Nixon (1969–1974)

The Nixon administration was confronted with international terrorism when a Palestine Liberation Organization (PLO) splinter group ("Black September") killed 11 Israeli athletes in the 1972 Munich Olympics. That day, Americans faced issues that had not been a part of the American culture: the Middle East, terrorists, and the PLO. The impact of that day, primarily a result of television coverage, was significant. According to documents made public, the Nixon administration established a terrorism taskforce. The documents reflect concern regarding potential biological terrorism; however, for various reasons – the Vietnam war, Watergate, and Nixon's resignation from office – the taskforce was disbanded (Barber 2016).

President Gerald Ford (1974–1977)

In response to the Church Committee, which investigated Central Intelligence Agency (CIA) abuses, the Ford administration issued an Executive Order outlawing the assassination of leaders of a sovereign state. The order, reissued by subsequent administrations, was the Ford administration's principal contribution to counterterrorism.

President Jimmy Carter (1977–1981)

The Carter administration's primary foreign policy focus was human rights. In November 1979, 51 Americans were taken hostage in Iran. The administration's operational effort ended when a rescue mission was aborted; eight servicemen were killed. America's incompetent execution of the mission was noted by international actors including terrorist organizations.

President Ronald Reagan (1981–1989)

Ronald Reagan's counter-terrorism policy sounded firm and decisive: "Let terrorists beware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution." However, reality was very different.

In what are considered suicide bombings conducted by terrorists, hundreds of Americans Marines were killed in Beirut in two separate attacks (Donohue 2001).

In response, President Regan ordered the withdrawal of the Marines from Beirut. According to terrorists and students of terrorism alike, this decision may be the seminal event in the history of modern terrorism. Terrorist leaders realized, and no doubt internalized, a wide gulf between America's stated policy and reality.

Similarly, following the brutal murder of Navy SEAL Robert Stethem by Hezbollah terrorists in Beirut during a plane hijacking, the Reagan administration's primary efforts were to negotiate an end to the hijacking. Though television showed terrorists throwing Stethem, onto the airport tarmac after shooting him in the head, the American response was one of weakness. President Reagan responded forcefully to the killing of American servicemen in a Berlin disco by attacking Libyan targets, including a presidential palace, allegedly killing one of Mu'amar Kaddafi's children. However, the attack appears to have been retaliatory in both nature and scope and thus in violation of international law, which does not allow for acts of reprisal.

Furthermore, the United States was actively encouraging, if not aiding, the Mujadin in Afghanistan. The Mujadin was engaged in pitched battle with the Soviet Union following the Red Army's invasion of Afghanistan, thereby facilitating Osama bin Laden's ascendency. America's singular focus on the Soviet Union, in the context of the Cold War, prevented the Reagan administration from identifying terrorism as the next threat to world order and stability.

President George H. Bush (1989–1993)

The first Bush administration's response to the 1988 Pan Am 103 terrorist attack, which claimed 270 lives (189 Americans), was to apply the criminal law paradigm initiating legal proceedings against Libyan agents responsible for the attack. It could be argued that the administration was hamstrung because the attack occurred over Scottish territory; nevertheless, Americans flying in an American commercial airliner were the intended target. Not only did the administration choose not to respond operationally against Libya but also its policy response was limited to initiating traditional criminal law measures (Guiora 2011).

President William Clinton (1993–2001)

The first significant legislation against terrorism was the 1996 Antiterrorism and Effective Death Penalty Act. President Clinton had previously submitted counter-terrorism legislation, which was bogged down in Congress; however, after the Oklahoma City and World Trade Center Bombings, Congress and the Administration agreed on counter-terrorism legislation.

The Act established a list of designated foreign terrorist organizations (FTOs) and made it illegal for a person in the United States, or subject to the jurisdiction of the United States, to provide funds or other material to any group on the list. Representatives and members of a designated FTO, if noncitizens, can be denied visas or otherwise excluded from the United States. Finally, American financial

institutions must block funds of FTOs and their agents and report this action to the Office of Foreign Assets Control in the Department of the Treasury.

After the first World Trade Center bombing, which killed six people, the Subcommittee on International Operations of the House Foreign Affairs Committee held a hearing on July 13, 1993. One of its primary purposes was for the Clinton administration to articulate its counter-terrorism strategy. During the course of the hearings, Assistant Secretary of State Timothy Wirth set forth that policy:

> The Clinton administration is committed to exerting strong and steady leadership in a rapidly-changing world… United States and all nations can meet that challenge by maintaining a commitment to democratic institutions and to the rule of law.
> … Working in close consultation with the Congress, successive administrations have developed a set of principles, which continue to guide us as we counter the threat posed by terrorists. These include making no concessions to terrorists, continuing to apply increasing pressure to state sponsors of terrorism, forcefully applying the rule of law to international terrorists, and helping other governments improve their capabilities to counter the threats posed by international terrorists. (United States 103rd Congress 1993)

The policy expounded by Wirth was strong on rhetoric but weak on concrete operational counter-terrorism, and practical legal and policy initiatives.

The US Counter-Terrorism in the Immediate Aftermath of 9/11

President George W. Bush's response can best be understood by examining three documents: the PATRIOT Act (October 2001), the Presidential Order establishing military commissions (November 2001), and the National Security Strategy document establishing the Bush preemption doctrine (NSSD, October 2002). The timeline is significant; while the first two documents were drafted in the *immediate aftermath* of the 9/11 attack, the NSSD was signed by the President a year later.

Post-9/11 American policy must be examined from both a domestic and a foreign perspective. The PATRIOT Act is the legislative response to an attack on American soil, articulating tools and measures Congress provided the administration to defend America. The Presidential Order established a quasi-judicial process, devoid of independent judicial review for detainees suspected of involvement in terrorism, be they foreigners or noncitizens living in America, including those living legally in the United States. The NSSD reflects the administration's post-9/11 counter-terrorism policy of aggressively taking the fight to the terrorists.

The PATRIOT Act

The PATRIOT Act has been much debated and criticized. Critics of the Bush administration argued it reflected disdain for basic civil liberties. Supporters of the Administration upheld it as the appropriate legislative response to an attack on America. Sections 203, 206, 213, 215, 218, and 411 are of particular relevance to this chapter.

To summarize, section 203 allows information from grand juries to be shared with the CIA without prior approval of a judge. Section 206 grants roving surveillance authority after requiring a court order approving an electronic surveillance to direct any person to furnish necessary information, facilities, or technical assistance in circumstances where the court finds that the actions of the surveillance target may have the effect of thwarting the identification of a specified person. Section 213, also known as the "sneak and peek" exception to the "knock and announce" rule states that notification of searches can be delayed if it would seriously jeopardize the investigation.

Section 215 authorizes the government to seize any tangible items sought for an investigation to protect against international terrorism or clandestine intelligence activities. This may include records from banks, credit bureaus, telephone companies, hospitals, or libraries. Section 218 amends FISA (Foreign Intelligence Surveillance Act) to require that an application for an electronic surveillance order or search warrant certify that a significant purpose (formerly "the sole or main purpose") of the surveillance is to obtain foreign intelligence information.

Section 411 of the Patriot Act addresses the definition of terrorist activity:

1. commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
2. prepare or plan a terrorist activity;
3. gather information on potential targets for terrorist activity;
4. solicit funds or other things of value for a terrorist activity or a terrorist organization (with an exception for lack of knowledge);
5. solicit any individual to engage in prohibited conduct or for terrorist organization membership (with an exception for lack of knowledge); or
6. commit an act that the actor knows . . . affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training for the commission of a terrorist activity; to any individual who the actor knows . . . has committed or plans to commit a terrorist activity; or to a terrorist organization (with an exception for lack of knowledge). (USA PATRIOT Act 2001)

The PATRIOT Act greatly expanded investigative power, especially by increasing opportunities to conduct e-mail and Internet searches, to authorize clandestine physical searches, to benefit from flexible FISA standards, and to apply these new powers to investigate crimes entirely unrelated to terrorism.

Presidential Order

On November 13, 2001, President Bush issued a Presidential Order establishing military commissions for enemy combatants. Over the course of the next 4 months, 300 detainees were transported to Guantanamo Bay for purposes of interrogation and hearings before military commissions. According to Section Four of the Presidential Order (66 Fed. Reg. 57833, 2001), a detainee convicted on any charge

could appeal only to the President of the United States or the Secretary of Defense. The significance of this is now clear: The United States government held hundreds of detainees in Guantanamo Bay while denying them independent judicial review of their status and a determination of whether they were a present and continuing danger to the national security of the United States.

The 2001 Presidential Order was based on the presidential order issued by President Roosevelt following the arrest of German saboteurs caught in New Jersey and Florida. In *Ex parte Quirin* (1942, USA), the US Supreme Court upheld presidential authority to establish military tribunals; as a result, the saboteurs, including an American citizen, were executed.

President Bush's order was criticized in the United States and abroad. Critics repeatedly commented on serious violations of due process both in the order and the subsequently issued military instructions. Initial criticism focused on a number of issues, including:

1. Failure to consult with Congress before issuing the order.
2. The Authorization to Use Military Force ratified by Congress does not provide for the establishment of the Commission.
3. Lack of an independent appeals process.
4. Detainee's inability to challenge the cause for detention.
5. A reduced evidentiary standard allowing the introduction of any evidence found to be of "probative value to a reasonable person."

In retrospect, the decision to hold detainees in Guantanamo Bay seems to have been based on two primary considerations: a desire to detain the individuals geographically distant from the combat zone and not to detain them in the United States, where the argument could be made they must be granted full constitutional rights.

After the Presidential Order was issued, the Senate Armed Services and Judiciary Committees held a series of hearings. Administration witnesses justified the establishment of the military commission by arguing that to effectively fight terrorism, an alternate judicial regime was required. According to the Bush Administration, Article III courts were inappropriate both for trying terrorists and those who provided them safe harbor ("Preserving Our Freedoms While Defending Against Terrorism." 2001).

In *Quirin* (1942, USA), the Court used three different terms (unlawful combatant, enemy belligerent, and enemy combatant) in referring to captured German saboteurs. Though the Court upheld President Roosevelt's decision to bring the German saboteurs before a military tribunal, the Court did not resolve the larger, far more crucial issue of defining the saboteurs. The Court stated that

> "[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war." In attempting to determine the Court's "working definition" for any one of those interchangeably used terms, the assumption is that the Court was referring to an individual, engaged in combat with the United States, who for whatever reason was not a soldier as understood and defined in international law conventions. (Quirin 1942, USA)

The appellants in *Quirin* were German soldiers who lost their status as soldiers when they purposefully discarded their uniforms. Distinct from terrorists, who do not belong to a regular army, the 1942 Court seemingly applied this "working definition" to individuals who had been soldiers. The loss of their status, due to their own actions, enabled the Court to determine that they were not acting as soldiers at the time of their capture and thus not entitled to prisoner of war status. This is distinct from terrorists who, unlike soldiers, do not fight on behalf of a nation state; important to recall, that terrorists are understood to be non-state actors.

In relying on *Quirin*, the administration established a unique judicial regime for the express purpose of trying detainees. The judicial regime created by the Bush administration was based on two foundations: (1) that the detainees were not prisoners of war and therefore could be brought to trial and (2) that the detainees were not entitled to traditional Article III protections afforded to defendants in the traditional criminal law paradigm ("Preserving Our Freedoms While Defending Against Terrorism." 2001).

According to administration officials who testified before the Congress, the fundamental purpose of the presidential order was to "target a narrow class of individuals – terrorists." In response to widespread criticism that the order insufficiently guaranteed detainee's rights, the Department of Defense issued ten instructions intended to facilitate the order's implementation. The ten instructions addressed a wide variety of issues (see Fig. 1).

Determining the appropriate forum for trying suspected terrorists requires addressing two related questions: what the appropriate term to be used for those engaged in terrorism, and what rights are they to be granted. Did the attacks of September 11 result in a shift from crime control to armed conflict?

The suggestion that international terrorists pose a criminal threat is met with impatience in some quarters, as if it somehow diminishes the magnitude of the events of September 11. However, in democratic societies, crimes against national security – espionage, for example – are not generally handled by military commissions. The Military Order appears to rest on a perception that the current terrorist emergency is legally of a warlike character and not simply a danger to national security or suitable grounds for military involvement in law enforcement.

The criminal law process guarantees the accused the following protections: (1) a presumption of innocence until proven guilty; (2) the submission of evidence to an open court of law; (3) the right to confront witnesses; (4) the right to remain silent; (5) the right to appeal to an independent judiciary; and (6) the right to trial by a jury of peers. Perhaps the most important right granted by the criminal law process is the defendant's right to confront his accusers, thereby enabling cross-examination in open court. However, as counter-terrorism is based on intelligence information, the prosecution would be obligated to make intelligence sources available for cross-examination. As has been documented, the risk is extraordinarily significant – if not life-threatening – for sources who testify.

Adopting a paradigm that does not guarantee the defendant the right to confront witnesses enables the prosecution to base a case, either in whole or in part, on

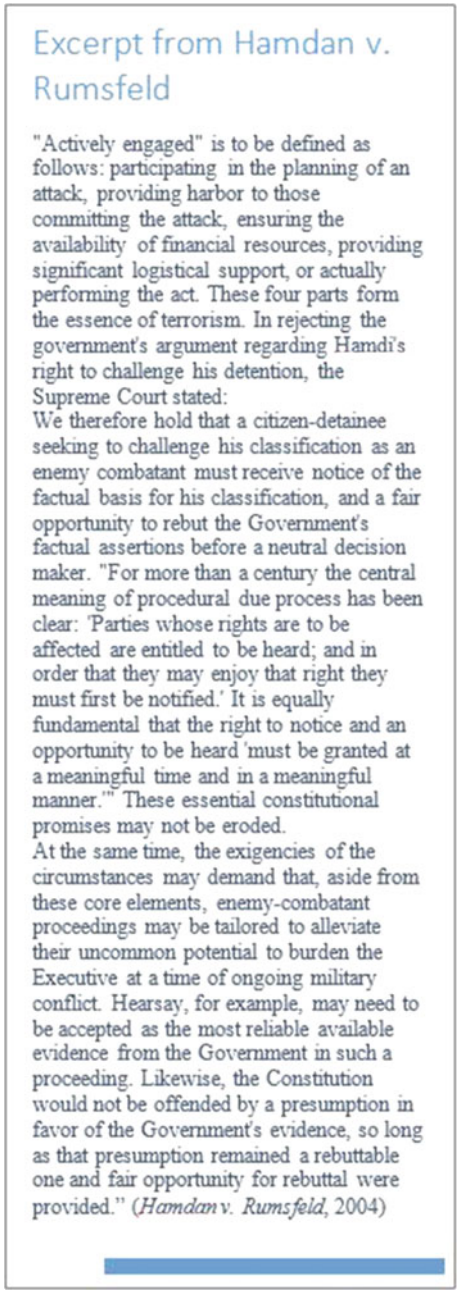


Fig. 1 Exerpt from Hamden v. Rumsfeld

intelligence information. As an example – albeit one that was criticized by the Supreme Court in *Hamdi v. Rumsfeld* (2004, USA) – the United States attempted to introduce intelligence information via the "Mobbs declaration." Justice O'Connor noted:

> On remand, the Government filed a response and a motion to dismiss the petition. It attached to its response a declaration from one Michael Mobbs. . .who identified himself as Special Advisor to the Under Secretary of Defense for Policy. Mobbs indicated that in this position, he has been "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban).". . .and declared that "[b]ased upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of . . . Hamdi and his detention by U. S. military forces.

Justice O'Connor continued:

> Mobbs then set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that he thereafter "affiliated with a Taliban military unit and received weapons training." It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces. . . The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants." Mobbs states that Hamdi was labeled an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban." *(Hamdi v. Rumsfeld* 2004).

In a series of memos, the Bush administration clearly articulated a position that those detained in the "war on terrorism" were not guaranteed Geneva Convention rights. Though the memos were subsequently "corrected," the administration's instinctive response is instructive in analyzing how the administration initially defined the terrorists' status.

In arguing that the detainees were not subject to Geneva Convention protections, the Administration determined that they were not soldiers. Thus, the administration found that the detainees were to be denied basic international law rights, with the exception of receiving food, water, shelter, and basic medical care. According to the administration, the detainees could be subject to torture, indefinite detention, and denied independent judicial review.

According to the Geneva Convention, captured soldiers must be returned to their home state upon the cessation of hostilities. Unlike traditional warfare, conflict in pursuit of counter-terrorism has no procedure for an agreed upon beginning or end. The lack of a foreseeable, agreed upon end to the conflict directly affects the detainees' status. As those detained will not be released in the foreseeable future, the question of their status directly impacts the rights granted to them (Geneva Convention Relative to the Treatment of Prisoners of War art. 118, 1949).

Unlike criminals, whose date of release is determined in their presence by either a judge or jury, enemy combatants as defined by the Bush Administration are to be held in a "black hole." Indefinite detention is a linchpin in defining the lack of rights of an enemy combatant.

According to the Presidential Order (66 Fed. Reg. 57833, 2001), an enemy combatant may be defined as any individual, who in any way or form came in contact with any member of al-Qaeda during any period of time with the intent of causing harm (in the broadest sense), to the United States. Enemy combatant is defined as an individual who need not necessarily have been involved in an act of terrorism; according to the above definition, it is sufficient to have provided assistance, even if minimal. Furthermore, the Order does not define the minimal degree required, thereby leaving significant grounds for interpretation by the executive in determining whether an individual is an enemy combatant.

Since 2001, more than 800 individuals have been transferred to Guantanamo Bay (Obama Administration Efforts to Close Guantanamo 2017). These individuals, accused of being enemy combatants, were considered by the United States government to be the "enemy."

Justice O'Connor's troubling words in *Hamdi* that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided," reflects a perspective that may suggest a "slippery slope" regarding rights denied to the defendants in military commission hearings (*Hamdi v. Rumsfeld* 2004).

A critical issue in the detention of enemy combatants is determining the threat they pose to the nation's security. One of the disturbing conclusions emanating from Guantanamo Bay is that some individuals were detained without cause. Furthermore, individuals were transported to Guantanamo though neither intelligence nor evidence was available regarding their involvement in terrorism, as required by the Presidential Order.

The criminal law paradigm, as analyzed in a wide range of the US Supreme Court cases, addresses the question of when an individual may be detained. What must be established is when an individual can be designated an enemy combatant, detained, and potentially remanded. Justice Stevens' dissent in *Rumsfeld v. Padilla* (2004) addresses this issue:

> There is. . . only one possible answer to the question whether he is entitled to a hearing on the justification for his detention. . . Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. . . Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.
> Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. (*Rumsfeld v. Padilla* 2004).

The Supreme Court addressed the issue of the military commissions and enemy combatants in *Hamdan v. Rumsfeld* (2004). The Court stated that under the commission's procedures:

> The accused and his civilian counsel may be excluded from and precluded from ever learning what evidence was presented during, any part of the proceeding that. . .the presiding officer decides to "close." Grounds for closure "include the protection of information classified or classifiable. . .; the physical safety of participants. . .including prospective witnesses; [the protection of] intelligence and law enforcement sources, methods, or activities; and other national security interests." (*Hamdan v. Rumsfeld* 2004).

Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information and "information concerning other national security interests"), so long as the presiding officer concludes that the evidence is "probative". . .and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." (*Hamdan v. Rumsfeld* 2004).

In further analyzing the procedures for the military commissions, the Court made clear that even if *Hamdan* were dangerous and posed a threat of great harm or death to innocent civilians, the government still must comply with the law.

Years after 9/11, the appropriate forum for trying suspected terrorists has not been clearly identified by the United States. The trail navigated by the Bush Administration was murky. From the initial decision to establish military commissions premised on troubled case law, the path has been less than clear. In determining that the suspected terrorists were not to enjoy Article III protections, the administration denied the detainees basic constitutional protections. Nevertheless, in at least one case, the administration decided to try a suspected terrorist in an Article III court.

The proceedings in the Moussaoui trial – result notwithstanding – resembled a circus more than a process. The manner in which the trial was conducted reflects enormous weaknesses in the traditional Article III judicial paradigm's ability to try "untraditional" defendants. The Bush administration's initial efforts to establish a new judicial paradigm were met with significant criticism from all quarters.

The failure to coherently and consistently articulate a response as to where suspected terrorists are to be tried is problematic from many perspectives – the legal, judicial, political, and practical. Rather than "define the issue," both the Executive and Judicial branches (perhaps with Congressional acquiescence) continued the tradition of failing to define the non-soldier combatant.

The National Security Strategy Document

The following clauses of the National Security Strategy Document clearly articulate President Bush's operational counter-terrorism policy:

1. "America will hold to account nations that are compromised by terror, including those who harbor terrorists because the allies of terror are the enemies of civilization . . . We will seek to deny them sanctuary at every turn.

2. As a matter of common sense and self-defense, America will act against such emerging threats . . .before they are fully formed.. . . In the new world we have entered, the only path to peace and security is the path of action.
3. We make no distinction between terrorist and those who knowingly harbor or provide aid to them.
4. We will not hesitate to act alone.. . . To exercise our right to self-defense by acting preemptively. . .
5. For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. . .We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.. . . To forestall or prevent such hostile acts by our adversaries the US if necessary will act preemptively. . . ." (The National Security Strategy 2002).

Counter-Terrorism Measures in the Obama and Trump Administrations

During the 2008 Presidential campaign, President Obama promised that if elected, counter-terrorism policies distinct from President Bush's would be developed, particularly closing Guantanamo Bay and not bringing suspected terrorists before Military Commissions. To that end, in January 2009, President Obama created three White House Task Forces mandated to address the following issues: identifying a proper forum for trying suspected terrorists, articulating a lawful interrogation regime, and closing Guantanamo Bay.

President Obama sought to strike a different tone: more cooperative and less confrontational than his predecessor. President Obama's National Security Strategy (outlined in Fig. 2) sought to articulate that shift in policy – both with respect to perception and application. Despite this attempt at shifting strategies, President Obama's counter-terrorism policies were very similar to President Bush's.

Terrorists and terrorist infrastructure continued to be aggressively attacked by the US drones, resulting in loss of life among intended targets and civilians alike. Guantanamo Bay has remained open, thus continuing the indefinite detention of inmates, and the question of where to try suspected terrorists remains largely unanswered. While many promises were never realized, there were a few notable shifts during the Obama administration. The formalization of drone policy and the question of when to apply Miranda rights are two key developments in the US counter-terrorism during the Obama Administration's tenure.

Drone Policy

Developments in drone policy directly reflected the shifting technology in counter-terrorism, as the United States moved away from "boots on the ground" and employed increasing drone strikes across the globe. During President Obama's first term, the Administration's drone used reportedly doubled from President Bush's two terms. During both terms of his presidency, President Bush reportedly

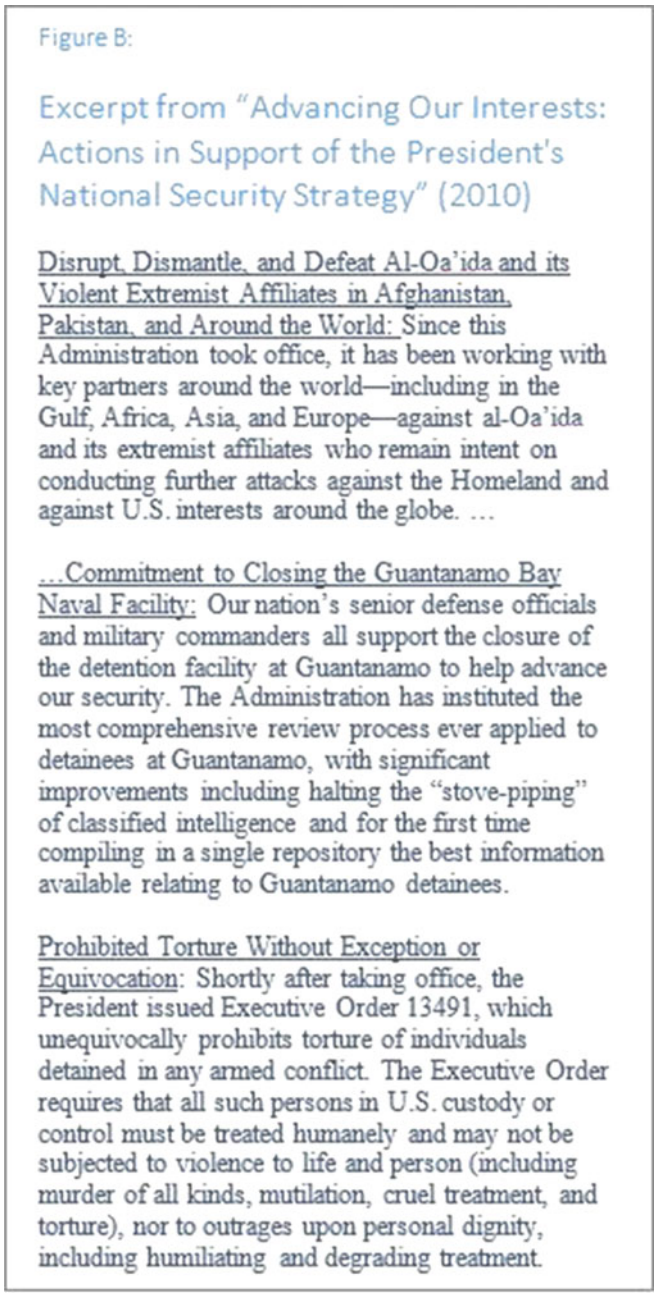


Figure B:

Excerpt from "Advancing Our Interests: Actions in Support of the President's National Security Strategy" (2010)

Disrupt, Dismantle, and Defeat Al-Qa'ida and its Violent Extremist Affiliates in Afghanistan, Pakistan, and Around the World: Since this Administration took office, it has been working with key partners around the world—including in the Gulf, Africa, Asia, and Europe—against al-Qa'ida and its extremist affiliates who remain intent on conducting further attacks against the Homeland and against U.S. interests around the globe. …

…Commitment to Closing the Guantanamo Bay Naval Facility: Our nation's senior defense officials and military commanders all support the closure of the detention facility at Guantanamo to help advance our security. The Administration has instituted the most comprehensive review process ever applied to detainees at Guantanamo, with significant improvements including halting the "stove-piping" of classified intelligence and for the first time compiling in a single repository the best information available relating to Guantanamo detainees.

Prohibited Torture Without Exception or Equivocation: Shortly after taking office, the President issued Executive Order 13491, which unequivocally prohibits torture of individuals detained in any armed conflict. The Executive Order requires that all such persons in U.S. custody or control must be treated humanely and may not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity, including humiliating and degrading treatment.

Fig. 2 Exerpt from "Advancing Our Interests: Actions in Support of the President's National Security Strategy" (2010)

allowed 51 drone strikes against terrorist targets in Pakistan (The Bush Years: Pakistan Strikes 2011), while President Obama allowed 52 strikes in 2009 alone (Obama 2009 Pakistan Strikes 2011) and then another 179 strikes by the end of 2010 (Obama 2010 Pakistan Strikes 2011).

The White Paper

On September 30, 2011, an American drone fired a missile at a truck in the Yemeni desert, killing two American citizens, Anwar al-Awlaki and Samir Khan, and several other al-Qaeda leaders. Anwar al-Awlaki had been a successful recruiter for al-Qaeda, with a large presence on YouTube (Gonzales 2013). Several terrorists including the Boston Marathon Bombers and the attempted Christmas Day Airline Bomber were believed to be influenced by his videos or by conversations with al-Awlaki himself (Shane 2015).

On February 4, 2013, NBC News posted a leaked Department of Justice "White Paper" on the legality of drone targeting of the US citizens. The document was prepared by the Department of Justice in 2011 for lawmakers in response to their requests for access to the then-classified Office of Legal Counsel memo on targeting Anwar Al-Awlaki (Savage 2013a). The White Paper sets forth the legal framework in which the US government could use lethal force in a foreign country against a US citizen.

The White Paper states:

> It would be lawful for the United States to conduct a lethal operation outside the United States against a US citizen who is a senior, operational leader of al-Qa'ida or an associated force of al-Qa'ida without violating the Constitution or the federal statutes discussed in this white paper under the following conditions: (1) an informed, high-level official of the US government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation is conducted in a manner consistent with the four fundamental principles of the laws of war governing the use of force (United States, Department of Justice 2013).

The White Paper is to date the best articulation of Obama era drone policy. It expresses the characteristics of a legitimate target and broadens the notion of an imminent threat. The White Paper notes that imminence does not "require. . .clear evidence [of] a specific attack. . .in the immediate future." Al-Qaida's "continually plotting attacks," argues the Justice Department, satisfies any requirement that a threat be "imminent." It does not elaborate on what would qualify an individual as a "senior operational leader of al-Qaida," nor does it define "associated forces" (United States, Department of Justice 2013).

Table provided in "Summary of Information Regarding U.S. Counter-terrorism Strikes Outside Areas of Active Hostilities", released July 1, 2016

Summary of U.S. Counterterrorism Strikes Outside Areas of Active Hostilities between January 20.2009 and December 31.2015	
Total Number of Strikes Against Terrorist Targets Outside Areas of Active Hostilities	473
Combatant Deaths	2372-2581
Non-Coenbatant Deaths	64-116

"Areas of active hostilities" included Afghanistan, Iraq, and Syria.

The vague terminology and lack of oversight or outwardly imposed limit casts doubt on claims of self-defense, whether alternatives other than a drone strike might be appropriate, and whether the use of state power is proportionate to the threat alleged. Moreover, the White Paper details a legal framework under which such a killing would be lawful if a target is "outside a recognized battlefield" (United States, Department of Justice 2013), thus legitimizing a wider range of the US involvement.

In 2016, the Obama Administration issued an Executive Order that continued a brief explanation of drone policy and statistics on both combatant and noncombatant deaths that had resulted from the US drone policy. The data left many independent groups such as the New America Foundation and the Bureau of Investigative Journalism concerned that the Administration was normalizing the use of drone attacks while utilizing terms that lacked precise definition, much less consistent implementation (United States, Office of the Press Secretary 2016).

The fact sheet press release accompanying the Executive Order included the following:

> In May 2013, President Obama issued Presidential Policy Guidance (PPG) that, among other things, set forth policy standards for US direct action outside the United States and outside areas of active hostilities. These policy standards generally include that the United States will use lethal force only against a target that poses a "continuing, imminent threat to U.S. persons,' and that direct action will be taken only if there is "near certainty' that the terrorist target is present and "near certainty' that non-combatants will not be killed or injured. . . (United States, Office of the Press Secretary 2016).

The PPG was a four-page document, and the accompanying statistics failed to account for even half of the civilian casualties that watchdog entities estimated. While the Obama Administration counted 473 drone strikes and 116 civilian deaths, the Council on Foreign Relations cited "542 drone strikes that . . . killed an estimated 3,797 people, including 324 civilians."(Zenko 2017).

The New York Times investigated discrepancies between government reports on civilian casualties in drone and airstrikes in Iraq. Between April 2016 and June 2017, authors visited the sites of nearly 150 airstrikes across

northern Iraq, interviewed witnesses, intelligence informants, and local officials. They were also granted access to the operations floor of the American base in Qatar from which the strikes are ordered. The study focused on 103 airstrikes and found:

> . . .that one in five of the coalition strikes we identified resulted in civilian death, a rate more than thirty-one times that acknowledged by the coalition. . . While some of the civilian deaths we documented were a result of proximity to a legitimate ISIS target, many others appear to be the result simply of flawed or outdated intelligence that conflated civilians with combatants. In this system, Iraqis are considered guilty until proved innocent. Those who survive the strikes. . . remain marked as possible ISIS sympathizers, with no discernible path to clear their names (Khan and Gopal 2017).

Suspected Terrorists and Miranda Rights

On Christmas Day, 2009, Umar Farouk Abdulmutallab attempted to detonate explosives hidden in his underwear while on board Northwest Airlines Flight 253 en route from Amsterdam to Detroit, Michigan. Abdulmutallab claimed his attack was motivated by his communication with Al-Qaeda operatives including Anwar al-Awlaki (Dolan 2011). On May 1, 2010, Faisal Shahzad attempted to detonate a car bomb in New York City's Times Square. He claimed that his anger at the United States stemmed from drone strikes in Pakistan (Wilson 2010). Both attacks were stopped before there was loss of life. On April 15, 2013, at the Boston Marathon, two homemade bombs detonated near the finish line, leaving three dead and several hundred injured. The ensuing manhunt left Tamerlan Tsarnaev, one of the perpetrators, dead. His brother, Dzhokhar Tsarnaev, was captured by police. Dzhokhar claimed that he and his brother were self-radicalized but had been influenced by the wars in both Iraq and Afghanistan (Cooper et al. 2013). These events demanded the Obama Administration determine how best to address individuals whose actions were influenced by events – and incitement – occurring internationally but who conducted attacks on American soil.

As the Obama Administration sought to disengage from Guantanamo Bay, this imposed the requirement to resolve two vexing issues: where to try suspected terrorists and what rights and protections should be extended to them. The complexity of this dilemma was exacerbated by the fact that some of the perpetrators of this combined international-domestic terrorism were American citizens or those lawfully residing in the United States.

The Obama Administration proposed that suspected terrorist be tried in federal court. Attorney General Eric Holder explained before a Senate Judiciary Committee on November 18, 2009:

> We know that we can prosecute terrorists in our federal courts safely and securely because we have been doing so for years. There are more than 300 convicted international and domestic terrorists currently in Bureau of Prisons custody including those responsible for the 1993 World Trade Center bombing. . . (United States Congress, Committee on the Judiciary 2009).

President Obama and A.G. Holder agreed on this point, though a large portion of the American public approved of military tribunals (Gallup 2009). In an Interview with *60 Minutes*, when asked to respond to those who claimed the American Justice system was incapable of dealing with terrorists, President Obama said: "I fundamentally disagree with that. Now do these folks deserve Miranda rights? Do they deserve to be treated like a shoplifter down the block? Of course not" (60 Minutes CBS 2009).

A.G. Holder and President Obama disagreed on this point. On the heels of both the failed Time Square bombing and the failed Northwest Airlines Flight 253 bombing, Holder recommended suspected terrorists be granted Miranda rights. In the immediate aftermath of Faisal Shahzad's attempt to blow up an SUV, Holder stated on ABC's "This Week":

> The [Miranda] system we have in place has proven to be effective. . . .I think we also want to look and determine whether we have the necessary flexibility–whether we have a system that deals with situations that agents now confront. . . .I think we have to give serious consideration to at least modifying that public-safety exception [to the Miranda protections]. . . that is also relevant to our times and the threats that we now face.

In *Miranda v. Arizona* (1966), the Court created the "Miranda warning" in order to protect the rights of suspects, with an understanding that in an interrogation, the power lies with the interrogator. It imposes a two-part obligation upon an interrogator; the interrogator must read the warning to the suspect and ensure the suspect understands the rights granted. It is the suspect's personal decision to waive those rights.

There is still no official policy on relaying Miranda rights to terrorists. A short memo released by the FBI in 2010 instructed agents to use a broadened notion of the public safety exception not to delay informing suspects of their Miranda rights but to "advise the arrestee of his Miranda rights and seek a waiver of those rights before any further interrogation occurs" once all public safety questions were exhausted (Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States 2010).

The recitation of Miranda rights occurred in both Shahzad and Abdulmutallab's investigations. Faisal Shahzad was interrogated for 3 or 4 h before he was read his Miranda rights, and then chose to waive those rights and continued to cooperate with investigators (Savage 2013b). Umar Farouk Abdulmutallab was read his Miranda rights after 50 min and requested a lawyer. He stopped talking to investigators for several weeks but after his family and lawyer urged him to cooperate, Abdulmutallab resumed talks with law enforcement and continued to cooperate (Savage 2013b). Dzhokhar Tsarnaev did not have Miranda rights read to him until nearly 16 h into interrogation.

The head of the American Civil Liberties Union commented "The public safety exception to Miranda should be a narrow and limited one, and it would be wholly inappropriate and unconstitutional to use it to create the case against the suspect" (Bazelon 2013).

The Trump Administration

Current policy is fluid in nature. Most policies continue uninterrupted though initial estimates indicate another increase in the use of drones. In his first 100 days in office, President Trump carried out more strikes in Yemen than had been conducted in 2015 and 2016 combined (Serle 2017). According to statistics compiled by Airwars, a watchdog group, there were nearly 50% more coalition air strikes in Iraq and Syria in 2017 compared with the previous year; civilian deaths rose by 215% (Hopkins 2018). The United States killed more than 200 people in Somalia in 2017, according to the Bureau of Investigative Journalism (Newton 2018).

On the domestic front, one of the most identifiable differences between President Trump and his predecessor involves the overt intertwining of immigration policy and the supposed needs of counter-terrorism efforts. In the first week in office, President Trump issued the Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States (United States Exec. Order No. 13769, 2017). The Order suspended immigration from seven predominantly Muslim countries, including Iran, Syria, Libya, Yemen, and Somalia. Citing 9/11, the Order states "The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. . . The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans"(United States Exec. Order No. 13769, 2017).

Critics immediately deemed the order a "Muslim Ban" and questioned its legal standing. Several critics cited promises made during the election, including well-documented tweets and Trump's retweeting of anti-Muslim hate videos (see "Donald Trump Retweets Far-Right Group's Anti-Muslim Videos." 2017).

On June 26, 2018, the US Supreme Court upheld the third iteration of the Executive Order as constitutional, finding it reasonable that national security concerns in immigration were well within the realm of Executive authority (Liptak 2018). Trump applauded the decision, stating:

> Today's Supreme Court ruling is a tremendous victory for the American People and the Constitution. . . In this era of worldwide terrorism and extremist movements bent on harming innocent civilians, we must properly vet those coming into our country (Statement from the President Regarding Supreme Court Ruling, 2018).

Supreme Court Justice Sotomayor wrote the Supreme Court's dissent. She delineated the anti-Muslim rhetoric Trump utilized both as a candidate and as President:

> Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims entering the United States" has since morphed into a "Proclamation" putatively based on national-security concerns. . .
> The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. (*Trump v. Hawaii* 2018).

Sotomayor continued to compare the Ban to the internment of Japanese-Americans during World War II. She ends the dissent by stating:

> Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent (*Trump v. Hawaii* 2018).

Topics in the United States Counter-Terrorism

The issues discussed in this section are not singular to a particular administration yet are important to examining the United States counter-terrorism policies in the context of civil liberties and human rights. In analyzing whether otherwise guaranteed rights and privileges are sufficiently protected, it is important to recognize the significant tension points between individual rights and national security. The question is whether decision makers have satisfactorily balanced competing interests and tensions.

Surveillance and Privacy

The development of a viable counter-terrorism policy requires intelligence gathering; the question is what costs are legitimate given constitutional and legislative limits on government intrusions of personal privacy. In order to understand surveillance and privacy within the United States, one must study both the Wiretap Act of 1968 and the Foreign Intelligence Surveillance Act (FISA) courts.

The following testimony, given to the 9/11 Commission by Marc Rotenberg, executive director of the Electronic Privacy Information Center, highlights the increasingly critical role technology plays in obtaining intelligence. Rotenberg's testimony suggests that increased technical abilities can reduce constitutionally granted protections.

> the.. key cornerstone to think about in assessing privacy protection in the United States is the Federal Wiretap Act. The wiretap statute was passed in 1968, following perhaps two of the most important privacy cases decided by the United States Supreme Court. One. . . concerned the use of a tape recorder in a public payphone . . . and whether that new investigative method would require the use of a warrant, which is to say judicial approval, or whether law enforcement could be free to use any new form of technology without judicial oversight to gather evidence that could be used in the criminal prosecution.
> . . .the court said quite clearly in Katz v. United States that this new type of technology needs to be subject to Fourth Amendment standards; not that it could not be used or that a prohibition should be established but rather that the traditional Fourth Amendment standards would be required for electronic surveillance. (Rotenberg 2003).

The US Congress enacted the Foreign Intelligence Surveillance Act (FISA) in 1978 (Foreign Intelligence Surveillance Act, USA 1978). Its primary purpose was to "secure framework . . . [for] electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights" (United States v Pelton 1987). To achieve these ends, FISA established the Foreign Intelligence Surveillance Court (FISC), a special court with exclusive jurisdiction to hear and grant Foreign Intelligence Surveillance Orders. FISC hearings are closed to the public and classified.

According to section 1804 of FISA, gathering foreign intelligence information from a suspected foreign agent must be a significant purpose of the surveillance. Section 1804(a)(7)14 allows the government to conduct wiretap surveillance of foreign powers or agents of a foreign power. However, section 1804(a)(7) limits surveillance: the conversations cannot involve American citizens; a significant purpose of the surveillance must be to obtain foreign intelligence information; such information cannot reasonably be obtained by normal investigative techniques; and the FISA court must issue a wiretap.

Between 1978 and 2009, the government submitted 80,625,358 warrant requests; 81,425,360 were issued. Despite the fact that the Court grants an overwhelming number of warrant requests, the Bush Administration – in the aftermath of 9/11 – decided to bypass FISA and ordered warrantless wiretaps on phone conversations originating overseas. According to numerous media reports, the taps included American citizens (Bamford 2005), a clear violation of FISA.

Presently, FISA Court judges weigh the reliability of intelligence in determining whether to grant government ex parte requests for wiretapping warrants. The standard the court would adopt in determining the information's reliability is the same standard applied in the traditional criminal law paradigm. The intelligence must be reliable, material, and probative.

On January 27, 2006, amid increasing controversy surrounding the NSA wiretapping program, the White House issued a document to journalists entitled The National Security Agency Program to Detect and Prevent Terrorist Attacks: Myth vs. Reality(United States Department of Justice, Office of Public Affairs 2006), In response to claims that Bush's authorization of the warrantless wiretaps exceeded executive powers, the White House asserted the following points:

- As Commander-in-Chief and Chief Executive, the President has legal authority under the Constitution to authorize the NSA terrorist surveillance program.
- The Constitution makes protecting our Nation from foreign attack the President's most solemn duty and provides him with the legal authority to keep America safe.
- It has long been recognized that the President has inherent authority to conduct warrantless surveillance to gather foreign intelligence even in peacetime. Every federal appellate court to rule on the question has concluded that the President has this authority and that it is consistent with the Constitution.
- Since the Civil War, wiretaps aimed at collecting foreign intelligence have been authorized by Presidents, and the authority to conduct warrantless surveillance for foreign intelligence purposes has been consistently cited and used when necessary.

- The White House document also rejected assertions that the NSA program violated the Fourth Amendment: The Supreme Court has long held that the Fourth Amendment allows warrantless searches where "special needs, beyond the normal need for law enforcement," exist. . .
- As the Foreign Intelligence Surveillance Court of Review has observed, the nature of the "emergency" posed by al Qaeda "takes the matter out of the realm of ordinary crime control."
- The program easily meets the Court's reasonableness test for whether a warrant is required. The NSA activities described by the President are narrow in scope and aim, and the government has an overwhelming interest in detecting and preventing further catastrophic attacks on American soil (2006).

The Bush White House rejected the argument that warrantless wiretaps violated provisions of FISA. They claimed that the NSA activities come from the very center of the Commander-in-Chief power.

Public mistrust of the NSA spiked again during the 2013 Snowden leaks (Lucas 2014). Edward Snowden, an NSA contractor, leaked classified documents that revealed that the NSA was collecting data from numerous vectors. The NSA cited both the Patriot Act and FISA to justify the collection of data, which ranged from recordings of telephone calls to internet records, cell phone locations to Skype calls (Macaskill and Dnace 2013).

Skepticism from the American public has decreased corporate willingness to openly cooperate with government intelligence gathering, particularly within the technological fields (Segal 2017).

The best example of the tense relationship between the American technology industry and government intelligence and investigatory agencies occurred after the San Bernardino shootings in 2015 (Aitken 2015). Fourteen people were killed, and 22 others were seriously injured in a two-part terrorist attack that involved a mass shooting and an attempted bombing in San Bernardino, California. The two perpetrators, Syed Farook and Tasheen Malik, were killed by police. The police managed to recover Farook's IPhone 5, but neither the FBI nor the NSA could access the phone due to security features. The FBI claimed it could not surpass the iPhone's encryption without Apple's aid. Then-FBI-director James Comey repeated the claim twice in Congressional testimony. Apple declined to help the FBI, citing the risks that the process would pose to every customer's phone.

The FBI ultimately was able to unlock the phone using the help of a third party, thus failing to resolve the fundamental questions that the conflict inspired. As of May 2018, the FBI was holding 1000–2000 locked phones in connection with a multitude of investigations (Savage 2018).

Policing and Profiling

Before September 11, about 80% of the American public considered racial profiling immoral. A federal law on racial profiling seemed likely. After September

11, however, polls reported that 60% of the American public favored ethnic profiling, at least as long as it was directed at Arabs and Muslims (Cole and Dempsey 2006).

The fact that the perpetrators of the September 11 attack were all Arab men, and that the attack appears to have been orchestrated by al Qaeda, led many to believe that it would be a reasonable precaution to pay closer attention to Arab-looking men boarding airplanes and elsewhere (Cole and Dempsey 2006).

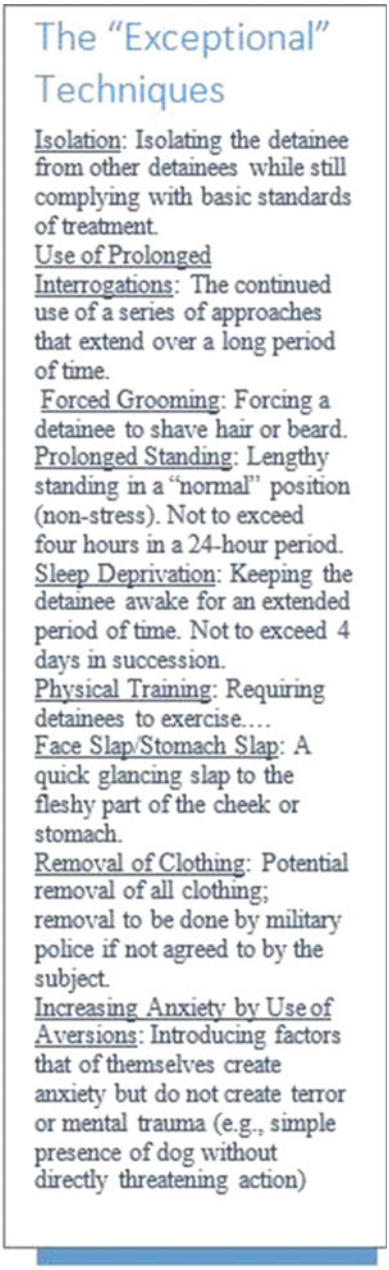
Racial profiling implies "guilt by association," a concept that raises profound constitutional questions and reflects a continuing imbalance between national security considerations and individual rights. The Supreme Court on a number of occasions expressly stated the unconstitutionality of guilt by association (see *NAACP v. Claiborne Hardware Co*. 1982); *United States v. Robel* 1967; *Keyishaian v. Board of Regents* 1967). In *NAACP v. Claiborne Hardware Co* (1982), the Court held that the First Amendment "restricts the ability of the State to impose liability on an individual solely because of his association with another." The Court wrote that to "punish association with such a group, there must be 'clear proof that a defendant specifically intends to accomplish the aims of the organization by resort to violence."

However, the Supreme Court has upheld the convictions of individuals for membership in a group that advocates overthrowing the US government by force or violence (*Scales v. United States* 1961). In order for membership to be illegal, the Court held that the membership must be knowing, active, and purposive as to the organization's criminal ends. The Justice Department maintains that "the racial profiling guidance recognizes that race and ethnicity may be used in terrorist identification, but only to the extent permitted by the nation's laws and the Constitution" (*Scales v. United States* 1961).

Interrogation and Torture

In the aftermath of 9/11, the United States defined the "limits of interrogation" extremely broadly. The Administration based this policy on the assumption that detainees are not entitled to Geneva Convention protections. The result was a policy that directly led to the human rights abuses at sites like Abu Ghraib and Guantanamo Bay. The first exemplifies mistreatment by prison guards, while the second captures mistreatment by interrogators.

Abu Ghraib prison was the US Army detention center twenty miles west of Baghdad from 2003 to 2006. At the height of use, the prison held as many as 3,800 detainees. An investigation into the treatment of detainees was prompted by the discovery of graphic photos depicting guards brutally abusing detainees. Abuses included physical and sexual abuse, rape, torture, sodomy, and at least one case of murder (see Greenwald 2009; Hersh 2004).


The "Exceptional" Techniques
Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment.
Use of Prolonged Interrogations: The continued use of a series of approaches that extend over a long period of time.
Forced Grooming: Forcing a detainee to shave hair or beard.
Prolonged Standing: Lengthy standing in a "normal" position (non-stress). Not to exceed four hours in a 24-hour period.
Sleep Deprivation: Keeping the detainee awake for an extended period of time. Not to exceed 4 days in succession.
Physical Training: Requiring detainees to exercise....
Face Slap/Stomach Slap: A quick glancing slap to the fleshy part of the cheek or stomach.
Removal of Clothing: Potential removal of all clothing; removal to be done by military police if not agreed to by the subject.
Increasing Anxiety by Use of Aversions: Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action)

Interrogation policies implemented by the Bush administration violated both the Geneva Convention and the US domestic law. In a memo written by Assistant Attorney General Jay S. Bybee, he stated that Geneva Convention protections do not pertain to the detainees (Bybee 2002). Two independent investigations, the Schlesinger commission and an internal Army review, contained disturbing information regarding torture and mistreatment of prisoners in Afghanistan, Iraq, and Guantanamo (Hooks and Mosher 2005). While the US law forbids torture, the Bybee memo – and subsequent statements and actions by the Bush administration – created a climate where basic violations of human rights were acceptable, if not encouraged.

In a Department of Defense memorandum, military officials divided nonroutine interrogation techniques into two broad categories. The first category contained 20 techniques, all recommended for approval. These included techniques with names "Dietary Manipulation," "Environmental Manipulation," and "Isolation." A second set of eight techniques was recommended for approval only "where there is a good basis to believe that the detainee possesses critical intelligence" and where the detainee has been determined to be medically suitable to withstand the technique (United States Department of Defense 2003).

The Bush Administration developed additional memos to provide legal basis for water boarding. The technique was utilized on several detainees at Guatanamo Bay Detention Center, often repeatedly. Khalid Sheik Mohammed, one of the 9/11 planners, was water boarded 183 times before the practice was abandoned. The harsh reality of the technique was minimized to the public, referred to as simulated drowning.

In 2009, the Obama administration released the most comprehensive accounting of torture during the Bush administration. The Obama administration decided not to prosecute CIA officials for their role in torturing detainees, stating it wanted to move away from a dark chapter in the US history. The Army Field Manual was reinstated as the fundamental text for interrogator conduct. It is difficult to predict what will happen with the Guantanamo Bay Detention Facility. On the eve of stepping down, President Barack Obama notified Congress that 41 detainees remained held at the Guantánamo Bay detention center (Gibbons-Neff 2017).

Torture was a key part of Trump's national-security platform as a candidate. He publicly defended torture, proclaiming that torture "only a stupid person would say it doesn't work." Beyond that, Trump claimed, "they deserve it anyway, for what they're doing." During the February 2016 Republican debate, Trump (then a nominee) pledged to "bring back a hell of a lot worse than waterboarding" (Serwer 2017).

On January 30, 2018, President Trump signed an Executive Order to keep the Guantanamo Bay open (Exec. Order No. 13823, 2018) and advocated adding to the detainee population (Ryan 2018).

Conclusion

American counter-terrorism over the past decades have been marked by a reactive rather than proactive approach. This has had a significant impact on individual liberties and human rights reflecting an imbalance between national security and individual privileges and protections.

In reactionary measures, each successive Executive Administration has imposed measures that minimize individual rights; Congress and Supreme Court have meanwhile failed to engage in robust and rigorous checks and balances. This has largely left the "playing field" of counter-terrorism in the exclusive domain of the Executive; the consequences from a rights perspective have been deleterious. Furthermore, it is questionable whether the rights minimization paradigm that defines the US policy has sufficiently out-weighted perceived benefits.

Successive Administrations have failed to articulate, much less implement, a cohesive and coherent counter-terrorism policy that reflects strategic consideration rather than tactical measures. As but an example: the Obama Administration, while endeavoring to close Guantanamo Bay, ultimately failed to do so. Regardless of one's political perspective, the failure to close Guantanamo reflects narrow political considerations that focus on tactics rather than overarching strategy. The same criticism can be ascribed to other measures discussed in this chapter.

Whether the development of an implementable counter-terrorism strategy is a realistic goal is a legitimate inquiry. Perhaps it is fool's gold for an Executive to articulate "strategy" when the reality is that an attack demands a dramatic response. That, then, suggests that respect for individual protections and human rights inevitably take a back seat; the visual of "action" is invariably more satisfying to a demanding public.

That, more than anything, seems to define the US counter-terrorism over the course of the past decades, regardless of the President's party affiliation. While some President's favor greater aggressiveness reflecting a willingness to tolerate infringement of individual rights, the reality is that terrorism and the fear of terrorism results in minimizing individual rights.

Ultimately, as we have come to see, the requirement to act outweighs protection of individual rights. That has defined the US counter-terrorism measures in the previous decades and whether that will reflect future policy is an open question.

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