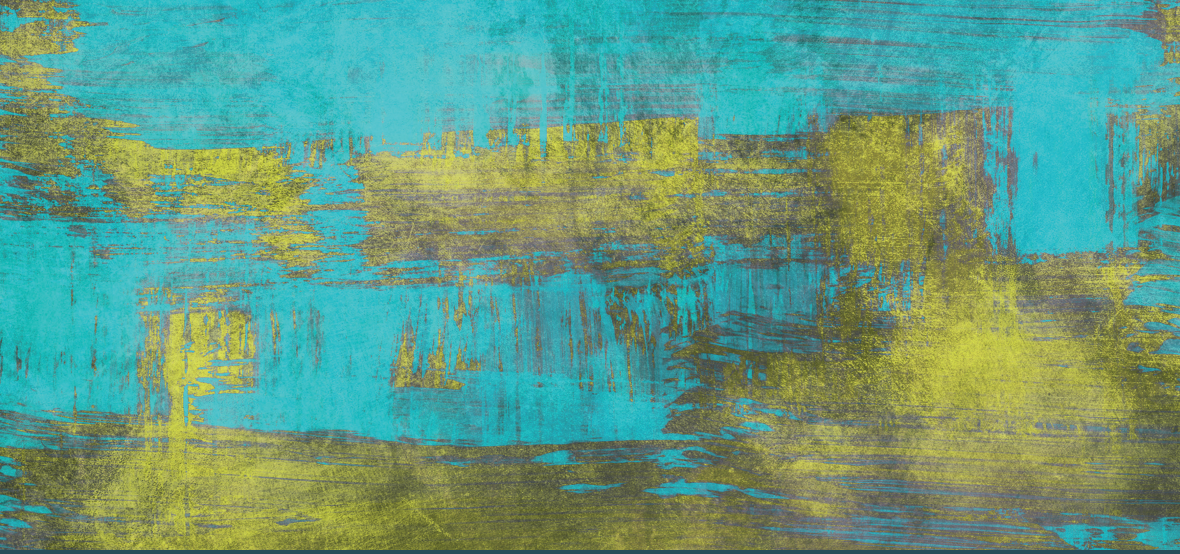
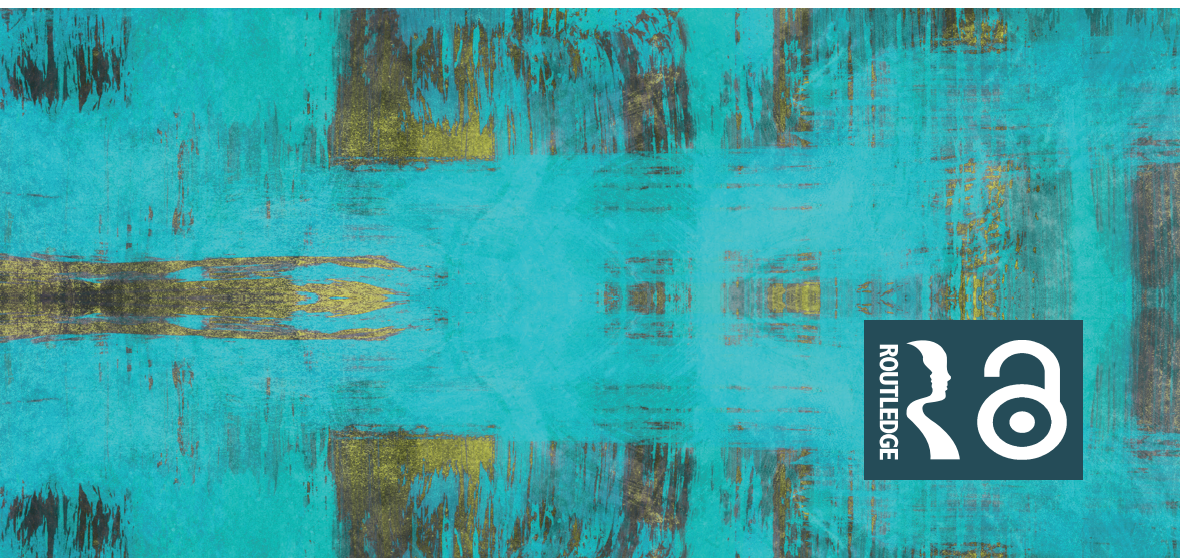


Routledge Studies in Human Rights

US COUNTERTERRORISM AND THE HUMAN RIGHTS OF FOREIGNERS ABROAD

PUTTING THE GLOVES BACK ON?

Monika Heupel, Caiden Heaphy, and Janina Heaphy



US Counterterrorism and the Human Rights of Foreigners Abroad

This book examines why the United States has introduced safeguards that are designed to prevent their counterterrorism policies from causing harm to non-US citizens beyond US territory.

It investigates what made US policymakers take steps to "put the gloves back on" through five case studies on the emergence of such safeguards related to the right not to be tortured, the right not to be arbitrarily detained, the right to life (in connection with targeted killing operations), the right to seek asylum (in connection with refugee resettlement), and the right to privacy (in connection with foreign surveillance). The book exposes two mechanisms – coercion and strategic learning – which explain why the United States has introduced what the authors refer to as "extraterritorial human rights safeguards", thus demonstrating that the emerging norm that states have human rights obligations toward foreigners beyond their borders constrains policy choices.

This book will be of key interest to scholars and students of human rights, counterterrorism, US foreign policy, human rights law, and more broadly political science and international relations.

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Preface

Guantánamo, Abu Ghraib, and Edward Snowden have become household names for many people all over the world. US targeted killing operations and restrictions on refugee admissions have also been widely recognized as evidence of the United States' disregard for human rights in the wake of 9/11. Much less known, however, is that since 2005 the United States has responded to criticism with the introduction of safeguards that are to protect foreigners abroad against harm caused by its counterterrorism policies. Nor is there a debate in political science on the broader question of how states can be held accountable for extraterritorial human rights violations generally. This is an important gap in light of the fact that globalization involves ever more interactions of states with non-citizens beyond their borders – interactions that have caused considerable amounts of harm.

That the United States has introduced what we call "extraterritorial human rights safeguards" – significantly flawed as they may be – cannot be undervalued. Such safeguards show that it is hard for powerful democracies to uphold policies that violate the human rights of foreign citizens beyond their borders. They also suggest that the "universal" in "universal human rights" is undergoing redefinition; not only must *all states* respect, protect, and fulfill human rights, but all states are increasingly obligated to respect the human rights of *all human beings*, regardless of their nationality or location. This book not only takes stock of which safeguards the United States has introduced, but also uncovers the mechanisms that underlie this development. We found that US policymakers have introduced safeguards either in response to immediate pressure or when they were confronted with convincing arguments as to why safeguards were in the United States' strategic interest. Although we do not deny that individual policymakers were influenced by moral arguments, there is little evidence that safeguards were introduced because of a conviction that the United States owed foreigners abroad protections. Hence, the norm that states owe human rights protections also to foreigners beyond their borders primarily had a regulative effect on US policymakers in that it constrained their range of justifiable policy choices.

This book would not have been possible without the willingness of so many individuals to share with us their insights and perspectives on the processes leading up to the safeguards covered in this book. We are incredibly grateful to have planned most of our interviews in Washington D.C. prior to the onset

of the COVID-19 pandemic, so that most interviews could be conducted in person. With that said, none of our research would have been possible without the generous financial support of the German Research Foundation (DFG). The book also greatly benefited from the excellent feedback we received when presenting our work at the European Consortium for Political Research (ECPR) General Conference, at the International Studies Association (ISA) Annual Convention, at the German Political Science Association's (DVPW) International Politics Section Conference, and to our colleagues at the University of Bamberg. Furthermore, the book could not have been completed without essential logistical support from Claudia Genslein and the most valuable research assistance of a group of dedicated student assistants – Wiebke Bleilefens, Theresa Mack, Hannah O'Neill, Jonas Reuter, Joke Reuvers, Rahel Rude, Simon Seitel, and Jana Vogel. Thank you! Last but not least, we would like to thank Andrew Taylor and Sophie Iddamalgoda for helping us publish our work with Routledge, and three anonymous reviewers for providing most helpful comments.

Monika Heupel, Caiden Heaphy, and Janina Heaphy
Bamberg, September 2021

Abbreviations

ACLU	American Civil Liberties Union
AFM	Army Field Manual
ARB	Administrative Review Board
AUC	United Self-Defense Forces of Colombia (*Autodefensas Unidas de Colombia*)
AUMF	Authorization for Use of Military Force
BIA	Board of Immigration Appeals
CAA	Consolidated Appropriations Act
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIA	Central Intelligence Agency
CIDT	Cruel, inhuman or degrading treatment
CJEU	Court of Justice of the European Union
CPERS	Captured persons
CSRT	Combatant Status Review Tribunal
DHS	Department of Homeland Security
DNI	Director of National Intelligence
DoD	Department of Defense
DoJ	Department of Justice
DoS	Department of State
DTA	Detainee Treatment Act
EIT	Enhanced Interrogation Technique
ELN	National Liberation Army (*Ejército de Liberación Nacional*)
EO	Executive Order
EU	European Union
FARC	Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*)
FDI	Foreign direct investment
FISA	Foreign Intelligence Surveillance Act
FISC	Foreign Intelligence Surveillance Court
FOIA	Freedom of Information Act
HIAS	Hebrew Immigrant Aid Society
HRF	Human Rights First

IAC	International armed conflict
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
INA	Immigration and Nationality Act
IO	International organization
ISIS	Islamic State in Iraq and Syria
JIAT	Joint Incidents Assessment Team
MCA	Military Commissions Act
NDAA	National Defense Authorization Act
NGO	Non-governmental organization
NIAC	Non-international armed conflict
NSA	National Security Agency
NSC	National Security Council
NSS	National Security Staff
OLC	Office of Legal Counsel
PCLOB	Privacy and Civil Liberties Oversight Board
POW	Prisoner of War
PPD-28	Presidential Policy Directive 28
PPG	Presidential Policy Guidance
PRB	Periodic Review Board
PRM	Bureau of Population, Refugees, and Migration
PSP	Principles, Standards, and Procedures
RCUSA	Refugee Council USA
SSCI	Senate Select Committee on Intelligence
TRIG	Terrorism-Related Inadmissibility Grounds
UAV	Unmanned aerial vehicle
UCMJ	Uniform Code of Military Justice
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	UN High Commissioner for Refugees
USCIS	US Citizenship and Immigration Service
USRAP	US Refugee Admissions Program

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1 US counterterrorism and extraterritorial human rights obligations

Introduction

It is well documented that the United States has committed extraterritorial human rights violations against foreigners abroad in its response to 9/11. Human rights watchdogs like Amnesty International (2005, 269–70) have written about the torture of foreign detainees in black sites and described how foreign detainees were held in Guantánamo Bay without access to a fair trial. The United Nations (UN) Human Rights Committee (2014, 4–6 and 9–10) has expressed concern about targeted killing operations and foreign mass surveillance. Similarly, the UN High Commissioner for Refugees (2010, 5) has criticized the United States' post-9/11 refugee policies as inconsistent with its international obligations under the Refugee Convention.

Political scientists and scholars from related fields have studied extraterritorial human rights violations in US counterterrorism operations from various angles. Some have described how the legal rules that enable such violations have evolved over time (Hellmuth, 2016). Focusing on the post-9/11 period, others have exposed commonalities and differences between different administrations (Jackson and Tsiu, 2016; Apodaca, 2019). Others again have pointed out that extraterritorial human rights violations already occurred before 9/11, although their number increased after that date (Cole, 2003, 85). Scholars have also investigated what enabled such rights violations in the first place and what made them persist over time. According to them, the construction of 9/11 as a crisis made taking extraordinary measures possible (Holland, 2012). Likewise, the invocation of various myths such as "American Exceptionalism" and "Civilization v. Barbarism" served to justify the "War on Terror" and legitimize its practices (Esch, 2010, 357). Furthermore, US policymakers have been accused of creating "extralegal 'rights-free' zones and individuals" (Koh, 2005, 128) and reinterpreted relevant law to establish the "plausible legality" of human rights abuses (Sanders, 2018, 3). Finally, according to some writers on the subject, it may have been the reluctance of the US Congress, the judiciary, the public, and the media to forcefully intervene with US policymakers that accounts for why rights violations have been allowed to persist for so long (Setty, 2015, 76).

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All these studies have been immensely useful for understanding why and how the United States committed extraterritorial human rights violations in its counterterrorism operations following 9/11. Yet, they have largely focused on "how the gloves came off" (Arsenault, 2017) rather than on whether, how, and why the gloves have been put back on. The highly significant fact that the United States has, over time, introduced a set of basic safeguards to limit the harmful consequences of its counterterrorism policies for foreigners outside its territory has attracted scant attention to date (Abel, 2018). Congress has outlawed previously authorized "enhanced interrogation techniques" and obligated government agencies to abide by the Geneva Conventions in their interactions with foreign detainees (US Congress, 2005 and 2015; White House, 2009). Guantánamo inmates were given a set of procedural rights before military commissions, and periodic review boards were installed to conduct regular reviews to prevent arbitrary detention (US Congress, 2009; White House, 2011). Safeguards for the target nomination process and the protection of civilians in targeted killing operations have also been established (White House, 2013 and 2016), as have safeguards that provide privacy protections for non-US citizens in relation to foreign surveillance (White House, 2014; US Department of Commerce, 2016). Lastly, Congress has authorized the granting of exemptions from terrorism-related inadmissibility grounds (TRIG) so as not to bar refugees from access to the US resettlement program on unfounded terrorism-related allegations (US Congress, 2007).

We do not claim that all of these safeguards effectively prevent extraterritorial human rights violations in US counterterrorism. They certainly do not. Whereas anti-torture safeguards are largely believed to constitute the most advanced protections among the safeguards we have chosen for our analysis, their reliance on the Army Field Manual is still seen as a weak point. Opportunities to seek judicial review to challenge indefinite detention have only been given to Guantánamo inmates. Regulations on the conduct of foreign surveillance have been lambasted by critics as paper tigers. Furthermore, under the Trump administration, several safeguards have been challenged or partially rolled back, as was the case for regulations on the conduct of targeted killing operations. Finally, in order to maintain the executive's authority and limit interventions by courts, the application of TRIG-related exemptions remains discretionary and is limited to specific groups. What is more, the United States does not consistently acknowledge in all the cases mentioned above that it has human rights obligations toward foreigners abroad, but rather tends to speak of "limitations", "precautions", or "heightened policy standards".

Nonetheless, the introduction of safeguards, flawed as they may be, shows that the United States realizes that there are constraints on its behavior toward foreigners abroad. US policymakers may not generally acknowledge that they have human rights obligations toward foreigners beyond US territory. Yet, by introducing safeguards whose aim, at least on paper, is to prevent their policies from causing harm to foreigners abroad, the United States recognizes limits to its behavior beyond its borders even in the face of strong countervailing security concerns.

This recognition is difficult to explain from many perspectives. Those who believe that, because of its overwhelming power, the United States is immune to pressure, have difficulties in accounting for the introduction of protection provisions for foreigners outside its territory. After all, why would the United States voluntarily impose limitations on how it executes its counterterrorism policies abroad? Likewise, the introduction of safeguards cannot be explained by party politics alone. Congress has adopted legislative reforms with different majorities and under Democratic and Republican presidencies; furthermore, most reforms introduced by the Obama administration have survived the Trump presidency. Finally, scholars who point to securitization moves following 9/11 and their role in justifying emergency policies can help us understand why extraterritorial human rights violations occurred in the first place, but they cannot account for why we have witnessed the emergence of rudimentary safeguards.

The aim of this book is to uncover why the United States has introduced limited "extraterritorial human rights safeguards", as we call them, and in so doing acknowledged that its treatment of foreigners abroad is subject to restraints. Have key US policymakers become persuaded that it is morally appropriate to accept human rights obligations toward non-citizens beyond US territory or, if they eschew the language of human rights, that the United States has a moral obligation not to subject non-citizens abroad to undue harm? Alternatively, are the safeguards the result of strategic learning in the sense that US policymakers carefully weighed the likely future costs and benefits of different policy options? Or were US policymakers coerced into establishing such safeguards by material sanctions, naming and shaming, or court judgments that demanded reforms?

Based on five case studies on torture, arbitrary detention, targeted killing, restrictions on refugee resettlement, and foreign surveillance, we reveal the following pattern: coercion and strategic learning – either separately or in combination – account for the establishment by the US of "extraterritorial human rights safeguards" in its counterterrorism policies. Which of the two mechanisms is activated depends on which set of enabling conditions is present at the time. Moral persuasion, as conceptualized in this book, did not prove decisive in any of our case studies. There is little evidence that US policymakers introduced protections for foreigners because they were convinced that this was the right thing to do. Rather, key policymakers tended to respond to immediate pressure or because they assumed that not reforming policies would be costly in the future. From this it follows that there are no indications that a significant number of US policymakers have internalized a truly universal understanding of human rights, according to which states not only have obligations toward their own citizens but toward all human beings – and which prevails even in times of fear and insecurity. Even so, that kind of understanding, even if "others" were the ones to have it, was strong enough to constrain the United States' scope of action in several meaningful ways.

In light of these findings, our book makes three contributions. First, it has obviously important practical implications. If we know what mechanisms work in holding powerful states like the United States to account for extraterritorial human rights violations and making them introduce safeguards that can at least

mitigate such violations, we may be able to devise better strategies to counter "human rights backlash" (Vinjamuri, 2017, 114). Second, our book helps to fill an important gap in political science research on human rights. Political scientists have not as of yet systematically looked into extraterritorial human rights obligations, but have instead either focused on domestic human rights violations or ignored the distinction between domestic violations and extraterritorial ones. Third, our object of study enables us to learn more about how norms evolve as a result of contestation. Our case studies show that the general human rights norm evolves as it becomes more specific (with regard to its extraterritorial applicability) following a transgression (harm to foreigners beyond the perpetrator state's territory) that triggered extensive contestation and debate.

The remainder of this introduction is structured as follows: we first give a brief overview of the state of the art in relevant fields; namely, cosmopolitan normative theory, international law, and political science. Next, we summarize our theoretical framework and research design. Specifically, we conceptualize mechanisms of social influence and introduce our method, case selection, and sources. Subsequently, we present our results and outline their broader theoretical and empirical implications. We close with a short preview of each chapter.

State of the art

Cosmopolitanism and extraterritorial human rights obligations

Cosmopolitan normative theory assigns to all human beings equally "fundamental moral significance" (Cabrera, 2020, 6) and sees them as "ultimate units of concern" (Pogge, 1992, 48). From this it follows that human beings have duties, or "cosmopolitan responsibilities", to all human beings, irrespective of whether they share a community bond with them (Ingram, 2016, 67). As Nussbaum (1996, 3–4) argues, human beings are members of an all-inclusive community as citizens of the world, and therefore have duties to all other human beings and not just their compatriots. Globalization, as Held and other cosmopolitan thinkers point out, has brought human beings into relations of interdependence with each other in unprecedented ways and created "overlapping communities of fate" (Held, 2010, 102) and a "responsibility for distant strangers" (Ingram, 2016, 67). Cosmopolitanism, therefore, fundamentally calls into question "principles of territoriality, collectivity and frontier" (Beck, 2000, 87).

While all cosmopolitan thinkers share the idea that human beings have obligations to other human beings whether they share a community or not, there is no consensus as to what exactly these obligations are (Taraborrelli, 2015). It is less controversial that human beings have negative duties – a negative duty being one that "requires us not to do things" or "not to deprive people of what they have rights to" – and that these duties are general in the sense that we owe them to all human beings and not just to those with whom we are in a special relationship (Shue, 1988, 688 and 690). Pogge (2002, 87), for instance, argues that we owe foreigners "our most important negative duties", meaning that we must not

submit other human beings belonging to other nations to unjust social institutions that prevent them from fulfilling their basic human needs. In his words, "though we owe foreigners less than compatriots, we owe them something. We owe them various negative duties, undiluted" (Pogge, 2002, 91). By contrast, whether and to what extent human beings also have positive duties toward all other human beings – a positive duty being one that "requires us to do or provide things" – is more contested (Shue, 1988, 688). Shue (1988, 688–9) argues, for example, that positive duties are normally special in the sense that human beings have them only toward others to whom they are owed because of a special relationship or occurrence. Similarly, Pogge (2002, 87) argues that "we do not all have equal responsibilities to everyone" and, in doing so, justifies differential treatment as long as fundamental negative duties are respected.

Human rights are cosmopolitan norms in that they are based on the idea that all human beings are entitled to the same rights and respective legal protections simply because of their being human and irrespective of nationality, gender, age, or any other distinguishing criterion (Benhabib, 2011, 9). Hence, human rights do not have to be earned but they are given to each human being at her or his birth. In this sense, the idea of universal human rights originates from the cosmopolitan idea that the world is "one unified ethical community" (Morsink, 2009, 148). Furthermore, as Benhabib (2007, 9) argues, every human being has the "right to have rights" in the sense that she or he has the right to be treated as a legal personality by any other actor (Benhabib, 2007, 15) and that, accordingly, we have to "view each and every individual as being entitled to the same rights and duties we would want to ascribe to ourselves". This would result in "cosmopolitan solidarity which increasingly brings all human beings by virtue of their humanity alone under the net of universal rights, while chipping away the exclusionary privileges of membership" (Benhabib, 2004, 21).

Cosmopolitan thinkers have not only provided arguments to demonstrate why cosmopolitan norms matter and duties toward strangers exist, they have also developed ideas as to how cosmopolitan norms should be institutionalized. It is generally assumed that cosmopolitan norms cannot flourish without cosmopolitan institutions or, in Held's words, that "cosmopolitan theory (…) has to be connected to cosmopolitan institution-building" (2010, 58). Among the most prominent ideas in this regard are Held's (2010) on how global governance institutions should be designed to do justice to cosmopolitan values and Pogge's (2008) proposal of cosmopolitan reforms to global economic governance. Thus, while cosmopolitan thinkers have acknowledged that the "cosmopolitan ideal is (…) unaccomplished" (Archibugi, 2020, 168), they have developed ideas as to which institutional features can bring us closer to it. As regards the institutionalization of human rights norms, proponents argue in favor of "cosmopolitan law" that would make "each and every individual (…) legally responsible for the rights of each and every other individual" (Nash, 2009, 1071).

How such law comes about or under which conditions states introduce "cosmopolitian law" has not been given much consideration, however. Thus, while cosmopolitanism constitutes the normative foundation for our analysis and

provides yardsticks for assessing to what extent institutions comply with cosmopolitan standards, it is of little help when it comes to deriving mechanisms that might account for the emergence of "cosmopolitan law" or institutions that are in line with cosmopolitan standards.

International law and extraterritorial human rights obligations

Cosmopolitan ideas have not only been debated among philosophers, they have also found their way into human rights law. Famously, the preamble to the Universal Declaration of Human Rights (UDHR) recognizes the "equal and inalienable rights of all members of the human family" and also states that all UN member states have "pledged themselves to achieve (…) the promotion of universal respect for and observance of human rights and fundamental freedoms" (UN General Assembly, 1948).

Despite this commitment to cosmopolitan values, however, neither the Universal Declaration nor the international human rights conventions definitively outline states' extraterritorial human rights obligations. All but two conventions feature jurisdiction clauses that provide guidance on their scope of application.[1] The International Covenant on Civil and Political Rights, for instance, obligates each signatory state "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights" of the Covenant (UN General Assembly, 1966, Art. 2.1), while the corresponding clause in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment uses the wording "in any territory under its jurisdiction" (UN General Assembly, 1984, Art. 2). Nonetheless, these clauses do not clearly define what the term "jurisdiction" means. Does jurisdiction require control over territory – either national territory or foreign territory, for example in the context of military occupation? Or does jurisdiction also apply to situations in which a state has factual control only over an individual without controlling the territory within which that individual is located?

Yet, ever since the international human rights conventions entered into force, courts and UN treaty bodies that monitor how states implement the conventions have played an important role in clarifying states' extraterritorial human rights obligations, and the conditions under which they are triggered. Overall, the jurisprudence coming out of national and regional courts and the recommendations published by UN treaty bodies on the extraterritorial application of human rights law reveal three interesting patterns: first, for the most part, the question no longer is whether states have extraterritorial human rights obligations but what these are. In light of this, scholars even claim that a "doctrine of extraterritorial application" has emerged that implies that states' human rights obligations are not confined to the domestic arena (Van Schaack, 2014, 23; see also Hathaway et al., 2011). Second, case law from courts, and to a lesser extent from UN treaty bodies, suggests that states are typically ascribed negative rather than positive duties toward foreigners beyond their borders. An example is the request by the UN Human Rights Committee (2015) that the United Kingdom investigate accusations that

its armed forces committed acts of torture, arbitrary detention, and other human rights violations in operations abroad. Third, case law suggests that states have extraterritorial obligations not only when they have control over foreign territory but also when they have merely factual control over persons or situations. In 2007, the European Court of Human Rights (2007) determined, for example, that the killing of a group of Iranians in North-West Iran by Turkish airstrikes took place in the jurisdiction of Turkey even though Turkey did not have effective control over the territory where the killing occurred.

International legal scholarship on states' extraterritorial human rights obligations largely reflects this gradual expansion of obligations described in the previous section. Accordingly, international law scholars point out that human rights were created as a protection for "individuals against the arbitrary exercise of power by the authorities of the territorial state" (Coomans and Kamminga, 2004, 1). Thus, traditionally, the dominant perspective of states' human rights duties has been based on a vertical conception of such duties, implying that states have obligations toward their own citizens and others residing on their territory (Vandenhole and Gibney, 2014, 1). By implication, this meant that "human rights law (…) was not primarily designed to apply extraterritorially" (Cerone, 2007, 3).

Over time, however, the "territoriality paradigm" (Vandenhole and Van Genugten, 2015, 1) of international human rights law has been questioned and scholars have pointed to a "paradox in international human rights law", insofar as human rights were supposed to be universal, while the duties traditionally ascribed to states were constrained by ideas of territoriality and citizenship (Gibney et al., 1999, 267). Accordingly, international law scholars have argued that in an interdependent world in which the actions of national governments routinely have an impact on citizens of other countries beyond their borders, it is no longer enough to recognize solely the vertical dimension of human rights duties. Rather, as obligations travel with the exercise of power, it is important to consider the diagonal dimension as well; namely, that states also have human rights obligations toward non-citizens in other countries (Cerone, 2007, 57; King, 2009, 522; Skogly and Gibney, 2010, 2). Like courts, and, to a lesser extent, UN human rights treaty bodies, international law scholars widely reject the idea that states have the same human rights obligations to all human beings (Meron, 1995). Rather, they suggest that states have primarily negative extraterritorial human rights obligations (Skogly, 2006, 3) or that there has to be a "relatively direct link to activities of the state across borders" to trigger obligations (Skogly and Gibney, 2002, 795). Nonetheless, international law scholars tend to accept factual control as triggering extraterritorial human rights obligations rather than insisting on territorial control (e.g. Scheinin, 2004, 80).

Thus far, international law scholars have produced the bulk of the scholarship on states' extraterritorial human rights obligations. However, while debates about the interpretation of legal norms certainly have great merit, international lawyers do not naturally focus on the question of what makes states recognize what they call diagonal human rights obligations and enact respective safeguards. Hence, we need to look to political scientists for answers.

Political science and extraterritorial human rights obligations

There is a substantial body of research in political science on how states are socialized into recognizing human rights norms, according to which there are several mechanisms of social influence. When in the late 1990s Risse, Ropp, and Sikkink (1999) presented their spiral model of socialization to human rights norms, they proposed three socialization mechanisms: instrumental adaptation, argumentation, and habitualization. Fourteen years later Risse and Ropp (2013), taking stock of their model, put forward four mechanisms, that is, coercion (the use of force and legal enforcement), changing incentives (sanctions and rewards), persuasion and discourse, and capacity-building. Goodman and Jinks (2004) introduced a similar distinction between different mechanisms of social influence (coercion, persuasion, and acculturation) that they expected to move states toward complying with human rights norms. Hathaway (2002) similarly distinguished four mechanisms: rational calculation, persuasion, legitimation, and internalization.

Political scientists have also conducted empirical studies to gain insights into what the conditions are under which specific mechanisms of social influence are effective in making governments accept human rights norms. It has been shown, for example, that the success of conditionality depends *inter alia* on the credibility of the threat or promised reward, on the size of the domestic costs of institutional or behavioral change, and on the dependence of the target on the sender (Schimmelfennig and Sedelmeier, 2004; Hafner-Burton, 2005, 607). It has been further demonstrated that the effectiveness of shaming depends on the costs the target government incurs when it implements the demands it is confronted with (Hafner-Burton, 2008), whether non-governmental organizations (NGOs) have a foothold in the target state, and whether they manage to engender additional pressure from individuals, third states, and international organizations (IOs) (Murdie and Davis, 2012). Finally, scholars have looked into the conditions under which it is possible to persuade policymakers of the value of human rights norms. They have found, for instance, that persuasion is more likely to occur if a new norm can be linked to already established norms (Keck and Sikkink, 1998, 204), and if the exchange of arguments takes place in a forum in which actors feel free to express their arguments (Deitelhoff, 2009, 43).

The categorization of mechanisms of social influence and the insights into the conditions under which they are effective have been enormously helpful in understanding what makes states accept human rights norms as standards to guide their behavior. Nonetheless, we know very little about the extent to which these mechanisms can be applied to the realm of extraterritorial human rights violations. Are they effective to the same extent, irrespective of whether the rights violations are committed in a domestic or an extraterritorial context? Or do the mechanisms work differently in different contexts? For instance, it might be more difficult for civil society actors to mobilize a domestic public if their campaign is about extraterritorial human rights violations afflicting distant foreigners not nationals. Likewise, it might be more difficult for aggrieved individuals to find a court to hear their claims when it comes to extraterritorial human rights violations as

courts might be reluctant to claim jurisdiction. By contrast, the presumed enforcement problem of the human rights regime – the assumption that states have little incentive to confront other states over human rights violations (Donnelly, 2013, 208) – might be less acute, as third states whose citizens suffer as a result of extraterritorial human rights violations should have an incentive to hold the rights-violating state accountable.

One reason why we do not know much about how these mechanisms fare when it comes to extraterritorial human rights violations is that most research still largely centers on the traditional vertical view of human rights obligations and violations, according to which violations are committed by states on their own territory against their own citizens. Consider, for instance, Simmons's otherwise impressive book *Mobilizing for Human Rights: International Law in Domestic Politics* (2009) on the impact of domestic factors on states' commitment to and compliance with international human rights law. The book opens with the following statement:

> Human rights underwent a widespread revolution internationally over the course of the twentieth century. The most striking change is the fact that it is no longer acceptable for a government to make sovereignty claims in defense of egregious rights abuses. The legitimacy of a broad range of rights of individuals *vis-à-vis their own government* stands in contrast to a long-standing presumption of internal sovereignty.
>
> (Simmons, 2009, 3)

Further, she writes that the "idea that a government should have the freedom to *treat its people* as brutally as it wishes while others are helpless to intervene because of its status as a sovereign state is legally – and possibly, morally – untenable in the twenty-first century" (Simmons, 2009, 23). Finally, she points out that

> "(i)nternational human rights treaties have a singularly unusual property: They are negotiated internationally but create *stakeholders almost exclusively domestically*. In the human rights area, intergovernmental agreements are designed to give individuals rights largely to be guaranteed and respected *by their governments*" (ibid., 126; emphasis added throughout).

Similarly, Donnelly's seminal book *Universal Human Rights in Theory and Practice* (2013) also largely treats human rights as norms governing the relations between states and their citizens. He explicitly acknowledges that "(i)f human rights are held universally – that is, equally by all – one might imagine that they apply universally against all other individuals and groups. Such a conception is inherently plausible and in many ways morally attractive" (Donnelly, 2013, 32). Nonetheless, he describes human rights as "equal and inalienable rights that all human beings have simply because they are human and that they may exercise against *their own state and society*" (Donnelly, 2013, 75–6), adding that "there is a transnational normative convergence on the basic expectations that

citizens may legitimately have of *their societies and governments"* (ibid., 58). Furthermore, "(o)ther states are not directly harmed by a government's failure to respect human rights; the immediate victims are that government's *own citizens"* (ibid., 208). Hence, "states are legitimate largely to the extent that they respect, protect, and implement the rights of *their citizens*" (ibid., 62; emphasis added throughout).

We do not deny that the domestic perspective on human rights is important or that the bulk of human rights violations are still committed by governments against their own people on their own territory. Yet, as governments routinely enact policies that have direct implications for non-citizens beyond their borders, it becomes increasingly necessary to also consider the external layer of human rights obligations. If we believe that every government is obliged to make sure that it does not violate the human rights of any human being, irrespective of nationality and location, it is essential to bring to light which mechanisms work to hold governments accountable for any violations that do take place.

Theory

Theorizing why states establish "extraterritorial human rights safeguards" presupposes that we have an idea of why states commit extraterritorial human rights violations in the first place. Assuming that they are aware of the harmful impact of their policies, government officials and legislators may not see a moral problem in committing such violations. They may simply not believe that states have moral obligations to foreign citizens beyond their borders. Alternatively, policymakers may see no instrumental reasons why they should refrain from policies that they believe further their own or their country's interests – even if they entail extraterritorial human rights violations or other harm. Particularly in the counterterrorism context, policymakers might recognize certain human rights obligations, but for strategic reasons prioritize a countervailing norm, namely national security.

Mechanisms that make states introduce "extraterritorial human rights safeguards" must alter one of these dispositions in addition to bringing human rights violations to the attention of policymakers. We conceptualize three such mechanisms: moral persuasion, strategic learning, and coercion. Moral persuasion implies convincing policymakers that foreigners abroad are entitled to human rights protection. The mechanism thus aims at changing the moral convictions of policymakers and hence addresses the first source of extraterritorial human rights violations described above. By contrast, strategic learning and coercion aim at changing policymakers' instrumental reasoning and hence address the second source. Strategic learning implies that policymakers carefully weigh the potential costs and benefits of introducing safeguards and eventually conclude that the anticipated benefits are likely to outweigh potential future costs. Coercion, however, implies that states face acute pressure and feel compelled to introduce safeguards. Coercion can occur in three variants depending on the actors who drive the mechanism and the strategies they apply, namely material sanctions, shaming and litigation.

Mechanisms map the causal processes that connect a starting point with an endpoint (Bennett and Checkel, 2015). To make mechanisms usable for empirical research, one needs to conceptualize their starting point and endpoint and the components that lie in between (Beach and Pedersen, 2019, 53–4). Loosely based on Coleman's (1986) theory of purposive action, we conceptualize our mechanisms as beginning with a starting point that triggers the mechanism, a first component in which an intervention takes place, a second component in which the intervention is processed, and an endpoint, in which an outcome is reached. Applied to our object of study, the mechanisms' common starting point is an extraterritorial human rights violation committed by the United States following 9/11, while their common endpoint is an introduction by US policymakers of "extraterritorial human rights safeguards". The first component of any mechanism consists in an intervention by concerned actors in favor of such safeguards; the second consists in US policymakers processing this intervention. A detailed conceptualization of each mechanism is provided in Chapter 2. This section merely provides brief outlines, as summarized in Figure 1.1.

The moral persuasion mechanism, like any other, begins with the United States committing extraterritorial human rights violations. Once knowledge of the rights violation becomes public, concerned actors provide moral arguments as to why it is appropriate for the United States to introduce safeguards to prevent such violations or at least lessen their impact. Norm entrepreneurs may argue that human rights are universal in the sense that all human beings are entitled to have their rights protected not just against their government but against any actors who interfere in their lives. They may further argue that governments therefore not only have a moral obligation to protect the human rights of their own nationals or others residing on their territory, but that they are also obliged to refrain from

Causal mechanism	Starting point	Intervention	Processing	Outcome
Moral persuasion	Extraterritorial human rights violations	Moral arguments	Acceptance of norm	Safeguards
Strategic learning	Extraterritorial human rights violations	Strategic arguments	Anticipation of future strategic losses	Safeguards
Coercion	Extraterritorial human rights violations	Material sanctions, shaming, or litigation	Perception of urgent need to react	Safeguards

Figure 1.1 Mechanisms of social influence

violating the human rights of any person irrespective of nationality or place of residence. They may also argue that US behavior is not in line with "American values". In response, US policymakers evaluate the persuasiveness of the moral arguments they are confronted with and assess whether the policies in question are morally justifiable. Finally, they come to the conclusion that it is morally appropriate to introduce safeguards that prevent or at least mitigate extraterritorial human rights violations.[2]

In the strategic learning mechanism, US policymakers are again confronted with arguments as to why they should introduce safeguards. However, unlike in the moral persuasion mechanism, the arguments presented to them are not moral but utilitarian and point to the anticipated long-term benefits of establishing human rights safeguards (and the likely negative consequences of not doing so). Intelligence officials, for instance, may warn that ongoing extraterritorial human rights violations might result in important allies withholding their support for US counterterrorism operations. Likewise, State Department officials may argue that the Unites States' soft power might be seriously damaged if rights violations continue and safeguards are not introduced. Subsequently, policymakers and their advisors process the arguments and weigh the expected future costs of not introducing safeguards against the expected future benefits of introducing them. Eventually, they arrive at the conclusion that it is in the United States' strategic interest to introduce safeguards.[3]

Like the strategic learning mechanisms, the three variants of the coercion mechanism are based on the assumption that policymakers introduce safeguards not because they believe that this is a moral requirement but because of the constraining effect of an emerging norm against extraterritorial human rights violations, which renders such rights violations costly. Unlike the strategic learning mechanism, however, the three variants of the coercion mechanism (material sanctions, shaming, and litigation) do not cause policymakers to introduce safeguards as a result of a future-oriented cost–benefit analysis, but because the interventions create immediate, negative consequences that require prompt action.

In the material sanctions variant of the coercion mechanism, actors with access to valuable resources apply material sanctions against the United States in response to its committing extraterritorial human rights violations. For example, states on whose cooperative behavior the United States relies may prevent the US military from using bases on their territory and signal that they will only lift such sanctions if the United States establishes human rights safeguards. Similarly, economically powerful states may curtail access by US companies to their markets and, again, announce that they will only ease such measures if the United States introduces safeguards. If such sanctions hurt and cannot be evaded, US policymakers are likely to agree to introduce safeguards in order to have the sanctions lifted.[4]

In the shaming variant of the coercion mechanism, actors publicly expose and denounce the United States' rights-violating behavior. Human rights NGOs may publish reports that give evidence of the extent of the violations committed via graphic pictures of victims, or personal testimonies from those directly affected. In doing so, they may try to highlight the discrepancy between the United States'

rhetorical commitment to human rights and its actual behavior, thereby accusing the United States of hypocrisy. Furthermore, media outlets and social networks may amplify the issue until it becomes a political scandal. Eventually, US policymakers agree to establish safeguards in order to remedy the reputational harm caused by the campaign.[5]

Lastly, in the litigation variant of the coercion mechanism, pressure comes from courts that issue judgments in which they determine that a human rights violation has occurred and demand that the United States introduce safeguards to prevent future harm. The courts that issue judgments on extraterritorial human rights obligations may be the domestic courts of the country that is accused of the rights violations, but may also be foreign domestic courts that are authorized to take on cases on the basis of the concept of universal jurisdiction, or even the International Criminal Court, if the rights violation is covered by its jurisdiction and has occurred on the territory of a state that has accepted the Rome Statute. Finally, US decision makers accept the authority of the court(s) issuing the judgment(s) and introduce the safeguards to satisfy the demands of the court(s).[6]

Research design

To detect why the United States has introduced safeguards that, if implemented properly, would reduce the harm its counterterrorism policies do to foreigners outside of the United States, we conducted five case studies in which the United States has introduced such safeguards. Most safeguards have important loopholes and scholars widely agree that they cannot guarantee that foreigners' rights are effectively protected. Yet, the emergence of even partial safeguards is an indication that US policymakers recognize limits on how the United States can treat foreigners in counterterrorism operations beyond its borders. Moreover, the limited safeguards might be an important step toward more effective safeguards in the future.

The book's five case studies cover the right not to be tortured (Chapter 3), the right not to be arbitrarily detained (Chapter 4), the right to life (Chapter 5), the right to seek asylum (Chapter 6), and the right to privacy (Chapter 7). The safeguards that we cover were introduced between 2005 and 2016 by Congress and the executive branch. In the first case study, we analyze the introduction of rules that specify what practices constitute torture and cruel, inhuman or degrading treatment (CIDT) and which US agencies are bound by these rules in their interaction with non-US citizens detained outside the United States. In the second, we trace the evolution of safeguards that enable detained foreign terror suspects to challenge the basis of their military detention in Guantánamo. In the third, we follow the introduction of guidelines that provide protection for terror suspects and civilians in targeted killing operations. In the fourth, we investigate the expansion of provisions that exempt refugees with no links to terrorist organizations from terrorism-related exclusion from the US resettlement program, and in the fifth case, we trace the emergence of rules to protect non-US citizens outside the United States against indiscriminate US foreign surveillance. Table 1.1 gives an overview.

Table 1.1 Cases

Cases	*Safeguards*
Detainee treatment and interrogations:	• Detainee Treatment Act (2005)
Right not to be tortured	• Executive Order 13491 (2009)
	• McCain–Feinstein Amendment (2015)
Military detention:	• Military Commissions Act (2009)
Right not to be arbitrarily detained	• Executive Order 13567 (2011)
Targeted killing:	• Presidential Policy Guidance (2013)
Right to life	• Executive Order 13732 (2016)
Refugee resettlement:	• Leahy–Kyl Amendment (2007)
Right to seek asylum	
Foreign surveillance:	• Presidential Policy Directive 28 (2014)
Right to privacy	• Privacy Shield (2016)

The case selection follows from three considerations: we selected cases in which the mechanisms' common starting point (extraterritorial human rights violations) and endpoint (safeguards) were both present (Goertz, 2017, 59; Beach and Pedersen, 2019, 98–9 and 258); that were sufficiently different to warrant a certain level of generalizability in our findings and to help us gain insights into the conditions under which each mechanism, or each of a mechanism's more specific variants, occurs; that were large enough in number to enable the possibility of equifinality to be taken seriously (George and Bennett, 2005, 207 and 220) and typical patterns to be discovered, but at the same time small enough to enable us to do justice to the requirements for studying mechanisms.

We relied on deductive process tracing to reveal which mechanism is present in each case. The method implies that the researcher conceptualizes one or more mechanisms before undertaking the empirical analysis (Beach and Pedersen, 2019, 53–4) – which is what we do in Chapter 2. Deductive process tracing is a within-case method that looks for evidence of a mechanism in one case. However, we applied this method not just to one case but to all five cases consecutively (Bennett and Elman, 2006, 251; Bennett and Checkel, 2015, 21; Falleti, 2016, 3), gathering empirical evidence in favor of and against each mechanism (see Mahoney, 2012, 589). By contrast, we combined deductive and inductive reasoning to learn about each mechanism's enabling conditions. In each case in which we detected a mechanism, we assessed whether we could confirm its conditions to be as expected in the extant literature, which we spell out in Chapter 2. However, we were also open to discovering additional conditions. Finally, given that there are few assumptions as to how the specific mechanisms interact, we took a primarily inductive approach to find out how different mechanisms can be combined. Essentially there are two ways in which two or more mechanisms may operate together to explain an outcome: in sequence or in parallel (Beach and Rohlfing, 2018).

Finally, we examined multiple sources. Academic and think tank publications, as well as newspaper articles, provided background information for each case. Additionally, we considered three types of primary sources: the safeguards

themselves, obviously, but also the material with which actors intervened in favor of safeguards and documents that provide evidence of the processing of such interventions by US policymakers. Finally, we conducted 57 interviews between 2017 and 2019 with US policymakers, their advisors and staff, bureaucrats, actors who campaigned for the safeguards, and experts familiar with the cases.

Results

Equifinality

There is not one mechanism nor one combination of mechanisms that can explain why the United States introduced "extraterritorial human rights safeguards" in all five cases. We found instead that two mechanisms, coercion and strategic learning, can explain, either alone or together, the emergence of such safeguards. We could not detect the moral persuasion mechanism, as we have conceptualized it in this book, in any of our cases. Table 1.2 summarizes these findings.

Coercion, which implies that immediate pressure is what induces policymakers to bring in a safeguard, appeared in three cases, each showing a different variant of the coercion mechanism. In the torture case, a powerful shaming campaign led Congress to enact anti-torture legislation. In the arbitrary detention case, Congress sprang into action after the US Supreme Court ruled that Guantánamo inmates were to be given the right to challenge their detention before federal courts. And in the foreign surveillance case, the Obama administration introduced limits on foreign surveillance when US technology companies applied and threatened sanctions that made it more difficult for the National Security Agency (NSA) to access their data. Our case studies thus suggest that the United States is not immune to coercion. As we will show in the following chapters, the safeguards that resulted from coercion came with considerable flaws. Nonetheless, coercive pressure by civil society actors, courts, or the business sector, produced at least limited safeguards.

Strategic learning, which implies that thorough reflection leads policymakers to conclude that introducing safeguards is likely to bring more future benefits than not introducing them, occurred in four cases. In the torture case, Congress and the

Table 1.2 Cases and mechanisms

Cases	*Mechanisms*
• Detainee treatment and interrogations: Right not to be tortured • Military detention: Right not to be arbitrarily detained	Coercion → Strategic learning
• Targeted killing: Right to life • Refugee resettlement: Right to seek asylum	Strategic learning
• Foreign surveillance: Right to privacy	Coercion

Obama administration strengthened existing anti-torture provisions after being confronted with arguments as to why such safeguards were in the United States' long-term strategic interest. In the arbitrary detention case, the Obama administration granted Guantánamo detainees the right to challenge their detention before Periodic Review Boards (PRBs) after weighing their likely strategic advantages against the potential costs associated with indefinite detention. In the targeted killing case, the Obama administration introduced basic guidelines for such operations after an intense debate about the potential strategic consequences of having guidelines or not having them. Finally, in the resettlement case, Congress expanded the administration's waiver authority after concluding that extensive bars to admissibility could undermine US refugee resettlement, and, therefore, key defense and foreign policy interests. The case studies therefore suggest that coercive pressure is not necessarily needed to make US policymakers establish protections for foreigners abroad, because sometimes the executive or the legislature will introduce safeguards before such pressure is applied – but only if the expected benefits of doing so, such as averting potential coercive pressure in the future, outweigh the costs that the safeguards are expected to involve in the eyes of a sufficient number of policymakers.

We could not find any sign that moral persuasion was operative in any of our cases in the sense that it would have had a direct effect on a sufficient number of US policymakers. As we will show in the empirical chapters, there were certainly committed norm entrepreneurs who believed in the moral appropriateness of introducing safeguards that would protect foreigners against harm and who put forward arguments to that effect. Moreover, we do not deny that there were US policymakers, like, for instance, Senator John McCain in the torture case study, who were convinced that it was morally right to introduce such safeguards. However, we did not find sufficient evidence that safeguards were introduced because moral arguments proved persuasive in any of our cases. This is at odds with US policymakers and citizens' perception of their country as one that greatly values human rights. It seems that the human rights of "others", in our case non-citizens abroad, are largely excluded from this perception. It also suggests that human rights tend to be valued as long as they do not conflict with other goals, most importantly security (see also McFarland and Mathews, 2005).

Finally, safeguards could be traced back to a single mechanism in three cases, while in two cases we observed a combination of two mechanisms. In the targeted killing and refugee resettlement cases (strategic learning) and in the foreign surveillance case (coercion), safeguards emerged as the result of a single mechanism. By contrast, in the torture and arbitrary detention cases, safeguards arose from the same sequential combination of the two mechanisms. In both cases, the first set of safeguards resulted from coercion: a powerful shaming campaign in the torture case and a groundbreaking Supreme Court judgment in the arbitrary detention case. However, in both cases we were also able to observe that policymakers in the years following introduced additional safeguards even though they no longer faced coercive pressure. Rather, they responded to plausible arguments as to why it was in the United States' strategic interest to introduce such

safeguards. They had learned from the past and concluded that it was in their interest to introduce safeguards to prevent coercive pressure from materializing.

Enabling conditions

Our case studies also delivered insights into the conditions under which the mechanisms, or their more specific variants, are likely to operate. We were able both to confirm conditions already established in the literature and to find indications of further ones. Table 1.3 summarizes our findings.

First, our case studies allow us to draw conclusions with regard to the conditions under which the different variants of the coercion mechanism occur. They suggest that the effectiveness of material sanctions depends on the credibility of the sender, as well as on the vulnerability of the target – as predicted by the literature (Donno and Neureiter, 2018, 336–7; Elliot, 2018, 59). The case study on foreign surveillance underlines the importance of the sender's ability to credibly signal that it will only lift or refrain from imposing sanctions if safeguards for foreigners are introduced. US tech companies could credibly signal that they were themselves under heavy pressure (from customers in countries of the European Union (EU) and a judgment by the Court of Justice of the European Union (CJEU)) and would not budge unless the government established safeguards. The foreign surveillance case study also points to the vulnerability of the target as an important condition for sanctions to work. Unlike in the other cases studies, the US government was vulnerable to sanctions as it could not afford to lose access to the data on foreign consumers that the tech companies possessed.

With regard to shaming, we were able to confirm the expectation from the literature that rights violations that can be visualized in a powerful way are what lend themselves in particular ways to a public campaign (Keck and Sikkink, 1998, 205). Shaming was instrumental in making Congress establish a first set of anti-torture safeguards for foreign terror suspects – and would most likely not have been as effective had the campaigners not been able to use shocking photographs, especially from the Abu Ghraib prison. By contrast, in other cases in which rights violations could not be easily visualized, shaming was not the eventual driving

Table 1.3 Mechanisms and their enabling conditions

Mechanisms	*Enabling conditions*
Coercion:	
Material sanctions	• Credible sender • Vulnerable target
Shaming	• Visualization of rights violation • Taboo-like character of violated norm
Litigation	• Legal precedent • Right to judicial review violated
Strategic learning:	
	• Trustworthy messenger • High perception of future risk

force behind the introduction of safeguards. We were also able to specify another expectation from the literature, namely that violations of widely accepted norms are most suitable for a shaming campaign. As we discovered that shaming only worked in the torture case in which a taboo was violated (Barnes, 2017), our findings suggest that for shaming to have an effect in relation to extraterritorial human rights violations, the bar is likely to be even higher.

Finally, as regards litigation, we were able, in line with the existing literature, to find indications that precedents do matter (Gerhardt, 2011). In the arbitrary detention case, the only case in which litigation against US office holders played a role, the court that issued the judgment that paved the way for Congress to grant Guantánamo detainees limited due process rights was able to refer back to a similar judgment it had passed earlier. However, going beyond the assumptions found in the literature on human rights litigation, we also found evidence that courts seem to have a special motivation to get involved if their "core business" is encroached on. In the arbitrary detention case, the issue at stake was the right to judicial review, that is, the right to be heard by a court. Potentially then, US courts, which normally tend to defer to the other branches of government when it comes to interaction with foreigners abroad, are most strongly motivated to rein in the legislative or executive branch when their own scope of action is threatened.

Our case studies furthermore allow us to draw conclusions with regard to the conditions under which the strategic learning mechanism is likely to unfold. In line with expectations from the literature on organizational learning, our case studies suggest that strategic learning depends on whether the actors who are confronted with information about potential negative consequences of extraterritorial human rights violations perceive the messenger as trustworthy and consider the risk that negative consequences will materialize to be high (Haas, 2004; Bapat et al., 2013, 89–90). In all cases in which strategic learning occurred, we observed that it mattered that policy recommendations came from sources that were considered credible by the actors who were targeted. In the torture case, for instance, in which utilitarian argumentation mattered greatly for the introduction of one set of safeguards, it was of great importance that the advice to strengthen the safeguards came from highly respected retired intelligence officers and senior military staff. Similarly, in the refugee resettlement case, it made a difference that key arguments were presented by internal actors, including from the State and Defense Departments, as well as trusted external partners, with whom US agencies had worked before. Likewise, in all cases in which we could detect the strategic learning mechanism, it was clear that the risk perception of the targeted actors played an important role. Only if policymakers could be convinced that the likelihood of inaction eventually having negative consequences was high, did they decide to introduce new safeguards or strengthen existing ones.

Broader implications

What are the broader theoretical and empirical implications of these findings? What do they tell us about the strength of cosmopolitanism, about how norms

evolve, and about the prospects of accountability in the international sphere? And to what extent are our empirical findings part of a broader trend of states accepting that they should not unduly harm foreigners beyond their borders?

Cosmopolitism meets *realpolitik*

Our findings suggest that human rights and power politics keep each other in check. Human rights, and the cosmopolitan ideal underpinning them, are constrained by *realpolitik*, but *realpolitik* is similarly constrained by human rights. Our case studies unearthed ample evidence that US policymakers did, for the most part, not introduce human rights safeguards because they thought it was morally right to grant human rights protection to foreigners beyond US borders; rather, they introduced them primarily because not to do so would have been costly at the time or was expected to cost them dear at a later date. Moreover, the protections for foreigners that emerged were all, with the partial exception of the anti-torture safeguards, rather limited – which would most likely not have been the case had they been introduced by actors with a sincere commitment to a truly cosmopolitan understanding of human rights, even if we acknowledge that policymakers have a desire to balance security and human rights concerns. Finally, US policymakers refrained in most cases from using human rights language or referring to human rights conventions when they devised these safeguards.[7] Foreigners were granted protection, but it was not in most cases explicitly acknowledged that the United States had human rights obligations toward them. Therefore, there is insufficient evidence that a substantial number of US policymakers have internalized a truly cosmopolitan understanding of human rights or acted upon such an understanding.

On the other hand, however, the fact that US policymakers primarily acted on instrumental rather than moral grounds does not mean that such a norm according to which states should take care not to violate the human rights of foreigners does not exist. In fact, had there been no actors who believed in a truly cosmopolitan understanding of human rights – that is, that every human being has a right to be protected against human rights violations not just by her or his own state but by all states – it would not have made sense for the United States to introduce such safeguards as to do so would not have brought them any strategic gains (see also Hurd, 2005, 523). Human rights norms may not have had a constitutive effect on US policymakers in the sense that the latter introduced "extraterritorial human rights safeguards" because they were convinced by a moral duty to protect foreigners abroad – even though there were, as our case studies show, notable exceptions of US policymakers displaying such a conviction. Nonetheless, human rights norms did have a regulative effect in the sense that they restricted US policymakers' leeway – by making the refusal to introduce safeguards costly, either immediately or in the longer term. In most cases, this regulative effect was not strong enough to lead to comprehensive safeguards, but was sufficiently strong to prompt US policymakers to introduce limited ones. In that way, cosmopolitan human rights ideas constrained US power politics, even if US policymakers, for the most part, had not internalized them.[8]

Norm specification through contestation

The example of the introduction of "extraterritorial human rights safeguards" by US policymakers exemplifies some of the dynamics of the process of norm specification through contestation. Norms are never static; they constantly evolve. While their core remains stable (unless they morph into a new norm), their meaning is constantly reinterpreted (Sandholtz and Stiles, 2009, 1; Wiener, 2009; Krook and True, 2012, 109). When norms are contested, the point of contention is frequently their scope of application (Deitelhoff and Zimmermann, 2020), that is the question of which phenomena a norm covers or which actors are bound by it. Contestation with respect to the applicability of a norm may be a regular by-product of incremental changes in the context in which the norm is embedded that lead to a misfit between its original interpretation and the purpose it is supposed to fulfill (Checkel, 1999). However, norm contestation of this kind can also be sparked by shocks that instantly lay open the fact that the norm in its original interpretation no longer fulfills its purpose (Welsh, 2013, 380).

The human rights norm has a long history of contestation with regard to its applicability. The UDHR, the human rights regime's foundational document, is vague in many respects. Subsequent UN human rights conventions have specified, at least to some extent, what states' obligations are, while ever more social aspirations have been lifted to the level of human rights (Alston, 1984) and private actors and IOs have become actors who are considered to have human rights obligations (Clapham, 2006; Heupel and Zürn, 2017). The idea that universal human rights means not only that all states have to protect the human rights of their own citizens but that they also have to make sure that they do not violate the human rights of foreign citizens beyond their borders has increased the scope of application of the human rights norm even further. This emerging understanding of "universal" is partly a response to incremental changes such as the increasing reach of many states beyond their borders, which has triggered expectations that human rights obligations should travel beyond borders, too, to fulfill the purpose of the human rights norm (Cerone, 2007, 57; King, 2009, 522; Skogly and Gibney, 2010, 2). Yet, the multitude of extraterritorial human rights violations committed not only by the United States following 9/11 but also by other states was a shock that contributed to transforming the notion of universal human rights, too. Again, we do not claim that this new interpretation is accepted by all the relevant actors – it definitely is not. However, we do argue that the meaning of the human rights norm has been altered and specified through contestation, with tangible consequences for the scope of action the United States enjoys in the "War on Terror".

Accountability in the international sphere

Our empirical findings also suggest that accountability, though more difficult to achieve than in a domestic setting, is not a chimera in the international sphere. For sure, some conventional approaches to accountability, such as electoral accountability, are largely restricted to the domestic realm (provided the state in question is a democracy). However, other forms of accountability might very well be

applicable to the international realm (Grant and Keohane, 2005). The case study on the emergence of privacy safeguards for foreign surveillance operations, for instance, has shown the feasibility of both legal and market accountability, given the impact of the CJEU's judgment in *Schrems I* and of the concerns of US technology companies about losing shares in foreign markets on the Obama administration's readiness to introduce limitations for foreign surveillance. Moreover, the case study on the emergence of anti-torture safeguards has shown that under certain conditions public reputational accountability can also be a powerful tool.

The findings also indicate that accountability relationships in the international sphere are inherently complex and diverse, with both beneficiaries themselves, as in the arbitrary detention case, and proxies on their behalf, as in many other cases, demanding accountability (see also Koenig-Archibugi and Macdonald, 2013). Furthermore, accountability claims have in most cases been addressed directly to the perpetrators of extraterritorial human rights violations; in the surveillance case, we can see, however, that accountability claims have specifically been addressed to third parties (US tech companies), which then forwarded the accountability pressure to the primary target, that is the US government (see also Rubenstein, 2007; Heupel, 2020). Hence, states' increasing reach beyond their borders and interaction with non-citizens outside their territory not only complicate conventional ways of holding power holders to account but also open up new spaces for contestation, that are increasingly used (see also Krisch, 2010).

Broader empirical trend

Looking beyond the cases dealt with in this book, there is evidence that "extraterritorial human rights safeguards" have also been introduced by other states besides the United States. In fact, the United Kingdom and other US allies have introduced some similar safeguards to their counterterrorism policies to protect foreigners beyond their borders (e.g. Investigatory Powers Commissioner's Office, 2019). Beyond counterterrorism, many Western countries have introduced human rights safeguards that provide guidance for the provision of development aid (German Federal Ministry for Economic Cooperation and Development, 2011) or encourage private companies to "do no harm" in their investments and operations abroad (French Ministry for Europe and Foreign Affairs, 2019). Even autocracies have begun to introduce safeguards that, at least on paper, have the purpose of protecting foreigners against harm caused by them or their intermediaries. China, for instance, has introduced social and environmental standards for overseas mining operations (Greenovation Hub, 2014), while the Saudi Arabia–led coalition in the war in Yemen has set up a unit whose mandate was to investigate allegations of civilian casualties caused by coalition air strikes (Human Rights Watch, 2018). If we go beyond the introduction of safeguards and look at discourse, we can also find indications that the idea that states have extraterritorial human rights obligations has gained in strength, as a recent study of states' rhetoric in the UN Human Rights Council suggests (Heupel, 2018). There is also ample anecdotical evidence of other states or IOs publicly condemning human

rights violations by states beyond their borders, such as Norway's condemnation of Russia violating human rights in Ukraine (Permanent Delegation of Norway to the OSCE, 2015).

Again, we do not claim that the safeguards adopted by the US are effective in the sense that they always or mostly lead to tangible improvements for victims of extraterritorial human rights violations. Nor do we claim that the safeguards have been introduced out of a sincere commitment to human rights – many of them certainly have not. Likewise, we do not claim that states' rhetoric on their extraterritorial obligations is always honest. Yet, we do assert that these trends are meaningful insofar as they reflect norm change. The fact that even countries that are among the world's worst human rights abusers feel the need to introduce safeguards to protect foreigners outside their borders is interesting in itself, even if safeguards are mere paper tigers. Moreover, that states use fora such as the UN Human Rights Council to accuse other states of extraterritorial human rights violations suggests that they expect such claims to resonate with relevant audiences and realize that the human rights norm is undergoing a profound change.

Plan of the book

In Chapter 2, we present our theory and research design. We present three general mechanisms of social influence (moral persuasion, strategic learning, and coercion) as well as three variants of the coercion mechanism (material sanctions, shaming, and litigation). We provide conceptualizations of the mechanisms by describing their common starting point (extraterritorial human rights violations), their common endpoint (safeguards), and their first (intervention) and second (processing) components, as well as the conditions under which each mechanism is expected to operate. We also introduce the method we use (small-N process tracing with deductive and inductive elements), our case selection, and the sources we draw on.

Chapter 3 covers the emergence of safeguards for the protection of foreign detainees outside US territory against torture and CIDT. Specifically, the chapter covers the Detainee Treatment Act (DTA), which prohibits torture and CIDT by members of the military, and Executive Order (EO) 13491 as well as its subsequent codification into law with the McCain–Feinstein Amendment to the National Defense Authorization Act 2016, which makes the Central Intelligence Agency subject to the same obligations as the military. We show that the DTA was a response to a shaming campaign triggered by media coverage of torture in Abu Ghraib, which significantly tarnished the United States' reputation abroad. EO 13491 and the McCain–Feinstein Amendment, by contrast, can be traced back to strategic learning, as they were adopted in the absence of urgent pressure but with a view to preventing potential future negative consequences if new cases of torture were to be exposed.

Chapter 4 deals with the emergence of safeguards designed to protect foreign terror suspects detained in Guantánamo Bay against arbitrary detention. The chapter covers the development of procedural rights before military commissions

according to the Military Commissions Act (MCA) of 2009 and the introduction of Periodic Review Boards open to detainees who are not subject to conviction by military commissions according to EO 13567. We provide evidence that suggests that the MCA 2009 was a direct response to the Supreme Court's decision in *Boumediene v. Bush* that granted Guantánamo inmates the right to challenge their detention before US federal courts. EO 13567, by contrast, was the result of strategic learning involving expected long-term future costs associated with ongoing detention of assumed terrorists in an evolving war.

Chapter 5 traces the emergence of safeguards to help the US agencies involved minimize unintentional killings of non-US citizens in targeted killing operations abroad. The chapter covers the emergence of safeguards for terror suspects and civilians and reconstructs the creation of the Presidential Policy Guidance on the issue and of EO 13732, which together provide protection for both types of victims. We demonstrate that both safeguards were introduced as a result of a strategic learning process in which President Obama and his advisors were confronted with utilitarian arguments as to why it was in the United States' long-term strategic interest to introduce such safeguards. In both instances, Obama and his advisors, after careful consideration, arrived at the conclusion that the expected strategic benefits of such safeguards outweighed associated costs, even though they did not face urgent pressure that would have made the immediate introduction of such safeguards inevitable.

Chapter 6 investigates the emergence of safeguards for refugees who seek resettlement in the United States. Specifically, the chapter focuses on the Leahy–Kyl Amendment to the 2008 Consolidated Appropriations Act (CAA), which created provisions on TRIG waivers for refugees awaiting resettlement to the United States that ultimately provided the basis for a series of situation- and group-based exemptions for refugees who would otherwise have been barred from protection in the United States on terrorism-related grounds. We show that the inclusion of these provisions in the CAA was the result of strategic learning by Department of Defense and Department of State officials who had been targeted by norm entrepreneurs from various NGOs involved in the US refugee resettlement program with information on the likely tangible repercussions of overly strict admission criteria.

Chapter 7 deals with the emergence of safeguards to prevent privacy infringements in relation to US foreign surveillance. Specifically, the chapter covers the introduction of Presidential Policy Directive-28 and the process leading to the EU–US Privacy Shield Framework Principles that the US Department of Commerce agreed with the European Commission. We show that both safeguards followed the threat and application of sanctions against the US government. In both instances US technology companies credibly threatened to deny the NSA access to their data on foreign users unless safeguards were enacted that would dispel those users' concerns. We also detail how the technology companies threatened and applied sanctions after they had themselves been confronted with coercive pressure, first when foreign users began to turn to foreign competitors and once again after the CJEU prohibited the transfer of data on EU

citizens to US servers unless protections against illegitimate NSA access were established.

The conclusion summarizes the finding that it is primarily instrumental considerations on the part of US policymakers that account for the introduction of protections for foreigners affected by US counterterrorism beyond US territory. We close by arguing that our results suggest that the human rights norm is undergoing change, triggered by contestation about what the notion of universality means and, accordingly, to which human beings in which situations states have human rights obligations – and that this norm constrains the range of policy options from which US policymakers can reasonably choose.

Notes

1 The Convention on the Prevention and Punishment of the Crime of Genocide and the International Covenant on Economic, Social, and Cultural Rights possess no clauses that confine their scope of application.
2 On moral persuasion generally see Risse and Sikkink (1999), Payne (2001), and Deitelhoff (2009).
3 On (strategic) learning generally see Argyris and Schön (1978), Huber (1991), and Haas (2004).
4 On material sanctions generally see Hafner-Burton (2005), Bapat et al. (2013), and Elliott (2018).
5 On shaming generally see Krain (2012), Murdie and Davis (2012), and Ilgit and Prakash (2019).
6 On litigation generally see Van Schaack (2004), Sikkink and Kim (2013), and Duffy (2018).
7 The only exceptions are Executive Order (EO) 13491, which explicitly references the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and Presidential Policy Directive (PPD)-28, which mentions "civil liberties concerns" of non-US citizens affected by US signals intelligence activities.
8 On the distinction between the constitutive and the regulative effect of norms see Klotz (1995), Wendt (1999, 47–91) and Glanville (2016).

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2 Studying the emergence of "extraterritorial human rights safeguards"

Theory and research design

Introduction

This book aims at discovering the mechanisms through which safeguards emerge in the United States to protect foreigners against harm caused by US counterterrorism policies outside US territory. This undertaking requires four steps: first, we need to conceptualize plausible mechanisms, drawing on theories of social influence generally and human rights socialization specifically. Next, we need to choose a suitable method and select cases according to reasonable criteria before then conducting an in-depth empirical analysis of each case, using suitable sources to be able to trace the mechanism/s that is/are present in each case. Finally, we need to bring together the findings of the individual case studies to draw conclusions on the explanatory power of the chosen mechanisms, on how they interact with each other, and under the conditions on which they are likely to occur.

This chapter covers the first two of these steps. We introduce three mechanisms of social influence (which we will test empirically in the subsequent chapters) and describe their basic logic. We conceptualize each mechanism and present expectations about each mechanism's enabling conditions. We also introduce our method, case selection, and the sources we have used.

Mechanisms of social influence

What mechanisms can account for why US policymakers accept limits to how they treat foreigners beyond US borders when they employ counterterrorism policies? Generally, mechanisms that depict the social influence of a norm draw either on the constitutive effect or on the regulative effect of norms (see Klotz, 1995; Wendt, 1999, 47–91; Glanville, 2016). A norm exerts a constitutive effect when actors begin to believe in the appropriateness of the norm and their moral convictions change. In contrast, a norm exerts a regulative effect when it constrains actors' behavior and norm violation becomes costly; hence, a norm exerts a regulative effect when actors recognize the norm not because they believe in the content of the norm but because adjusting one's behavior becomes rational.

We give consideration to three mechanisms, namely moral persuasion, strategic learning, and coercion (see also Cardenas, 2010; Risse and Ropp, 2013).[1]

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Moral persuasion implies that policymakers become convinced of the value of a norm (e.g. Risse and Sikkink, 1999). Strategic learning implies that policymakers anticipate future strategic benefits or costs associated with norm recognition or norm rejection, respectively (see e.g. Argyris and Schön, 1978). Coercion implies that policymakers take measures to act in accordance with a norm because they face immediate pressure that they believe compels them to do so. The coercion mechanism can come in three variants, depending on which actors intervene and what strategies they choose.[2] In the material sanctions variant, intervening actors punish norm-violating actors by barring them from realizing material interests (e.g. Hafner-Burton, 2005). In the shaming variant of the coercion mechanism, intervening actors damage the norm-violating actors' reputation (e.g. Schimmelfennig, 2001). In the litigation variant, judges issue judgments that demand reforms that, if implemented, would bring formerly norm-violating actors closer to norm-conformity (e.g. Duffy, 2018). Figure 2.1 summarizes the three mechanisms and their variants, while the next section provides conceptualizations of each mechanism.

By considering moral persuasion, strategic learning, and coercion, we thus acknowledge that norms can have both constitutive and regulative effects. The moral persuasion mechanism draws on the constitutive effect of norms, as it involves actors changing their normative convictions. By contrast, strategic learning and coercion draw on the regulative effect of norms, as the two mechanisms aim at changing actors' rational considerations. Applied to our object of study, this implies that we are open to the possibility that US policymakers introduce what we call "extraterritorial human rights safeguards" because they have been convinced of the moral value of such safeguards – but also that they do so on the basis of instrumental reasoning.

Conceptualization

Mechanisms are composed of discrete building blocks. They link a specified starting point with a specified endpoint through intermediate entities and processes (Mayntz, 2004, 241; Bennett and Checkel, 2015). Mechanism research therefore differs from correlation research in that it requires the researcher to piece together every link in the causal chain between a mechanism's starting point and its endpoint. Crucially, researchers must not jump over any link in the causal chain but

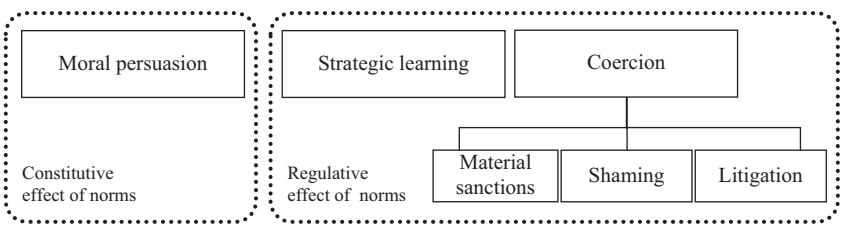

Figure 2.1 Three mechanisms and their variants

must find empirical evidence for each building block of a mechanism before they can conclude that the mechanism was present and had an effect.

To make them useful for empirical research, mechanisms need to be conceptualized with a view to their building blocks. This implies that we need to specify each mechanism's components between its starting and endpoint (Beach and Pedersen, 2019, 53–4). For this purpose, we follow the basic logic of Coleman's (1986) theory of purposive action, according to which events at the macro-level trigger action at the micro-level, which, in turn, results in changes at the macro-level. To add agency and interaction, we find inspiration in Koh's concept of transnational legal process, which he defines as "process by which public and private actors – namely, nation-states, corporations, international organizations, and nongovernmental organizations – interact in a variety of fora to make, interpret, enforce, and ultimately internalize rules of international law" (Koh, 2009, 131; see also Koh, 1997).

In the remainder of this section, we conceptualize our selected mechanisms of social influence based on these considerations. Importantly, the different mechanisms' individual components need to be distinct from each other, so that each piece of empirical evidence can be unequivocally assigned. The mechanisms' common starting point at the macro-level is extraterritorial human rights violations. Their first component is at the micro-level and consists in the intervention of individuals, groups, or organizations with policymakers in the rights-violating state who demand that the latter recognize extraterritorial human rights obligations and introduce respective safeguards. The mechanisms' second component is at the micro-level as well and consists in policymakers in the rights-violating state processing the input and forming the will to introduce safeguards. Finally, the mechanisms' common endpoint, or outcome, is at the macro-level again and consists in the establishment of safeguards that are to make sure that the state in question does not harm non-citizens outside of its territory. Figure 2.2 visualizes the mechanisms' inner logic.

Thus, the mechanisms are conceptualized in such a way that they only cover the direct effect of a specific social influence on policymakers in a rights-violating

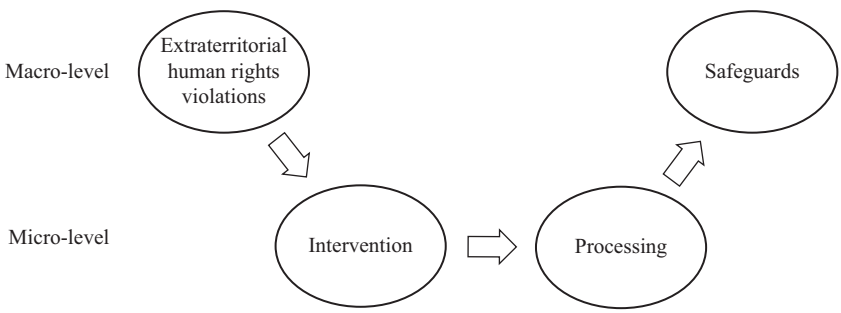

Figure 2.2 Coleman's bathtub applied to the emergence of "extraterritorial human rights safeguards"

Causal mechanism	Starting point	Intervention	Processing	Outcome
Moral persuasion	Extraterritorial human rights violations	Moral arguments	Acceptance of norm	Safeguards
Strategic learning	Extraterritorial human rights violations	Strategic arguments	Anticipation of future strategic losses	Safeguards
Coercion	Extraterritorial human rights violations	Material sanctions, shaming, or litigation	Perception of urgent need to react	Safeguards

Figure 2.3 Mechanisms of social influence

state, but not its indirect effect. In other words, the mechanisms embody how policymakers in a rights-violating state are persuaded, how they learn strategically, and how they are pressured; they do not include the motivations of those actors who intervene with policymakers in the perpetrator state. Therefore, the question of whether those who intervene have themselves been morally persuaded, convinced by strategic arguments, or coerced into action is not part of the conceptualization of the mechanisms. Figure 2.3 gives an overview of each mechanism's conceptualization, while the remainder of this section is dedicated to detailed conceptualizations of each mechanism.

Starting point: extraterritorial human rights violations

Each mechanism's common starting point is extraterritorial human rights violations defined as human rights violations committed by a state against foreign citizens beyond its borders.[3] Extraterritorial human rights violations can be attributed to a state as a whole, a government agency, or even an official representing the state. For example, states refer to another state's extraterritorial human rights violations during the UN Human Rights Council's Universal Periodic Review (Heupel, 2018). Similarly, government agencies can be accused of violations by whistleblowers, as was the case with the United States' National Security Agency (NSA) regarding indiscriminate foreign surveillance (e.g. Green and Rodriguez, 2014). Allegations may even be directed against specific government officials, such as the complaint filed to the General Prosecutor of Paris against former US Secretary of Defense Donald Rumsfeld in relation to alleged violations of the Convention against Torture (Center for Constitutional Rights, 2021).

Extraterritorial human rights violations can result from states disregarding negative or positive human rights obligations, although there is less agreement on the extent to which states have positive human rights obligations toward foreigners abroad (Skogly and Gibney, 2002). A state disregards its negative obligations when it fails to respect the human rights of non-citizens beyond its borders. In contrast, it disregards its positive obligations when it fails to guarantee that non-citizens abroad are protected against human rights violations by third parties, or when it fails to contribute to the enjoyment of human rights by non-citizens abroad. When it comes to extraterritorial human rights violations by the United States following 9/11, both categories of human rights violations are relevant. Torture in Abu Ghraib would be an example of a violation of a negative obligation, as US government officials, by effectively authorizing torture practices, have violated the right of Iraqi detainees to be free from torture (Duffy, 2008, 573). *Per contra*, sending terror suspects to another country that has a reputation for torturing detainees during interrogations is a violation of a positive obligation, as it constitutes a failure to protect individuals against mistreatment by a third party (Sadat, 2006).[4]

Finally, a state can commit extraterritorial human rights violations in different contexts. For one, such rights violations can occur when a state has control over foreign territory in which non-citizens reside (for instance during the transitional administration of foreign territory) but also when it merely has factual control over non-citizens abroad (e.g. Scheinin, 2004, 80). In the US response to 9/11, extraterritorial human rights violations occurred in relation to both types of control. Rights violations took place when the United States controlled territory and established prisons outside US territory in which foreign terror suspects were tortured (Senate Select Committee on Intelligence, 2014), and they took place in situations of factual control when disproportionate numbers of civilians were killed in targeted killing operations in areas outside US control (UN Office of the High Commissioner of Human Rights, 2012). Furthermore, some extraterritorial human rights violations that have occurred following 9/11 have been directly related to military campaigns, while others have not. An example of the former is the cases of arbitrary detention in US prisons in Afghanistan in the midst of ongoing military operations (Hafetz, 2011, 48–50). An example of the latter is foreign mass surveillance, which violated the privacy rights of countless non-US citizens in countries with which the United States was not at war (Greenwald, 2014).

First component: intervention

The mechanisms' first component consists of an intervention with the purpose of making policymakers in the target state establish safeguards that can guarantee that foreigners abroad are not harmed by the state's policies. Actors who intervene with policymakers in a rights-violating state can possess a diverse array of backgrounds and characteristics and include actors such as other states, transnational advocacy networks, UN human rights bodies, academics, and judges. In addition, although "intervention" assumes a difference between the intervener and the

intervenee, interveners, such as formal advisors to the head of state or a group of parliamentarians, may also belong to the group of decision-makers within the target state. In any case, actors who intervene may apply different strategies: they may provide moral arguments, as in the moral persuasion mechanism; they may provide instrumental arguments, as in the strategic learning mechanism; or they may exert immediate pressure, as in the three variants of the coercion mechanisms, namely through material sanctions, shaming, and litigation.

In the *moral persuasion* mechanism, policymakers in the rights-violating state are confronted with arguments by norm entrepreneurs as to why their policies are morally unacceptable. Such moral arguments are intended to challenge policymakers' principled beliefs in order to convince them of the inherent value of the norm that is promoted (Nadelmann, 1990, 482; Finnemore and Sikkink, 1998; Busby, 2007). Such arguments may arise in a moral discourse among a group of decision-makers in the target state, upon recognizing the unintended human rights violations that occur as a result of a specific policy. Newly elected policymakers might also introduce new moral perspectives upon entering office. Policymakers may also be confronted with moral arguments from the public when norm entrepreneurs intervene from the outside and transnational advocacy networks or UN bodies provide moral arguments. Moral arguments can be reason-based, if it is argued, for example, that states owe human rights not just to their own citizens and non-citizens on their territory but also to non-citizens beyond their borders because human rights are universal values. In contrast, however, moral arguments may also attempt to tap into the power of myths or evoke emotions to make key policymakers challenge and ultimately change their moral convictions (see Risse and Sikkink, 1999, 14).

In the *strategic learning* mechanism, policymakers in the target state are confronted with instrumental arguments as to why their rights-violating behavior, and their failure to introduce effective safeguards, is likely to lead to future strategic losses (see Drezner, 2003; Grobe, 2010, 12; Clay, 2018, 201) – or, conversely, as to why the introduction of safeguards is likely to further policymakers' own, or their country's, strategic interests (see Bapat et al., 2013, 94). Policymakers may be confronted with warnings that continued rights violations could endanger military personnel abroad, or result in the loss of key cooperation agreements with other states or in civil society actors staging a powerful shaming campaign that could tarnish their reputation. In contrast, policymakers may also learn of long-term strategic benefits of policy reform, such as setting standards other countries can emulate. Thus, unlike in the coercion mechanism, in which policymakers are confronted with immediate pressure (see below), in the strategic learning mechanism policymakers do not face immediate pressure, but are given arguments as to why introducing safeguards is rational, also in order to prevent such pressure from building up in the future. Also in this mechanism, arguments may be provided by actors with direct links to decision-makers but also by actors who provide their expertise from the outside (Thomas, 2001, 335). As regards access to policymakers, there may be formal structures, such as expert bodies set up with the task to provide guidance or boundary-spanning units that involve external stakeholders

in policy debates (Aldrich and Herker, 1977). However, access may also be informal and depend on personal ties and developed traditions.

In the *coercion* mechanism, immediate pressure to act is already a reality, and not just a possibility that can still be averted, as would be the case in the strategic learning mechanism. In its first variant, interventions materialize in the form of *material sanctions* that actors apply against the rights-violating state, one of its agencies, or against individuals representing the state. Material sanctions are applied based on the assumption that they are sufficiently hurtful so that decision-makers in the target state take measures to stop or at least mitigate the rights violations. Sanctions can be issued by different actors as long as they have power resources at their disposal that they can apply. States can stop granting foreign aid to states on account of their poor human rights records or suspend trade agreements with in-built human rights conditionality (Hafner-Burton, 2005; Donno and Neureiter, 2018). States can also refuse to agree to a country joining an international organization (IO) of which they are members or they can forbid other states from using military bases on their territory. IOs have various options for applying sanctions, too. The UN Security Council can adopt different types of sanctions against countries and individuals responsible for grave human rights violations, including commodity sanctions and asset freezes. The Council of the EU can strip EU member states that violate their commitment to respect human rights of their voting rights in the Council (Official Journal of the European Union, 2012, Art. 7), while the World Bank can pause funding to projects in countries if these do not comply with the World Bank's social and environmental safeguards (Heupel, 2017). Private actors can also apply sanctions against states that commit human rights violations. An example of this is transnational companies shunning foreign direct investment in countries that do not commit to human rights treaties (Garriga, 2016).

The first component of the *shaming* variant of the coercion mechanism consists of actors publicly exposing a state's norm-violating behavior and attributing blame. The purpose of shaming is to increase the reputational costs of continuing with the norm-violating behavior (Lebovic and Voeten, 2006; Pruce and Budabin, 2016, 419). Consequently, observers, including citizens of the targeted state, may begin to think less of the state for its handling of human rights issues, which could result in reduced support for the state and its political leadership (see Ausderan, 2014). Shaming can be undertaken by nongovernmental organizations (NGOs), but also by IOs, the media, or individuals (Hafner-Burton, 2008). It involves the framing of a behavior as a violation of a commonly accepted standard of behavior and can implicate the manipulation of information (Pruce and Budabin, 2016, 418). Additionally, it frequently implies the discrimination between an in-group and an out-group and thus the exclusion of a perpetrator from an imagined community (Risse and Sikkink, 1999, 15). It can also serve to expose a gap between the scandalous norm-violating behavior of the target state and its legal commitments or self-ascribed identity. In doing so, actors who apply a naming-and-shaming strategy may aim for rhetorically entrapping the target state by accusing it of hypocrisy (Schimmelfennig, 2001; Franklin, 2008; Goddard, 2009, 125; Ilgit and

Prakash, 2019, 1303). Hence, actors close down the space for justifiable rebuttal and render contestation difficult. Importantly, other than in the case of moral persuasion, the aim of naming and shaming is not to convince the target actor that its behavior is morally unjustifiable, but rather to make norm violation too politically damaging (Schimmelfennig, 2001; Krebs and Jackson, 2007).

The intervention component of the *litigation* variant of the coercion mechanism consists of a court judgment according to which a norm-violating behavior or policy is found to be unlawful. Judges who issue such judgments engage in judicial policy-making in the sense that they fill the gaps in a country's law or even develop the law further (see Stone Sweet, 2000, 195; Ginsburg, 2005; Wessel, 2005). Such judgments are normally related to a concrete case concerning the behavior of a government official, the government as a whole, or one of its agencies, initiated by an affected individual. Nonetheless, the impact of the specific case is frequently expected to be a broader change to the rules and regulations that have enabled the specific rights violation. Such litigation has been called "public impact litigation", or "cause lawyering", in the sense that lawyers consider the potential broader ramifications of a beneficial judgment, beyond those affecting the client they represent. Traditionally, lawyers who have engaged in human rights cause lawyering have been ideologically committed lawyers, but more recently they also include those who are attracted to the high profile of such cases (Van Schaack 2004, 2306 and 2310; Simmons, 2009, 133). Regarding cases involving (extraterritorial) human rights violations, affected individuals can, in principle, try to seek accountability and initiate proceedings before different courts (Sikkink and Kim, 2013, 271-2). In addition to domestic courts, they might seek recourse from a foreign or international court, including the International Criminal Court.

Second component: processing of intervention

In the mechanisms' second component, targeted policymakers process the intervention – moral or instrumental arguments or immediate pressure – and form the will to introduce safeguards for foreigners abroad. Depending on the type of intervention, this processing consists of a thorough consideration of the presented moral or strategic arguments, or of developing a way to rid oneself of the immediate pressure.

In the *moral persuasion* mechanism's second component, policymakers who have been confronted with moral arguments reflect, either on their own or in dialogue with others, on the moral arguments and accept the moral claims made by norm entrepreneurs. Based on an engagement with the moral arguments provided, policymakers arrive at the conclusion that their behavior has been morally inacceptable and become convinced of the value of the promoted norm. Specifically, they assess the validity and moral justifiability of their previous beliefs and subsequently change their convictions so that their beliefs come in line with the expectations associated with their role so as to avoid cognitive dissonance. Over time, moral persuasion implies that a new norm, or a new understanding of a norm, is

internalized and assumes a taken-for-granted status (Risse and Sikkink, 1999, 14 and 29–31). In this sense, the processing of moral arguments is a form of social learning, as actors engage with novel information about standards of appropriate behavior in a given community, "assess the validity claims of norms and standards of appropriate behaviour", and begin to "believ(e) in the moral validity of the norms and rules in question" (Risse, 2004, 288 and 293). As such, this component of the moral persuasion mechanism is inherently demanding, especially as new normative understandings are not contemplated in a vacuum but contend with other potentially conflicting normative understandings (Payne, 2001, 38).

In the *strategic learning* mechanism, policymakers engage with the causal arguments they have been provided with and conclude that it is rational for them to introduce "extraterritorial human rights safeguards", as they consider the anticipated benefits of doing so to be greater than those of not doing so. Specifically, policymakers may conclude that reforms can preempt future pressure to introduce changes, which are expected to be more costly (see Clay, 2018, 134 and 136–7). Hence, strategic learning resembles single-loop learning as developed by Argyris and Schön (1978), as policymakers do not change their principled beliefs but rather adapt their strategies to reach their existing goals as derived from principled beliefs that remain stable. Specifically, policymakers, who have been provided with new causal arguments about the likely consequences of their behavior, including the potential for future sanctions, scandal, or litigation, deliberate on the likelihood of such scenarios and weigh it against the costs of reforms. If the future benefits of undertaking reforms outweigh the likely costs of maintaining the status quo, then policymakers will introduce or enhance human rights safeguards (see Grobe, 2010; Pruce and Budabin, 2016). Consequently, the strategic learning mechanism's processing component differs clearly from that of the moral persuasion and coercion mechanism: on the one hand, policymakers do not concern themselves with moral but with instrumental arguments; on the other hand, policymakers respond to primarily hypothetical pressure and concerns.

Other than in the strategic learning mechanism, policymakers at the processing stage of the three variants of the *coercion* mechanism consider the effects of immediate pressure. In the *material sanctions* variant, the processing component consists of policymakers in the rights-violating state recognizing an imperative to counteract the negative consequences of the sanctions applied or threatened. For instance, policymakers in a state which is deprived of foreign aid or which sees a trade agreement canceled on account of alleged human rights violations would realize that they have little choice other than to bow to the demands of the sender(s) of the sanctions and improve human rights protections (see Hafner-Burton, 2005; Donno and Neureiter, 2018). Likewise, policymakers in states that are targeted by the UN Security Council with sanctions by reason of grave human rights violations would conclude that to get the sanctions lifted they have to demonstrate convincingly that they have taken steps to improve their states' human rights record (see Cortright et al., 2000). Policymakers in states that lose much needed foreign direct investment (FDI) owing to violations of basic human rights standards would also see little alternative other than to change their human rights

record for the better. In contrast, policymakers in economically powerful states but who rely on the support of international allies in foreign counterterrorism operations could conclude that allies rescinding such support would make reforms necessary (see De Felipe and Martín, 2012).

In the processing component of the *shaming* variant of the coercion mechanism, policymakers in the target state see an urgent need to mend the loss of reputation brought about by public incriminating allegations. Policymakers realize that the reputational loss brought about by a shaming campaign is intolerable as it undermines their, or their state's, legitimacy, either domestically or abroad. Policymakers therefore decide to take measures as demanded by the actors who have applied naming-and-shaming strategies and to stop, or at least reduce, behavior that is creating scandal, or introduce respective safeguards, to win back legitimacy. At least, they should expect that complying with the demands brought forward would move them, or their country, out of the spotlight (Krain, 2012; see also Pruce and Budabin, 2016). Alternatively, policymakers might be less motivated by reputational concerns but might rather feel motivated by negative emotions engendered by concerns about their self-image due to a perceived failure to live up to widely accepted values (Ilgit and Prakash, 2019).

Litigation's processing component implies that policymakers in the accused state consider it necessary to respond to a court judgment that has been handed down. Specifically, policymakers realize that acting contrary to the court decision involves intolerable costs (see Simmons, 2009, 135), including, for example, undermining the balance of power between the different branches of government. To the extent that policymakers have internalized the norm that court judgments are to be followed, they may be motivated to comply with the judgment because of the involved court's perceived authority (Barnett and Finnemore, 2004). Yet, policymakers may also comply with a court judgment for instrumental considerations, if they, for instance, believe that non-compliance undermines a domestic court's authority in unwanted ways. Additionally, policymakers might also believe that non-compliance with the decisions of a foreign court jeopardizes their country's relationship with that country or that non-compliance, especially with judgments issued by international courts, undermines their standing as trustworthy actors. Finally, it is important to note that not only a judgment itself but also the process leading up to a judgment can have an effect on the target state, as the process of litigation itself "may lead states to clarify their own policies" (Duffy, 2008, 595). Consequently, states may be prompted to introduce reforms under direct threat of a pending judgment to preempt the court's decision.

Outcome: safeguards

The common endpoint of all mechanisms is the establishment of safeguards that are designed to prevent harm to foreign citizens by the accused state beyond its borders. States can use human rights language when introducing such safeguards, but must not necessarily do so. The safeguards can be established by the executive, if, for instance, the US president issues a directive, an order, or a guidance

banning a specific practice that has resulted in extraterritorial human rights violations. Likewise, an agency, such as the NSA, or a ministry, such as the Department of Defense, may revise its guidelines and add protections for non-US citizens beyond US territory. Safeguards can also be established by the legislature, if for instance Congress enacts a law that prohibits a certain rights-violating policy or requires measures that make human rights violations or other hurtful behavior less likely.

The mechanisms' endpoint can either be the introduction of new safeguards or improvements to already existing provisions. We define improvements as changes that render extraterritorial human rights violations less likely. We assume specifically that changes to five distinct features of the safeguards constitute improvements (see also Heupel and Hirschmann, 2017, 43–8): a first indication of improvement is the extension of the scope of the human rights violations covered. Thus, if for example an anti-torture safeguard had initially only prohibited sleep deprivation, but at a later stage additionally prohibits waterboarding, we would treat this as an improvement. A second indication of improvement is a rise in the number of beneficiaries. Hence, if for example the initial safeguards had only applied to citizens from one country but are subsequently changed in a way that they apply to any foreigner beyond the state's territory, we would count this as an improvement, too. Third, improvement can also imply the transition from non-binding to binding rules, as binding rules are assumed to have a particularly strong compliance pull (Abbott et al., 2000, 408–9), or the addition of a law passed by Congress to an executive order. A fourth indication of improvement is the replacement of ambiguous with precise rules. Precise rules are believed to have a stronger compliance pull as well, as they make it more difficult for actors to come forward with opportunistic rule interpretation (Franck, 1990). Finally, improvements can come in the form of adding complaint provisions that enable aggrieved individuals to hold perpetrators to account for already existing prevention provisions. Complaint provisions are believed to have a deterrent effect and might thus influence the decision on whether to violate norms or abide by them (Grant and Keohane, 2005).

Finally, several considerations help us make an assessment as to which mechanism(s) has/have generated the outcome of interest (safeguards) in each case. First, given that a mechanism is only present if all its components are present (Beach and Pedersen, 2019, 246), a mechanism can only be present if, following its starting point, both its first and its second component can be observed. Thus, if a court has issued a judgment demanding safeguards (component 1 of the litigation mechanism present), but policymakers do not feel compelled to implement the judgment as they do not recognize the court's authority (component 2 of the litigation mechanism not present), safeguards that have nevertheless emerged cannot be explained by the litigation mechanism, but must have emerged via another mechanism. Only if policymakers had felt compelled to follow the judgment, and had introduced safeguards in order to satisfy the court, could we have concluded that litigation can account for the establishment of safeguards.

Furthermore, we look out for "auxiliary traces" (Mahoney, 2012, 575) that the mechanisms might have left. We therefore assess whether there are similarities between the demands of the intervening actors in a mechanism's intervention component and the design of the safeguards that are later introduced. We also consider the justifications for the introduction of safeguards. Accordingly, if a government establishes safeguards that reflect the demands made by a court, and if the government justifies the introduction of the safeguards with its obligations to comply with the judgments of the court, we treat this as further evidence that the litigation mechanism likely produced the safeguards.

Additionally, there are reasons to believe that different mechanisms may lead to safeguards of different quality and at a different speed. Moral persuasion, which implies that key actors change their principled beliefs and start to believe in the inherent value of extraterritorial human rights protection, should be associated with more far-reaching safeguards, as actors should have the ambition to produce the most reliable safeguards possible. At the same time, moral persuasion is believed to be a slow-moving process (Hafner-Burton, 2005, 600–1). By contrast, strategic learning and coercion, which follow an instrumental logic in the sense that actors introduce safeguards because they believe that this furthers their long-term strategic gains or because they are immediately compelled to do so, should lead to less far-reaching provisions that can be viewed as "tactical concessions" (see also Risse and Sikkink, 1999, 12). Nonetheless, especially coercion, and to a lesser extent strategic learning, should result in safeguards in less time if compared to the moral persuasion mechanism.

Enabling conditions

Mechanisms do not automatically reach their endpoint. Rather, for each mechanism to unfold and reach its endpoint, certain conditions are believed to be beneficial to activate the mechanisms in the first place and eventually facilitate its unfolding via its components until its endpoint (Falleti and Lynch, 2009; Bennett and Checkel, 2015, 12). In the following, we therefore specify some of the mechanism's enabling conditions, even as we remain open to inductively deriving further conditions.

A number of different conditions are believed to be conducive to *moral persuasion*. Regarding the content of the norm in question, it has been argued that it is comparatively easier to persuade actors if the norm relates to fundamental and generally shared values such as equality and individual dignity (Sandholtz and Stiles, 2009, 17) or the prevention of bodily harm and consistency in decision-making (Hawkins, 2004, 785). Others have argued that persuasion is more likely if a new norm can be related to a preexisting norm, so that moral claims can resonate (Keck and Sikkink, 1998, 204). Furthermore, the absence of countervailing norms, which may weaken or challenge the promoted norm, is considered helpful for persuading key actors (see Cardenas, 2004, 222–4). Regarding the venue in which moral persuasion takes place, it is believed that a venue with flat hierarchies internally, in which actors feel free to make arguments, is beneficial,

as is a venue which is open to external actors participating in the exchange of arguments (Risse, 2004, 294 and 296; Deitelhoff, 2009, 43). Regarding the actors involved, scholars assume that actors who are to be persuaded should not hold deeply anchored beliefs but should in principle be open to change their beliefs (Risse, 2004, 294; Hafner-Burton, 2005, 6000), while norm entrepreneurs should have the ability to display empathy (Risse 2000, 10), and should not be perceived as hypocrites (Goodman and Jinks, 2013, 184).

Strategic learning is also assumed to benefit from a number of enabling conditions. It is assumed, for instance, that the more severe the threat that negative consequences will materialize if reforms are not undertaken, the more likely it is that policymakers will consider reforms (Bapat et al., 2013, 89–90). In addition, it is believed to be important that the warnings of negative consequences of non-reform and the likely benefits of reforms are perceived to be reliable (Clay, 2018, 136); this can be the case if the source that provides the information is perceived to be knowledgeable and credible (Haas, 2004). Moreover, it has been argued that the more uncertain policymakers are about the situation they find themselves in, the more open they will be to engaging with the causal arguments they are confronted with (Risse, 2000, 33). Furthermore, openness toward external actors is also believed to be conducive to learning processes, whereas walling off from voices external to the inner decision-making circle is believed to interfere with learning (Poister, 2010, 248; Bryson et al., 2018, 331). Finally, as in the moral persuasion mechanism, an organizational culture in which participants can exchange their views freely is believed to be conducive to strategic learning, too (Child and Heavens, 2003).

Furthermore, scholars have identified two key conditions for *material sanctions* to have effects on actors targeted with sanctions. First, the targeted actors must be vulnerable and the actors who apply the sanctions must have real leverage (Bapat et al., 2013, 94; Donno and Neureiter, 2018, 336–7). Thus, if the targeted actors can substitute the goods or services that are withheld from them, they are not vulnerable to sanctions. As for sanctions by private actors, it has been claimed that if a country loses FDI because of its failure to comply with human rights standards, but can get FDI from other firms without human rights conditionality, it is not particularly vulnerable to this type of sanction. Regarding sanctions by states and IOs, it has been claimed that if economic sanctions are adopted by a group of states or by an IO that can compel a great number of states to implement their sanctions, vulnerability rises (Bapat et al., 2013, 89; Elliott, 2018, 59). Furthermore, if the targeted state has the possibility to retaliate with sanctions, vulnerability should be low, too, as the targeted state has leverage to make the sanctioning actor withdraw its sanctions. Second, the sanctioning actor must be able to credibly convey the message that it will lift the sanctions only if certain demands are met. Hence, if the targeted actor believes that sanctions are not long-term because they hurt the sanctioning actor, too, or because the government that has enacted the sanctions will be removed from power soon anyway, the sanctioning actor's credibility is low and the targeted actor can assume that the sanctions will be lifted without it changing its behavior (see Elliott, 2018, 59).

Regarding the conditions on which *shaming* is effective in bringing about policy change, scholars believe that the type of issue that is addressed in a shaming campaign matters. Issues that involve bodily harm or harm afflicted on innocent civilians are believed to be particularly suitable to construct a shaming campaign (Keck and Sikkink, 1998, 27). The same is believed to apply to issues that can be easily visualized (ibid., 205) and to issues that appeal to the sponsors of civil society organizations as these depend on external resources and must therefore choose issues that are attractive to their funders (Hendrix and Wong, 2014). Issues that involve the violation of norms that are widely accepted in a society and can thus only with difficulty be rhetorically rebutted are also believed to lend themselves to a shaming campaign (see Goddard, 2009, 123). Beyond that, the effectiveness of shaming is also assumed to be influenced by the constellation of actors who engage in shaming. Accordingly, shaming seems to be particularly promising when transnational organizations coordinate their efforts with IOs, third-party states, or individuals from outside the target state (Murdie and Davis, 2012). Finally, features of the target state are also believed to matter: if changes are demanded that would endanger the survival of the government, shaming is less likely to be effective, while shaming is more likely to be effective if the demanded reforms are less threatening to the government (Murdie and Peksen, 2015). Furthermore, governments should be more vulnerable to reputational loss on account of alleged human rights violations if they see the state they represent as part of a "community of liberal states" (Risse and Sikkink, 1999, 24; see also Klotz, 1995).

Finally, with regard to the conditions of effective *litigation*, the formal and informal rules governing the practices of the available courts are assumed to play an important role. Specifically, it is considered important that not only nationals but also foreign citizens have access to the courts (see Simmons, 2009, 134); likewise, it should matter what the rules are as to where a judiciable rights violation must have taken place, that is, only on the territory of the perpetrator state or also beyond its territory (Liste, 2016, 218). Moreover, the courts' legal culture and the precedents and standards of behavior that have emerged over time should have an impact, too. Applied to our case, this would imply that courts which have a reputation for accepting that they should not interfere with a government's foreign policy decisions should be less likely to issue judgments that demand extraterritorial human rights protections (Gibney, 1997; Van Schaack, 2004, 2312; Duffy, 2008, 595). Likewise, courts that have historically ruled that security concerns outweigh human rights concerns are also less likely to rule in favor of expanding safeguards (Duffy, 2008, 594).

Method

We conduct qualitative case studies to shed light on which mechanism(s) can account for why the United States has introduced safeguards that are to prevent harm to non-citizens in its counterterrorism operations abroad. Specifically, we conduct five case studies to examine the explanatory value of the mechanisms that we have conceptualized in the previous section (see also Hall, 2008, 309–10

and 313; Schimmelfennig, 2015, 106–7). In doing so, we combine within-case process tracing with a small-N design to harness the specific benefits of each type of inquiry (Bennett and Elman, 2006, 251; Bennett and Checkel, 2015, 21; Falleti, 2016, 3). Our research design also brings together deductive and inductive elements (George and Bennett, 2005), taking into consideration the varying availability of theoretical insights on different aspects of our object of study.

We use process tracing to assess the explanatory value of the selected mechanisms. Process tracing has been defined as the "examination of intermediary steps in a process to make inferences about hypotheses on how that process took place and whether and how it generated the outcome of interest" (Bennett and Checkel, 2015, 6). Process tracing allows us to reconstruct all relevant micro-processes of a case to collect supporting or contradicting evidence for each mechanism (see also Mahoney, 2012, 584). Unlike correlation analysis, process tracing therefore does not limit itself to identifying a correlation between an independent and a dependent variable. Rather, process tracing is a tool to expose the intermediary steps that link an episode's starting point with its endpoint (Checkel, 2006).

Process tracing also allows us to detect combinations of different mechanisms within one case. One way in which different mechanisms can in conjunction explain a case's outcome is cumulation, which implies that two or more mechanisms operate in parallel and together produce an outcome. Alternatively, mechanisms can also be combined in a sequential pattern (Gehring and Oberthür, 2009, 148–52; Goodman and Jinks, 2013, 166; Goertz 2017, 30 and 133; Beach and Rohlfing, 2018). Applied to our study, cumulation could mean, for example, that extraterritorial human rights violations committed by a US agency motivate civil society actors to publicly shame the United States for the rights violations and at the same time prompt an important ally to rescind the exchange of intelligence with the United States. Under pressure on two fronts, the US government would then introduce safeguards, whose emergence would then be explained by the simultaneous operation of two variants of the coercion mechanism (shaming and material sanctions). However, if we find evidence for two mechanisms when tracing the process leading to the establishment of a specific safeguard, but evidence is strong for one mechanism but weak for the other, we would only consider the strong evidence in order to steer clear of overdetermination (Hedström and Swedberg, 1998, 10). By contrast, sequential combination could mean, for example, that safeguards are introduced in response to a court judgment (litigation), which triggers changes in the principled beliefs of key policymakers, which motivates the latter to introduce further changes to the safeguards (moral persuasion).

Although process tracing is a within-case method, we apply the method not in one but in five parallel case studies to be able to "accumulat(e) systematically within-case causal inferences" (Goertz, 2017, 173) across different cases. In doing so, we avoid falsely generalizing from one case to a broader set of cases and, furthermore, take the notion of equifinality seriously. In light of the complexity of today's world, there is little reason to assume that in each case in which the United States introduces "extraterritorial human rights safeguards" the same causal factors are at work. Rather, we are open to the possibility that we will detect different

Table 2.1 Combination of within-case analysis and small-N design

Within-case analysis	*Small-N design*
• Which mechanism(s) can we detect in each case?	• Which pattern of mechanisms and their combination can we detect across all cases? • Which pattern of enabling conditions of each mechanism can we detect across all cases?

mechanisms, or different combinations of mechanisms or their variants, in different cases (George and Bennett, 2005, 207 and 215; Checkel, 2006, 368; Bennett and Checkel, 2015, 19; Checkel and Bennett, 2015, 272; Goertz, 2017, 45). Investigating five cases allows us to expose variance and to detect typical patterns. It also enables us to gain insights into the conditions on which each mechanism is likely to occur. Table 2.1 summarizes how we combine within-case analysis with a small-N design.

Our research design integrates deductive and inductive elements, depending on the state of research we can draw on. We use deductive, or theory-testing, process tracing to assess which mechanism(s) has/have explanatory value in each case. The deductive variant of process tracing is appropriate if there are testable theoretical mechanisms or theories based on which such mechanisms can be constructed (Beach and Pedersen, 2019, 245). As we have shown in the previous section, the literature on commitment to and compliance with human rights norms specifically and on strategies of social influence more broadly has been a fertile ground for constructing such mechanisms. Theory-testing process tracing implies that the researchers, *ex ante*, that is, before they confront their empirical material, conceptualize each mechanism with a view to its starting point, endpoint, components, and enabling conditions (Beach and Pedersen, 2019, 53–4). Only after providing conceptualizations of the selected mechanism(s) can the researchers then subject their mechanism(s) to one, or in our case several, empirical test(s).

When it comes to discovering typical combinations of mechanisms, we largely follow an inductive logic. There are some assumptions on how mechanisms of social influence may interact with each other, but they have been limited. It has been argued, for instance, that human rights organizations applying moral pressure and gathering information increases the likelihood that states or IOs apply economic sanctions against a target state (Allendorfer et al., 2020, 3; see also Franklin, 2008, 207). Others have suggested that litigation has the potential to trigger "broadbased public engagement" (Van Schaack, 2004, 2342) or a "shift in public opinion" (Sikkink and Kim, 2013, 596). It has also been argued that "fear of sanctions or other coercive measures (…) has the (unintended) effect of promoting a human rights identity" (Mertus, 2004, 13). Yet, there is not sufficient theoretical knowledge on how different mechanisms occur in conjunction or interact with each other to permit a deductive approach when it comes to uncovering typical combinations of mechanisms and formulating and testing a set of concrete expectations.

Table 2.2 Combination of deductive and inductive reasoning

Deductive	*Inductive*	*Deductive and inductive*
What mechanisms are present?	How do the mechanisms interact with each other?	What are the enabling conditions of each mechanism?

When it comes to investigating the enabling conditions of each mechanism, we blend deduction and induction. As has been apparent in the conceptualization of the mechanisms earlier in this chapter, scholars have established different theoretical assumptions on the mechanisms' enabling conditions and have in some cases tested these assumptions empirically. Yet, scholars have also pointed to the difficulty of deductively deriving conditions on which mechanisms occur (Elster, 1993, 5; Goertz, 2017, 71). We are therefore open to the possibility that there might be further conditions that can only be inductively obtained through the examination of empirical cases. Our aim in our case studies is thus not only to gain insights into the plausibility of the mechanisms' enabling conditions that other scholars have proposed, but also to expose additional ones. Table 2.2 summarizes our combination of deductive and inductive reasoning.

Case selection

Our five cases cover the emergence of safeguards related to the extraterritorial protection of five distinct human rights in US counterterrorism policy following 9/11. The five human rights our case studies cover are the right not to be tortured, the right not to be arbitrarily detained, the right to life (in targeted killing operations), the right to seek asylum (in relation to refugee resettlement), and the right to privacy (in the context of foreign surveillance). Table 2.3 provides an overview of the cases.

The case studies begin in autumn 2001 following the 9/11 attacks but occasionally go back further in time to provide context. The case studies focus on the Bush administration (2001–2009) and the Obama administration (2009–2017), as this was the time period in which extraterritorial human rights violations occurred but also the time period in which safeguards emerged. The case studies also, albeit briefly, cover the Trump administration (2017–2021), during which most safeguards remained in place while some were weakened or abrogated.

The case selection is due to several considerations. First, following the logic of theory-testing process tracing, we have chosen cases that display both the mechanisms' common starting point and their common endpoint (Beach and Pedersen, 2019, 98–9 and 258). We thus follow Goertz's (2017, 59) advice to first focus on cases in which hypothesized mechanisms can be explored and leave cases in which the mechanisms' endpoint is not reached to a later stage. All five cases begin with extraterritorial human rights violations by the United States: following 9/11, the United States tortured captured terrorism suspects who were held in prisons in Iraq, Afghanistan, and elsewhere. Also, soon after 9/11, the United

Table 2.3 Cases

Human right	*Operational context*	*Title of safeguards*	*Year*
Right not to be tortured	Detainee treatment and interrogations	• Detainee Treatment Act (DTA), Title X of Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006	2005
		• Executive Order (EO) 13491: Ensuring Lawful Interrogations	2009
		• McCain-Feinstein Amendment to the National Defense Authorization Act (NDAA) for Fiscal Year 2016, Section 1045: Limitation on Interrogations Techniques	2015
Right not to be arbitrarily detained	Military detention	• Military Commissions Act, Title XVIII of the NDAA for Fiscal Year 2010	2009
		• EO 13567: Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force	2011
Right to life	Targeted killing	• Presidential Policy Guidance (PPG): Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities	2013
		• EO 13732: United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force	2016
Right to seek asylum	Refugee resettlement	• Leahy-Kyl Amendment to the Consolidated Appropriations Act (CAA), 2008, Section 691: Relief for Iraqi, Montagnards, Hmong, and Other Refugees Who Do Not Pose a Threat to the United States	2007
Right to privacy	Foreign surveillance	• Presidential Policy Directive (PPD) 28: Signals Intelligence Activities	2014
		• EU-US Privacy Shield Framework Principles	2016

States began to detain terror suspects in Guantánamo Bay without providing them with the opportunity to challenge their detention before a court. Especially during the presidency of Barack Obama, the United States expanded its targeted killing operations, particularly with drones, that initially lacked safeguards that would have assured that only terror suspects who pose an immediate threat to the United States could be killed and that civilians are sufficiently protected. Furthermore, the United States has barred numerous refugees from entering the United States based on overly broad definitions which lumped terrorist groups together with their most immediate and vulnerable victims, that way indiscriminately curtailing refugees' right to seek asylum. Finally, US foreign surveillance, that was

significantly expanded after 9/11 as well, involved the indiscriminate gathering of data of non-US citizens outside of the United States, violating their right to privacy.

In all cases safeguards subsequently emerged that were designed to prevent, or lessen, harm to non-US citizens outside US territory. Congress and the Obama administration enacted laws and regulations that banned torture and cruel, inhumane, or degrading treatment (CIDT) by the military and intelligence agencies (Chapter 3). Congress and the Obama administration also introduced procedural safeguards for inmates of the Guantánamo Bay detention facility to enable them to have their cases reviewed (Chapter 4). Additionally, President Obama issued executive orders that specify the conditions on which targeted killing operations are permitted particularly with a view to preventing civilian casualties (Chapter 5). Congress has furthermore enacted legal provisions that were to make sure that *bona fide* refugees were not barred from entering the United States on unfounded terrorism-related grounds (Chapter 6). Finally, Obama issued a directive that bans indiscriminate surveillance of non-US persons outside US territory, while his administration negotiated an agreement with the European Commission that was to provide for privacy protection for EU citizens specifically (Chapter 7). All safeguards undoubtedly have their flaws, even if the anti-torture safeguards are generally seen as stronger than those that have emerged in the other cases. Moreover, safeguards that were to guide targeted killing operations have in part been annulled by the Trump administration, which has also delayed or tampered with implementation of the safeguards in the remaining cases. Nonetheless, that safeguards have emerged at all is a significant development that warrants an investigation into the mechanisms that have driven this development.

Secondly, the selected cases differ in potentially interesting ways. This allows us to put the mechanisms to the test in different contexts, which is not only advisable with a view to the generalizability of the findings, but should also help us gain insights into the mechanisms' enabling conditions. For instance, not in all but in some cases (torture, targeted killing) did rights violation involve bodily harm, which is believed to be an issue that is beneficial to the success of moral persuasion given the broad acceptance of the general norm not to cause physical harm (Hawkins, 2004, 785). Likewise, some cases (targeted killing, foreign surveillance) are about rights violations related to technological innovations. In light of the fact that uncertainty, brought about by technological innovation or other circumstances, is believed to make actors open to learning, these cases might be cases in which strategic learning is particularly likely (Risse, 2000, 33). Moreover, in one of our cases (foreign surveillance) citizens of powerful countries and allies of the United States were among the victims of the rights violations, which helps us ascertain to what extent the application and effectiveness of sanctions depends on the sanctioning power of the states whose citizens are harmed (see Donno and Neureiter, 2018, 336–7). Furthermore, in some cases are cases in which the rights violations can be visualized in powerful ways (especially torture, but to a lesser extent also arbitrary detention), or in which the victims can be portrayed as innocent (foreign surveillance, refugee resettlement, and targeted killing), which

is expected to facilitate shaming (Keck and Sikkink, 1998, 27 and 205). Finally, some cases involve the violation of *ius cogens* rights (the right not to be tortured and the right to life) which should make litigation more of an option than in cases in which less generally accepted rights are violated.

Finally, five cases strike a good balance between competing considerations: on the one hand, our aim is to conduct as many case studies as possible to do justice to the expectation of equifinality (i.e. that different mechanisms may have explanatory power in different cases), but also to be able to detect patterns of typical combinations of mechanisms. On the other hand, process tracing is extremely time-consuming as the researchers must draw on a variety of different sources, including interviews, to expose the microprocesses of each case; therefore, practical considerations limited the total case number to ensure that our empirical analysis can meet the demands of thorough process tracing.

Sources

Process tracing requires an analysis of as many sources as possible and involves delving as deeply as possible into each case to be able to expose the microprocesses of each mechanism that is at work (Beach and Pederson, 2019, 198–9). With this in mind, we have relied on a combination of different sources, namely secondary and primary sources and interviews.

Obviously, a careful reading of the scholarly literature and other secondary sources on our cases was an important starting point to establish a first understanding of each case. In different cases, we could draw on secondary literature to a different extent. For the case studies on torture and arbitrary detention there was a substantial body of literature available so that it was possible to get a solid first understanding of the causal processes at work from the scholarly literature. This applies, albeit with certain reservations, also to the case study on foreign surveillance. For the remaining two case studies, however, we could rely on far less secondary literature. This applies especially to the case study on refugee resettlement but to a lesser extent also to the case study on targeted killing. Additionally, for all case studies, and especially for those case studies with less scholarly literature, we scanned US and foreign newspaper articles and NGO publications for relevant information, too, to piece together empirical evidence for and against each mechanism.

We have used primary sources for each case study for three purposes. First, primary sources were consulted to trace the evolution of the safeguards over time. To this end, we have studied relevant legislation and executive orders, but also regulations from ministries and specialized agencies. Second, we have drawn on primary sources to uncover how actors intervened with US policymakers in favor of safeguards. Therefore, we have gathered and examined various primary documents including public statements by civil society actors, media reporting on rights violations, policy proposals by expert bodies, congressional hearings, and court judgments. Finally, we have used primary sources to find out how US policymakers and their staff and immediate advisors processed the information provided to them. Thus, we have tried to get hold of documents with which policymakers

responded to policy advice or public statements or in which they outlined how they intended to respond to a court judgment. Again, the extent to which primary sources were available varied across the cases, with many documents being available for the torture, arbitrary detention, and foreign surveillance case studies but far less for the targeted killing and refugee resettlement case studies.

Lastly, semistuctured interviews with open-ended questions have been indispensable to reconstruct the causal processes that were at work in our five cases (Leech, 2002). This applies particularly to case studies for which scant secondary and primary sources were available, but also to case studies in which the interviews primarily served to confirm evidence from other sources (Tansey, 2007). In total, we conducted 57 interviews in 2019 and 2017. One set of interviews has been with actors who intervened in any way in the policy-making process, such as experts who offered strategic or moral arguments, activists who organized shaming campaigns or testified before Congress, or foreign diplomats who negotiated with US representatives about protections for non-US citizens. The purpose of these interviews has been to find out how these actors intervened and how they assess the effect of their intervention. Another set of interviews has been with US policymakers and their staff and advisors, and bureaucrats. The purpose of these interviews has been to assess how policymakers have processed the different interventions they have been confronted with and to which intervention their decision to introduce safeguards can be attributed. Finally, a third set of interviews has been with experts with primarily academic backgrounds or those who were affiliated with Washington-based think tanks. Some interviewees preferred to speak off the record while others were open to being referred to or cited.

Conclusion

In this chapter we have introduced our theoretical framework and have provided a conceptualization of the different mechanisms of social influence, that is moral persuasion, strategic learning, and three variants of coercion, namely material sanctions, shaming, and litigation. We have also presented our research design by outlining the methodological approach we have chosen, the considerations that have guided our case selection and the sources we have used. What follows are five chapters that each contain one case study. All case studies follow the same structure in that they give an overview of the extraterritorial human rights violations that have taken place, describe how actors have intervened with US policymakers in favor of safeguards, set forth how US policymakers have processed such interventions, and outline what "extraterritorial human rights safeguards" have emerged. The book's final chapter summarizes the findings and discusses their broader theoretical and empirical implications.

Notes

1 Cardenas provides a similar distinction when she writes that "human rights pressure can coerce, induce, or otherwise persuade states to comply with international norms"

(Cardenas, 2010, 26). She also distinguishes between rationalist-materialist and ideational-constructivist approaches and assigns coercion and inducement to the rationalist camp and persuasion to the ideational camp (ibid., 18). Risse and Ropp (2013) present four mechanisms of social (inter-)action in the revision of their spiral model of human rights socialization, namely coercion, changing incentives, persuasion and discourse, and capacity-building.

2 For the concept of subtypes of mechanisms see also Falleti and Lynch (2009, 1149).

3 Extraterritorial human rights violations are frequently defined more broadly as human rights violations committed by states against any individuals beyond their borders. We focus on rights violations states commit against *non-citizens* beyond their borders (see also Gibney et al., 1999; Skogly, 2006; Skogly and Gibney, 2010; Milanovic, 2011).

4 Although rendition operations are rightfully the subject of criticism regarding violations of the right not to be tortured, this book's chapter on the emergence of anti-torture safeguards focuses exclusively on safeguards involving the United States' negative human rights obligations.

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3 Detainee treatment, interrogations, and the right not to be tortured

Introduction

US foreign policy in the second half of the 20th century was shaped by military and security competition with the Soviet Union and related wars in Korea, Vietnam, and elsewhere – but also by strong efforts to advocate for human rights and democratic norms. The terror attacks of 9/11, however, changed US foreign policy significantly by exposing the United States' vulnerability to non-state actors. In light of the continuing threat posed by al-Qaeda, President George W. Bush shifted the national security focus away from post-Cold War matters, concentrating instead on counterterrorism (Arsenault, 2017). In particular, revelations that inadequate and improperly processed intelligence had made 9/11 possible triggered an unprecedented quest for information to prevent future attacks (US Department of Justice, 2004, 2).

It was in this context that Bush started two wars in Afghanistan and Iraq, while announcing that he had "directed the full resources of our (US) intelligence and law enforcement communities to find those responsible and to bring them to justice" (Bush, 2001, 65). Consequently, the Bush administration increased the CIA's scope of operation considerably by establishing the CIA Detention and Interrogation Program, which enabled the agency to detain and to coercively interrogate terrorist suspects (Senate Select Committee on Intelligence, 2014, 3). At the same time, the Office of Legal Counsel (OLC) sanctioned so-called enhanced interrogation techniques (EITs), a set of practices that took inspiration from the military's Survival Evasion Resistance Escape Techniques, which had originally been designed to train US soldiers to withstand hostile capture and coercive interrogation techniques (Office of Legal Counsel, 2005, 3). As a result, the EITs comprised practices including waterboarding, walling, as well as food and sleep deprivation, which stood in stark contrast to the standards sanctioned by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which the US is a signatory. In addition, these practices conflicted with former US assessments that had, for instance, classified waterboarding as a war crime (US Senate, 2009, 284).

However, the CIA Detention and Interrogation Program with its use of the EITs was not the only US violation of the right to be free from torture and CIDT in

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relation to terrorist suspects. In fact, detailed photographic evidence and witness accounts would later reveal severe abuses of foreign detainees by US military personnel. In addition to the frequent use of the EITs, military personnel were also involved in beatings, rectal rehydration without medical necessity, sexual assault, and mock executions. In total, an estimated 119 foreign citizens fell victim to the CIA Interrogation and Detention Program between 2002 and 2007 (Senate Select Committee on Intelligence, 2014, 11). Yet, in light of the incarceration of so-called ghost detainees[1] and the unknown number of unrecorded incidents in US military facilities abroad, the dark figure of abuses is suspected to be considerably higher (Human Rights Watch, 2006).

Between 2005 and 2015, a number of safeguards emerged that, at least on paper, protect foreign detainees in US custody outside US territory against torture and CIDT. In 2005, Congress passed the Detainee Treatment Act (DTA), the first safeguard addressing torture and CIDT of foreign detainees in the context of the "War on Terror". The legislation obligated all Department of Defense (DoD) personnel to comply with the basic rulebook of the military, the Army Field Manual (AFM) on Intelligence Interrogation (AFM34-52), and its corresponding anti-torture regulations, while also making respective training of the Iraqi military forces, with whom the United State cooperated in detention matters, mandatory. The DTA also took a stance in the debate about applying US jurisdiction abroad and stipulated that "(n)o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment" (US Congress, 2005a, 1). In 2009, President Barack Obama issued EO 13491: Ensuring Lawful Interrogations, banning any use of torture and CIDT, extending mandatory compliance with the AFM to all government agencies, including the CIA (White House, 2009). Six years later, in 2015, Congress passed the McCain–Feinstein Amendment to the National Defense Authorization Act (NDAA) of 2016, enshrining EO 13491 into law, and thus made the executive order's requirements less vulnerable to future administrations that might disapprove of them (US Congress, 2015).

This chapter illustrates that the DTA was a response to shaming by the US media and NGOs, while EO 13491 and the McCain–Feinstein Amendment can be traced back to strategic learning in the Obama administration and in Congress. In 2005, incriminating evidence including graphic photos of the abuses in Abu Ghraib and leaks of top-secret OLC memos in combination with persistent NGO coverage caused public outrage that exerted intense pressure on US policymakers to introduce anti-torture safeguards. Led by Senator John McCain, relevant members of Congress quickly came to the conclusion that they had to swiftly respond to spare additional damage to the United States' reputation, which threatened to undermine the country's foreign policy goals and national security. EO 13491 and the ensuing McCain–Feinstein Amendment, in contrast, were primarily the result of extensive strategic consultations with retired intelligence and flag officers. Through a concentrated lobbying campaign, this group ultimately made then presidential candidate Obama and Congress aware of potential negative

long-term consequences for the United States if they failed to introduce binding standards for the military and the CIA that could withstand potential challenges from future administrations.

This chapter is structured as follows. Based on an in-depth analysis of primary sources and expert interviews, it traces first the making of the DTA and secondly the process leading up to EO 13491 including its codification into law with the McCain–Feinstein Amendment. Both sections closely follow the conceptualization of the shaming and the strategic learning mechanisms as outlined in the second chapter of this book. The following section briefly explores the Trump administration's position on the safeguards, while the final section concludes with a summary of the main findings of the case.

Toward the Detainee Treatment Act of 2005

Extraterritorial human rights violations

When Operation Enduring Freedom and Operation Iraqi Freedom began, the memory of 9/11 was still very much alive (Bush, 2003). This not only fueled the United States' counterterrorism efforts, but also enabled the use of torturous interrogation practices by both the US military and the CIA. Given the perceived need for more human intelligence regarding the internal structure and processes of al-Qaeda and the Taliban, the Bush administration in 2002 authorized the so-called EITs (Independent Panel to Review DoD Detention Operations, 2004, 12). Since then, ten additional methods of interrogation were at the disposal of US intelligence and military personnel, including "attention grasps, walling, facial hold(s), facial slap(s), cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and the waterboard" (Office of Legal Counsel, 2002c, 2–4). Sleep deprivation, for example, could involve keeping detainees awake for up to 180 hours, usually standing or forced into stress positions with their hands at times shackled above their heads (Senate Select Committee on Intelligence, 2014, 116). In one such case, Khalid Shayk Muhammad, one of the masterminds of the 9/11 attacks, was subjected to waterboarding by CIA interrogators 183 times during 15 sessions over 14 days with the longest session lasting 40 minutes (CIA Inspector General, 2004, 44–5). In other instances, the interrogators combined various interrogation techniques in an effort to increase their impact. Accordingly, a senior al-Qaeda member was subject to prolonged sleep and food deprivation, cold showers, and "rough takedowns",[2] while sitting naked and short-chained on the concrete floor. He was eventually found dead in his cell with the autopsy indicating hypothermia (CIA Inspector General, 2004).

In order to avoid potential legal challenges, the EITs were based on the so-called "torture memos", a series of legal reviews issued by the OLC between 2002 and 2005, which outlined the Bush administration's understanding of relevant international law and used loopholes to justify potential transgressions (Office of Legal Counsel, 2002b, 67–8). According to the OLC's opinion, the

Geneva Conventions were not applicable to all parties to the "War on Terror" (ibid., 1). Therefore, the president had the option of suspending the treaty obligations toward the Taliban (ibid., 11–5) and could deny the group Prisoner of War (POW) protections (ibid., 25–8). Further, it was alleged that al-Qaeda's status as a non-state actor disqualified the organization as a High Contracting Party to the Geneva Conventions, which, according to the OLC, released the United States from any respective obligations (ibid., 9–10). Likewise, the OLC decided that according to the US understanding of torture, the newly established EITs did not constitute any breach of the CAT (White House, 2002; Office of Legal Counsel, 2002a, 2002b and 2002c, 9), as the practices would not meet the following threshold: "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" (Office of Legal Counsel, 2002b, 9). Finally, the OLC also reckoned that even if somebody claimed that the EITs were torture, the domestic implementation of the CAT (18 U.S.C. Section 2340A) would not apply as it was argued that any law restricting the president's role as Commander-in-chief during wartime would be unconstitutional (Office of Legal Counsel, 2002a, 39).

Nevertheless, the CIA's and the military's use of EITs did not remain the only breach of the CAT, as additional cases of severe abuse and mistreatment that had not been officially sanctioned took place inside military detention facilities. Pictures and videos from Abu Ghraib, for instance, revealed the widespread abuse of Iraqi prisoners, showing detainees being forced to pose and interact naked in degrading sexual practices or of guards punching, slapping, and kicking detainees (Hersh, 2004; Leung, 2004). In total, 13 forms of severe mental, physical, and sexual abuse were recorded in Abu Ghraib, each having been determined to have violated the victims' right to be free from torture or CIDT (Taguba, 2004). Reports by the International Committee of the Red Cross on detainee treatment in the Guantánamo Bay detention facility revealed a similar picture, describing both the use of the EITs as well as other abuses including humiliating acts, solitary confinement, exposure to extreme temperature, beatings, and the use of white noise to extract information from detainees (Lewis, 2004).

Intervention

When evidence of detainee abuse during the first years of the Iraq War emerged, multiple actors including the media, NGOs, and military officials attempted to capture the attention of the US public and of US policymakers. Despite witness testimonies, however, their efforts remained ineffective for several years. In 2003, for instance, The Associated Press released an article based on interviews with former Iraqi detainees, describing the conditions in Camp Bucca, Camp Cropper, and other US detention facilities in Iraq. While former detainees mentioned that some guards exhibited decent behavior, they also reported repeated beatings, psychological abuse, arbitrary corporal punishment, and cases of guards shooting inmates in response to disobedient behavior like talking to relatives who were

being kept in other tents (Hanley, 2003). Due to the top-secret classification of the CIA Detention and Interrogation Program and the resulting shortage of publicly available information, however, it proved difficult to present graphic evidence supporting these claims and, as a result, the coverage attracted little public interest. Likewise, various NGOs attempted to file Freedom of Information Act (FOIA) requests to force the US government to publish documents that would give evidence of abuse and deaths of detainees in US facilities abroad, but protracted legal battles delayed their release and impeded further efforts (American Civil Liberties Union, 2019, 1).

Besides these early futile attempts at shaming and litigation, similar attempts to convince public officials with strategic and normative arguments against the use of torture and CIDT in US interrogations made few inroads. Alberto Mora, General Counsel of the Navy between 2001 and 2006, recounted several efforts he and other Judge Advocate Generals of the Navy made in 2002 to convince senior officials within the executive of the EITs' negative long-term consequences. Accordingly, Mora argued in several meetings with DoD General Counsel William J. Haynes II and Deputy Secretary of State Paul Wolfowitz that the methods applied were not only useless but that they would be detrimental to national security. He argued that they might trigger a spiral of violence, as they would incite junior officials to use physical force without setting proper boundaries. Other arguments, such as the possibility of Secretary of Defense Donald Rumsfeld being personally held accountable for his signature and a comment on one of the OLC memos, were likewise presented. In the same meetings, Mora and other officials from the Naval Criminal Investigative Service also emphasized how the EITs stood against American values and were unworthy of the US military (Mora, 2004). Yet, the absence of subsequent policy change suggests that neither strategic nor normative arguments resonated with the administration.

2004 eventually marked a turning point, however, when a series of scandals triggered a massive outcry both domestically and internationally that forced the administration and Congress to recognize the need for new anti-torture safeguards. The first and biggest scandal broke in April 2004, when CBS News broadcast very graphic photos and videos of torture and other abuses in Abu Ghraib during its nationwide program *60 Minutes II*. The photos taken in November 2003 had been leaked to the network and revealed the horrific extent of torture and CIDT including, for example, sexual, mental, and physical abuse inflicted by US military personnel who smiled and posed near their victims (Leung, 2004). After this first exposure, the public outcry in the United States was massive[3] and a second wave of leaks followed shortly. This time, the *New Yorker* published excerpts of the Taguba Report, an internal military investigation conducted in late 2003 examining allegations against soldiers and intelligence officials in Abu Ghraib (Hersh, 2004). The report not only described the incidents in Abu Ghraib as "sadistic, blatant, and wanton criminal" (Taguba, 2004: 16), but also contradicted official statements by proving that the government had previously known about the abuses and had done little to hold the responsible officials accountable (ibid., 22–4). Despite efforts by the administration to minimize the leak's impact

by dismissing the abuse as not officially sanctioned, the Abu Ghraib leaks with their graphic pictures and videos fundamentally changed the domestic public's perception of US detainee treatment in Iraq.[4]

The second blow to the Bush administration erupted when *Washington Post* journalists Dana Priest and Jeffrey Smith disclosed the existence of the OLC torture memos and the thoroughly planned CIA Detention and Interrogation Program. In June 2004, Priest and Smith published an article with detailed information on the OLC memos, describing them as a "reflect(ion of) the Bush administration's desire to explore the limits on how far it could legally go in aggressively interrogating foreigners suspected of terrorism or of having information that could thwart future attacks" (Priest and Smith, 2004). The article's disclosure of the US definition of torture and its dismissal of international law was received with great public anger.[5] Another article by Priest of 2005, in contrast, disclosed the CIA Interrogation and Detention Program, whose existence the Bush administration attempted in vain to deny. The article predominantly focused on Guantánamo and the system of secret black sites, which were run by the CIA in cooperation with international partners in order to detain high-profile prisoners (Priest, 2005). Against the background of the previous publications, the article created great indignation among the US public and increased the pressure on the government considerably.[6]

Finally, transnational NGOs and numerous media outlets amplified the reach of the TV coverage and the articles, spreading the stories and pictures around the globe.[7] After the first revelations of what had happened in Abu Ghraib, Human Rights Watch, for instance, published and promoted its own report on the issue, accusing the United States of war crimes. The advocacy group demanded independent inquiries that would not only hold low-ranking military officers who had committed the acts but also senior executive officials who had sanctioned the EITs in the first place accountable for their alleged crimes (Human Rights Watch, 2004). Amnesty International, in turn, undertook similar investigations, and submitted its findings to the UN Committee against Torture, raising the issue of torture in relation to detainee treatment outside a state's territory to the highest international level (Amnesty International, 2004 and 2005). The media, in turn, featured the scandal around the world, displaying not only the pictures of Abu Ghraib, but also highlighting the accusations against the United States and its allies from first-hand accounts (Harding, 2004; Jones and Sheets, 2009).

Processing

At the height of the scandal, severe consequences began to quickly materialize. In a first step, the scandal quickly tarnished the US government's reputation both domestically and internationally, before, in a second step, the immediate consequences of the reputational damage began to show. As a result, especially Congress under the leadership of Senator John McCain pushed for tighter regulation of detainee treatment, while the administration began to consult about potential policy changes,[8] after it had in vain attempted to thwart the allegations (Bush,

2004a; Gonzales in White House, 2004; US Department of State, 2006). In fact, the mounting pressure exerted by whistleblowers, NGOs, and the media quickly accumulated to such an extent that the creation of safeguards was deemed, especially by Congress, urgently necessary.

At first, the various leaks and revelations greatly tarnished the political leadership's reputation at home, creating not only a strong pushback from the American public, but also from the US military.[9] Polls from 2005 show that 74% of the American public believed that the US had tortured detainees abroad, while 80% disapproved of the abuse that had occurred in Abu Ghraib (Carlson, 2005a and 2005b). Similarly, the support among the American public for the Iraq war decreased significantly in light of the Abu Ghraib scandal, from 63% in December 2003 to 47% in April 2004 (Stevenson and Elder, 2004). At the same time, various military officials of different ranks complained to their superiors, demanding that the disclosed misconduct not go unpunished and be stopped immediately. In their statements, they emphasized that the exposed treatment of detainees breached ethical standards in the US military and contradicted the military's self-image, and that due to insufficient intervention by the political leadership, American soldiers would be unfairly associated with abuses which were neither normal practice nor normally tolerated in the US military (Mora, 2004, 1–3; Fishback, 2005).

At the same time, the United States also suffered great reputational damage internationally, which ultimately threatened to jeopardize its cooperation on security matters with key allies and other states around the world. In particular, the pictures of Abu Ghraib and the OLC memos had been perceived with great anger and resentment in many parts of the Muslim world. The abuse and torture were seen as symbols of the disrespect and assumed superiority with which the United States supposedly treated Arab culture and majority Muslim countries in the Middle East in general (Whitaker et al., 2004; Khan, 2005). Yet, the pictures from Abu Ghraib and leaked OLC memos appalled not only actors in the Middle East but also some of the United States' key allies. While some partners in intelligence sharing might have suspected that the CIA had used questionable interrogation techniques,[10] the disclosure of evidence exposed extensive legal distortion and sadistic conduct to an unexpected extent, which in due course greatly tarnished the United States' reputation among many key allies.[11]

In light of the reputational damage resulting from the torture revelations, the risk of prompt, severe consequences relating to the future of Operation Iraqi Freedom, intelligence cooperation, and national security more generally began to crystallize. First, with domestic public support for the Iraq war shrinking and parts of the military objecting to existing interrogation and detainee treatment procedures, the political leadership faced the risk of losing domestic backing for its operations in Iraq. This support, however, was essential for Congress and the White House as, on the one hand, continuous opposition from the US public would undermine the US narrative of a legitimate intervention, while, on the other hand, future military spending could not be guaranteed without domestic approval.[12] Thus, new rules regarding the treatment of detainees were needed to prove to the public and to the

military that their worries were being taken seriously and that what had happened in Abu Ghraib was not representative of the US mission in Iraq.[13]

On the international stage, the consequences of the reputational damage caused by the torture scandal were seen as directly jeopardizing important security cooperation with allies and partner states. The support of the Arab world was crucial for the Bush administration, as a Democratic Senator pointed out during the confirmation hearing of Attorney General Alberto Gonzales in Congress:

> (W)inning the hearts and the minds of the Arab world is vital to our success in the war on terror. Photographs that have come out of Abu Ghraib have undoubtedly hurt those efforts and contributed to a rising tide of anti-Americanism in that part of the world.
>
> (Kohl in US Senate, 2005a, 76)

Similarly, settling tensions with key international allies in intelligence sharing was also perceived to be of high importance. Once the media and civil society had disclosed the United States' abusive interrogation practices, the fallout from the disclosures threatened to seriously undermine international intelligence cooperation, as under the CAT partners could be held liable for future collaboration if legal and behavioral changes were not made.[14] Some European countries were particularly upset about the abuses and breaches of the CAT, and thus demanded a series of meetings to reevaluate the framework of future intelligence cooperation.[15] In order to restore the United States' international reputation and to avoid losing key partners in its counterterrorism campaign, a new guidance on how to prevent torture was therefore considered to be urgently needed by McCain and many other members of Congress.

Finally, a third instantly pressing issue brought to the fore by reputational damage caused by the scandals associated with Abu Ghraib and the "torture memos" was the question of the implications for terrorist propaganda and the safety of US soldiers stationed abroad. US officials grew rapidly worried as the released pictures were being used as terrorist propaganda to strengthen al-Qaeda's calls for retaliation, including attacks on US territory (US Senate, 2008, 18). The fear of al-Qaeda using the scandals for its propaganda was confirmed when shortly after the revelations al-Qaeda swore revenge and distributed videos of an American citizen being beheaded while wearing the orange jumpsuit used in American detention facilities (Whitaker and Harding, 2004). Respective calls to counter anti-US propaganda by impeding future misconduct were likewise echoed by civil society actors and military officials who worried about the safety of US military personnel stationed abroad.[16] They feared that the abuse of foreign detainees would endanger the safety of captured American soldiers[17] as they were likely to be the first targets of revenge and thus were under threat of being treated similarly to what had been portrayed in the al-Qaeda video (McCain in US Congress, 2005b, S12381). In this context, the urgent need for action was clearly linked to security concerns, which according to McCain could only be addressed if new safeguards ensured a higher standard of detainee treatment.[18]

In light of these immediately tangible repercussions, the White House and the DoD issued official apologies (Bush, 2004b; Rumsfeld in US Senate, 2004), the Department of State initiated internal investigations (US Department of State, 2006), and President Bush invited European allies to visit US detention centers abroad (Lowenkron, 2006, 2). In Congress, meanwhile, Senator McCain spearheaded the push for safeguards.[19] Having previously focused on other issue areas, McCain, upon seeing the Abu Ghraib revelations and receiving letters from concerned military personnel, concentrated his efforts on passing new legislation that would ensure that similar incidents of abuse would not be repeated in future.[20] As a former officer and POW who had endured torture in Vietnam himself, McCain was well respected among the military leadership (Panneton in US Congress, 2005b, S12382) and could at the same time quickly establish himself as a convincing advocate and leading figure in Congress on the issue.[21] Hence, McCain presented Senate Amendment 2425 to the NDAA for Fiscal Year 2006, which foresaw a mandatory adherence to the AFM by the military as well as a strict ban on CIDT of persons detained by the US government (McCain in US Congress, 2005b, S1280). In his corresponding speech, McCain repeatedly referred to the previous series of scandals and their negative consequences, urging his fellow senators to

> (l)et there be no question about America's character. In deciding these rules, each Member of this body has a vital role. (…) Our brave men and women in the field need clarity. America needs to show the world that the terrible photos and stories of prison abuse are a thing of the past. Let's step up to this responsibility and speak clearly on this critical issue.
>
> (McCain in US Congress, 2005b, S12382)

Outcome

Despite being aware of the need for new guidelines, the Bush administration opposed various key points in McCain's proposal, especially the suggestion to extend mandatory adherence to the AFM to the CIA.[22] However, the final proposal, a compromise between Congress and the White House, was ultimately well received in Congress (US Senate, 2005b), so that a new safeguard re-regulating the military's treatment and interrogation of detainees, the DTA, was passed into law in November 2005. Section 1002 of the DTA introduced a uniform standard of interrogation for the US military, thus making compliance with the AFM mandatory for any future military interrogation session. Accordingly, no person in US military custody or under effective control of the US military was to be subjected to any interrogation technique not authorized in the AFM. This not only meant that during interrogation every detainee was afforded the protections of the Geneva Conventions, but also implied a general prohibition of torture as granted in Common Article 3 of the Geneva Conventions (US Congress, 2005a, 1–2).

Section 1003 outlined the second key point of the DTA, namely the geographically unlimited prohibition of any CIDT of foreign detainees in general, not just

during interrogations. Important hereby is the clear emphasis on the universal applicability of this section, which implies that the DTA comes without any geographical limitation: "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment" (US Congress, 2005a, 2). Thus, the section ensured that the ban on CIDT had to be observed by the DoD both domestically as well as extraterritorially. Moreover, by inserting passage (c) "Limitation of Supersedure", McCain and the DTA's cosponsors ensured that any future change of section 1003 had to be approved by Congress, thus preemptively forestalling any future attempt by the executive to single-handedly change the respective provisions.

Section 1006, finally, was inspired by the incidents in the Abu Ghraib prison and related to US cooperation with Iraqi forces and DoD contractors. Specifically, it established obligations for the training of Iraqi forces with whom the US military cooperated when running prisons in Iraq. Accordingly, any person acting on behalf of the US Armed Forces or within facilities of the Armed Forces had to be trained "regarding the international obligations and laws applicable to the humane detention of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture" (US Congress, 2005a, 6). Corresponding training and briefing sessions were to be documented, while the AFM was to be translated into Arabic and distributed among any cooperating Iraqi forces and DoD contractors. Furthermore, Section 1006 also provided for documented acknowledgments on the training of Iraqi forces (ibid., 6).

In conclusion, the DTA was a direct response to the scandal triggered by the coverage of detainee abuse in Abu Ghraib and related revelations and the negative consequences that the scandal immediately provoked – an assessment also reflected in a speech by McCain before Congress on the occasion of the introduction of the DTA:

> If we inflict this cruel and inhumane treatment, the cruel actions of a few darken the reputation of our country in the eyes of millions. (…) Yet, reports of detainee abuse continue to emerge, in large part because of confusion in the field as to what is permitted and what is not. That is why part of this amendment would establish the Army Field Manual as the uniform standard for the interrogation of Department of Defense detainees – so there is no confusion.
>
> (McCain in US Congress, 2005b, S12381)

Toward Executive Order 13491: Ensuring Lawful Interrogations and the McCain–Feinstein Amendment to the NDAA 2016

Executive Order 13491

Extraterritorial human rights violations

The DTA was an important step toward enhanced anti-torture safeguards in the "War on Terror", yet, due to the Bush administration's opposition to more

comprehensive safeguards, various compromises had to be made[23] that ultimately reduced the scope of the legislation.[24] Despite recognizing the need for tighter regulation, the White House had insisted on excluding the CIA from the provisions, arguing that intelligence agencies needed flexibility and should thus not be constrained by the AFM or other specific guidance (Priest, 2005, 1). Moreover, the DTA also included a good faith clause (Sec. 1004), which guaranteed impunity for any action prior to the enactment of the DTA (US Congress, 2005a, 1). A further weakness did not derive from the legislation itself but rather from the corresponding presidential signing statement, in which Bush declared that

> (t)he executive branch shall construe (…) the Act, relating to detainees, in a manner consistent with the constitutional authority of the President (…) as Commander in Chief (…) which will assist in achieving the shared objective of the Congress and the President (…) of protecting the American people from further terrorist attacks.
>
> (White House, 2005)

By drawing on his constitutional power as Commander-in-chief, Bush reserved the presidential right to waive the legal restrictions implemented by the DTA in cases of an imminent threat to national security or other "ticking time bomb" scenarios (Savage, 2006).

In light of the DTA's shortcomings, abuse against foreign detainees in US detention facilities abroad continued. For example, CIA black sites were kept open after 2005, although eventually foreign prisoners were sent to either military custody, like Guantánamo, or to detention facilities in their home countries, many of which also had long records of torturous interrogation methods (Office of the High Commissioner for Human Rights, 2006). Likewise, the use of EITs was still officially sanctioned for the CIA by the Bush administration, which resulted in continued CIA violations of the right to be free from torture and CIDT after the enactment of the DTA. The Senate Select Committee on Intelligence, which documented abuse by the CIA before and after the passing of the DTA, described, for instance, the abuse of Muhammad Rahim, a senior al-Qaeda official, in Iraq in 2007:

> (Muhammad) Rahim was subjected to eight extensive sleep deprivation sessions, as well as to the attention grasp, facial holds, abdominal slaps, and the facial slap. During sleep deprivation sessions, Rahim was usually shackled in a standing position, wearing a diaper and a pair of shorts. Rahim's diet was almost entirely limited to water and liquid Ensure meal.
>
> (Senate Select Committee on Intelligence, 2014, 166)

According to the Committee's report, the longest session of sleep deprivation that Rahim was subjected to lasted about 138 hours (Senate Select Committee on Intelligence, 2014, 166).

Moreover, even though official DoD publications state that overall conditions of military interrogation improved after 2005 (Otstott in Senate Select Committee on Intelligence, 2007; US Senate, 2007), there were various new cases of severe physical abuse, humiliating treatment, and sexual assault of detainees outside of interrogations, which occurred in the Guantánamo Bay detention facility (Bonner, 2009). Given their prolonged detention under poor conditions, 200 of the detainees still held at Guantánamo Bay participated in hunger strikes, to which the US guards responded by submitting detainees to solitary confinement for up to a week and strapping them in "restraint chairs" for hours while being force fed with gastric feeding tubes (Office of the High Commissioner for Human Rights, 2006, 4–5).

Intervention

The DTA's shortcomings and, especially, the CIA's remaining leeway in its treatment of detainees, was not lost on observers; rather they triggered new attempts of shaming the White House into introducing additional protection policies – however without any success. In early 2006, new photos from Abu Ghraib and evidence of CIA interrogations that relied on CIDT were leaked to the media and published in newspapers around the world (Salon, 2006; Special Broadcasting Service, 2006). The photos were as explicit and gruesome as the photos leaked in early 2004, but while they kept the story alive, they ultimately failed to trigger the same public response as two years before.[25] On the one hand, this was due to President Bush being able to point to the DTA as proof that rules had changed, while also presenting the trial of some low-ranking soldiers as evidence of how the government did not tolerate abusive behavior. On the other hand, the moderate public response was also due to the American public having grown somewhat accustomed to photos of this kind, so that the leak did not create the same shock momentum as previous leaks had done.[26]

Similarly, attempts at litigation failed to create sufficient momentum for policy change. In the years following the Abu Ghraib scandal, the American Civil Liberties Union filed numerous FOIA requests resulting in the disclosure of about 4,800 documents up until 2009 regarding the CIA Detention and Interrogation Program (American Civil Liberties Union, 2019). However, large parts of the files were redacted to protect classified information, thus reducing the informational value of the obtained evidence. Moreover, the files' remaining sections created more embarrassment than legal liability for the government, as the documents outlined how the administration had reinterpreted national and international law to justify their operations and prevent legal challenges (Scott, 2009b). In another case of litigation, namely *Hamdan v. Rumsfeld*, the US Supreme Court decided in June 2006 that Common Article 3 of the Geneva Conventions was applicable to al-Qaeda and the "War on Terror". Although the ruling sent out an important signal[27] and, as we will show in the next chapter, had an effect on the evolution of safeguards against arbitrary detention, the impact on detainee interrogation was negligible.[28] In fact, the EITs were used by the CIA for at least another year after the court ruling. Moreover, President Bush responded to the ruling by

issuing Executive Order 13440, which simply declared that the CIA Detention and Interrogation Program was compliant with Common Article 3 of the Geneva Conventions, because the EITs did not constitute torture or CITD under the administration's definitions (White House, 2007).

In early 2008, when Bush vetoed a law that would have extended the DTA restrictions to the CIA (White House, 2008), civil society and other stakeholders eventually realized that they needed to focus their attention toward Congress and toward the next administration which was to be elected that year.[29] Consequently, various NGOs joined forces, while groups like Amnesty International or the Center for Victims of Torture targeted grass-root groups and the public as their main audience. Importantly, Human Rights First (HRF) developed a sophisticated strategy of orchestrating an exchange of arguments between prospective presidential candidates and retired intelligence officers and flag officers.[30] The HRF campaign was constructed in such a way that the NGO would act as a facilitating coordinator in the background, while the intelligence officers, generals, and admirals would spearhead the actual debate about additional anti-torture safeguards with various party candidates during the presidential primaries. That way, the instrumental arguments, HRF believed, would be greatly strengthened by the officers' field expertise and credibility, and the campaign would be able to provide reliable sources, which would be well respected among political elites on both sides of the aisle, and could thus be referenced without allegations of bias.[31] Parallel to these efforts, other experts such as the Deputy Commander of the DoD's Criminal Investigative Task Force at Guantánamo as well as military and medical officials publicly raised their concerns about the ongoing weaknesses of existing safeguards (Senate Select Committee on Intelligence, 2007).

Against this background, future President Obama and his close advisers were, from early on, confronted with four basic arguments. First, in an expert meeting hosted by HRF, intelligence and flag officers argued that any interrogation by force would not be effective as terrorist suspects might not cooperate or might refuse to speak, which would make forceful interrogation a waste of valuable resources (Human Rights First, 2008). Hence, coercive interrogation techniques would only bolster terrorist suspects' hostile views against their interrogators, making them even more reluctant to answer and more likely to endure the mistreatment out of spite and out of a reinforced belief to fight for their cause.[32] Instead, the former CIA and military officers highlighted the need to return to "(n)on-coercive, traditional, rapport-based interviewing approaches", as only these would create the trust necessary to obtain reliable, human intelligence (Human Rights First, 2008). They also argued that existing research clearly showed how rapport-based interviewing, including methods like sketching or thinking back to certain situations, could enhance a suspect's ability of retrospection, whereas coercion and stress could, given the fragility of episodic and semantic memory, block recollections.[33] Therefore, the retired flag officer as well as the other experts addressing Congress highlighted that a ban on torture was indispensable to ensure that no scarce human intelligence sources were lost.

In addition to the risk of terrorist suspects not cooperating at all, there was concern that any information gathered from coercive interrogations could be false or misleading, and therefore would undermine key decisions in time-sensitive operations (Human Rights First, 2008). According to this argument, when coercion was applied, interrogated individuals would say or admit to anything in order to escape the mistreatment, providing information that is most likely to please the interrogator regardless of its accuracy.[34] In the same context, both the retired officers collaborating with HRF, as well as experts speaking before Congress, claimed that the logic behind the often-mentioned "ticking time bomb" scenario was flawed. Aside from the low likelihood of capturing the one terrorist who is planning and preparing an imminent attack, without having any other information about his or her previous actions and whereabouts, the chances of coercing this individual into sharing useful information would be extremely low. If a person was that convinced of his or her cause that he or she would, for example, be ready to plant a bomb in a city, then he or she would presumably be committed enough to either endure the torture until the explosive went off or to blatantly lie in order to mislead the interrogators.[35] Hence, any information obtained under such circumstances would be worthless, whereas a ban on torture was necessary in order to obtain valuable information.

Additionally, the former intelligence officers, generals, and admirals emphasized the need for a coherent and "well-defined single conduct in interrogation and detention practices across all US agencies" (Human Rights First, 2008). It was important for junior officers with little field experience, they underlined, to have clear guidance on how to conduct interrogations, so that they could follow a coherent scheme and would be aware of permitted techniques and respective limitations. Moreover, a single well-defined standard for conduct in interrogations would also prevent conflict between different agencies in cases in which different agencies were to operate in the same detention facility and successively interrogate the same detainees.[36]

Finally, drawing lessons from experience including the Abu Ghraib scandal, the former intelligence and military officers also referred to the impact of torture on the United States' reputation abroad. Consequently, the risk of the abuse being used as an enemy recruitment tool would pose a national security risk and endanger US soldiers in captivity abroad specifically (Human Rights First, 2008). Pointing to the repercussions of the Abu Ghraib scandal, in the aftermath of which American citizens were killed in retaliation by al-Qaeda operatives, and close allies reassessed their intelligence cooperation with the US, senior military intelligence officer and anti-torture advocate Colonel Steve Kleinman asked lawmakers the following question: "How valuable would have an information to be to outweigh the strategical costs of having the reputation of being a country that tortures?"[37] In the intelligence and military officers' opinion, it was hard to imagine a scenario that justified the use of information acquired through torture. Thus, the officers reiterated their stance on banning torture and interrogations based on CIDT.

Processing

The strategy of having retired intelligence officers and senior military personnel present strategic arguments against torture to the Democratic and Republican primary contenders and later presidential candidates proved effective in the end. Importantly, it implied that policymakers were provided with sources that in conservative circles were easier to reference than NGOs.[38] Primarily as a result of the campaign, the issue of torture and Abu Ghraib remained consistently present during the 2008 presidential race between John McCain, who was already an outspoken anti-torture advocate, and Barack Obama, a constitutional lawyer. Both presidential candidates agreed from the very beginning that a more comprehensive ban on torture was necessary, yet, as stakes were high, both candidates carefully weighed the costs and benefits associated with the details of any reform (Lehrer, 2008).

Regarding the costs, a new safeguard had to strike the balance between prohibiting future abusive interrogation techniques while simultaneously not officially putting the United States' previous compliance with the CAT and the Geneva Conventions into question. If not worded carefully, the new legislation could be interpreted as governmental admission that the United States had previously not complied with international law, and thus, create additional reputational harm with potential legal consequences.[39] Moreover, especially Republicans were eager to prevent any accountability clause for previous actions,[40] which also influenced Obama's considerations; he had no interest in further alienating conservative voters as there already existed a partisan split on the "War on Terror". Lastly, there was a bipartisan consensus that human intelligence was vital for national security, and, therefore, it was feared that overly strict constraints on interrogation techniques would compromise effective intelligence gathering, and thus, imperil US security in the long term (White House, 2008).

A new regulation could bring many benefits, however, especially regarding the arguments presented by the retired intelligence and flag officers. New rules could narrow down the interrogation techniques to methods that, according to experts in the field, had proven to be effective in making terror suspects share accurate information. That way the officers would see their concerns addressed, while the efficiency of intelligence gathering could be significantly increased (McCain, 2008). In addition, basing new rules on the opinion of experts who were well respected both by the public and in political circles was expected to make the implementation of a new safeguard less contentious.[41]

At the same time, a new regulation would also send a positive signal to the US public as well as to allies abroad, and thus repair some of the reputational damage that the United States had incurred. Domestically, a new regulation could be used to send out a clear message that the new government would distinguish itself from the previous administration and not tolerate extraterritorial torture.[42] Moreover, a new regulation was expected to serve a similar purpose internationally. On the one hand, the administration could present itself as a reliable partner that complied with human rights norms to allied states. This would help restore

the United States' reputation abroad and, as a consequence, smooth out obstacles to future intelligence cooperation (Obama, 2009). On the other hand, a stronger anti-torture policy could likewise show the Iraqi and Afghani people that the new presidency would not continue with hitherto employed programs, thus countering terrorist propaganda; rather the administration would act as a force for good (Obama, 2008).

Finally, a single, well-defined interrogation standard for all government agencies would create greater coherence and reduce transaction costs. Accordingly, a regulation that would apply to all units and agencies that conducted interrogation would lead to more efficient processes in shared detention facilities, as confusion regarding which rule applied when and to whom could be avoided, while also enabling interrogators from different agencies to assist each other without being afraid of breaching their agency's guidance.[43] This increase in efficiency and cross-agency cooperation, in turn, would facilitate better resource management, and thus, lower the financial costs of intelligence operations.

Taking all points together, both presidential candidates eventually came to the assessment that the benefits of a new, carefully worded ban on torture outweighed its potential costs (Lehrer, 2008). Moreover, senior policymakers who would assume high-ranking positions in the Obama administration in early 2009 shared this appraisal. For instance, future Secretary of State Hillary Clinton referenced the meetings with the generals in the context of the HRF campaign when she outlined why she began to support a more comprehensive torture ban (Clinton, 2007; see also Brooks, 2006). Similarly, future Vice President Joe Biden pointed to utilitarian arguments and his encounters with the above-mentioned generals to justify his support for a more comprehensive ban on torture:

> No, I would not (torture). And I met, up here in New Hampshire, with 17 three- and four-star generals who, after my making a speech at Drake Law School, pointing out I would not under any circumstances sanction torture, I thought they were about to read me the riot act. Seventeen of our four-star, three-star generals said, will you make a commitment you will never use torture? It does not work. It is part of the reason why we got the faulty information on Iraq in the first place is because it was engaged in by one person who gave whatever answer they thought they were going to give in order to stop being tortured. It doesn't work. It should be no part of our policy ever.
>
> (Biden, 2007)

Outcome

On his second day in office, surrounded by the same flag officers who had toured the country lobbying against the use of torture,[44] and who had been mentioned by Hillary Clinton and Joe Biden in their respective speeches, Barack Obama signed EO 13491: Ensuring Lawful Interrogations, an explicit ban on extraterritorial torture and CIDT (Scott, 2009a). When presenting EO 13491, Obama alluded to the previously mentioned strategic arguments, declaring that the new directive was

"to improve the effectiveness of human intelligence-gathering, (and) to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts" (White House, 2009, 1).

In a first step, the executive order reset all previous internal regulations regarding interrogation to introduce a common standard across all governmental agencies. Hence, the order revoked all "executive directives, orders, and regulations inconsistent with this order (EO13491)", especially referencing Bush's EO 13440 and any OLC memo on the issue published between 11 September 2001 and 20 January 2009. Consequently, the memos justifying the use of EITs and establishing the CIA Detention and Interrogation Program's alleged compliance with Common Article 3 of the Geneva Convention were withdrawn, officially ending the network of black sites and the holding of ghost detainees, as well as the use of the previously sanctioned EITs (White House, 2009, 1).

Section 3 of EO 13491 established Common Article 3 of the Geneva Conventions as a minimum baseline and common standard of any interrogation and extended the mandatory use of the active AMF (AFM 2–22.3 of 2006) to all governmental agencies engaged in missions abroad, including the CIA (White House, 2009, 2–3). Common Article 3 explicitly prohibits any "cruel treatment and torture", or any "outrages upon personal dignity, in particular humiliating and degrading treatment" (International Committee of the Red Cross, 2020). Given that the AFM accounts for international treaty obligations as well as respective US reservations, EO 13491 established the AFM as a uniform guidance, declaring that no interrogation technique differing from the sanctioned methods in the AFM should be applied (White House, 2009, 2).

Finally, the executive order also established a Special Interagency Task Force that was to review existing interrogation techniques. Specifically, the group, which comprised, among others, the Attorney General, the Director of National Intelligence, the Secretary of Defense, and the Secretary of State, was to review the AFM 2-22.3 to determine within 180 days whether the listed interrogation techniques "provided appropriate means of acquiring the intelligence necessary to protect the Nation". In case of a negative assessment, recommendations for additional measures were to be proposed to the president to put him in a position to institute further changes (White House, 2009, Sec. 5).

The McCain–Feinstein Amendment and the codification of EO 13491 into law

Risk of extraterritorial human rights violations

While EO 13491 introduced important constraints on US interrogation and detainee treatment practices, its Achilles' heel was its nature as an executive order rather than a law enacted by Congress (Senate Select Committee on Intelligence, 2014, 5). Given that an executive order can be revoked by the president without approval from Congress, EO 13491's survival beyond Obama's presidency

was contingent on the goodwill of future presidents as they had the executive authority to alter or discard the directive depending on their own strategic calculations. Thus, as long as the strengthened anti-torture rules of EO 13491 were not enshrined into law by Congress, the order's ban on torture remained fragile and the way back to torturous practices remained open. As Obama prioritized an economic recovery and health care in his early presidency[45] and public pressure subsided, the debate on potential anti-torture legislation weakened.[46]

Intervention

This hiatus ended, however, when the Senate Select Committee on Intelligence (SSCI) in 2014, after years of inter-partisan struggle,[47] published its minority report, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program.[48] The report, which had been commissioned in March 2009 by the SSCI itself after the intentional destruction of CIA interrogation recordings, was to investigate the role and behavior of the CIA in the "War on Terror". The outcome was an almost-7000-page-long account of CIA counterterrorism-related activities since 9/11, including in-depth research into torture allegations and practices relating to the CIA Detention and Interrogation Program (Senate Select Committee on Intelligence, 2014, 2). The published version of the report, despite having been redacted to 525 pages, nonetheless outlined the CIA's use of the EITs, as well as incidents of severe abuses, and, importantly, evidence of the inefficiency of coercive interrogation techniques (ibid., 2–3).

Set in motion by the report's findings, John McCain and SSCI Chair Dianne Feinstein seized the moment to start lobbying fellow members of Congress for new legislation that would enshrine EO 13491 into law and make it less vulnerable to the discretion of future presidents. The detailed report strengthened their undertaking significantly, as it listed various examples of misconduct by the CIA and Bush administration officials,[49] while also reinforcing the arguments against torture previously presented by various retired intelligence and flag officers. Accordingly, the report reiterated that detainee mistreatment not only caused severe reputational damage on the international stage but that the "use of the (Enhanced Interrogation) techniques failed to elicit detainee cooperation or produce accurate intelligence" (Senate Select Committee on Intelligence, 2014, 78).

With strong support from HRF, which revived its campaign of enlisting retired intelligence and flag officers, McCain and Feinstein set out to promote in Congress an amendment to the NDAA 2016, which codified EO 13491 before a new president assumed office in early 2017 (Human Rights First, 2015). In order to do so, the Senators chose the same strategy that had already proven effective during the campaign that had led to EO 13491 in 2009 and thus tried to win over their fellow Congressmen and -women with strategic arguments against the use of torture,[50] bolstered by the authority of former intelligence and flag officers. Hence, the retired intelligence and flag officers visited both Republican and Democratic senators to share their interrogation experience with them and to convince them that adopting a law that would make AFM

compliance mandatory to all governmental agencies was in the United States' national interest.[51] At the same time, intelligence experts like Mark Fallon went on television, explaining to the public the strategic need to prohibit by law any sort of torture or CIDT by any US agency,[52] while other former intelligence officers, such as Glenn Carle, sent out the same message to the print media (Ryan, 2015).

Processing

At last, the debate in Congress on whether to pass the proposed amendment to the NDAA 2016 again centered on weighing the costs against the strategic benefits associated with passing the amendment. As EO 13491 was already in place and a new law would thus not introduce any novel protections, the political costs of the legislation were relatively low.[53] Yet, especially Republican representatives were still afraid that a new law could create new permanent accountability measures, which in turn could establish legal liability for former members of the Bush administration.[54] Likewise, binding the CIA permanently to the AFM would significantly reduce the agency's flexibility, especially as the AFM had significant shortcomings itself as the manual had originally not been designed as a general interrogation standard, but rather as a first response guidance for low-ranked soldiers. On the positive side, however, the bill would strengthen the prohibition of torture, elevating the already existing ban from an executive document to an actual law, which could then only be changed with congressional approval and not "with the stroke of a pen" (Feinstein, 2014, 5). Codification would therefore secure the advances already made and more effectively prevent the negative consequences of the use of torture in interrogations.

Outcome

Finally, the strategic arguments in favor of the new safeguard carried the day as they had before and, after long debates, Congress eventually passed the McCain–Feinstein Amendment to the NDAA 2016 in November 2015 (US Congress, 2015, 977–9). As in EO 13491, both the military and the CIA were legally bound to comply with the AFM, which strictly prohibited any form of torture and required adherence to Common Article 3 of the Geneva Conventions at all times. In order to ensure that no section of the AFM could be construed in a way that it permitted coercive interrogation techniques, the amendment also established a three-year revision cycle for the AFM in which the manual would be scrutinized to make sure that no specified interrogation practice involved the threat or use of force or torture. In addition, the High-Value Detainee Interrogation Group, which comprised intelligence professionals from the Federal Bureau of Investigation, the CIA, and the DoD, was tasked with compiling best-practice reports and making recommendations on potential alterations, including non-coercive interrogation practices, to the AFM (US Congress, 2015, 978).

The safeguards during Trump's presidency

Shortly after taking office, President Donald Trump openly stated his opinion on torture, promising to "bring back waterboarding and a hell of a lot worse" and praising the effectiveness of harsh interrogation techniques (Trump, 2017). In line with that objective, Trump nominated Gina Haspel to be CIA director in early 2018. The nomination sparked an outcry among human rights advocates around the world, as Haspel had served in 2002 as the base chief of the CIA's black site detention facility Cat's Eye in Thailand, which had been infamous for its extensive use of EITs (Goldman, 2018). Many experts in the field, both from inside as well as outside the intelligence community, perceived Haspel's nomination as a strong statement by Trump,[55] especially as Trump briefly considered reopening black site facilities, before withdrawing the draft order (Miller, 2017).

In the end, Trump did not bring back Bush's CIA Detention and Interrogation Program. One reason for this was that Trump's close national security advisors had recommended against doing so. In their confirmation hearings, General James Mattis and Congressman Mike Pompeo had asserted on public record that they would not bring back torture,[56] and Trump had openly stated that he would do whatever his senior advisers deemed necessary:

> I will say this, I will rely on Pompeo and Mattis and my group. And if they don't wanna do (torture), that's fine. If they do wanna do (torture), then I will work for that end. I wanna do everything within the bounds of what you're allowed to do legally. But do I feel it (torture) works? Absolutely I feel it works.
>
> (Trump, 2017)

Hence, Trump not only seemed to have listened to the advice of his key advisors not to officially sanction torture and CIDT for use in interrogations but he also publicly committed to not using interrogation techniques that were outside the bounds of what was legally permitted. Without a majority in Congress that would have supported a nullification of the McCain–Feinstein Amendment, Trump was legally bound by the amendment and its anti-torture and -CTID safeguards.[57] Whether his administration actually complied with the requirements set out in the amendment is obviously another question that cannot yet be answered.

Conclusion

In the aftermath of 9/11, the Bush administration established the CIA Detention and Interrogation Program that heavily relied on officially sanctioned EITs and violated the United States' obligations under the CAT. Moreover, cases of torture and CIDT unrelated to the use of EITs were reported from both CIA and military facilities. However, between 2005 and 2015 both Congress and the executive introduced multiple safeguards to protect foreign detainees held by the United States in prisons outside US territory against torture and CIDT. The DTA marked

the first important policy change, binding any interaction of the military with foreign detainees to the standards of the AFM and making cooperation on the matter with Iraqi forces dependent on respective training. In addition to that, the DTA signed into law that the prohibition of CIDT was universally applicable, irrespective of whether extraterritorial jurisdiction was formally established or not. In 2009, President Obama enacted EO 13491, which extended mandatory compliance with the AFM to all governmental agencies operating abroad, and thus importantly also to the CIA. EO 13491 also established a Special Interagency Task Force that was to assess whether interrogation techniques that complied with AFM standards were suitable tools to obtain reliable intelligence. Any adjustments that the Special Interagency Task Force would recommend would have to be in line with Common Article 3 of the Geneva Conventions. In 2015, finally, Congress created an amendment to the NDAA 2016, which codified the executive order's specifications into law.

The passage of the DTA can be traced back to the shaming mechanism as outlined in the second chapter of this book, which fed on the disclosure of the massive abuse that had occurred in Abu Ghraib and of the OLC's "torture memos". The very graphic photos and videos illustrating the torture and abuse in the US-run prison in Iraq, in particular, triggered a public outcry in- and outside the US that made sufficient members of Congress conclude that reforms were necessary. With NGOs and the media spreading visual evidence of the abuse around the world, the United States' reputation suffered, which not only led to diplomatic tensions with key allies, but also posed a national security threat and put captured US soldiers abroad at risk. Alarmed by the photos and the repercussions of the campaign, Senator McCain played a key role in translating the immediate pressure into tangible, legislative results, which led to the passing of the DTA in 2005. Finally, President Bush, who also saw the need to repair the reputational harm the United States had incurred, decided to sign the DTA into law.

EO 13491 and its codification into law, in contrast, can be traced back to the strategic learning mechanism. Thus, while the DTA was a direct response to tangible pressure, EO 13491 and the respective amendment to the NDAA 2016 were preceded by an extensive exchange of arguments about future consequences of further reforms or non-action. It was mainly retired intelligence and flag officers, who widely enjoyed bipartisan respect from policymakers, who successfully provided various arguments as to why it was in the United States' own interest to introduce further safeguards. The key strategic arguments included that coercive interrogations not only undermined cooperative behavior by detainees but also increased the likelihood of obtaining inaccurate information. In addition, the reputational loss caused by abusive behavior would, it was argued, endanger the safety of captured American soldiers abroad, while also posing a risk to national security as intelligence cooperation with allies and partner states might decrease, whereas terrorist propaganda, in contrast, would likely increase.

It is, however, important to mention that – even though the enacted safeguards have survived a presidency such as the Trump administration that was diametrically opposed to such limitations– the safeguards are no guarantee that there

are and will not be cases of torture or other forms of mistreatment in US detention facilities outside of US territory. With a unitary standard for interrogations enshrined into law, practices like the EITs were officially outlawed and Common Article 3 of the Geneva Conventions was established as a minimum baseline for interrogations. However, as most CIA interrogation operations are being held in secrecy, non-compliance with the safeguards is unlikely to surface quickly. Also, even though mandatory adherence to the AFM by the military and the CIA constitutes an important advancement, there remains further potential for policy development, given that originally the AFM was not written as a comprehensive interrogation guide for senior officers, but rather as a guidance for junior military personnel on how to handle enemy combatants upon capture. Hence, the AFM might sometimes restrict intelligence gathering operations by impeding non-coercive interrogations techniques that are not listed in the manual. Nonetheless, with the safeguards enshrined in law, the policies that have emerged do establish legal liability for any breaches, and, thus, provide for an important accountability mechanism; therefore, the introduction of safeguards has made it less likely that US agencies apply torture and CIDT in their interaction with foreign detainees abroad.

Notes

1 Detainees who upon incarceration are not being registered with the International Committee of the Red Cross and are subsequently being held *incommunicado*.
2 The term rough takedowns refers to a form of very harsh detainee treatment. The Senate Select Committee on Intelligence describes one such incident in the following way: "(A)pproximately five CIA officers would scream at a detainee, drag him outside of his cell, cut his clothes off, and secure him with Mylar tape. The detainee would then be hooded and dragged up and down a long corridor while being slapped and punched" (Senate Select Committee on Intelligence, 2014, 4).
3 Interview with Colonel Steve Kleinman, Senior Military Intelligence Officer, Washington D.C., April 2, 2019.
4 Interview with Elizabeth Grimm Arsenault, Associate Professor and Director of Teaching, Center for Security Studies, Georgetown University, Washington D.C., March 19, 2019.
5 Interview with Benjamin Wittes, Senior Fellow, Brookings Institution, Washington D.C., March 19, 2019.
6 Interview with Glenn Carle, former CIA officer and Deputy National Intelligence Officer, National Intelligence Council, Washington D.C., April 10, 2019.
7 Interview with John Bellinger, former Senior Associate Counsel to the President and Legal Adviser to the National Security Council, Washington D.C., April 10, 2019.
8 Interview with Philip Zelikow, former Counselor of the US Department of State and Member of the President's Intelligence Advisory Boards, Washington D.C., April 8, 2019.
9 Interview with Alberto Mora, former General Counsel of the Navy, Washington D.C., April 4, 2019.
10 Interview with Glenn Carle.
11 Interview with Benjamin Wittes.
12 Interview with Benjamin Wittes.
13 Interview with Michael Posner, former Assistant Secretary of State for the Bureau of Democracy, Human Rights and Labor, Washington D.C., July 1, 2019.
14 Interview with Colonel Steve Kleinmann.
15 Interview with John Bellinger.

16 Interview with Elizabeth Grimm Arsenault.
17 Interview with Admiral Jamie Barnett, United States Navy, Washington D.C., March 28, 2019.
18 Interview with Mark Fallon, former Chair of the US Government's High-Value Detainee Interrogation Group Research Committee, Washington D.C., May 3, 2019.
19 Interview with Phillip Zelikow.
20 Interview with Douglas Johnson, former Director of the Center for Victims of Torture, Washington D.C., April 25, 2019.
21 Interview with Alberto Mora.
22 Interview with Alberto Mora.
23 Interview with John Bellinger.
24 Interview with Alberto Mora.
25 Interview with Benjamin Wittes.
26 Interview with Elisa Massimino, former President Human Rights First, Washington D.C., March 28, 2019.
27 Interview with Elizabeth Grimm Arsenault.
28 Interview with Philip Zelikow.
29 Interview with Elisa Massimino.
30 Interview with Douglas Johnson.
31 Interview with Elisa Massimino.
32 Interview with Glenn Carle.
33 Interview with Colonel Steve Kleinman.
34 Interview with Mark Fallon.
35 Interview with Glenn Carle.
36 Interview with Mark Fallon.
37 Interview with Colonel Steve Kleinman.
38 Interview with Elisa Massimino.
39 Interview with Benjamin Wittes.
40 Interview with Alberto Mora.
41 Interview with Douglas Johnson.
42 Interview with Elizabeth Grimm Arsenault.
43 Interview with Michael Posner.
44 Interview with General Robert Gard, United States Army, Washington D.C., March 29, 2019.
45 Interview with Alberto Mora.
46 Interview with Benjamin Wittes.
47 Interview with Douglas Johnson.
48 Interview with Michael Posner.
49 Interview with Elizabeth Grimm Arsenault.
50 Interview with Elisa Massimino.
51 Interview with Colonel Steve Kleinman.
52 Interview with Mark Fallon.
53 Interview with Scott Roehm, Director Washington D.C. Office of the Center for Victims of Torture, Washington D.C., March 20, 2019.
54 Interview with Glenn Carle.
55 Interview with Steve Kleinman.
56 Interview with Elisa Massimino.
57 Interview with Michael Posner.

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4 Military detention in Guantánamo and the right not to be arbitrarily detained

Introduction

The detention of enemy combatants during wartime to prevent detainees from returning to the battlefield is a widely recognized humane alternative to execution (Office of the High Commissioner for Human Rights, 2006, 8). International humanitarian law and human rights law nonetheless dictate the procedural and substantive rights that must be protected to prevent states from holding military detainees *incommunicado*, indefinitely, or from prosecuting them without a fair trial. The United States has repeatedly utilized its authority under domestic and international law to detain combatants until the end of hostilities and to prosecute them for violations of the laws of war. Traditionally, the United States has relied on courts martial governed by the Uniform Code of Military Justice (UCMJ) as well as federal courts to prosecute enemy combatants for violations of the laws of war. Military commission systems, which departed from these models, were used during World War II.

In November of 2001, however, the Bush administration adopted a radical reinterpretation of American obligations by alluding to the unprecedented nature of the global "War on Terror". In doing so, the administration labeled al-Qaeda and Taliban forces as "unlawful", or "unprivileged enemy combatants" who were neither "Prisoners of War" nor interned civilians under the Third and Fourth Geneva Conventions, nor were they protected by customary safeguards in international humanitarian law, namely Common Article 3 of the Geneva Conventions (White House, 2002). Instead, detainees were to be prosecuted using a novel military commission system that was not obligated to adhere to international law or the UCMJ (White House, 2001). Not only were the evidentiary and procedural safeguards of the new military commissions significantly weaker than those of the standard courts martial, the DoD was also empowered to prosecute additional crimes such as "material support" to terrorism, conspiracy, and solicitation, which were not clearly in violation of the laws of war at the time they were committed (Elsea, 2014, 11). Furthermore, the administration determined that the extraordinary circumstances of the "War on Terror" justified the use of additional military detention facilities in the US Naval Base at Guantánamo Bay with the intention of inhibiting judicial interventions by US federal courts. Consequently, detention

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policies in Guantánamo, among others, were hidden from public scrutiny, enabling severe violations of international law governing the grounds and processes of internment and the rights to a fair trial.

Since January 2002, the US government has detained hundreds of "enemy combatants", including minors, in Guantánamo (New York Times, 2021). In addition to Iraqi and Afghani nationals, foreign detainees were apprehended as terrorist suspects outside of the officially recognized battle zone (Fitzpatrick, 2003, 250). As of 2006, only 7% of the over 500 detainees had been actually captured by US or Coalition forces at a time when generous bounties were paid for suspected enemy combatants in Afghanistan and Pakistan (Denbeaux et al., 2006, 14–5). Because the US relied extensively on unknown, third-party bounty hunters, there was "little ability either for the Government to corroborate or a detainee to refute such an allegation" made by the capturers, who turned over suspects to American or allied forces (ibid., 15). In Guantánamo, detainees were initially held indefinitely without charge or the right to challenge their continued detention, and were denied access to legal counsel or contact to their families (Amnesty International, 2007, 28). Those few who were eventually charged for crimes were tried under the new military commission system, which explicitly neglected customary due process safeguards (US Supreme Court, 2006). For several years, detainees were explicitly denied the right to judicial review before US courts. While denying detainees' rights under the Geneva Conventions and the International Covenant on Civil and Political Rights (ICCPR), subsequent US administrations reaffirmed their authority to detain "enemy combatants" until the end of hostilities, despite the absence of a clear definition of how a global war on terrorism could "end".

Following a series of legal battles that stretched over several years, a number of safeguards nonetheless began to emerge that extended Guantánamo detainees' due process rights within the new military commissions system, and improved their right to challenge their indefinite detention. Shortly after taking office, President Obama's administration submitted to Congress a series of recommendations for improving the military commissions, some of which were included in the Military Commissions Act (MCA) of 2009. Specifically, the MCA 2009 included, among others, several procedural safeguards dictating the types of evidence that were permitted, in addition to expanding the defense's access to counsel, witnesses, and to exculpatory evidence; it restricted the types of chargeable offenses; and it reaffirmed detainee's constitutional right to judicial review in a civilian court. In fact, the MCA 2009 was a significant improvement over the 2006 MCA, which had restricted detainees' access to judicial review. Despite the MCA 2009, however, hundreds of detainees remained imprisoned at Guantánamo Bay. Subsequently in 2011, Obama issued EO 13567, establishing an interagency process, called Periodic Review Boards (PRBs), for regularly reviewing the national security threat posed by these detainees to determine whether they should be recommended for transfer, release, prosecution, or continued detention under the laws of war. The process, which was later partially codified by Congress into law in the NDAA for 2012 (Sec. 1023), provided detainees regular opportunities to present evidence and testimony to challenge the necessity of their indefinite

detention. The PRBs, though discretionary in nature, were an important improvement for detainees who the United States wished to detain indefinitely without trial.

This chapter demonstrates that the expansion of due process safeguards for Guantánamo detainees under the MCA 2009 was the primary result of the litigation mechanism, whereas the PRBs established by EO 13567 resulted from strategic learning within the Obama administration. Following the Supreme Court of the United States' 2008 decision in *Boumediene v. Bush* (US Supreme Court, 2008), the US government was faced with overwhelming pressure from *habeas corpus* proceedings of Guantánamo detainees whose right to challenge their continued detention in US federal courts was constitutionally reinforced – which led the government to introduce the MCA 2009. In contrast, EO 13567 was born out of recommendations made by multiple task forces to improve the legitimacy of US detention policies in Guantánamo in light of the perceived necessity of continued detention of a number of detainees who were believed to be too dangerous to release or transfer, despite the absence of charges. The Obama administration ultimately concluded that such reforms were necessary to satisfy security concerns and to preempt accusations that detainees in Guantánamo were being held arbitrarily in contradiction to international law.

Using evidence gathered from expert interviews and relevant primary and secondary sources, this chapter traces the creation of the MCA 2009 and EO 13567. Following the conceptualization of the mechanisms described in Chapter 2, the next two sections provide evidence for litigation and strategic learning as causal mechanisms that can account for the establishment of the first and second set of safeguards, respectively. The ensuing section provides a brief overview of the Trump administration's handling of the safeguards before the final section concludes with a summary of the main findings.

Toward the Military Commissions Act of 2009

Extraterritorial human rights violations

Using the authority granted to the executive by Congress after 9/11 (US Congress, 2001), President Bush established the first military detention facilities in Guantánamo Bay in 2002, the rules and regulations of which were at the discretion of his Secretary of Defense Donald Rumsfeld. At least 780 foreign detainees have been held in Guantánamo, several of which were also detained and interrogated in secret CIA detention centers prior to being transferred to the military prison. The majority of detainees were foreign individuals who were born in Afghanistan, Saudi Arabia, and Yemen, and were captured abroad; at least one American citizen, Yasser Hamdi, was held in Guantánamo (US Department of Defense, 2006). In spite of official accounts, the full extent and details of the United States' global detention program are not known to the public. Although the majority of Guantánamo detainees were released or transferred during the Bush and Obama administrations, at least 40 detainees, including 15 "high-value

detainees", remain interned there as of March 2021 as so-called "forever prisoners". At least 22 detainees continue to be held indefinitely in law-of-war detention without any prospects of transfer or prosecution; those remaining have been recommended for transfer (6), recommended for prosecution (3), have pending cases (7), or were convicted (2) before a military commission. As of March 2021, the average length of time spent in Guantánamo for the 22 detainees in indefinite detention is 16 years and 9 months; however, three detainees, including two of Osama bin Laden's personal bodyguards, have been imprisoned there for over 19 years without trial. Over the years, at least nine detainees have died while in custody, seven of which died from apparent suicide (New York Times, 2021). Despite attempts by the Bush and Obama administrations to close the infamous detention facilities, the fate of the "forever prisoners" remains uncertain 20 years after the 9/11 attacks.

In order to understand the extent of the violations of the right not to be arbitrarily detained that took place within the context of US detention policies in Guantánamo Bay, it is necessary to review the international obligations that states hold. According to the UDHR (UN General Assembly, 1948, Art. 9), "(n)o one shall be subjected to arbitrary arrest, detention, or exile". More specifically, the right not to be arbitrarily detained necessitates that there is a legitimate legal basis for the continued detention, that international standards of a fair trial are respected, and that access to judicial review to challenge the appropriateness of the detention is protected. International law protecting personal liberty in military detention during an armed conflict can be divided into four subject areas: the treatment and interrogating of detainees, the material conditions of detention, the grounds for internment and procedural safeguards, and fair trial rights (Office of the High Commissioner for Human Rights, 2000, 13–20). Whereas the first two topics are covered in Chapter 3's analysis of safeguards against torture and cruel, inhumane, and degrading treatment, this chapter will focus on the development of procedural safeguards governing the detention of so-called enemy belligerents in Guantánamo Bay and judicial guarantees protecting their right to a fair trial before a military tribunal.

Detention safeguards for enemy combatants captured in an international armed conflict (IAC) are enshrined in international humanitarian law under the Third Geneva Convention Relative to the Treatment of Prisoners of War (1949) (henceforth "Third Convention"). This convention obligates the United States to treat POWs humanely, and to provide them with all of the rights and privileges detailed in the convention. Specifically, it enables states to detain POWs until the end of hostilities to prevent them from returning to combat, or to charge them for war crimes, genocide, or crimes against humanity. However, the accused must be provided, among others, the rights and means of a meaningful defense, and they must only be convicted before sufficiently independent and impartial courts that are capable of enforcing final decisions. According to the International Committee of the Red Cross (ICRC), the United States was obligated to screen captured combatants for POW status in Afghanistan and Iraq until June 2002 and June 2004, respectively, at which point both wars evolved into non-international

armed conflicts (NIAC) (Office of the High Commissioner for Human Rights, 2006, 29). As of February 2002, however, the Bush administration, emboldened by the Office of Legal Counsel, determined that the Third Convention did not protect al-Qaeda or the Taliban (White House, 2002). Specifically, officials argued that POW status only applied to the armed forces of "High Contracting Parties", of which al-Qaeda was not one (ibid., Sec. 2a). Similarly, the administration determined that the Taliban's disregard for the law of war made them "unlawful combatants", and therefore disqualified them from POW status (ibid., Sec. 2d). Consequently, the Bush administrative stopped standard screening procedures for assessing POW status on a case-by-case basis, and denied all rights based on the Third Convention for all captured combatants in direct violation of international law (Waxman, 2009, 345).

Even if one were to accept the Bush administration's logic that members of al-Qaeda and the Taliban did not qualify for POW status, international law nonetheless mandates that states adhere to the minimum detention safeguards established by Article 3 common to all four Geneva Conventions (henceforth "Common Article 3"), regardless of the nature of the conflict. Under Common Article 3, the United States may detain belligerents, including citizens who take up arms but who are not ordinarily members of the military, for security reasons for the duration of hostilities without trial. Although the procedural protections for POWs are more detailed and extensive than the language of Common Article 3 (Waxman, 2009, 347),[1] there are a number of key principles and safeguards that are defined as necessary minimum standards for governing detention and fair trial (Pejic, 2005 and 2011). To protect detainees from being arbitrarily detained, detainees must, among others, be informed of the reasons for their detention, and they must be provided sufficient access to legal representation and must be granted a genuine opportunity to challenge the legality or conditions of their detention before an independent and impartial body, otherwise referred to as "judicial review" or *habeas corpus*. The administration, however, attempted to take advantage of what they believed to be a gap in international humanitarian law by claiming that Common Article 3 only applied in NIACs, and by maintaining that the "global War on Terror" despite the ICRC's assessment, was inherently an IAC. Consequently, the US government determined that neither group was protected by Common Article 3, even as a minimum standard, in direct violation of customary international law (Pejic, 2011, 10).

Despite the United States' stance during the early years of the "War on Terror", the ICRC contended that "human rights soft law and jurisprudence have established that the right to challenge the lawfulness of one's detention before a judicial body must be preserved in all circumstances" (Pejic, 2005, 386). The location of detention facilities in Guantánamo Bay, however, effectively rejected any form of accountability over the administration's new detention policies. In fact, the Office of Legal Counsel suggested that by strategically locating detainees in Guantánamo, which it argued was outside of the United States' sovereign territory, US federal courts would not have the authority to receive detainee petitions for judicial review (Office of Legal Counsel, 2001). Accordingly, the Bush

administration prioritized efforts to restrict detainees' access to judicial review, by implementing processes and procedures that they argued sufficiently replaced any need for oversight.

In 2005, for example, the administration implemented the Combatant Status Review Tribunal (CSRT) and the Administrative Review Board (ARB) to evade concerns that detainees had been denied any opportunity to challenge their classification as "enemy combatants" or to their continued detention (Wolfowitz, 2004a and 2004b). However, these policies departed significantly from standards and practices that were deemed necessary for preventing arbitrary and indefinite detention (Amnesty International, 2007). Under international law, the suspension of the right to personal liberty should only be reserved as an exceptional measure in which individual detainees are proven to be a sufficient threat to warrant continued detention (Pejic, 2005, 380, 388–9). CSRTs were therefore created to determine whether detainees had been accurately classified as "enemy combatants" warranting detention and potential prosecution.[2] Although detainees were permitted to attend these tribunals, the regulations in place fundamentally undermined their right to provide a meaningful defense. Specifically, detainees were not granted legal counsel beyond a military representative; they were provided only very limited access to declassified summaries of evidence or witness testimonies; they were not protected against testimonies derived from coercion or torture; and they were presumed to be "enemy combatants" unless sufficient evidence proved otherwise (Drumbl, 2005; Amnesty International, 2007; Arik, 2008). Additionally, at least five negative CSRT determinations, which would have ordinarily permitted the release of detainees, were overruled by subsequent CSRTs using newly located, classified evidence. Following this assessment, ARB provided annual reviews of the threat posed by detainees to justify continued detention. In preparation for these administrative hearings, detainees were "allowed a pen and paper the day before", but were not permitted legal representation, nor could they seek advice from other detainees (Amnesty International, 2007, 7).

Additional US detention policies failed to meet basic standards that ensure that detainees are provided some form of contact with the outside world. Initially, detainees were even held *incommunicado*, since they were denied contact with family, lawyers, and their national governments for extensive periods, even years. In one such case, Omar Khadr, an Afghani who was 16 when he arrived at Guantánamo, was not allowed to have a telephone call with his mother until March 2007, over five years after his initial arrest (Amnesty International, 2007, 6). Prior to 2004, civilian lawyers were not even permitted access to the base in order to consult their clients. A new policy in 2008 allowed detainees one telephone call per year, which could be used to contact family. Additionally, detainees were generally permitted for 30 minutes a week access to a pen and paper with which they could write family or lawyers, assuming they were sufficiently literate to do so (Gaberson, 2008). These policies, though improvements over previous practices, failed to meet even minimum detention standards recognized by customary international law (Office of the High Commissioner for Human Rights, 1988, Principles 15 and 19).

Although detainees may also be tried by a military tribunal, judicial rights for detainees facing trial under the new military commissions in Guantánamo were severely flawed. Common Article 3 clearly states that detainees must be afforded "all the judicial guarantees which are recognized as indispensable by civilized peoples" (Common Article 3, 1d). Although this provision does not detail what constitutes a fair trial, there are several judicial guarantees that are arguably binding in armed conflict under international law to ensure a detainee's right to prepare a meaningful defense (Pejic, 2011). Under the military commission system first established by the Bush administration in 2001, the defense was provided only limited access to legal counsel, interpreters, unclassified evidence, and witnesses. Meanwhile, communications between a client and his attorney were extensively monitored, so that attorney–client privileges were absent. Additionally, detainees were not protected against "double jeopardy" (Elsea, 2007, 35–7), nor punishment for a crime that did not exist at the time of the act (ibid., 11–2), nor were they protected against the use of evidence derived from coercion and torture (ibid., 26). Additional protections regulating the constitution of the military commissions to ensure that they were sufficiently independent and capable of enforcing a final decision were infamously compromised (ibid., 61–3). Furthermore, detainees, upon conviction, were permitted limited access to appeal the decision before the D.C. Circuit Court of Appeals.[3]

Intervention

Shortly after its establishment, the detainee population in Guantánamo began to rapidly grow, prompting many to start voicing concerns about US detention policies. It would take six years after its establishment, however, before any intervention efforts had notable success. During these years, actors from both inside and outside the US government led several intervention attempts, including via strategic and persuasive argumentation, as well as multiple coercion efforts. Even a bipartisan push in Congress to amend detainees' access to judicial review failed on multiple occasions to gain enough votes. As this section will demonstrate, it would take several high-profile Supreme Court victories, which greatly increased the legal pressure on the US government, before sufficient US policymakers conceded that meaningful safeguards could no longer be evaded.

During its first year in operation, the Guantánamo population quadrupled from 156 to 625 detainees (House Armed Services Committee, 2012, 15). The surge in numbers led to concerns about the effectiveness and strategic benefits of the detention policy by military officials and by advisers within the administration. National Security Council (NSC) staffers who led the GTMO Policy Coordination Committee began as early as 2002 to question whether adequate procedures and resources were in place to quickly process the high volume of detainees being captured (ibid., 16). Others expressed concern that failure to distinguish between low- and high-risk detainees would result in the radicalization of those who had not initially been security threats, thereby necessitating the continued detention of those who would have otherwise qualified for release (Golden and van Natta,

2004). These concerns were shared by several Judge Advocate Generals, or military lawyers, and were supported by a 2002 assessment by the CIA that estimated that as many as one-third of the detainees in Guantánamo were actually civilians or low-level militants with little intelligence value (House Armed Services Committee, 2012, 16). Strategic arguments against US detention policies, however, remained primarily focused on efficiently reducing the detainee population,[4] and did not trigger substantive discussions on establishing due process safeguards for detainees.

As the identity of Guantánamo detainees became public, foreign governments began to utilize diplomatic channels in another attempt to pressure the United States to release or transfer detained nationals (House Armed Services Committee, 2012, 29), but this pressure failed to produce substantive changes for the remaining detainees. According to a 2012 House Armed Services Committee report, "(i)n some cases, in order to ensure information sharing and collaborative counter-terrorism efforts with other nations, their detainees were transferred to them. '(N)ations were threatening (...) not to cooperate' with American goals abroad if their nationals were not returned" (ibid., 35). In 2003, for example, British Prime Minister Tony Blair pressed President Bush during a joint conference to agree to repatriate British detainees (The Guardian, 2003). The White House's decision to agree to the transfer was "intended to 'resolve the detainee issue in a way which protected (US) security interests (...) while also (...) being attentive to the broader strategic context of (US) bilateral relations' with the United Kingdom" (House Armed Services Committee, 2012, 36). Similar pressure by Saudi Arabia led to the expedited transfer of four Saudi detainees in 2003, in exchange for access to Saudi Arabian military bases during the invasion of Iraq (Golden and van Natta, 2004). As many as 51 detainees between 2002 and 2004 were suspected of having been released in response to diplomatic pressures from allies (House Armed Services Committee, 2012, 29). However, such sanctioning efforts were limited in their scope, and failed to produce relevant safeguards for the remaining detainees at Guantánamo.

Despite several efforts to initiate shaming campaigns against alleged arbitrary detention by capitalizing on the 2004 Abu Ghraib torture scandal, such attempts failed to gain traction with the general public. A number of NGOs, including Amnesty International (2007) and Human Rights First (2004), published multiple reports highlighting violations of detainees' rights, based on evidence gathered from the families and personal lawyers of those detained. Furthermore, an attorney representing several Guantánamo detainees argued that the CSRT system effectively "forces an alien prisoner unfamiliar with our justice system and held incommunicado to disprove allegations he cannot see, and whose reliability he cannot test, before a military panel whose superiors have repeatedly prejudged the result, all without counsel" (Marguilies, 2006, 170). High-ranking military officers, including Lieutenant Colonel Stephen Abraham, who served on the CSRT review board, and Colonel Morris Davis, the DoD's chief prosecutor, publically claimed that the independence of the CSRTs and the military commissions had been compromised by pressure from the administration (Feinstein

in US Congress, 2007b, 2–4). Due to the complex nature of detainee due process rights and the absence of graphic imagery to demonstrate the nature of the human rights abuses, however, these efforts failed to build on the success of the anti-torture campaign. In fact, the majority of Americans remained consistently opposed to closing the prison as well as to releasing or transferring the remaining detainees to the United States to be tried before federal courts where their rights could have been guaranteed. In 2007, only 33% of the US population preferred closing the prison facilities versus 53% who preferred to keep them open (Gallup, 2014).

Furthermore, due to the complex legal nature in which the administration classified Guantánamo as outside the jurisdiction of federal courts and due to the tradition of judicial deference to the executive on matters of national security, initial litigation efforts were easily mitigated. Consequently, the first wave of judicial interventions was forced to first settle whether courts even had the legal authority to intervene, before engaging in substantive discussions on legal safeguards. In 2004, two parallel Supreme Court decisions (in *Rasul* and *Hamdi*) determined that detainees could request judicial review before a federal court via *habeas corpus* (US Supreme Court, 2004b), but suggested that this right could be suspended if sufficient due process safeguards were established (US Supreme Court, 2004a). These judgments, while laying the foundation for future legal challenges, failed to detail which procedural safeguards were required and whether such rights were constitutionally guaranteed. Despite ruling in favor of the detainees, the degree of leeway in the Supreme Court judgments ultimately enabled Congress to restrict future interventions by the courts (US Congress, 2005, §1005e and §1005e2c). Additionally, the judgments failed to coerce the administration to create more far-reaching safeguards beyond the limited procedural guidelines provided by the CSRT, which gave detainees an opportunity to challenge their status as "enemy combatants" without addressing the legality of their continued detention (Wolfowitz, 2004b, 3). Consequently, it would take several more years of litigation before the issue of detainee rights would reach the Supreme Court again.

Congress' restriction of the judiciary's authority to hear detainees' *habeas* petitions was challenged by a second wave of litigation, this time targeting the constitutionality of the military commission system established by Military Order 1. In 2006, the Supreme Court determined in *Hamdan v. Rumsfeld* that the new military commission system established by the executive violated the judicial guarantees of a "regularly constituted court"[5] as it was established without Congressional approval as required.[6] Specifically, it found that Common Article 3 was relevant in *all* cases, regardless of the actors involved or the nature of the conflict. The judicial authority reestablished by *Hamdan*, however, was short-lived. Soon thereafter, Congress passed the Military Commissions Act of 2006 (US Congress, 2006), which maintained many of the questionable regulations established by the previous system and further restricted detainees' statutory right to *habeas corpus* (ibid., Sec. 7, §2241e). Although *Hamdan* was crucial in that it codified the application of Common Article 3, its narrow wording empowered the administration to swiftly evade any further obligation to expand detainees' access to due process.

Although several moral arguments had been made over the years, the most significant attempt arose out of opposition by several members of Congress to Section 7 of the MCA 2006, who tried unsuccessfully to persuade their colleagues to restore judicial review. In one Senate Committee Hearing, Senator Patrick Leahy argued: "(Section 7 of MCA 2006) remove(s) this vital check that our legal system provides against the Government arbitrarily detaining people for life without charge. That is wrong. It is unconstitutional. It is profoundly un-American" (US Congress, 2007c, 2–3). Senator Leahy was not alone in his stance; over the course of several hearings both Democrats and Republicans attempted to warn of the moral implications of such a policy. Senior Republican Senator Lindsay Graham, for example, argued during another hearing that:

> (t)he techniques and the devices we use to prosecute people and to gather information will do one of two things—it will elevate this country so we can beat this enemy or it will diminish us. And I believe we can be safe and maintain the moral high ground and that is a false choice to have to choose between the two and if you do, you've already lost to the enemy.
>
> (US Congress, 2007b, 47)

Senior military officials similarly attempted to persuade Congress of the moral arguments to reforming Guantánamo's military commissions. In one such testimony, retired Rear Admiral John Hutson argued that "(i)t's only a human right if it applies to all human beings. It's only a rule of law if it applies all the time" (ibid., 35). Despite these efforts, however, several attempts from both sides of Congress to restore *habeas corpus* rights for Guantánamo inmates ultimately failed to garner sufficient votes.

Finally, in light of the administration's third attempt to restrict judicial review, the Supreme Court choose to intervene once again in 2008, this time with significantly more success. The decision to hear *Boumediene v. Bush* came after several years of litigation and appeal. The case itself was the consolidation of several *habeas* petitions involving multiple detainees. The lead plaintiff for which the case is famous, Lakhdar Boumediene, was a naturalized Bosnian citizen who was born in Algeria, and who had worked as the director for humanitarian aid for the Red Crescent Society of the United Arab Emirates in Sarajevo (Boumediene, 2012). Boumediene had been captured by US forces in Bosnia in 2001 and had been transferred to Guantánamo in 2002. Prior to 2005, two sets of *habeas* cases had reached contradictory conclusions on whether Guantánamo detainees had any constitutional protections. The administration defended its position by arguing that the plaintiffs were provided sufficient alternatives to judicial review via the DTA 2005, and that those processes must first be exhausted before any additional reviews could begin. The decision by the Supreme Court to hear *Boumediene v. Bush* came after the court initially declined the plaintiffs' petitions. In court filings, the plaintiffs' lawyers successfully argued that the administration had conceded in a parallel case that the procedures established by the DTA 2005 were not equivalent to the protections

guaranteed by *habeas corpus*; therefore, a Supreme Court intervention was in fact warranted.

In *Boumediene v. Bush*, the Supreme Court ruled in favor of the detainees by recognizing a constitutional right to judicial review, which superseded previous statutory protections and amended the due process standards according to those outlined in the Constitution. Consequently, the court in *Boumediene* ensured that in all cases detainees would have, if necessary, a "meaningful opportunity to demonstrate that (the detainee) is being held pursuant to 'the erroneous application or interpretation' of relevant law" (US Supreme Court, 2008, 7). Since the regulations established by the DTA 2005 and the MCA 2006 provided insufficient protections, the Supreme Court struck down Congress' suspension of *habeas corpus* in Section 7 of MCA 2006, arguing that it violated the constitution. According to the Court, judicial intervention was justified in this case, despite the ongoing threat posed by terrorism:

> Security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.
>
> (ibid., 68–9)

> The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional.
>
> (ibid., 43)

Consequently, the DTA 2005 and the remainder of MCA 2006 were permitted to remain in place. However, Guantánamo detainees could now challenge the government in federal courts to defend their continued detention. If the administration failed to present sufficient evidence, the courts were now authorized to order the detainees' release.

Processing

Following *Boumediene*, the government was faced with a precedent that enabled detainees to issue challenges to the legality of their detention in Guantánamo via *habeas corpus*. Consequently, a seemingly endless stream of judicial review unleashed by *Boumediene* began to significantly undermine the remaining benefits of the detention program, thereby mobilizing stakeholders, and increasing the credibility of their claims in favor of a reformed detention policy.[7] Prior to the *Boumediene* decision, there remained hope among many government officials that such litigation could be prevented (Philbin and Gingrez in US Congress, 2007a, 10, 40). Although Congress disagreed on its response to the Supreme Court's intervention,[8] members of both parties did not deny the influence of the *Boumediene* decision on US detention policies in Guantánamo. Several members of Congress, primarily Democrats, who had made previous intervention attempts, applauded

the decision as a restoration of justice.[9] Even so, Republicans also recognized the court's authority and the need for reform: "Clearly, we are talking about failed detainee policies in the context of decisions that the Supreme Court has rendered. We are talking about acts of Congress that have been declared partially invalid or unconstitutional" (Kyl in US Congress, 2008d, 6). Similarly, policymakers who fundamentally disagreed with the decision conceded in subsequent Congressional hearings that the court's decision was now the "law of the land" (Hunter in US Congress, 2008a, 4). Consequently, the legal mandate established by the Supreme Court's decision and the subsequent judicial pressure that immediately followed forced the administration and Congress to take seriously the practical, strategic, and reputational repercussions of not reforming US detention policies in a series of hearings over the following months.

The new pressure created by the *Boumediene* decision was substantial as the practical consequences for the administration were twofold. Firstly, the sheer quantity of *habeas* cases immediately began to overwhelm the Justice Department's resources. According to one testimony, government attorneys, who had been managing around 200 pending cases at the time of the decision, now faced as many as 300 additional petitions that had been previously placed on hold. Furthermore, the complexity of each case prompted a "flurry of motions" as well as "disputes over discovery", which prevented any expedited litigation despite the good intentions of federal judges (Rivkin in US Congress, 2008d, 22). In addition to straining the Department of Justice's (DoJ) resources, the Acting General Counsel for the DoD warned that each *habeas* petition required an extensive number of legal, administrative, security, and intelligence personal and assets, which were now being diverted from active military operations (Dell'Orto in US Congress, 2008b, 2).

Beyond the practical implications of the ongoing litigation, the court's decision had serious immediate consequences for the administration's detention policy. Both experts and policymakers expressed concern in hearings that the judicial branch could now determine which detainees could be held, under what circumstances, and for how long, despite lacking insight and expertise on national security matters (Klingler in US Congress, 2008a, 13). Specifically, they argued that the administration was now forced to choose between revealing invaluable intelligence that was crucial to counterterrorism efforts and releasing enemy combatants who nonetheless posed a threat (Rivkin in US Congress, 2008d, 24). Furthermore, they warned that such detainees could then demand to be released within the United States if the government was unable to find an ally who accepted their transfer within the six-month period required by US law (Hunter in US Congress, 2008a, 5). These fears especially concerned the developments in one specific ongoing *habeas* case, in which two courts had disagreed on whether federal courts had the authority to order the US government to release Guantánamo detainees into the United States.[10]

In addition, the Supreme Court's decision greatly undermined cooperation with allies, who doubted the legality of US detention policies. The decision also dismayed the "actual folks whose names we do not know on the ground in villages and towns and barrios we have never heard of" who are being presented "a vision

of the United States that is hostile and unwelcome" (Whitehouse in US Congress, 2008d, 17). Although the military commissions under the MCA 2006 were permitted to continue, they "had seriously eroded the fundamental American principles of the rule of law in the eyes of Americans and in the eyes of the rest of the world", according to a former chief defense counsel of the DoD Office of Military Commissions (Gunn in US Congress, 2008d, 7). Consequently, several members of Congress concluded that the decision had had a "devastating impact" that needed to be "restored" as soon as possible (Leahy in US Congress, 2008e, 3).

Given these heightened concerns about the pressure emanating from the *Boumediene* decision, reforming US detention policies could have several additional advantages. First, it was believed that the introduction of rules that reflected international standards would actually reduce the number of *habeas* petitions heard by the courts. It was argued that the current level of judicial intervention was unprecedented in comparison to the tradition of deference to the executive on military matters. By restoring trust in detention policies, the courts would be less inclined to challenge the administration in individual cases (Gunn in US Congress, 2008d, 15). Furthermore, such reforms would prevent the expansion of future judicial interventions to include judicial review for detainees held by US forces in Iraq and Afghanistan (Martin in US Congress, 2008d, 25).

In addition to reducing current litigation, experts argued that legislative reforms would restore the United States' partnerships with its allies and strengthen its counterterrorism efforts. By working together with international partners to establish detention safeguards in the "War on Terror", the United States could demonstrate that its policies are in alignment with "international consensus" (Cardin in US Congress, 2008d, 18). Accordingly, this would reduce concerns by allies who might be hesitant to work with the United States in security and intelligence operations (Martin in US Congress, 2008d, 9). Furthermore, a "constitutionally balanced legislation" would improve the capacity of the military commissions to successfully convict terrorists, and enable the United States to "showcase the rule of law and contrast it with the despicable world of the enemy, who lacks respect for (the American) way of life and (American) values". As a result, the United States could reestablish its leadership in the global counterterrorism efforts (Katyal in US Congress, 2008a, 11).

In light of these considerations, the Obama administration temporarily suspended the military commissions for five months and established the Detention Policy Taskforce to review the legal options for detention, trials, and transfers in all detention operations in light of the *Boumediene* decision (White House, 2009b). President Obama justified this approach by pointing to the importance of "establish(ing) a legitimate legal framework, with the kind of meaningful due process rights for the accused that could stand up on appeal" (Obama, 2009). In its Preliminary Report, the Detention Policy Taskforce (2009) concluded that "if military commissions are to serve as a legitimate part of the U.S. justice system, significant reforms are appropriate to ensure that they are lawful, fair and effective" (3). The administration, after consulting military law experts, modified the Manual for Military Commissions and summited several amendments to the

Military Commissions Act to Congress – many of which were eventually incorporated into a bipartisan bill.

Outcome

In October 2009, newly elected President Obama signed into law the Military Commissions Act of 2009 (US Congress, 2009a). Incorporating some of the suggestions made by the administration, the MCA 2009 codified a list of minimum safeguards that were to be afforded to Guantánamo detainees being prosecuted before military commissions, which exceeded those previously established by the MCA 2006 and the DTA 2005. Specifically, the MCA 2009 established stricter rules governing procedural and evidentiary matters, including the use of coerced statements and hearsay evidence, and it strengthened detainees' access to an effective defense counsel. Furthermore, the MCA 2009 reconfirmed detainees' access to appeal before federal courts, clarified protections against double jeopardy, and restricted punishable offenses to include only those committed in connection with hostilities. In doing so, the bill addressed some of the biggest concerns regarding the protection of due process for detainees tried before military commissions raised by the Supreme Court in *Boumediene*.[11]

One of the most significant changes made to the military commissions system involved the inadmissibility of evidence and testimonies derived from coercion. Specifically, the MCA 2009 explicitly prohibited the use of statements obtained through torture or through cruel, inhumane, or degrading treatment (US Congress, 2009a, §948r). Whereas the MCA 2006 did not restrict the use of such evidence if it was obtained prior to the DTA 2005 if the "totality of circumstances under which the statement was made renders it reliable and possessing sufficient probative value" and if "the interests of justice would best be served" by the admission of such evidence, the MCA 2009 prohibited the use of all such statements regardless of when they were made (ibid., §948r(a)). Furthermore, judges now had to weigh the voluntariness of self-incriminating statements and confessions against the circumstances of the interrogations and the military training, age, and education level of the accused (ibid., §948r(d)). Only voluntary statements that were found to be sufficiently reliable and relevant could be admitted as evidence (ibid., §948r(c)). Furthermore, the government now had the burden of establishing admissibility, which would be subject to challenges by the defense.

Although the MCA 2009 permitted the admission of hearsay testimony, it shifted the burden of proof for determining the reliability of the evidence. Previously, the party "opposing the evidence" was responsible for proving that such testimonies were either unreliable or irrelevant (US Congress, 2009a, §949a(b)(2)(E)(ii)). Under the MCA 2009, the proponent of the evidence had to establish that the hearsay testimony is reliable, relevant, that direct testimonies were not available, and that "the interests of justice (were) served by admission of the statement into evidence" (ibid., §949a(b)(2)(D)(ii)). This change reduced the incentive for the government to rely on hearsay testimonies that it could not

readily justify, while protecting the opportunity of the defendant to challenge the admissibility of such evidence.

The MCA 2009 also introduced multiple procedural safeguards for detainees tried before a military commission. First, the detainees were detailed a military defense counsel earlier than what was afforded under the MCA 2006, and were granted the right to select their military counsel as their legal representative, as long as such persons were "reasonably available" (§948c, §948k). Additionally, the detainees could now elect to represent themselves (US Congress, 2009a, §949a(b)(2)(D)). Unlike the MCA 2006, the MCA 2009 "does not provide for the exclusion of the accused (or his civilian attorney) from portions of his trial, and does not allow classified information to be presented to panel members that is not disclosed to the accused" (Elsea, 2014, 22). Furthermore, detainees were entitled to all exculpatory or mitigating evidence (US Congress, 2009a, §949j), and have the right "to present evidence in (their) defense, to cross-examine the witnesses who testify against (them), and to examine and respond to evidence admitted against (them) on the issue of guilt or innocence and for sentencing" (ibid., §949a).

In summary, the government established evidentiary and procedural safeguards for Guantánamo detainees in an attempt to satisfy concerns of the Supreme Court in its *Boumediene* decision. In particular, the MCA 2009 amended military commissions in response to concerns that the military commissions did not provide a fair trial or a meaningful defense for detainees. By reforming these aspects of the detention system, the government could reduce the constant "flood of legal challenges" that the new administration had inherited from its predecessor (Obama, 2009). President Obama emphasized this conclusion while explaining why it was important to reform the military commissions system:

> (MCA 2006) failed to establish a legitimate legal framework, with the kind of meaningful due process rights for the accused that could stand up on appeal (...) Instead of using the flawed commissions of the last seven years, my administration is bringing our commissions in line with the rule of law.
>
> (Obama, 2009)

Although both presidential candidates endorsed the closure of Guantánamo, President Obama's election over John McCain was for many detainee rights activists a considerable victory. Two days into his presidency, President Obama had issued a series of executive orders, which had promised to close the Guantánamo detention facilities by January 22, 2010 without granting further due process rights. To facilitate the closure of Guantánamo by the one-year deadline, President Obama had established the Guantánamo Review Task Force to evaluate all legal policy options for transferring, prosecuting, and releasing the remaining detainees (White House, 2009a). Additionally, President Obama had established the Detention Policy Task Force to "conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or

apprehended in connection with armed conflicts and counterterrorism operations", which were "consistent with the national security and foreign policy interests of the United States and the interests of justice" (White House, 2009b). These interagency task forces, though distinct, consisted of legal advisors and representatives from the DoJ, DoD, Department of Homeland Security (DHS), Office of the Director of National Intelligence, the Joint Chiefs of Staff, the Department of State, and the intelligence agencies. As 2009 ended, however, it became evident that President Obama would not meet his deadline to close Guantánamo.

Toward Executive Order 13567 – Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force

Extraterritorial human rights violations

The MCA 2009 was a key development for detainee safeguards, specifically regarding judicial guarantees in the military commission system. Despite these advancements, several questions remained for the 242 detainees still in Guantánamo. While the Obama administration expressed its intent to prosecute a number of the detainees under the renewed military commissions, critics were concerned about the continued detention of those who would not face trial (Amnesty International, 2010, 343–4). The bipartisan consensus, which had empowered the MCA 2009, found little shared ground regarding procedural safeguards governing the continued detention of enemy belligerents. Specifically, several members of Congress were wary of the administration's efforts to transfer prisoners to the United States and to try them in federal courts (Elsea, 2014, 3). Consequently, detainees who had been detained for several years continued to face indefinite detention in Guantánamo.

Included among these so-called "forever prisoners" were 23 Uyghurs, who – despite being reclassified as *non*-enemy combatants – continued to be detained. According to a 2005 *Washington Post* article, the Pentagon had conceded in 2003 that 15 Uyghurs were approved for transfer, five of which had simply been "in the wrong place in the wrong time" when they were mistakenly captured in 2002 (Wright, 2005). As members of an oppressed ethnic minority in China, however, the United States could not repatriate them back to China where they faced persecution. Whereas six of the detainees were eventually transferred in 2006, 17 detainees continued to be detained in Guantánamo two years later, because no other country was willing to accept their transfer or offer them asylum (Barrio, 2008). Following *Boumediene*, the Justice Department announced that the 17 remaining detainees were no longer classified as enemy combatants, but the administration nonetheless opposed their release into the United States.[12]

Intervention

Several critics attempted to shame the administration for failing to fulfill its promise, but had little success. In its 2010 Report, Amnesty International accused the

administration of allowing domestic politics to "(trump) the human rights of the detainees" (Amnesty International, 2010, 18). A similar ACLU report condemned the government for delaying the closure of Guantánamo, and for embracing its authority to detain terrorism suspects without trial while "opposing in court the release of detainees against whom the government has scant evidence of wrongdoing" (2010, 10). After a failed terrorist attack in Detroit on Christmas Day 2009 by a Yemini suicide bomber, public support for restricting any efforts to release or transfer Guantánamo detainees increased significantly. By 2010, the percentage of Americans who opposed closing the facilities grew by 20% from 2007 to 64% (Gallup, 2014), further complicating the administration's plans to close Guantánamo.

Efforts to intervene on behalf of Guantánamo detainees who wished to challenge their continued detention via litigation were similarly unsuccessful. Between 2009 and 2011, only 16 detainees won their *habeas* petitions; whereas eight were released within the following year; six were transferred or released several years later following failed government appeals; and two successful cases were eventually overturned. In spite of these limited successes, no cases successfully challenged the administration's detention policies. To the contrary, in 2010 and in 2011, the courts further reduced the burden of proof for the government, so that more judicial deference was given to the government's allegations and intelligence reports. According to legal experts, the consequences of these decisions were devastating for future litigation efforts: "(A) clear pattern has (since) emerged: almost no detainees will prevail at the district court level, and if any do, the D.C. Circuit will likely reverse the decision to grant them relief" (Denbeaux et al., 2012, 2).

Although several allied governments were hesitant to assist the United States in detention operations, they failed to sanction the United States. Instead, several allies resisted aiding US efforts to reduce the existing Guantánamo population. Italy, for example, rejected the transfer of detainees from US custody to its own detention facilities out of national security concerns, because the United States had previously argued that only "the worst of the worst" were detained in Guantánamo, and American officials themselves had openly protested transfers to US soil (Boucaud, 2009). Similar concerns were expressed by Canada, Australia, and the United Kingdom, despite being traditional allies in counterterrorism efforts (Rietveld et al., 2021, 44). The effect of this resistance was that the United States was left with 150 "cleared but unreturnable" detainees, who the administration was forced to continue detaining for an extended period of time even though they had been individually cleared for transfer (ibid., 37).

Attempts to persuade members of Congress with moral arguments were also met with little enthusiasm. In one such testimony it was argued that, "(p)rolonged detention without a proven crime offends the world's most basic sense of fairness. It is the hallmark of repressive regimes that the United States historically has condemned around the globe" (Cleveland in US Congress, 2009b, 19). In response, several national security experts counter-argued that US national security interests outweighed any obligations to Guantánamo detainees: "We act 'morally' when we do our absolute utmost, within the bounds of law and proper policy, to

defend the United States and the American people from terrorism" (Rivkin in US Congress, 2009b, 6). Furthermore, they argued that "the most important national security benefit of detaining enemy combatants is simple but essential: to meet our moral commitment to ensure that those detained do not directly or indirectly attack our troops or citizens, here or abroad" (Klingler in US Congress, 2009b, 17). In the end, moral arguments in favor of stronger protections failed to persuade enough members of Congress to mobilize reform efforts.

Strategic arguments that outlined added counterterrorism benefits of detention reform, in contrast, proved much more convincing. Although the United States had the authority to detain enemy combatants until the end of hostilities, norm entrepreneurs contested the scope and the effectiveness of its detention framework. Specifically, several human rights and counterterrorism experts argued in hearings before Congress that reforming the US detention policies with the ultimate goal of closing Guantánamo would improve the effectiveness and the sustainability of the United States' global counterterrorism effort in three primary ways. First, it was argued that the indefinite detention of enemy combatants in Guantánamo was an ineffective strategy in the "War on Terror" (Jones and Libicki, 2008). Specifically, they noted that the primary counterterrorism objective should be to incapacitate terrorists; and yet, Guantánamo, like Abu Ghraib, had become a symbol that had emboldened terrorist causes against the United States. In his testimony before the Senate Select Committee on Intelligence, Admiral Dennis Blair, for instance, confirmed this assessment: "(T)he detention center at Guantánamo has become a damaging symbol to the world (…) that (…) must be closed. It is a rallying cry for terrorist recruitment and harmful to our national security, so closing it is important for our national security" (Blair in US Congress, 2009c, 7). Furthermore, transparent reforms, which reflected international legal standards with the ultimate goal of closing Guantánamo, could distinguish the Obama administration's detention policies from its infamous legacy of the Bush administration. Without such reforms, Guantánamo would continue to aid radicalization and terrorist recruitment (Massimino in US Congress, 2009b, 13).

Secondly, experts argued that the nature of the ongoing conflict demanded intelligence and policing cooperation with global allies, and detention reforms were key to legitimizing the United States' long-term national security objectives. The damage caused to the United States' reputation was not only useful for aiding terrorist recruitment, it also deterred potential allies and undermined US soft power abroad. Elisa Massimino, Executive Director of Human Rights First, warned that "(i)f U.S. detention policies continue to fall short of the standards adhered to by our closest allies, then those policies will continue to undermine our ability to cooperate in detention and intelligence operations" (Massimino in US Congress, 2009b, 15). In addition, the United States' actions would affect its long-term ability to lead by example on global security issues: "By condoning (prolonged detention), we embolden other states to take actions contrary to global security interests around the world" (Cleveland in US Congress, 2009b, 20). A former senior director of the NSC argued that US detention policies have had "an extremely corrosive impact on the rule of law in other countries", and that

policymakers should think seriously about whether they would be "comfortable if other countries applied similar theoretical arguments to their own conflicts and wars on terror" (Malinowski in US Congress, 2009b, 29).

Thirdly, experts argued that the creation of a robust legal system governing continued detention would protect against future legal interventions and public campaigns, while providing a basis for detention in the future. Accordingly, detention policies that adhered to international legal standards were not only less likely to face challenges from the courts, but they were also more likely to improve the effectiveness of the military and intelligence operations by avoiding "false positives" (Cleveland in US Congress, 2009b, 27). Such practices would help ensure that only the right people were detained, preventing, in turn, future scandals for the government. Additionally, effective detention review structures that provided for sufficient safeguards could even be replicated in environments outside of Guantánamo in areas of active conflict (Vogel, 2019).

Processing

For those working within the Obama administration, it was not so much a question of *if* detention policies should be reformed, but *how*. Although the task forces were closed to the public, their members were not deaf to the strategic arguments being presented in Congressional hearings.[13] Similarly, the administration remained actively involved in public debates on the matter, even as the multiple task forces continued their assessments. In justifying his desire to close Guantánamo, President Obama repeated many of the same strategic arguments that were presented by military, human rights, and counterterrorism experts. In one such speech, President Obama concluded:

> Rather than keeping us safer, the prison at Guantánamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it.
>
> (Obama, 2009)

Nonetheless, government officials remained aware of the serious national security costs of failing to implement a reliable system for detaining foreign terrorist suspects. Specifically, DoD officials tended to favor the need for a continued detention policy option, especially as members of Congress increasingly restricted options and resources for transferring and releasing detainees. If the administration sanctioned the premature release of dangerous detainees, they worried that US citizens would suffer from the government's negligence.[14] Additionally, DoD officials worried that expanding detainee rights further could create undue administrative and operational costs for the government. The Guantánamo Review Task Force in the completion of its review concluded that there was a legal basis for continued detention of foreign terror suspects under Congress' 2001 Authorization for Use

of Military Force (AUMF), and that at least 48 detainees were "too dangerous to transfer but not feasible for prosecution". Additionally, at least 30 detainees were to be held conditionally due to the security situation in Yemen (Guantánamo Review Task Force, 2010, ii).[15] Continued detention as a policy option became paramount for the administration due to the restrictions on transfers and prosecution in federal courts placed by Congress starting in 2009 (Elsea, 2014).

Consequently, the administration concluded that an administrative review process could alleviate concerns of arbitrary detention by providing safeguards to detainees as a matter of policy. The administration argued that Guantánamo suffered from an absence of legitimacy, which officials concluded was dangerous to US national security objectives. This, they believed, was indicative of the ongoing legal challenges that the administration faced (Smith in US Congress, 2011a, 8). A transparent process, which allowed detainees to challenge the evidence against them with the support of legal counsel, could limit the potential of future judicial interventions by reestablishing trust with the courts. In justifying the need for a periodic review process, Deputy Secretary of the DoD William Lynn III stated: "Our goal is to ensure a system of detention that is balanced and fair with respect to the detainees and is sustainable and credible with the U.S. courts, Congress, the American people and our allies" (US Congress, 2011a, 4).

Periodically reviewing the evidence supporting or negating the continued detention of Guantánamo detainees had additional operational benefits beyond repairing the intragovernmental relationships. Indeed, such a process could facilitate the transfer, release, and prosecution of the remaining detainees. The level of interagency review, in turn, could help ensure that assessment errors, recidivism, and delayed prosecutions could be better prevented. Furthermore, by prioritizing detention for only those who posed the most obvious threats, the government could offset the costs of the review process with a reduced number of detainees. If such a process were to prove effective, it could also serve as a sustainable framework for future US detention policies relating to counterterrorism operations abroad (Lynn in US Congress, 2011a, 5).

Lastly, there were added political benefits to policy reforms both domestically and abroad. By creating a process that would reflect many international obligations, the United States could demonstrate to its allies that it was committed to the principles of fairness and due process, even in a conflict not clearly outlined in international law. Such a statement could prevent future reputational damage, while demonstrating the administration's commitment to international law in contrast to the previous administration. Additionally, the efficiency of the proposed process would permit the administration to claim it was making tangible steps toward fulfilling Obama's campaign promise to close the Guantánamo Bay detention facilities, even as domestic politics increasingly hampered those efforts (White House, 2011b). By reforming procedural safeguards for those in continued detention, the administration could attempt to stymie future pressure for failing to make substantial advances in closing Guantánamo.

Although the debate on US detention safeguards underwent several challenges over the first two years of the Obama presidency, the strategic reasoning that

eventually prevailed can be summarized by the words of Colonel William K. Lietzau, Obama's Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy: "(The war with al-Qaeda) suffer(ed) from (a) lack of clarity regarding both the "who" and "when" for long-term detention", which was "best rectified by the establishment of a clear process from which both the government and the detainee can benefit" (Lietzau, 2012, 336).

Outcome

In March 2011, President Obama issued Executive Order 13567 – Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, which established PRBs to determine the necessity for continued detention for Guantánamo detainees (White House, 2011a). Specifically, PRBs were to determine whether detainees still constituted a significant threat warranting continued detention (Garcia et al., 2013, 6).[16] Although PRBs did not consider the legality of the continued detention, EO 13567 nonetheless required the Secretary of State and the Secretary of Defense to undertake "vigorous efforts" to ensure the transfer of detainees if they were found to not pose a threat to US national security (White House, 2011a, Sec. 4a).

In advance of each hearing, detainees had to be notified and provided a written, declassified summary of all the factors that would be considered by the PRB, including the government's reasons for their continued detention (White House, 2011a, Sec. 3(a)(1)). During the initial PRB hearing, detainees were given opportunities to present written arguments, to request witnesses, and to review evidence (ibid., Sec. 3(a)(3)). Detainees also gained the right to appear in person before the PRB. For each hearing, the detainee was assigned a military officer as a personal representative who was empowered to advocate on behalf of the detainee, challenge the basis and conclusions of the government's threat assessments, and introduce additional information (ibid., Sec. 3(a)(2)). This was still the case, even if the detainee refused to participate in the proceedings. Furthermore, detainees retained the right to private counsel, who could work together with the personal representative on the detainee's behalf (ibid., Sec. 3(a)(2)). Detainees who were not approved for transfer were to receive a file review every six months and a full hearing every three years (ibid., Sec. 3(b–c)) following confirmation of the PRB's decision.

Due to their discretionary nature, PRB hearings could experience significant delays. PRB decisions that failed to reach a unanimous consensus were subject to review by a Review Committee, which could require additional in-person meetings with the Secretary of Defense and the NSC. If at this point a unanimous consensus was still not reached, then the Review Committee was to conduct a paper review of the detainee's case, which was, again, subject to multiple levels of review, each of which could create considerable delays until a final decision was reached. Until such a final decision was reached, however, the six-month/three-year schedule could not commence, further prolonging future opportunities for detainees to challenge their threat assessments. Detainees could also face

additional delays even after being approved for transfer or release, if the destination countries could not provide security assurances required by Congress. In spite of these weaknesses, however, PRBs were a considerable advancement over previous procedures, especially because they addressed the due process concerns of the courts. Furthermore, military legal experts have argued that PRBs are a framework that is potentially replicable for detentions in future NIACs, for which there is a lack of clear procedural entitlements for detainees under international law (Vogel, 2019).

Despite being elected on a pledge to close Guantánamo, President Obama nonetheless faced considerable political opposition when it came to actually implementing his plans to release or transfer detainees. Shortly after establishing the PRBs, critics in Congress, especially within the House of Representatives, attempted to replace the PRB system entirely via a provision in the 2012 defense bill (H.R. 1540). A last-minute threat by the administration to veto the NDAA 2012 eventually forced Congress to restrict its alterations to the proposed text (Elsea and Garcia, 2016). Although the NDAA 2012 effectively codified the PBR system, the final version reaffirmed the discretionary nature of the provisions, and increased the obligations of the administration to consider several more specific national security interests when approving future transfers and releases (US Congress 2011b, Sec. 1023–5). Upon signing the NDAA 2012 into law, President Obama characterized sections 1023–1025 as "needlessly interfere(ing) with the executive branch's processes for reviewing the status of detainees" (Obama, 2011).

The safeguards during Trump's presidency

While on the campaign trail, Donald Trump made evident his desire to revamp US detention operations in Guantánamo Bay. When asked about his plans to keep open the detention facilities in Guantánamo Bay, he stated: "We are going to load it up with some bad dudes, believe me" (Welna, 2016). In 2018, President Trump revoked Obama's executive order to close Guantánamo, and ordered his Secretary of Defense James Mattis to review options for sending new detainees there (White House, 2018). During his State of the Union Address, President Trump justified his decision by referring to the need for indefinite detention of ISIS fighters who were captured abroad (Trump, 2018). Despite authorizing the expansion of US detention, however, no new detainees were detained in Guantánamo during Trump's presidency.

Moreover, President Trump left in place many of the due process safeguards for Guantánamo detainees established under the previous administration. The legacy of these safeguards, however, is much more complex. During Trump's tenure, trials before military commissions continued, without any notable challenges to the evidentiary or procedural safeguards established by the MCA 2009. Nevertheless, military commissions have continued to experience considerable delays due to the legal and political obstacles of a court system without significant precedents (American Bar Association, 2018). Although Trump reaffirmed

the use of PRBs in January 2018, his administration was criticized for exploiting the PRBs to reinforce continued detention via negative decisions and indecision because of a repeated inability to reach a consensus on final decisions. Consequently, critics have accused Trump of "systematically denying certain detainees meaningful review of their detention and an avenue for release" (Farley, 2018). The Trump administration's misuse of the PRB system illustrates the weakness of a discretionary policy. In the absence of clear protections guaranteed by law, safeguards as a matter of policy are subject to the discretion of future administrations. Despite this weakness, the PRBs remain a key tool for facilitating President Joe Biden's recommitment to closing Guantánamo, and have since been used to approve additional detainees for transfer (Rosenberg, 2021). Absent any additional reforms, however, the PRBs will remain vulnerable to policy considerations.

Conclusion

Despite failing to fulfill his campaign pledge to close Guantánamo, President Obama succeeded in expanding judicial guarantees for detainees, protecting their right to a fair trial before a military commission, and expanding safeguards against arbitrary detention. The MCA 2009 greatly extended procedural and evidentiary safeguards, and included protections against the use of evidence derived from torture or through cruel, inhuman, or degrading treatment. Additionally, it provided detainees with more access to evidence and a meaningful defense. EO 13567, which established PRBs, created an administrative review process for detainees who would otherwise be detained indefinitely without trial. Both safeguards have been key for expanding safeguards against arbitrary detention for those who remain in Guantánamo.

Whereas the MCA 2009 was created to mitigate legal pressure from the courts, EO 13567 primarily resulted from strategic learning within the Obama administration. Upon entering the presidency, President Obama inherited many of the legal challenges to detention from the Bush administration. Previous attempts by both the Bush administration and Congress to avoid judicial interventions had resulted in several extended legal battles and eventually triggered an intervention by the Supreme Court in 2008. In *Boumediene v. Bush*, the Supreme Court reaffirmed Guantánamo detainees' constitutional right to judicial review, thus unleashing an inevitable surge in *habeas corpus* petitions against the government in federal courts. President Obama together with Congress eventually passed the MCA 2009 to address many of the criticisms voiced by the courts. In contrast, the Obama administration, which was aware of both the damage that could be caused by future judicial interventions as well as the strategic costs associated with maintaining Guantánamo, subsequently issued EO 13567. This provided for the regular review of transfer and release options for detainees who were subject to continued detention under the laws of war. In neither case did moral persuasion, material sanctions, or shaming have a direct impact on US policymakers' decisions to establish these safeguards.

In spite of these relatively significant improvements for detainee safeguards, both military commissions and PRBs suffer from important limitations. Even with the protections created by the MCA 2009, the military commissions in Guantánamo are plagued by delays and distrust. Consequently, very few detainees have been successfully tried under these procedures. Furthermore, the PRBs as they were introduced by the Obama administration were significantly different to those under the Trump administration, thus demonstrating the pitfalls of safeguards whose application is left to the discretion of the administration. Such inconsistencies between the protections that were established and their actual implementation are made worse with every year continued detention is justified by a conflict in which both the scope of the battlefield and the identity of the enemy is ever evolving. Despite these weaknesses, however, the safeguards that have emerged have provided some critical relief to those who have been subject to arbitrary detention in Guantánamo in the name of counterterrorism.

Notes

1 Specifically, it prohibits the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court" (Common Article 3, 1d).
2 CSRTs were established in response to two Supreme Court decisions (US Supreme Court, 2005a; 2005b).
3 Until 2005, only a review panel, which was appointed by the Secretary of Defense, had the authority to review the record of a trial in a closed setting, but it was not required to consider new submissions from the defense nor were its recommendations binding (Elsea, 2007, 64–5).
4 The Bush administration recognized the challenge of maintaining detention operations at Guantánamo (Bush, 2006), and gradually reduced its overall detainee population by 540 by the end of 2008 (Rosenberg, 2018).
5 Specifically, the court found that the military commissions unconstitutionally barred detainees' access to evidence; it allowed the use of hearsay evidence and testimonies derived from torture and coercion; and it denied the right to appeal before an independent court (US Supreme Court, 2006).
6 "[Common Article 3's] requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try *Hamdan* does not meet those requirements" (US Supreme Court, 2006, 72).
7 Interview with Leon Panetta, former Secretary of Defense and Director of the CIA, Washington D.C., March 27, 2019; Interview with Lieutenant Colonel Geffrey Corn, former Judge Advocate Officer, US Army, Washington D.C., March 30, 2019; interview with Colonel William Lietzau, former Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, Department of Defense, Washington D.C, April 3, 2019.
8 See Representative King's reference to the decision as overreach by an "oligarchical court" (US Congress, 2008c, 35).
9 See Senator Feingold's statement: "The writ of *habeas corpus* provides one of the most significant protections of human freedom against arbitrary government action that has ever been created (...) The Court struck down the provisions in the Military Commissions Act (...) and reaffirmed that the Government does not have the power to detain people indefinitely and arbitrarily without adequate judicial review" (Feingold in US Congress, 2008d, 5).

10 Less than four months after *Boumediene*, the D.C. District Court in *Kiyemba v. Obama* ordered the government to release 17 non-enemy Uighur combatants into the United States. Although this ruling was eventually reversed by the D.C. Circuit Court of Appeals in February 2009, it initially appeared as though the Supreme Court would review the Circuit Court's decision, only to change course in April 2011.
11 For a complete comparison of the military commission rules under MCA 2006 and MCA 2009, see Elsea (2014).
12 The last three remaining Uyghur detainees were reportedly released in 2013 (Savage, 2014).
13 Interview with Eric T. Jensen, former Special Counsel to the Department of Defense, Washington D.C, April 5, 2019.
14 Interview with Colonel William Lietzau.
15 The remaining detainees were approved for transfer (126) or were referred to prosecution (44) (Guantánamo Review Task Force, 2010).
16 Each PRB consists of senior representatives from the DoD, DHS, DoJ, DoS, Offices of the Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence.

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5 Targeted killing and the right to life

Introduction

During World War II and in the post–World War II era, the "pre-meditated and deliberate use of lethal force against perceived military opponents during wartime" (Alston, 2010, 3), more commonly known as "targeted killing", has been a frequently used tool in US foreign security strategy. Operation Vengeance against the Japanese Admiral Isoroku Yamamoto, the Phoenix Program against the Vietcong, and the multiple attempted killings of Osama bin Laden are just a few of many examples (Friedman, 2012). Though traditional targeted killing methods like gunship attacks, raids, or poisoning have retained their relevance (Alston, 2010, 4), the nature of US lethal actions changed drastically in the early 2000s, when key US ally Israel introduced its first unmanned aerial vehicles (UAVs) program. By using drones as lethal weapons, not only did the target accuracy greatly improve but the new method also significantly reduced the risk of the attacking states' own soldiers being killed or harmed during an attack. Given the perceived advantages of drone warfare, the United States swiftly remodeled their lethal action missions and steadily implemented the new technology into their own operations (Masters, 2013).

This transformation became particularly important after 9/11, when fear of another imminent attack greatly influenced US foreign policy and counterterrorism operations. On the basis of Congress's 2001 Authorization For Use of Military Force (AUMF) resolution, President George W. Bush initiated Operation Enduring Freedom in Afghanistan and Operation Iraqi Freedom, while at the same time launching the first drone strikes on Pakistani soil in 2004. Yet, under Bush's presidency, drones were primarily used as a supplementary tool to standard warfare, rather than constituting the centerpiece of the US counterterrorism approach. This changed drastically once President Barack Obama took office in 2009, due to the preferences of the new administration as well as to technological advances. Under Obama's guidance, the use of UAVs in targeted killing missions experienced a ten-fold increase from approximately 50 authorized strikes during the Bush administration to 506 strikes during the Obama administration (Zenko, 2016). Consequently, the death toll rose resulting in between 3,308 and 4,788[1]

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casualties between 2004 and 2016, depending on the source (Emmerson, 2013, 9; New America, 2018a, 2018b and 2018c).

While the White House assessed the new strategy as a useful tool to target terrorist suspects in remote areas of Pakistan, Somalia, and Yemen[2] (White House, 2008; Obama, 2013), the practice also triggered a lot of criticism due to its questionable human rights implications. With the estimated number of casualties reaching new heights, many state and non-state actors claimed that the US government was extraterritorially violating the right to life of both civilians and terrorist suspects (Casey-Maslen, 2012; Kaufman, 2012). The latter criticism especially referred to so-called signature strikes, which target individuals solely based on certain behavioral patterns, or "signatures", even though their individual identities remain unknown to the military and the intelligence agencies (Stanford Law School and NYU School of Law, 2012, 12). As these individuals, however, often do not even know about the United States' suspicions against them, they cannot refute the evidence or challenge the decision in court before being executed by a drone strike; hence, the accusation of the United States conducting extrajudicial killings (Davis et al., 2016, 1). Although critics do acknowledge that humanitarian law accounts for collateral damage in military action, many claim that the high civilian casualty toll, which has steadily increased over the years, is not only disproportionate but also excessive (European Center for Constitutional and Human Rights, 2019).

After years of strict secrecy surrounding the targeted killing program by both the Bush and Obama administrations, Obama eventually established the first safeguards to prevent or attenuate harm deriving from US UAV missions. Specifically, during his second term in office, Obama, who had massively escalated the US targeted killing program, released two directives that centered on protection measures for the application of lethal force in operations outside areas of active hostilities. First, Obama enacted in 2013 Presidential Policy Guidance (PPG): Procedures for Approving Direct Action against Terrorist Targets Located outside the United States and Areas of Active Hostilities. Being the first directive of this kind, the PPG provided overall guidance for the program by specifically outlining and establishing a "rather capture than kill" policy, thereby making the use of lethal actions a tool of last resort. Three years later, Obama issued EO 13732: United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in US Operations Involving the Use of Force to improve target accuracy and to increase the program's transparency. Nonetheless, both directives remain insufficient to guarantee the right to life of non-US citizens during targeted killing operations. Most importantly, both directives were written in vague language and, given their nature as executive directives, they lacked stringent, long-term obligations – which was exploited by President Donald Trump when he annulled parts of the directives in 2017 and 2019. Yet, both the PPG and EO 13732 constitute a small, albeit important, step toward the development of human rights safeguards in the US targeted killing program.

This chapter shows that both the PPG and EO 13732 were the result of strategic learning. The recurrent extraterritorial violation of the right to life of terror

suspects and civilians in US targeted killing operations triggered an intervention by both internal and external actors to the Obama administration who worried about the negative strategic and operational implications of an unregulated targeted killing program. Respective recommendations as to how likely future costs, such as reputational harm and missed opportunities to impact international standard-setting, were passed on to key decision-makers in the Obama administration and initiated internal strategic discussions. Consequently, Obama and his advisors came to realize the risk associated with not responding to the warnings and recommendations they had received, and ultimately decided to introduce the limited safeguards.

This chapter is structured as follows. Based on an in-depth analysis of primary and secondary sources as well as expert interviews, the next two sections trace the way to the PPG and the EO 13732, respectively. Following the requirements of theory-testing process tracing, both sections are structured according to the conceptualization of the strategic learning mechanism set out in Chapter 2 (rights violations – intervention with strategic arguments – processing of strategic arguments – safeguards). Subsequently, we describe the weakening of the safeguards during the Trump presidency, while the conclusion summarizes the main findings of the case.

Toward Presidential Policy Guidance – Procedures for Approving Direct Action against Terrorist Targets Located outside the United States and Areas of Active Hostilities

Extraterritorial human rights violations

In the early 2000s, when the United States started its UAV targeted killing operations in areas outside of active hostilities, the absence of any public guidance for such operations offered ample leeway to the President and the military in their use of the new drone technology. This had severe implications for the people on the ground. Despite the exact casualty rates differing depending on the reporting source, they all portrayed the same trend that ultimately reflected a steep increase in casualties since the application of the new technology. According to the two leading and most recognized NGOs offering independent body counts, New America and The Bureau of Investigative Journalism, the UAV casualty rate in Pakistan, Somalia, and Yemen during the Bush administration had ranged between 458 and 658 individuals. In contrast, the same organizations reported for the same areas an eight-fold increase of casualties during the Obama administration; namely a range between 3345 and 4825 individuals.[3] Official sources, however, refused for a long time to publish their own body count. In 2013, Senator Lindsey Graham, traditionally a strong defender of the drone program, publicly confirmed, however, that 4700 individuals had been killed in UAV operations since 2004 (Zenko, 2013).

While total numbers can give a sense of the magnitude of the problem, it is also important to distinguish between civilian and "militant" deaths, and to understand

the controversy around and the politics behind the death tolls' subdivision into civilians and "militants". For instance, New America reported that under the Obama administration 1659 to 2683 "militants" and 129 to 162 civilians had been killed in Pakistan (New America, 2018a). The absence of a commonly accepted definition of a "militant", however, suggests that this comparatively low civilian death toll may actually be misleading. While some institutions only count terrorist suspects with clear links to a terrorist organization or a plotted attack into the "militant" category, others, including former members of the White House staff and some media, identify any individual interacting with a supposed terrorist suspect as a "militant" until proven otherwise (Columbia Human Rights Clinic, 2012, 15). This arbitrary use of the term "militant", however, not only means that statistics have to be handled with care but also has severe implications for the people in affected areas. Civilians in Pakistan have described the UAVs' hovering over the cities as perpetual torment, given that at any time a supposed "militant" might move into their neighborhood, cross by them on the street, or pass them at the market, thus potentially triggering a deadly signature strike (Center for Civilians in Conflict, 2012, 23). Likewise, communal events like weddings and funerals might turn into dangerous activities as a large gathering of military-aged men or a larger convoy of trucks may already raise sufficient flags in the CIA control rooms to sanction a drone attack (Human Rights Watch, 2014).

Keeping these psychological repercussions in mind, it is likewise important to scrutinize the operations' international legal background in order to discern their implications on the victims' right to life and the subsequent evolution of safeguard policies. International human rights law is applicable given its standing as one of the key pillars of the contemporary international legal system and the targeting of suspects outside of a theater of active conflict. However, international humanitarian law (IHL), in contrast, is arguably also applicable due to the fact that the US government bases the legality of its targeted killing operations on the right to self-defense and thus claims to act in line with the law of war (Koh in US Department of State, 2010).

With regard to protections for civilians under human rights law, the right to life is enshrined in the Universal Declaration of Human Rights: "Everyone has the right to life, liberty and security of person" (UN General Assembly, 1948, Art. 3). Additionally, Article 6(1) of the International Covenant on Civil and Political Rights reads as follows: "Every human being has the inherent right to life … No one shall be arbitrarily deprived of his life" (UN General Assembly, 1966, Art. 6(1)). Hence, the killing of civilians is prohibited under human rights law. Furthermore, criminal suspects are similarly protected by this principle and the respective prohibition of extrajudicial killing, as emphasized by the official reports of the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions. Acting in this position, Philip Alston reported in 2010 that the most pressing legal shortcomings of the US UAV missions center around the scope of the "War on Terror", including unclear criteria for target nomination, the absence of any procedural safeguards ensuring the legality and accuracy of the strikes, and the lack of any accountability mechanism. Due to the absence of transparent rules

laying out the target nomination process and by not granting suspected terrorists a forum at which they could defend themselves before being targeted, the targets cannot present their cases in court, ask for pardon, or attempt to reverse their effective death sentence. This, according to Alston, results in arbitrariness, and is in clear violation of the Universal Declaration and the ICCPR (Alston, 2010, 10–1).

Proponents of the US targeted killing program argue, however, that in times of war, when IHL applies, these rules can change (Kretzmer, 2005, 171). Although customary humanitarian law allows civilian casualties, the "principle of proportionality in attack" nonetheless mandates that any collateral damage be proportionate and must not be excessive (International Committee of the Red Cross, 2019). In light of this, some legal scholars claim that the high civilian casualty rate compared to the number of eliminated combatants in US UAV missions is, *per se*, a clear violation of the proportionality principle. In addition, the opacity of the US targeted killing program and the absence of a clearly defined combat zone in the "War on Terror" is said to bar civilians from seeking refuge outside the combat zone (Kaufman, 2012). Furthermore, international law scholars have also observed discrepancies between the right to life granted by IHL to hostile combatants (i.e. terrorist suspects) and respective US practices. Accordingly, given that signature strikes are based on behavioral patterns and not on the individual's identity, the chances of false identification are relatively high (Lewis and Vavrichek, 2014, 15). But even if the enemy combatant can be correctly identified, the Geneva Conventions of 1949 and their Additional Protocols account for the right to life for combatants who have surrendered or are in the process of surrendering (International Committee of the Red Cross, 1988). Yet, by targeting combatants' homes, combatants lose the chance to do so as they would in conventional warfare, because they cannot see the adversary approaching; rather, they are targeted from a drone, often undetected, from above. Hence, a former senior policy advisor to the Pentagon, Ryan Vogel, concluded that even if combatants do surrender, the actual organization of such a surrender – from stopping an already launched missile to manifesting those *hors de combat* – remains impracticable within the UAV program (Vogel, 2010, 128).

Intervention

Once evidence of the harm caused by US targeted killing operations began to surface in 2008, different actors began to try to apply pressure on the US government in order to compel it to introduce safeguards to its targeted killing program – without any notable success, however. For instance, none of the cases against extraterritorial lethal action made it before a US court, as any attempt was immediately countered by the US government's narrative of its right to self-defense (Obama, 2013). Equally, an attempt by the American Civil Liberties Union (ACLU) to enhance transparency and accountability by filing a lawsuit under the FOIA was promptly discarded by the US District Court for the District of Columbia, reiterating the government's claim to the right to "state secrecy" (US District Court for

the District of Columbia, 2011). Hence, until 2013, only one FOIA request had been successfully filed against the US government on the subject of extraterritorial targeted killing.

In the same way, no powerful public campaign against the US targeted killing program materialized. Some civil society groups tried to apply naming and shaming strategies to tarnish the US government's reputation and force it into establishing safeguards. Consequently, NGOs attempted to counter the government's secrecy around the program by making public their own body count in non-active combat zones. New America, for example, produced research in which it outlined country specific information on US drone strikes conducted in Pakistan, Somalia and in Yemen, providing for each presidency since 2004 details on the total amount of strikes, targeted groups, civilian casualties, and the total fatality rate (New America, 2018a). Other groups, including Human Rights Watch, published reports similarly condemning the high civilian casualty rates while also displaying interviews with the victims' families and photos of the strikes' aftermath (Human Rights Watch, 2013). However, these attempts failed to turn US public opinion against the program, as by 2013, 73% of the American people were still in favor of (65%) or indifferent to (8%) drone strikes abroad (Gallup, 2013). At the international level, the UN for a long time refrained from in-depth debates on the matter or from taking a definitive stance against the US targeted killing program (Lynch, 2012). It was not until late 2013, almost ten years after the US UAV program had started, that the first formal discussions within the UN on the topic of targeted killing took place. Yet, even then, Christof Heyns, as UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, refrained from explicitly criticizing the program, and instead noted that "core questions about the law, policy, and practices, around (drone) use" remained (UN General Assembly, 2013, 1).

Ultimately, Pakistan's attempt to sanction the US government for targeted killing operations on its territory also proved to be futile. Although the Pakistani government faced protests from its own population on account of its alleged acquiescence to US drone strikes on its territory (Masood, 2012a), its demands for safeguards remained vague and inconsistent, thus reducing the leverage it held against the United States.[4] Hence, despite the official Pakistani condemnation of US targeted killing operations and the Pakistani high court ruling that the US UAV program was in breach of Pakistan's sovereignty, the United States merely temporarily reduced operations only to later continue them in the country's northwestern territory (Miller and Woodward, 2013). The White House even went so far as to implement sanctions against the Pakistani government in response to its opposition to the US UAV operations (Masood, 2012b).

Nonetheless, while attempts to coerce the United States into establishing safeguards to its targeted killing program failed, another form of intervention proved more powerful, namely the provision of strategic arguments as to why establishing such safeguards was in the United States' own long-term interest. Such arguments were primarily provided by administration insiders. Yet, some NGOs, who had realized that shaming was unlikely to achieve the desired results, also

changed their action plans, gradually moving away from their previous shaming attempts toward an active participation in consultation meetings. Groups like Human Rights Watch, Amnesty International, and HRF met with White House staffers and provided them their own research on the long-term strategic consequences of UAV missions. As a result, NGOs were allowed to take part in confidential sessions in which policy drafts were debated.[5]

Altogether, from 2009 onwards, key decision-makers in the White House were confronted with three central arguments. The first line of reasoning centered on the long-term negative effects on the principles of checks and balances in the United States, assuming that a continued absence of rules would further increase the president's discretionary power on the matter of targeted killing.[6] Such presidential leeway seemed especially difficult in combination with the AUMF resolution, which allowed the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons". Under this broad legislation, the president, with the right framing, did not need further congressional approval for lethal actions. Moreover, the resolution had the effect that the judiciary would be unlikely to intervene as long as the president clearly linked extraterritorial targeted killing operations with the nation's inherent right to self-defense (American Civil Liberties Union, 2019). Hence, in continued absence of a set of official rules establishing some sort of guidance, let alone mandatory limitations, the president as commander-in-chief would have the full authority to target outside US territory whomever he or she deemed to be an immediate threat to national security. Consequently, with both Congress and the judiciary being left aside, the checks and balances enshrined in the Constitution could be impeded, which, in turn, could ultimately threaten the country's political stability.[7]

The second argument was primarily brought forward by the president's advisors in the NSC and centered on international standard-setting for drone warfare.[8] When the United States first started acquiring and using UAVs for its targeted killing missions, it was among just a few states that had such technology at their disposal (New America, 2019). Yet, it became evident over the years that other countries would gradually start buying or developing armed drones themselves, and would consequently develop their own rules and procedures for the use of the new weapons. Following the logic of the international principle of reciprocity, various advisers in the NSC advocated in favor of setting an example and implementing a basic set of transparent rules and procedures, as these would then in turn strengthen the United States' position in future international negotiations about universal minimum standards for UAV missions. They argued that if the United States continued its policy of extreme secrecy, thus making its targeting decisions untraceable and incomprehensible, it could not expect other countries to behave differently.[9]

The third argument introduced to the debate reflected the intelligence community's worries about losing sources of information by eliminating suspects without prior interrogation. By not detaining and questioning alleged terrorists, the

CIA and other intelligence agencies feared that crucial information could be lost. This, in turn, it was feared, could thwart the prevention of future attacks or the capture of high-value suspects.[10]

Interestingly, despite various policymakers voicing moral concerns, normative arguments did not ultimately play a significant role in the decision-making on the future of the US targeted killing program. Already in 2011, John O. Brennan, then CIA Director under Obama, had pointed out that the UAV missions might be morally challenging, but that ultimately, due to a lack of an efficient alternative, they were necessary and further normative discussions on the matter would be idle (Brennan, 2012). Although NGOs provided arguments as to why the US targeted killing program was morally questionable (Human Rights Watch, 2010), their strategies eventually shifted from predominantly focusing on shaming campaigns to increasingly providing strategic arguments.

Processing

It was not long until the various strategic arguments brought forward were debated in the US government's Counterterrorism Working Group, among senior White House staffers and in consultation with Obama.[11] In various discussions and consultations, the anticipated costs and benefits of the suggested reforms were weighed against each other. Anticipated costs included the negative long-term consequences of hastily devised and implemented safeguards. Some officials reckoned that greater transparency in the target nomination process would clearly outline operational procedures, and thus enable terrorists to use the information to avoid being targeted (Zenko, 2017). Likewise, any new policy introducing a definite target nomination process or new bureaucratic procedures would increase financial costs and delay targeting decisions, while simultaneously restricting the president's hitherto granted power on the matter.[12] At the same time, the executive was reluctant to set a new array of high standards, given the chance that in the future similar standards would be demanded for other weapon systems, too, which could trigger major operational backlash (Zenko, 2017).

Nonetheless, there was also a lot to gain from safeguards, especially concerning the three key arguments previously brought forward in the discussion. First, a quasi-limitation of presidential discretionary power – be it through more transparent procedures or an increased level of accountability – would settle the staffers' concerns regarding the political system's checks and balances as foreseen in the Constitution, and therefore strengthen the country's long-term political stability. Accordingly, the risk of a future president abusing his or her power and seeing targeted killing operations as a "cure-all for terrorism" could be reduced, as even an executive directive would create costs for any future president wanting to abolish even minimum standards (Obama, 2013, 8).

Additionally, a policy change could address concerns from within while simultaneously improving US military and intelligence operations abroad. Hence, if basing a new policy on US best practices and favored operational proceedings, the White House could actually use such a directive as a basis for multilateral

negotiations, and thus be one of the first countries to offer a blueprint for international standards regarding targeted killing. In doing so, the United States would be able to ensure that its own interests were being considered in international discussions and ultimately steer the course of the respective talks.[13] Similarly, a new policy striking a balance between the administration's ambition of eliminating hostile combatants and the intelligence community's request for securing information through capture would not only ease tensions between the different domestic actors involved in the program, but could also enhance the efficacy and legitimacy of UAV missions.

In addition to these principal calculations, other benefits were likewise taken into consideration, as safeguards could also reduce the risk of future, potentially more successful, coercion attempts. For instance, a guideline on the issue of targeted killing was believed to conclude most of the legal debates. Previous discussions had been predominantly based on the complete absence of rules and the lack of a comprehensive outline of the target nomination process, so that by dealing with these shortcomings potential future legal challenges could be obviated.[14] In addition, a new cross-checking provision for targeting procedures could diminish Pakistan's resentments. By introducing interagency consultations, the entire process could rely on more intelligence and expertise; thus increasing strike accuracy. Consequently, future civilian casualties could be reduced, while the Pakistani government would also be able to show to its people that it had been advocating their interests against the United States (Obama, 2013, 6). At the same time, such an effort to reduce the fatality rates would generate further benefits as it would also offset the worries of NGOs; therefore reducing the risk of future shaming campaigns and their negative consequences.[15]

Overall, the debate on what would become the Presidential Policy Guidance constituted a long process in which institutional authorities were clarified, legal limitations were scrutinized, and in which the strategic costs and benefits of the new directive were weighed against each other.[16] This characterization is also reflected in Obama's own description of the process, in which he stated that "(his) administration has worked vigorously to establish a framework that governs (the United States') use of force against terrorists – insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance" (Obama, 2013, 6).

Despite the moral concerns of White House staffers and policymakers, there is little evidence that moral arguments played a decisive role in the debates about safeguards. Obama did acknowledge that civilian casualties posed moral questions, but ultimately invoked the narrative of a "just war" and reiterated that "neither conventional military action nor waiting for attacks to occur offers moral safe harbor" (Obama, 2013, 6–8). In fact, the generally agreed upon opinion in the White House was that the targeted killing operations constituted a necessary and useful tool as long as efficiency and accuracy were appropriately improved.[17] Thus, taking all pros and cons into consideration, the strategic contemplations pointed toward the advantages of introducing safeguards.[18]

Outcome

In 2013, Obama published Presidential Policy Guidance (PPG): Procedures for Approving Direct Action against Terrorist Targets Located outside the United States and Areas of Active Hostilities, which for the first time outlined standards for the conduct of targeted killing operations conducted by US agencies (White House, 2013). The Guidance provided three key advancements that all directly addressed the strategic concerns debated in the run-up to its release: first, the PPG made targeted killing a tool of last resort by establishing a "rather capture than kill" policy. Specifically, UAV missions were only permitted when the capture of a terrorist suspect was being assessed as too dangerous or infeasible. Furthermore, the PPG determined that "lethal actions should not be proposed or pursued as a punitive step or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission" (ibid., 1). As a result, the intelligence community would be able to gather information in case a terrorist suspect was captured. At the same time, the PPG aimed to dissipate concerns that targeted killing operations constituted extrajudicial killings.

Second, the PPG established a more thorough target nomination process to ensure that "there is a near certainty that the individual being targeted is in fact the lawful target and located at the place where the action will occur" (White House, 2013, 1). Before any decisions on targeting were to be taken, the nominating agency had to develop an operational plan outlining the objectives to be achieved by the strike, the duration of the operation, the necessary surveillance assets required, and the relevant international legal justification. Once the plan had been elaborated, it had to pass a legal review by the General Counsel of the nominating agency as well as an interagency review by the National Security Staff (NSS) and Legal Adviser (ibid., 3). Subsequently, members of the Deputies and Principal Committees of the NSC were to review the operational plan with the respective legal assessments, before presenting it to the President for a final decision. Intermediate counseling among the different agencies was made available at any time if necessary and appropriate. In doing so, the different actors in the process were to ensure a nearly certain identification of the respective target, that a capture of the target was impracticable, that the preconditions of the standard of self-defense were being met, and that there was a near certainty that non-combatants would not be injured (ibid., 3 and 11–4).

Third, the PPG introduced after-action reports and congressional notifications to strengthen the UAV mission's accountability mechanisms. Henceforth, executing agencies were obliged to provide reports to the NSS, which had to be submitted within 48 hours of a strike and had to contain preliminary information including a description of the operation, an assessment of whether the strike's objective was achieved or not, and an estimated number of individuals killed in action. The congressional notifications, in contrast, required that "appropriate Members of Congress" were to be notified whenever a new operational plan had been approved or an operation had been conducted (White House, 2013, 18).

The text of the PPG repeatedly referred to the benefits expected from the guideline discussed in the previous section, suggesting that the PPG was indeed

the result of a strategic learning process. For instance, in the PPG, the "rather capture than kill" policy is introduced with the remark that "capture operations offer the best opportunity for meaningful intelligence gain from counterterrorism" (White House, 2013, 1). Furthermore, when Obama announced the PPG in a speech at the National Defense University in 2013, he not only outlined why the Guidance served the United States' strategic interests, but he also outlined the specific considerations behind not taking additional reforms that would supersede those laid down in the PPG:

> Going forward, I've asked my administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress. Each option has virtues in theory, but poses difficulties in practice. For example, the establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority. Another idea that's been suggested – the establishment of an independent oversight board in the executive branch – avoids those problems, but may introduce a layer of bureaucracy into national security decision-making, without inspiring additional public confidence in the process.
>
> (Obama, 2013, 9)

Toward Executive Order 13732 – United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force

Extraterritorial human rights violations

With the enactment of the PPG, many of the previous challenges, especially those regarding the disproportionate killing of civilians and the accusation of extrajudicial killings, had been addressed – at least on paper. In practice, however, many challenges persisted. Most obviously, the civilian fatality tolls remained high (Greenfield and Hausheer, 2014, 3). In Pakistan, Yemen, and Somalia alone, approximately 582 to 908 civilians and terrorist suspects were killed between 2013 and 2016 (The Bureau of Investigative Journalism, 2019).

Not only do these numbers point toward continued human rights violations after 2013, but it became quickly evident that the Guidance left a lot of leeway regarding the application of the standards of the operational plan in case of a fleeting opportunity. In such a case, nominating agencies and the NSS only had to elaborate and discuss an individualized operational plan for a mission with other departments "as appropriate and as time permits", before submitting it to the president. Similarly, previously established core requirements of these operational plans were allowed to be deviated from in case of extraordinary circumstances (White House, 2013,16).

The PPG's biggest shortcoming, however, lay in its primary focus on targeting procedures and not on the protection of civilians, which the document only

covered in the context of reducing collateral damages (Davis et al., 2016, 12). Hence, the PPG required a "near certainty that non-combatants will not be injured or killed", but it did not provide any further guidance on how to proactively avoid civilian casualties through better intelligence, information exchange, or other measures. In light of this gap, operating agencies were indeed instructed to keep collateral damage as low as possible, but they were not given any tools or training to actually improve their target accuracy.

Intervention

Despite the enactment of the PPG, the persistent problems of the targeted killing program did not go unnoticed. As before, there were instances of actors trying to enforce reforms to the safeguards, but with little success.[19] Various NGOs publicly blamed the US government for failing to introduce effective civilian casualty mitigation measures.[20] Despite considerable media attention covering the issue (Ackerman, 2014; Friedersdorf, 2016), public support for the government's drone program remained consistently high, however. In 2015, 65% of the US respondents in a survey still did not oppose extraterritorial US drone strikes, either perceiving it as a legitimate tool in counterterrorism operations (58%) or having no opinion on the matter (7%) (Pew Research Center, 2015). One incident, however, did gain major attention, when in 2015 an American and an Italian hostage were killed during a UAV signature strike in Pakistan. Obama immediately publically apologized and promised the victims' families compensation payments. Although some advocates commended the administration's response, especially as it pertained to the American civilian, others complained that such consolatory actions had been absent for the countless other innocent Pakistani, Afghani, and Yemini victims. The apparent discrepancy between the Italian victim and the victims of non-Western countries caused great frustration especially among citizens in regularly targeted countries. In spite of this, however, the incident failed to develop into a sizable scandal that would have made additional action necessary.[21]

The ongoing opaqueness of the target nomination process also continued to create frustration among the populations of targeted countries, especially in Pakistan. Although the PPG was intended to make the internal target nomination process more transparent, important aspects such as the justifications for individual strikes and the number of strikes and casualties remained secret.[22] This secrecy, coupled with the ongoing strikes in North Waziristan, led to continuous resentment among the Pakistani population, which in turn attempted to pressure its own government into taking a harder stance against the United States (British Broadcasting Corporation, 2014). As a result, Prime Minister Nawaz Sharif struck a deal with the Obama administration, according to which the United States was to stop its UAV operations in North Waziristan, while the Pakistani military would be sent to the area (Boone, 2014). However, the deal only resulted in a temporary reduction of strikes, while the general rules guiding UAV operations remained untouched (The Bureau of Investigative Journalism, 2019).

Importantly, however, key US policymakers were once more confronted with arguments as to why past reforms were insufficient and why more far-reaching safeguards were in the United States' own strategic interest. At first, strategic pro-reform arguments targeted the DoD with the purpose of effectuating reform to DoD procedures. Given the lengthy interagency review process and the DoD's outright resistance to stricter rules, however, proponents of reforms began to provide arguments directly to the president and his advisers,[23] as well as to other government agencies. This time, the recommendations centered on two main arguments, with the first outlining national security risks and the second elaborating on the value of international legitimacy.

Especially advisors within the Department of State (DoS) argued that the number of civilian casualties was not just a military issue but also a threat to national security. Given the existence of hostile anti-US sentiments in Pakistan, Somalia, and Yemen, it was cautioned that terrorist groups could further exploit the high civilian deaths tolls for their propaganda purposes, while also singling out the victims' families for recruitment. It was feared that if no further safeguards were implemented, the UAV targeted killing missions might ultimately create more radicalized enemies in the battlefield than the strikes were actually eliminating (Vavricheck, 2014, 47). In line with this, the DoS presented data on how further safeguards that enhanced civilian protection could likewise bring strategic and tactical benefits for the United States on the battlefield. Accordingly, improved civilian casualty mitigation could bring a twofold benefit; on the one hand, enhanced accuracy would increase their operational efficiency and lead to a higher rate of successfully hit military targets, while on the other hand, the reduction of civilian casualties could reduce backlash among populations in targeted areas.[24]

The second argument concerned the implications of UAV missions for the perceived legitimacy of the United States and its troops deployed abroad. Again, the DoS warned that despite the PPG, the DoD only rarely took responsibility for civilian deaths, let alone reported respective numbers, which might eventually lead to lower international acceptance of US targeted killing missions. These worries became particularly relevant with the rise of the Islamic State in Iraq and Syria (ISIS) in 2014, which meant that new policies had to be developed at the same time that a new security threat was emerging.[25] Similarly, advocates of further reforms feared that the low level of transparency would gradually undermine the United States' legitimacy as well as its standing among its international partners; a risk that could have a great impact on the United States' long-term strategic planning (Senate Select Committee on Intelligence, 2013, 63).

Processing

In the end, both strategic rationales resonated with decision-makers within the Counterterrorism Working Group, the NSC, and the DoS, as well as the president and his closest advisors. As many former NGO staffers meanwhile held positions in the Obama administration the amount of expertise on civilian casualty mitigation strategies in the administration was generally high, as was a general openness

to contemplate further change.[26] In line with that, the Directorate General of National Security Intelligence, the Bureau of Democracy, Human Rights, and Labor and other government agencies held frequent consultations with both internal and external experts, discussing the feasibility of various options for further US UAV policy reforms.[27]

In the analysis of potential costs and benefits of further reforms to the safeguards, many factors and differing interests had to be taken into account, especially as high stakes were involved. For instance, the military had little interest in altering any provisions as it claimed that the already existing rules would be sufficient and only the respective implementation needed to be improved.[28] Without the military's support, however, the success of any UAV policy reform was unlikely, given the military's central role as the nominating, planning, and executing agency in the majority of the missions. In addition, the intelligence community had reservations regarding new regulations that would make public, in-depth after-action reports mandatory. Specifically, it was feared that such reports on civilian casualties could reveal secret operations by the CIA, and thus cause even greater strategical disadvantages than the lack of public support.[29]

In spite of these costs, which were considered carefully, key policymakers also expected, however, that more far-reaching civilian protection safeguards could in the future bring various major benefits. To begin with, a new regulation including better civilian protection could be used abroad to counteract terrorist recruitment efforts, and to convince civilians in affected areas that the United States did not arbitrarily use drones without caring about potential collateral damages. While this would seemingly decrease external threats to US national security, the data previously presented by the DoS could also be used to justify a respective policy change *vis-à-vis* opposing internal actors in the United States. Other key benefits of a new policy were expected to show in the United States' legitimacy abroad. Enhanced civilian protection combined with moderate transparency measures would on the one hand appease internal stakeholders worried about the UAV program's long-term impact on the United States' reputation, while also protecting the necessary secrecy of CIA covert operations. On the other hand, official government reports about civilian casualties would allow the US government to portray itself as a responsible and accountable actor, which, in turn, could increase the United States' credibility as a human rights defender, rather than enabling the narrative of a determined invading force that did not care about civilian losses (White House, 2016).

In the end, the actual drafting process of what would become EO 13732 was declared top-secret and only involved a few internal experts. Nonetheless, a broader dialogue on the issue was maintained throughout Obama's second term,[30] and strategic advice from the outside infiltrated inner circle debates. This was, for instance, reflected in a speech Obama gave at West Point Academy in 2014, when he picked up many of the debate's points and alluded to the respective strategic calculations behind his considerations: "When we cannot explain our efforts clearly and publicly, we face terrorist propaganda and international suspicion, we erode legitimacy with our partners and our people, and we reduce accountability

in our own government". Further, he argued that the issue of transparency was directly linked to American leadership in the world, a role that could not be upheld if the United States lost legitimacy and the trust of its partners due to insufficient information sharing (Obama, 2014).

Outcome

In July 2016, Obama enacted EO 13732: United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force**.** The executive order was a compromise between differing strategic interests in order to retain the benefits while simultaneously reducing the costs of strengthened safeguards. Consequently, the new order was not presented as a completely new set of rules, which would have upset the military, but as an accumulation of the military's best practices that – in combination with a few new ideas – would strengthen US civilian casualty mitigation in targeted killing operations.[31] Hence, the executive order introduced this narrative, stating that: "the Administration is taking additional steps to institutionalize and enhance best practices regarding US counterterrorism operations and other US operations involving the use of force" (White House, 2016, 1).

EO 13732 advanced the PPG in primarily three ways; namely, by introducing new transparency requirements; by instituting more comprehensive rules regarding civilian protections; and by announcing the establishment of infrastructure to ensure that the EO was periodically reviewed for improvements. Specifically, Section 3 established new transparency requirements, while at the same time acknowledging the CIA's concern about the risk of disclosing its covert operations. Accordingly, relevant agencies were directed to annually submit a report to the President and the Director of National Intelligence, which should list the number of strikes carried out outside areas of active hostilities and include an overview of the respective combatant/non-combatant death tolls (White House, 2016, 3). Furthermore, the agencies were instructed to outline the sources and methodology used while gathering these numbers so that, if needed, discrepancies between NGO data and US government data could be explained. In order to maintain operational secrecy, however, only an unclassified summary of the report had to be released to the public with a special exception clause that permitted the concealment of sources and methods (ibid., 4).

The subject of civilian casualty mitigation featured prominently in the Preamble of EO 13732, which also points to the strategic rationale behind the order, emphasizing how the benefits of civilian protection measures would outweigh potential costs:

> The protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and

> enhance the legitimacy and sustainability of U.S. operations critical to our national security.
>
> (White House, 2016, 1)

Building upon the Preamble, Section 2 established civilian casualty mitigation measures that can be categorized into pre- and post-strike measures. Regarding pre-strike measures, it stipulated more advanced preparation for strikes by training personnel in tactical and legal matters, by conducting "simulations of complex operational environments that include civilians" and by acquiring weapons systems that would enable more reliable target discrimination. Moreover, enhanced field intelligence should provide "more accurate battlespace awareness", which, in turn, would enable the targeting agency to distinguish more accurately between military and civilian targets, or adjust the time of the strikes to prevent as many civilian victims as possible (White House, 2016, 2–3). Regarding post-strike measures, EO 13732 ordered special reviews for attacks resulting in civilian casualties, established further consultation channels, and encouraged information exchange with foreign partners to "share and learn best practices". Most remarkably, however, the order clearly stated the need to acknowledge US responsibility for civilian victims, which was not only limited to offering condolences, but also included a potential *ex gratia* payment for injured or killed civilian victims (White House, 2016, 3). Although this step did not outline clear processes on how to organize potential compensation payments, it still marked an important advancement: for the first time, the US government acknowledged responsibility for civilian casualties in UAV missions instead of considering them simply as collateral damage in self-defense operations.

Finally, Section 4 provided for periodic consultations between the various agencies and the NSC, which were to institutionalize exchange channels and to act as an additional source of expertise. This was to guarantee that trends in civilian casualties could be detected early on, and that further improvements to existing safeguards could be developed and introduced if needed (White House, 2016, 4).

EO 13732 complemented the PPG in important ways; however, it also displayed two major weaknesses. The first weakness was that, like the PPG, its language was very vague. For instance, the EO indicates that "relevant agencies" were to investigate strikes resulting in civilian casualties (White House, 2016, 4), but it did not mention whether the Joint Special Operations Command or the CIA were included in this group of relevant agencies. Similarly, important advancements like the possibility of *ex gratia* payments to civilian victims were included in the directive, but have ultimately not been further outlined, making it difficult for victims to point toward the EO to claim compensation. The second weakness was the document's executive nature, which made it vulnerable to the discretion of subsequent presidents who could repeal the order without any restrictions if they did not support its purpose.

The safeguards during Trump's presidency

Even before he became President, Trump made no secret of the fact that he generally supported the US targeted killing program, and that he opposed any

restriction of the program's potential on account of diplomatic or human rights concerns (Trump, 2011, 101). However, when Trump took office in early 2017, many of his advisors advised strongly against completely abolishing Obama's security-related directives as "explicitly removing them would be burdensome and could spur backlash from the national security bureaucracy" (Zenko, 2017). As a result, Trump refrained from completely nullifying the advances made by PPG and EO 13732 as he had done with other Obama-era policies (Human Rights First, 2017, 1).

Nevertheless, Trump altered both documents in significant ways, which substantially weakened them (Human Rights First, 2017, 1). First, in 2017, Trump replaced the PPG with a new document called Principles, Standards, and Procedures (PSP), which kept some of the central rationales of the PPG, but ultimately altered central sections. Accordingly, PSP kept PPG's overarching structure outlining a general guidance as it had been requested by Obama's advisors prior to 2013, while also retaining the emphasis on restricting "civilian collateral damage" due to perceived strategic benefits (Hartig, 2017). Whereas the exact details of PSP remain confidential, the *New York Times* reported supposed alterations in the target nomination processes and a new classification of targets as a response to new security challenges posed by ISIS. Consequently, not only can terrorist suspects who pose an "imminent threat" to the United States be targeted, but also other actors within a terrorist network, such as bodyguards, couriers, or propagandists. In general, senior officials within the Trump Administration argued that "the replacement rules should be seen as similar to Mr. Obama's but clearer and less bureaucratic" (Savage and Schmitt, 2017).

Additionally, in 2019, Trump used two laws passed by Congress to justify revoking Section 3 of Executive Order 13732. In doing so, Trump used various amendments of the NDAA for Fiscal Years 2018 and 2019,[32] which were actually meant to increase congressional oversight and the military's accountability, to declare the reporting obligation on civilian casualties established in EO 13732 (Section 3) as redundant by arguing that similar obligations had been enshrined in law elsewhere (White House, 2019). This assessment has been widely challenged, especially in light of the fact that the two NDAAs only refer to DoD operations and not to missions conducted by the CIA or other agencies that had previously been required to report their body counts by the voided section of EO 13732. To that effect, Rita Siemion, HRF's Director for National Security Advocacy, summarized the government's proceeding by stating that "(t)he Trump Administration's action is an unnecessary and dangerous step backwards on transparency and accountability for the use of lethal force, and the civilian casualties they cause" (Siemion, 2019, 1).

In sum, the Trump Administration exploited one of the key weaknesses of the safeguards enacted by the Obama administration, namely their executive nature, to considerably weaken and partially replace them (Jurecic, 2018). Important provisions of the PPG and EO 13732, such as the PPG's provisions aimed at the reduction of civilian collateral damages and the pre-strike measures of the EO, however, remained in place even in the new versions of the regulations.

Nonetheless, Trump's changes regarding the "imminent threat" rule and the downsizing of the reporting obligations constituted a heavy blow to the safeguards and reversed many of the advancements instituted during Obama's second term.

Conclusion

Between 2013 and 2016, safeguards to protect civilians and terrorist suspects from arbitrary killings in US UAV missions were advanced, thus strengthening, at least on paper, protections of the right to life for foreign civilians and terrorist suspects affected by the US targeted killing program. Obama's PPG of 2013 introduced a more thorough target nomination process and established a "rather capture than kill" policy, which addressed allegations of extrajudicial killing and ended the hitherto complete secrecy surrounding the United States' drone program. The same directive also provided for civilian protection measures, and addressed the issue of accountability by introducing mandatory interagency reviews. Executive Order 13732 of 2016, in turn, focused on civilian victims, making their protection a matter of strategic interest and increased public oversight by establishing mandatory agency reports to the President and the Director of National Intelligence, whose unclassified summaries were to be shared subsequently with the public.

In both cases, the introduction of safeguards can be traced back to strategic learning in the Obama administration based on the processing of key strategic arguments brought forward by internal as well as external actors. Such arguments especially centered on the effects of the targeted killing program on the United States' reputation abroad and on setting a standard for other countries acquiring UAV technology. In addition, considerations of the targeted killing program's implications for domestic political stability similarly played an important role in the discussions. Conducive conditions for the strategic learning process to unfold included the general openness of the Obama administration to engage with external advice on the matter as well as the willingness to engage with a variety of arguments addressing different benefits and risks associated with safeguards in the first place. Neither coercion, be it in the form of shaming campaigns, court judgments or material sanctions, or moral arguments appear to have played a significant role in the establishment of the safeguards.

It is important to note, however, that we do not argue that the two directives effectively guaranteed that the right to life of affected civilians and suspected terrorists was reliably protected. Both policies were predominantly written in vague language, which gave government officials considerable leeway when it came to implementation. Furthermore, despite advances regarding transparency, it was impossible to ascertain to what extent the requirements in the policies were adhered to in practice, as UAV missions are still core national security matters, and, thus, are handled with a high level of confidentiality. Finally, the safeguards are contained in executive documents, which can be changed or even repealed without the consent of Congress – a fact exploited by Trump when he abolished important sections of both guidelines. Despite these obvious limitations, however, the PPG and EO 13732 nevertheless constitute important advancements.

The enactment of these guidelines bears witness to the fact that the Obama administration officially acknowledged that targeted killing operations were only justifiable as a tool of last resort if the identity of the terrorist suspect can be reliably established and if harm to civilians can be minimized.

Notes

1 Given the state secrecy around the program, the exact number of strikes and casualties varies depending on the reporting source.
2 This chapter focuses on areas outside of active hostilities (2004–2016) given the differing application of international law in situations of (non-)active combat.
3 New America and The Bureau of Investigative Journalism both base their reports on newspapers, US military press releases, and partially interviews with survivors (The Bureau of Investigative Journalism, 2020).
4 Interview with Patricia Stottlemyer, Litigation Staff Attorney, Human Rights First, Washington D.C., March 26, 2019.
5 Interview with Luke Hartig, former Senior Director for Counterterrorism at the National Security Council, Washington D.C. July 2, 2019.
6 Interview with Kenneth Anderson, Professor of Law at American University, Washington D.C., March 21, 2019.
7 Interview with Kenneth Anderson.
8 Interview with Larry Lewis, former Senior Advisor to the Department of State's Assistant Secretary for Democracy, Human Rights, and Labor, Washington D.C., April 3, 2019.
9 Interview with Larry Lewis.
10 Interview with Kenneth Anderson.
11 Interview with Larry Lewis.
12 Interview with Kenneth Anderson.
13 Interview with Larry Lewis.
14 Interview with Larry Lewis.
15 Further considerations such as Obama's ambitions in legacy building, were also often cited by civil society actors as decisive factors in the policy-making process.
16 Interview with Luke Hartig
17 Interview with Luke Hartig.
18 Interview with Luke Hartig.
19 Interview with Patricia Stottlemyer.
20 Interview with Sarah Holewinski, Board of Directors Center for Civilians in Conflict, Washington D.C., March 22, 2019.
21 Interview with Kenneth Anderson; interview with Luke Hartig; interview with Larry Lewis; interview with Andrea Prasow, Washington Director Human Rights Watch, Washington D.C., March 25, 2019.
22 Interview with Andrea Prasow.
23 Interview with Larry Lewis.
24 Interview with Larry Lewis.
25 Interview with Luke Hartig.
26 Interview with Sarah Holewinski.
27 Interview with Luke Hartig.
28 Interview with Sarah Holewinski.
29 Interview with Larry Lewis.
30 Interview with Larry Lewis.
31 Interview with Sarah Holewinski.
32 Under NDAA18, Sec.1264, the president had to submit a report outlining all, at that time, relevant legal and policy frameworks for national security operations, explaining

any changes made since January 20, 2017. For any future policy changes, a presidential notice to the appropriate congressional committees was made mandatory. NDAA19, Sec.1057, required the DoD to publish casualty reports in relation to targeted killing operations, only allowing an exception for cases in which the Secretary of Defense considered such a publication to be a threat to national security. NDAA 19, Sec.1062, enhanced the scope of the government's casualty report for military actions (US Congress, 2017; US Congress, 2018).

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6 Refugee resettlement and the right to seek asylum

Introduction

The resettlement of refugees and the provision of asylum for those fleeing persecution are proud foreign policy traditions in the United States. The formalization of resettlement and asylum provisions under international law largely followed the devastation of World War II. The right to seek and enjoy asylum, as defined in Article 14(1) of the UDHR, was concretized in the Convention Relating to the Status of Refugees of 1951 and the Convention's Optional Protocol of 1967. Following its ratification of the Optional Protocol, the United States has historically supported a generous resettlement program to grant protection to vulnerable refugees who are unable to reach the United States on their own in addition to its regular admission of asylum seekers. Despite its cultural history as a sanctuary for "huddled masses yearning to breathe free" (Lazarus, 1883), however, the United States, like many other countries, has a long history of only selectively granting various forms of humanitarian protection to refugees and asylum seekers (Waibsnaider, 2006, 395–414). The Displaced Persons Act of 1948, for example, provided limited resettlement for Eastern European refugees following World War II, but it initially excluded approximately 90% of Jewish applicants (Bockley, 1995, 261–4). Moreover, subsequent US administrations prioritized the admission of refugees to undermine communist regimes as a key strategy throughout the Cold War (Waibsnaider, 2006, 396–7). While the Refugee Act of 1980 intended to remedy much of the discriminatory nature of resettlement and asylum by providing an "ideologically and geographically neutral" definition of a "refugee" (Tyson, 1990, 924), political considerations continued to dominate the administration of resettlement and asylum as demonstrated by the United States' preference for refugees fleeing Cuba over those escaping Haiti in the 1990s (Bockley, 1995, 272–6).

Following 9/11, widespread fear that foreign terrorists posed a continued threat to the US population paved the way for an expansion of counterterrorism efforts. Several changes targeted US migration policies in particular justified by concerns echoed in the final 9/11 Commission Report that terrorists could infiltrate US borders through fraudulent refugee, asylum, and immigration applications (National Commission on Terrorist Attacks upon the United States, 2004, 384).

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The creation of the DHS in 2002, which consolidated the former Immigration and Naturalization Service and the US Customs Service along with 20 other agencies relating to counterterrorism, disaster preparedness, and domestic security, was one manifestation of these heightened concerns (White House, 2002, 9). Moreover, building on changes incorporated into the 2001 USA PATRIOT Act, Congress passed the REAL ID Act in 2005, which greatly expanded who constituted a potential terrorist by redefining "terrorist organizations" and "terrorist activities" under the Immigration and Nationality Act's (INA) "Terrorism-Related Inadmissibility Grounds" ("TRIG" or "TRIG bars"). This link to inadmissibility barred individuals from entering the United States and from receiving humanitarian relief through resettlement, asylum, or any other form of humanitarian protection if they were suspected of having "supported" a "terrorist organization" or engaged in "terrorist activities", broadly defined. Because the law allowed in very limited cases for the government to issue waivers to block admissibility restrictions, these "exception waivers" supplemented any right to appeal this classification (US Congress, 2005a, Sec. 212(d)(3)(B)). The combination of the expanded definitions and the absence of judicial review constituted a serious violation of the spirit of the Refugee Convention.

Although these changes were championed by Republicans in Congress as necessary security measures to prevent the "immigration system (from being) exploited by those malevolent individuals who seek to destroy Americans and (the US) way of life" (Bilirakis in US Congress, 2005b, 562–3), their impact on the US Refugee Admissions Program (USRAP) was immediate and far-reaching (Acer et al., 2006). Strict interpretation of the new provisions by the DHS and DoJ resulted in the widespread rejection of cases that had been recommended by the public and private organizations who co-manage the US resettlement program. Due to the involvement of multiple departments, interagency disagreements and miscommunication further paralyzed the adjudication process, leaving applicants in indefinite administrative hold in dangerous locations abroad, often separated from their families, and with little prospect for relief (Hughes in US Congress, 2007c, 19–20).

Eventually, after attempts to issue TRIG waivers under the 2005 authority repeatedly proved to be extremely cumbersome or outright futile, a number of high-ranking members of Congress from both parties were convinced by strategic arguments from advocates from the resettlement community of the need for better safeguards for refugees. Support from the DoD and the State Department similarly overcame resistance from the DHS, DoJ, the White House, and conservatives in Congress. The resulting amendment to the INA led by Senator Patrick Leahy (D) and Senator Jon Kyl (R) was attached to the Consolidated Appropriations Act (CAA) of 2008 and provided flexibility to the overly restrictive TRIG bars by expanding the exemption authority of the Secretaries of State and Homeland Security. It also granted automatic relief from TRIG for eight groups that had previously been deemed terrorist organizations. Despite several limitations, the Leahy–Kyl Amendment restored some basic protections for refugees seeking resettlement to the United States.

As this chapter will demonstrate, the reforms were primarily the result of strategic learning. While consecutive attempts to rescind the expanded TRIG provisions from the 2005 REAL ID Act through public shaming and moral persuasion failed, stakeholders from the resettlement community utilized preexisting communication channels to negotiate alternative solutions with their counterparts in the Departments of State and Homeland Security. Gathering most of their influence from concerns about the provision's potential impact on US military objectives and foreign policy, these stakeholders, aided by State Department officials, proceeded to inform members of Congress of the looming negative strategic implications of such inflexible and inefficient inadmissibility bars. In particular, they referred to cases in which military allies in Iraq were rejected for supporting the United States and examples of how the tightened TRIG bars undermined State Department agreements with other countries to resettle vulnerable groups. In the end, by easing the requirements for the issuance of TRIG waivers, Congress concluded that it could address some of the humanitarian consequences of the TRIG bars and offset the costs of inaction, while balancing key national security concerns.

The following chapter proceeds accordingly: the next section shows, based on evidence gathered from expert interviews and relevant primary and secondary sources, that the expansion of TRIG exemption waivers in the Consolidated Appropriations Act of 2008 has been the result of strategic learning. It is structured according to the conceptualization of the strategic learning mechanism defined in Chapter 2 (human rights violations – intervention with strategic arguments – processing of strategic arguments – safeguards). The ensuing section briefly discusses the Trump administration's stance toward TRIG exemptions, while the final section provides a summary of the main findings.

Toward the Leahy-Kyl Amendment to the CAA 2008

Extraterritorial human rights violations

In the wake of 9/11, Congress repeatedly expanded the scope of TRIG bars in the INA to prevent foreign terrorists from abusing the US immigration system and threatening the United States. Accordingly, any individual who was a member of a "terrorist organization", or who had engaged in so-called "terrorist activity", was to be denied admission into the United States for any immigration or humanitarian purposes even if those actions were conducted while under duress (Laufer, 2006, 458–68). Especially following the 9/11 Commission's testimony before the House Select Committee on Homeland Security, there was a consensus among most Republicans as well as several moderate Democrats that such reforms were necessary if the US were to be able to continue offering "hope and shelter to people who can legitimately claim and receive asylum" (Sensenbrenner in US Congress, 2005b, 550). Specifically, members of Congress were reassured by witnesses that such provisions were necessary and that they could be implemented in a common-sense manner (Sabin and McCarthy in US Congress, 2005c, 13–4).

Assuming that the INA's preexisting TRIG waiver authority would provide sufficient flexibility, they ignored the concerns from other members of Congress as well as the testimony of one legal expert who described the statute's protections against overly harsh application of TRIG as a "largely meaningless defense" (Cole in US Congress, 2005c, 24).

The first major expansion of the TRIG provisions came with the 2001 USA PATRIOT Act ("PATRIOT Act"), when a third "tier" of terrorist organizations was introduced. The first two tiers of terrorist organizations referred explicitly to groups that had been officially designated by the US government according to congressionally mandated processes. Tier I referred to Foreign Terrorist Organizations, while Tier II referred to organizations on the Terrorist Exclusion List.[1] In contrast, the newly established Tier III was a catch-all for any undesignated "group of two or more individuals, whether organized or not, which engages in terrorist activity" (US Congress, 2001, Sec. 212(a)(3)(B)(vi)(III)), to be determined on a case-by-case basis without any central authority. In addition, the definition of "terrorist activity" was expanded to also include "material support", with little regard for the political context, nor whether the support was insignificant in nature or born out of duress (Harvard Immigration and Refugee Clinical Program, 2006, 3–4). Although a waiver authority to exempt individuals from the material support bar was included in the PATRIOT Act, it was not applied to any known cases prior to its replacement four years later (Hughes, 2009, 41).

In 2005, the TRIG bars were further expanded by the REAL ID Act to also include anyone who expressed support for "terrorist activity", anyone who was a member of or has received military training from a terrorist organization, as well as any spouses and children of persons deemed inadmissible (US Congress, 2005a, Sec. 212(a)(3)(B)(i)(IX)). Additionally, the definition of Tier III terrorist organizations was also expanded to include any group that has a subgroup that engages in terrorist activity (ibid., Sec. 212(a)(3)(B)(vi)(III)). Whereas previous precedent did not bar a person from refugee protections for participation in guerilla warfare in a civil war (Hughes, 2009, 20), the DHS and the DoJ adopted significantly stricter interpretations under the new law, going so far as to argue that a hypothetical "glass of water" at gunpoint would constitute "material support for a terrorist organization" for immigration or humanitarian relief purposes (ibid., 33). In one case, the law was even interpreted to such an extent that "women who had been raped and enslaved by armed militias in Liberia" were considered to have provided material support for a terrorist organization because of their provision of slave labor (Acer et al., 2006, 1). Furthermore, exemptions from TRIG could only be issued via a consensus between the Secretaries of State and Homeland Security in consultation with the Attorney General, and could only apply to specific circumstances. As a result, neither individuals who provided material support under duress to a Tier I or II group nor persons who "engaged in terrorist activity", broadly defined, on behalf of any terrorist organization, including Tier III groups, could be exempted (Hughes, 2009, 43). Due to the complexity of the waiver policy several discrepancies emerged; for example, a group could be classified as a

Tier III group in one instance even after being recognized as sufficiently safe in another context.

The impact of the reforms, compounded by interagency disagreements and delays, was profound: between 2005 and 2009, NGOs estimated that over 18,000 refugees and asylum seekers were directly affected by the tightened TRIG bars, forcing US government officials on multiple occasions to delay or forgo plans to resettle thousands of vulnerable individuals, effectively crippling the US resettlement program (Hughes, 2009, 9). In 2006, for instance, at least 20% of the 70,000 spots allocated by the US government for resettlement could not be filled because of the impact of the TRIG bars, according to an estimate from the International Rescue Committee (Stein, 2006, 940). Although it is impossible to gauge the total impact of TRIG as the government failed to keep any record of its application (Acer et al., 2006, 5), the REAL ID Act was especially devastating for two specific types of refugees. In particular, the material support bar entrapped *bona fide*[2] refugees who had formed the basis of their case off personal encounters with armed groups, whereas "freedom fighters" who had opposed illiberal regimes, sometimes with direct US support, were accused of engaging in terrorist activity under the new interpretation of the respective provisions. Although TRIG had existed since its inception in the 1990s,[3] the full extent of its impact on the right to seek asylum did not become clear until after 9/11 and especially its extension in 2005. Prior to this point, there was a stronger desire to balance national security concerns with the United States' obligations under Article 14(1) of the Declaration according to which states are not allowed to prevent refugees from seeking and enjoying asylum from persecution.

As a direct result of the material support bar, the resettlement of refugees from Colombia to the United States effectively ended, because so many refugees fleeing Colombia had been forced to provide material support under duress (Gavin in US Congress, 2006c, 82; Refugee Council USA, 2007, 11–3). Common examples of material support included extortion and ransom payments to the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), or the United Self-Defense Forces of Colombia (AUC), all groups considered Tier II terrorist organizations by the US (Nezer, 2006, 180). According to the UN High Commissioner for Refugees (UNHCR), at least 70% of *bona fide* Colombian refugees became inadmissible as a direct result of the expansion of the TRIG restrictions (Refugee Council USA, 2007, 11). Initial attempts by the US Refugee Admissions Program, which is managed by the US Citizenship and Immigration Services (USCIS) on behalf of DHS, to recognize an exemption waiver for material support while under duress were thwarted by senior DHS officials in 2004.[4] In the end, however, DHS determined that there was not a statutory basis for such an exemption, and therefore the US Refugee Admissions Program did not have the authority to recognize such a waiver. As a result, the adjudication of refugee cases in which material support was provided under duress to FARC, ELN, or AUC was put on indefinite hold by the DHS until further guidance was published in 2007. Consequently, UNHCR officials significantly reduced the number of Colombian refugees they recommended to the US after the 2005 provision despite them being

the largest group of refugees in the Western Hemisphere, preferring instead to prioritize limited resources for US resettlement for applicants that had a genuine chance of success (Gabaudan in US Congress, 2006c, 73).

The overall impact of the new TRIG restrictions was not limited to Colombian refugees, however. In 2005, an agreement to resettle several thousand Burmese refugees who had been located in camps for decades along the Thai border nearly collapsed (Refugee Council USA, 2007, 14–8). Despite years of strained negotiations between the Department of State and the government of Thailand to reach the agreement, the DHS blocked the resettlement of ethnic Chin and Karen refugees who had engaged with or who provided material support to groups that opposed the military junta government in Myanmar, overturning their initial approval for resettlement (Nezer, 2006, 181–3). In interpreting TRIG, DHS predominantly ignored the context in which supposed Tier III groups operated, relying instead on the expanded definition of "terrorist activity" to determine inadmissibility. Consequently, State Department officials were forced to delay the processing of approximately 8,500 Karen refugees as part of the agreement's pilot program (Sauerbrey in US Congress, 2006c, 5). Approximately 1,185 of the 1,500 Chin refugees that had been approved for resettlement were also "negatively affected by the material support bar" (Gavin in US Congress, 2006c, 82).

In addition to the ethnic Chin and Karen groups in Thailand, the United States' plans to resettle Lao Hmong from Thailand and Vietnamese Montagnards from Cambodia were similarly threatened by TRIG. These groups were classified as Tier III organizations as a direct result of their guerilla efforts against the Communist Vietnamese government on behalf of the CIA and US Armed forces during the Vietnam War (Sauerbrey in US Congress, 2006c, 5–6). Under the new provisions, virtually all use of force – past and present – and support thereof by a non-state actor against another state constituted terrorist activity, regardless of the US government's direct or indirect support of the group. As a result, allied groups around the world, who were now fleeing persecution because of their alliance to the United States, were disqualified for refugee protection in the United States (Fleming et al., 2006, 12). This directly affected the claims of many Iraqis, among others, who had assisted the US military against Saddam Hussein in the 1990s and during the 2003 Operation Iraqi Freedom (Hughes, 2009, 4–5). In fact, the DHS even admitted in a trial before the Department of Justice's Board of Immigration Appeals (BIA) that the US Marines would classify as a Tier III terrorist organization under the law's strict interpretation, because their operations during the US occupation of Iraq were illegal under Iraqi law (Pasquarella, 2006, 29).

Although proponents of TRIG's expansion admitted that it was never their intention to exclude American allies or *bona fide* refugees, they did not recognize that the new law violated international law. Under the Refugee Convention, the right to seek asylum is primarily rooted in states' obligation to respect the principle of *non-refoulement* (US Department of Justice, 1991, 86–7). According to this principle, states must take particular care not to return an individual to a country in which they are likely to face persecution. Therefore, if the United States fails to consider the potential of persecution when rejecting an asylum seeker

found inadmissible under TRIG, it is in violation of international law (Harvard Immigration and Refugee Clinical Program, 2017, 13). Vulnerable refugees who are unable to reach a viable host country on their own, however, are forced to rely on the assistance of the UNHCR to be resettled via a partnership program of states and private organizations. In some contexts, repatriation or asylum in neighboring countries is simply not an option because of persistent violence or the threat of persecution (UN High Commissioner for Refugees, 2011, 4). Resettlement is therefore considered a vital tool especially for vulnerable persons, but there is not technically a right to be resettled under international law, even if that might be an individual's only viable access to asylum (Gabaudan in US Congress, 2007a, 41–2). Consequently, countries involved in resettlement programs, like the United States, participate on a voluntary basis, and maintain considerable discretion in determining which pre-vetted refugees to accept prior to their arrival. In contrast to asylum seekers who file for asylum upon entering a country, refugees can be rejected for resettlement without being physically removed or expelled from the country and without officially breaking international law.

The United States, as party to the 1967 Protocol to the Refugee Convention, cemented this distinction between refugees and asylum seekers with the passage of the Refugee Act of 1980, resulting in largely separate processes and bodies of law (Waibsnaider, 2006, 398). Accordingly, an individual who has a well-founded fear of persecution based on his or her "race, religion, nationality, political opinion, or membership in a particular social group" may seek protection from abroad via "refugee status" (US Congress, 1980, Sec. 207), whereas those arriving at the border or already residing within the United States may apply for "asylum status" (ibid., Sec. 208). The DoS's Bureau of Population, Refugees, and Migration (PRM) manages the US Refugee Admissions Program (USRAP) in partnership with the UNHCR[5] and the Refugee Council USA (RCUSA), a large conglomeration of NGOs and civil society organizations, which administer Resettlement Support Centers around the world. The key stakeholders within the USRAP coordinate policies via an interagency working group, which met regularly under the Bush and Obama administrations.[6] Following a referral from the UNHCR or a US embassy, the DOS-PRM recommends the refugee for adjudication by the DHS's USCIS. The DHS Secretary, using its discretionary authority, determines whether the refugee is admissible. Each year, the President in consultation with Congress sets a refugee admissions "ceiling" for resettlement based on the budget funding allocated by Congress. Contrary to the resettlement process, asylum is almost exclusively adjudicated by the DHS, and may be referred to a full hearing before a DoJ immigration judge after a negative decision.[7] As a result of this two-tiered system, TRIG has the potential to affect foreigners seeking humanitarian relief before they enter the United States via resettlement, arriving refugees, and asylum seekers, as well as those who already reside within the United States (Hughes, 2009, 6).

Although the use of TRIG against refugees in resettlement was not as obvious a violation of the Refugee Convention as it was for asylum seekers, advocates nonetheless argued that the broad application of "material support" and "terrorist

activity" definitions fundamentally undermined the spirit of the Convention by hindering the right of the most vulnerable refugees from seeking asylum (Gabaudan in US Congress, 2006c, 72–3). According to purposivist legal theories, a policy can legally follow the letter of the law, without complying with the purpose or spirit of the law. This evasion of international obligations under the Refugee Convention is not uncommon for Western democracies, but nonetheless demonstrates a form of "bad faith non-compliance" (Búzás, 2017, 862–3). Therefore, while Article 1F of the Refugee Convention denotes the grounds for a refugee or asylum seeker to be excluded on national security concerns, it nonetheless regulates the necessary procedures for determining whether exclusion applies (Fischer, 2012, 258). As Gilbert (2003, 445) states,

> (g)iven that Article 1F(b) represents a limitation on an individual right – *non-refoulement* – it should be interpreted restrictively and, without evidence of involvement in a specific serious non-political crime, it would be contrary to the spirit and intention, if not the very language, of the 1951 Convention to exclude someone.

According to the UN Counter-Terrorism Implementation Task Force (2014, 15), by implementing mechanisms that "(result) in the inability of asylum-seekers and refugees to benefit from international protection", states risk "violat(ing) international refugee law". Consequently, critics of the new law argued that the restrictions were indiscriminate in their breadth, and effectively inhibited thousands of credible refugees' right to seek asylum in the US (Fleming et al., 2006, 14–5).

Furthermore, legal scholars have argued that the lack of duress and *de minimis* exemptions and the excessively broad interpretation of material support were fundamentally incompatible with established legal doctrine (Horowitz in US Congress, 2006c, 94). It is well established under US criminal law that individuals who commit otherwise illegal acts under the threat to oneself or to one's loved ones of bodily harm or death are permitted a duress defense. Furthermore, critics point out that a person who commits such acts in the United States would be considered a victim of extortion rather than a criminal (Fleming et al., 2006, 23). Under the broad interpretation of material support without access to a duress defense,

> these refugees are faced with a horrific catch-22: to stay alive in their home country, they must provide the goods and services demanded by these guerrilla groups. However, by doing so, they are giving up any chance of gaining protection from these same guerilla groups through United States refugee programs.
>
> (Fischer, 2012, 257)

In instances not involving duress, supporters of the TRIG restrictions argue that the respective provision already sufficiently provides a defense for persons who did not know that they were committing a crime,[8] so long as they can "demonstrate by

clear and convincing evidence that (they) did not know, and should not reasonably have known, that the organization was a terrorist organization" (US Congress, 2005a, Sec. 103(a)(i)(VI)). This exception to the material support bar, however, does not consider the feasibility of providing evidence regarding all interactions with any individual belonging to a group of two or more persons, organized or unorganized, who the DHS may at some point determine to be a Tier III terrorist organization (Fischer, 2012, 257). The absence of a *de minimis* exemption further exacerbates this contradiction by completely disregarding the significance of any support that has been given by a credible refugee unknowingly or while under duress. As a result, everyday interactions between a shop owner and a complete stranger could be defined as material support, if there is a reasonable suspicion that that stranger has been associated with any form of terrorist activity (ibid., 248).

Finally, the manner in which the United States' TRIG policy undermines the spirit and aim of international refugee law is two-fold in that it denies the resettlement of *bona fide* refugees in the United States while also preventing these groups from seeking asylum elsewhere. Given the seriousness of denying resettlement to a *bona fide* refugee, international law states that each case be considered for individual responsibility and that "limitations imposed for the protection of national security must be necessary to avert a real and imminent—not just hypothetical—danger" (UN Counter-Terrorism Implementation Task Force, 2014, 5). The interpretation of the TRIG bars, however, as argued above, fails to consider the seriousness of the act, the context in which the act was committed, any expression of regret, or the time that has elapsed since the original act. Although being denied resettlement from one country does not necessarily disqualify a refugee from resettlement elsewhere, these final decisions have had the secondary effect of stigmatizing inadmissible applicants (Gabaudan in US Congress, 2006c, 76). According to the UNHCR's Assistant High Commissioner for Protection, other countries involved in resettlement have been reluctant to accept eligible refugees who were previously denied by the United States because they were now associated with terrorism (Fleming et al., 2006, 9). As a direct result of the United States' global influence, its TRIG bars have therefore limited the right of many vulnerable individuals fleeing persecution to seek asylum, in violation of the Refugee Convention's key principles.

Intervention

Shortly after the passage of the REAL ID Act of 2005, which had been added to a "must pass" bill without substantial debate in the Senate, advocates representing refugee and asylum cases began to recognize the scope of the law's impact on the US resettlement program. These advocates included immigration lawyers representing several NGOs from RCUSA including HRF, Human Rights Watch, and HIAS, among others.[9] In addition, the UNHCR with its vital role in classifying refugees and recommending them for resettlement, as well as in coordinating the partnerships between states and non-state actors, was actively involved

in mediating much of the debates in the interagency working group.[10] After interpreting the complex legal content of the bill, this resettlement community began to engage in various efforts to either pressure the US government to introduce safeguards for refugees with no links to terrorist organizations or involvement in terrorist activities, or to persuade them that introducing such safeguards was morally imperative; however, neither strategy was successful.

Initial attempts to publicly shame Congress and the Bush administration for the bill's restrictions on resettlement and asylum relied on information published in the media and by advocacy networks. Dozens of articles and opinion pieces published in 2006 and 2007 in widely read newspapers including the *Washington Post*, the *New York Times*, and the *Miami Herald*,[11] as well as several popular Christian magazines including *Christianity Today* and the *Christian Science Monitor*,[12] drew support from a diverse coalition of NGOs and other civil society actors. An investigative report titled "Abandoning the Persecuted" by Human Rights First (Acer et al., 2006) gathered significant attention for its collection of explicit stories of people who were affected by the terrorism bars. In addition to its criticism of the initial law, the authors specifically shamed US policymakers for their inaction: "While refugees continue to suffer, the various agencies and arms of the U.S. government that are responsible for safeguarding the persecuted have failed to demonstrate the kind of coordination, leadership and commitment that is needed to resolve this problem" (Acer et al., 2006, 2). These efforts garnered considerable support from high profile actors from a number of conservative political and faith-based organizations including, among others, Gary Bauer of American Values and the Family Research Council, Michael Horowitz of the Hudson Institute, and Wendy Wright of Concerned Women for America ("Letter to the President from Faith-based community leaders and individuals" in US Congress, 2006c, 66). Despite this initial achievement, which would later prove useful for broadening support among Republicans in Congress,[13] the TRIG issue struggled to capture sufficient public attention outside of the immediately affected communities due to the nature of the issue, which was legally complex even for politicians and civil servants directly involved in immigration law.[14] That, in combination with the absence of graphic photos, which could create a scandal, failed to overcome the legal complexity of the issue, undermining efforts to build a shaming campaign. Consequently, the campaign failed to trigger a reaction from Congress or the administration.

Similarly, while several countries voiced concern, there were no known attempts to sanction the United States. Although on several occasions State Department officials expressed concern about how TRIG would affect US foreign policy in Southeast Asia and the Middle East (see below), this concern was not born out of the threat of sanctions. Rather, US officials worried about how neglected resettlement agreements would undermine key incentives for foreign governments to protect refugees in volatile regions (US Embassy Bangkok Thailand, 2005; US Embassy Bangkok Thailand, 2006). The governments of Thailand and Jordan, for example, had struggled to continue offering protection to Burmese and Iraqi refugees, respectively, without significant support from

the international community (Younes in US Congress, 2007b, 44). Any attempts from foreign countries to contact the US administration therefore came in the form of requests for help,[15] as opposed to outright material sanctions against the United States or threats thereof.

Furthermore, litigation efforts before the DoJ were also unsuccessful in triggering the creation of safeguards for *bona fide* refugees. BIA judges consistently rejected any alternative reading of the respective provisions in the REAL ID Act and instead reaffirmed the DHS' position in several asylum cases. Prior to 2008, there were several occasions in which the BIA agreed with the DHS that the respective provisions in the REAL ID Act did not exempt material support for medical professionals or while under duress, without establishing a legally binding precedent (Nezer and Hughes, 2009, 580). As a result, medical personal who provided treatment to anyone deemed to have been a member of a terrorist organization, either willingly or while under duress, could be found to have engaged in terrorist activity. Similarly, advocates failed to trigger a precedential decision for cases involving *de minimis* support or for child soldiers who had been conscripted into rebel armies (ibid., 581). In one particularly devastating blow to the establishment of safeguards, the court upheld the DHS' broad interpretation of "terrorist activity", rejecting any required examination of the target or motive of the actions (US Department of Justice, 2006, 946). Consequently, these litigation efforts failed to provide any statutory limitations to the DHS' reading of the law, effectively leaving asylum seekers vulnerable to DHS' broad discretion.

Whereas previous attempts at coercion were outright unsuccessful, one coordinated effort to morally persuade members of Congress nearly succeeded, only to expire without a vote. Once it became clear that DHS had little interest in granting leeway in the interpretation of the 2005 law, advocates from the resettlement community chose to pursue a legislative solution.[16] Relying on the support of members of Congress who had traditionally shown interest in refugee and asylum issues, they pushed for the introduction of two amendments to the INA in 2006, S. 4117 and H.R. 5918, which would have required that the application of TRIG be directly linked to a threat to US nationals or national security, while also providing for a statutory duress exemption. The House Bill led by Representative Joseph Pitts (R) gathered the support of 21 cosponsors,[17] whereas the Senate Amendment led by Senator Patrick Leahy (D) had the support of seven cosponsors.[18] In the absence of traditional hearings and procedures, the bipartisan efforts appealed to religious and patriotic values associated with humanitarian relief. Upon introducing S. 4117, Senator Leahy argued the following:

> (S. 4117) speaks to the moral goodness of our Nation. It ensures that the waiver in current law is available to asylum seekers who were forced to join terrorist groups or to provide material support against their will. Completely innocent victims of ethnic and other forms of violence and repression are being denied asylum for engaging in the very activity they were forced to engage in, even though they pose no threat to U.S. security—child soldiers,

> sex slaves of people who were among the worst violators of human rights. Those victims are being excluded by our great, good Nation.
>
> (Leahy in US Congress, 2006b, 4939)

Several members of Congress, however, were not persuaded by Leahy's moral arguments. In particular, Senator Jon Kyl (R) responded by arguing that sufficient waiver authority already existed in the law:

> I urge my colleagues, simply because your heart yearns to help someone who might have been forced under a concept of duress to support a terrorist organization or an organization like the Taliban that is not designated as a terrorist organization, don't adopt this amendment under the mistaken view that there is no other remedy. There is a remedy (…) I urge my colleagues to reject this very dangerous amendment.
>
> (Kyl in US Congress, 2006b, 4942)

Additionally, Senator Arlen Specter (D) warned that rushing the weakening of a counterterrorism bill posed too great of a national security risk (Specter in US Congress, 2006b, 4942). Consequently, both S. 4117 and H.R. 5918 failed, despite their considerable bipartisan support.

Although attempts to shame and persuade continued despite their setbacks, advocates involved in the internal negotiations admitted that representatives of DHS and DoJ immediately dismissed them.[19] Whereas other governmental departments concerned themselves with the humanitarian aspects of US policies, advocates concluded that DHS' mandate prioritized national security over the well-being of foreigners abroad. The legalist tradition of the DoJ similarly limited any willingness for broader interpretations.[20] Despite public efforts to label TRIG as intentionally restrictive, advocates more closely involved in the TRIG working group preferred campaigning for what they believed were common-sense reforms that appealed to a broader audience of decision-makers.[21]

Eventually, the advocates from the resettlement community realized that arguments that failed to recognize the strategic interests of a post 9/11 America would never gain sufficient support from outside NGO and religious communities.[22] By utilizing their access to the governmental working group as stakeholders in refugee resettlement, advocates from HRF, HIAS, and UNHCR, among others, participated in the exchange of strategic arguments with representatives from each of the relevant governmental agencies.[23] Specifically, they began to reorient their conversations toward engaging the concerns of their counterparts in the Department of State and DoD, who had shared interests in maintaining a flexible refugee policy, and who had grown uneasy about the impact of TRIG. At the same time, the advocates continued to build on their progress made in Congress with the support from their networks with other non-profits and religious organizations to expand support for a legislative solution.[24] Over the course of the following year, TRIG was increasingly discussed across several Congressional hearings, including several testimonies from experts from the resettlement

community and the State Department, as well as from individuals who had been directly impacted by the material support bar. Benefiting from their networks in Congress and their expertise on this issue, these witnesses addressed TRIG in at least five Congressional Hearings before the Senate Judiciary Committee alone.[25] Altogether, key policymakers in Congress were confronted with three central arguments about why more flexible and targeted TRIG bars were in the United States' own strategic interest.

In response to concerns from Congress that the resettlement program was unlikely to reach its admission goals for 2006 and that budget resources were being wasted, stakeholders from the resettlement community argued that the existing waiver authority was insufficient to surmount the legal quagmire created by the expansion of TRIG. Although the 2005 law had permitted exemptions, each individual waiver required unanimous approval from the Secretary of State, the Attorney General, and the Secretary of Homeland Security, which had proven extremely challenging and time-consuming (Daskal in US Congress, 2007c, 85). In an oversight hearing before the Senate Judiciary Committee, testimonies from Ellen Sauerbrey,[26] Michel Gabaudan,[27] and Reverend Kenneth Gavin[28] attested to the fact that the current process was so cumbersome as to render it largely ineffective. Accordingly, because interagency agreements were so difficult to achieve, sometimes needing months to negotiate, the waivers, which could only be issued for some groups, remained extremely specific (Gavin in US Congress 2006c, 83). As a result, it took, for instance, nearly four months before a waiver, which had been issued for Burmese Karen refugees in the Tham Hin Camp, was expanded for Karen refugees in other Thai camps, even though these groups were nearly identical and had been previously approved by the US government for resettlement (Gabaudan in US Congress, 2006c, 75). Despite the considerable effort and resources needed to issue a series of waivers, the exemption authority was limited to select Burmese groups and had zero impact on any other refugee groups who had been barred from the US resettlement program by TRIG (Sauerbrey in US Congress, 2006c, 104). Without a reform, advocates argued, it would cost extensive resources to recover only a small portion of the resettlement program, leaving Congress painfully short of its refugee admission goals and significantly over budget, while still failing to provide relief for the majority of *bona fide* refugees barred by TRIG.

To further underline the strategic costs of TRIG, State Department officials argued that inflexible restrictions to resettlement undermined the program's importance as a foreign policy tool. The United States' commitment to refugee resettlement not only had reputational advantages, it also operated as a form of potential leverage in negotiations with foreign governments. Specifically, State Department officials worried that TRIG undermined resettlement agreements that the United States had regularly used to incentivize liberal reforms (US Embassy Bangkok Thailand, 2005). In addition, resettlement advocates noted that classifying refugees as terrorists for their opposition to an oppressive regime sent a contradictory message (Harvard Immigration and Refugee Clinical Program, 2006, 18; Hughes, 2009, 41). Resettlement, they argued, was key to advancing

US foreign policy goals and was at the core of US relations with several countries (Horowitz in US Congress, 2006c, 96–7). If resettlement goals failed to materialize because so many refugees were barred by TRIG, foreign governments like the Thai and Jordanian governments, for example, could become overwhelmed by the prolonged refugee crises in Myanmar and Iraq (Refugees International, 2005; Iraq Study Group, 2006, 26). The rejection of newly implemented liberal reforms in bordering countries, including the expulsion or rejection of said refugees, could cause a spillover effect, undermining Burmese and Iraqi democracy-building and spreading instability across their respective regions (Iraq Study Group, 2006, 28; Green in US Congress, 2006a, 11). According to an estimate from Refugee International of 2005, "over half a million Burmese (were) living as internally displaced people along the Thai-Burma border and many in this vulnerable population could flee to Thailand to escape fighting and persecution" (Refugees International, 2005). Advocates argued that the potential for violence compounded by the threat of a dual health epidemic (HIV/AIDS and the H5N1 avian influenza), would be catastrophic (Thin Thin Aung in US Congress, 2006a, 36), but the United States' ability to respond and resettle refugees would be almost completely impeded by the 2005 provisions (US Embassy Bangkok Thailand, 2006). Through an expansion of the existing waiver authority, the State Department could maintain existing agreements, and would be able to intervene on behalf of key groups that were wrongly barred by TRIG, thereby preventing the escalation of crises that could sabotage US foreign policy interests.

Finally, TRIG, advocates argued, was similarly destructive to US military interests by compromising the policy of asylum for individuals and members of rebel groups who had assisted US military forces, opposed US adversaries, and generally advanced US military interests abroad, thereby undermining security cooperation arrangements with key allies. Although experts had assured Congress when passing the REAL ID Act in 2005 that it was entirely illogical that TRIG might entrap allies,[29] the impact was nonetheless visible. In this context, Captain Zachary Iscol of the Foreign Military Training Unit of the Marine Forces Special Operations Command testified before Congress of the strategic importance of foreigners as translators and allied troops in the war in Iraq:

> Tactically, counterinsurgency, and especially the development of credible partner nation forces, is all about personal relationships (…) we cannot cultivate these relationships without the service of Iraqi translators who join our ranks at great risk to themselves and to their families (…) As our eyes, ears and voice on the ground, our translators were critical to this approach. They bridged vast ethnic and language divides, while providing the guidance we needed to be able to operate across complex cultural terrain.
>
> (Iscol in US Congress, 2007a, 28–9)

In the same hearing, Congress heard personal testimonies from several Iraqi refugees to illustrate the threats that they and their families faced for their work for the US military.[30] Although there was a strong desire by US officials to protect these

allies, UNHCR representative Gabaudan argued that the REAL ID Act's material support bars had forced UNHCR to redirect most Iraqi refugees, including former translators, to other countries for resettlement (Gabaudan in US Congress, 2007a, 147). In addition to being perceived as having abandoned Iraqis, advocates argued that the broad application of TRIG was an "embarrassment" for the United States as it demonstrated the United States' willingness to turn their backs on historical allies, including those who had been trained and sponsored by the US government in Cuba and in Vietnam ("Joint Letter from human rights and religious rights organizations", ibid., 151–2). The inability to resolve this issue had the potential to tarnish the United States' reputation abroad and to hinder future military operations by scaring away potential allies (Kerwin and Stock, 2007, 7). This argument was meant to resonate with US policymakers who were especially sympathetic to veteran interest groups, as well as those who were concerned about US international military interests. The arguments were so convincing, in fact, that Senator Kyl (R) and Senator Cornyn (R), who had openly opposed the previous amendments, became directly involved in negotiations with Senator Leahy (D) to find a legislative solution in the Senate.

Processing

The presentation of these arguments in public hearings and in the TRIG working group negotiations prompted Congress and key policymakers in the Bush administration to consider the pros and cons of a safeguard for refugees and asylum seekers unfairly barred by TRIG. On the one hand, lawmakers and government officials considered several potential costs associated with a relaxing of the TRIG bars. Specifically, several members of Congress worried about the implications of weakening a counterterrorism policy, as no elected official wanted to be associated with a change of law that could presumably enable another terrorist attack on American soil.[31] In any case, the potential political costs of passing such a bill were enough to warrant suspicion from both Republicans and Democrats. Specifically, a reform that enabled judicial review of the exemption waivers would restrict DHS' counterterrorism efforts by establishing legal precedent, potentially paving the way for dangerous individuals to enter the country (Kyl in US Congress, 2006b, 4942). Generally, broad restrictions that ensured that only the most obvious cases could be exempted were believed to be less risky from a national security perspective (Scharfen in US Congress, 2006c, 107). Similarly, in working group negotiations, DHS officials were especially resistant to any reform that would limit the DHS' authority in refugee and asylum adjudication.[32] Similarly, Congress rejected any provision that would assume the presumption of innocence for applicants, thereby forcing adjudicators to provide evidence on an individual basis that the applicant is a threat, as being overly burdensome for an administrative procedure and bearing potentially dangerous consequences.[33] This was due in a large part to the entanglement of rebel groups with terrorist activities and organizations that frequently evolved over the course of prolonged conflicts, and the extreme difficulty intelligence agencies had in determining

with clear certainty that a particular group did not pose any threat to the United States.[34]

Despite the potential for increased administrative costs associated with the creation and implementation of a safeguard across several independent agencies, policymakers considered the benefits of such a reform. Firstly, the process of determining TRIG waivers and for keeping applicants on hold under the previous provision was indeed costly in terms of time and budget resources. This was a particular concern of several members of Congress who were responsible for managing the government's budget and appropriations for UNHCR. By expanding the grounds on which waivers could be issued beyond the restrictions established by the REAL ID Act, the waivers could be applied as necessary across more cases. Consequently, DoS and DHS could begin to process the hundreds of cases that had been stuck for years on hold because certain groups could not previously be considered for waivers. The adjudication of cases on hold would greatly reduce administrative costs, while addressing some of the humanitarian concerns expressed by the resettlement community. Specifically, the streamlining of group- and situation-based exemptions promised to reduce future costs by improving efficiency and helping jump-start the US Refugee Admissions Program, which had been paralyzed by the uncertainty created by TRIG determinations. This would also create more clarity about TRIG and how waivers would be applied in the future so that UNHCR and government officials could focus their limited resources more on cases with a higher likelihood of success, and less on interagency negotiations.

Additionally, a reform could address the concerns of the different involved governmental departments, while preserving the ultimate discretion of the Secretaries of Defense and Homeland Security and the Attorney General. This exclusive discretion according to Senator Kyl reduced the risk of judicial interventions and prevented "classified information that would be compromised if litigated in open courts" as well as "sensitive judgements about which terrorist groups are more dangerous than others". By restricting this authority to issue waivers to the executive, the Senator argued, it "allow(ed) the Government to take the common-sense approach of treating different groups differently based on how violent they are and how much of a threat they pose to the United States" based on a "full range of information that is available to the State Department, Homeland Security, and to intelligence agencies" (Kyl in US Congress, 2007d, 15876). Consequently, each department could apply an expanded exemption authority as it deemed appropriate, reducing the potential for interagency disagreements. Accordingly, DHS could continue to limit the use of waivers in asylum adjudication, whereas DoS and DoD could more effectively apply waivers for individuals and groups of strategic interest. In addition, the possibility to exclude certain groups entirely from the Tier III classification would prevent the need for exemption waivers in several instances, and relieve those who were never intended to be barred by TRIG in the first place. The new waiver authority could therefore undo damages caused by removing any "legal ambiguity" about the status of high-interest groups, while preventing additional reputational damage to relations with foreign governments and strategic allies (ibid., 15877).

In addition, a more flexible TRIG provision was believed to have several military and counterterrorism-related advantages. An automatic preclusion of several historical allies from classification as Tier III terrorist organizations would demonstrate a return to normalcy in the United States' alliance with foreign rebel groups. This would reduce the risk that local populations of strategic concern would feel disenfranchised by US foreign policy objectives, which could be used to advance sympathies for terrorists. In addition, a reform could send a second message to hostile groups by reaffirming the United States' commitment to fighting support for terrorism. By excluding individuals who voluntarily join or support Tier I and II groups from waivers, the United States would actively de-incentivize foreigners abroad from associating with these groups. Consequently, terrorist groups would become "radioactive in the foreign countries where they are based" undermining their efforts to "recruit members or to carry out terrorist attacks" (Kyl in US Congress, 2007d, 15876). The passage of such a reform, therefore, could also be utilized to clearly exclude the Taliban or al-Qaeda and their supporters, to ensure their inadmissibility and to reassure concerned members of Congress (ibid., 15877). Hence, the strategic benefits of a reform to TRIG for US counterterrorism efforts were seen as two-fold in that it would not only protect the US borders from terrorist infiltration but would also advance the United States' long-term national security objectives.

Finally, a bipartisan group of lawmakers led by Senator Leahy and Senator Kyl concluded that the costs associated with expanded waiver provisions were outweighed by the strategic benefits of a flexible, functioning refugee resettlement program. Not only could Congress applaud its efforts to settle the humanitarian issues created by TRIG, but it could do so without appearing weak against terrorism in post-9/11 America. Rather, Senator Kyl argued that it was a "reasonable compromise" that guaranteed to keep national security at the forefront of refugee and asylum policies" (Kyl in US Congress, 2007d, 15877). Although the proposed solution was not an ideal solution for refugee and asylum advocates, they believed it could provide the groundwork for future, more far-reaching safeguards for refugees and asylum seekers, and thus, they commended Congress on its initiative.

Outcome

In the end, Congress adopted the Consolidated Appropriations Act of 2008 (CAA08) including Section 691, titled "Relief for Iraqi, Montagnards, Hmong, and other refugees who do not pose a threat to the United States", otherwise known as the Leahy–Kyl Amendment, which was signed into law by President George W. Bush in December 2007 (US Congress, 2008). The Leahy–Kyl Amendment consisted of two key parts and expanded on the preexisting waiver authorities without drastically reforming TRIG. Although the ultimate discretionary authority of the Secretaries of State and of Homeland Security was preserved and no additional access to judicial appeals was given, the safeguards that were enabled by the CAA08 were an important advancement for refugee resettlement.[35]

Firstly, Section 691a of the CAA08 expanded the authority to issue waivers, allowing the Secretaries to determine some groups to be admissible that had previously been inadmissible. Under the new law, members and representatives of groups that had been declared Tier III terrorist organizations, persons who have engaged in, broadly defined, terrorist activities of Tier III groups, and persons who unknowingly engaged in terrorist activity were eligible for waivers.[36] This authority provided the basis for a series of situation- and group-based exemptions that would be issued over the following years. Despite these waivers, however, Section 691a did not declassify these groups as terrorist organizations, rather, it merely provided for exemptions for supporting said groups that would ordinarily trigger inadmissibility grounds. In contrast to the group-based waivers in Section 691a, Section 691b classified eight specific organizations as *not* terrorist organizations, thereby providing automatic relief for several high priority groups. Specifically, allied groups from Vietnam, Cuba, and Tibet[37] as well as several ethnic Burmese groups[38] were protected by Section 691b, building on the *ad hoc* protections that had previously been issued by DoS and DHS.[39] As a result, TRIG could not apply to anyone who had been a member of or who had materially supported any of these groups, so long as they were not inadmissible on any other grounds. For example, individuals could still be inadmissible if officials believed they were likely to commit terrorist acts in the future, or if they have actively participated in attacks against democratic governments or civilians. This improved flexibility nonetheless enabled the adjudication of resettlement applications of many refugees in protracted crises to resume.

As it was necessary to find a compromise in order for it to be accepted, the Leahy–Kyl Amendment had several flaws that prevented it from being a very strong safeguard. In addition to the discretionary authority of the Secretaries, the amendment did not provide clear guidance on how the waivers were to be applied, leaving the exemption process vulnerable to delays and interagency discrepancies (Hughes, 2009, 49–50). While the new safeguard increased the amount of flexibility available to the Secretaries, it did not provide for increased accountability as it preserved the Secretaries authority to determine the degree to which individuals should be made aware of whether they are being considered for TRIG bars or potential waivers. As a result, applicants may be unable to provide evidence in their defense or clarify details about circumstances in which the TRIG bars could be found applicable. Lastly, the law enabled the Secretaries to withdraw any exemption without warning (US Congress, 2008, Sec. 212(d)(3)(B)(i)), therefore leaving the safeguard vulnerable to the discretion of the politics of an administration at any given time. Together, these limitations meant that UNHCR and the resettlement community continued prioritizing less complicated groups when recommending cases for the US Refugee Admissions Program or when lobbying for new waivers.[40]

Whereas the expansion of waivers nonetheless proved fruitful for refugees in the US resettlement program, asylum seekers received significantly fewer exemptions. Given the DHS' almost exclusive authority over the adjudication of asylum applications, only 657 exemptions were granted in cases of asylum seekers

arriving at the border as of February 2018 (Data on file with the authors). In line with DHS' positioning, the Board of Immigration Appeals (BIA) has maintained very strict interpretations of the law blocking any automatic, or statutory, limitations to its application. As recently as 2018, the BIA refused to recognize *de minimis* support as a defense against the TRIG bars for asylum seekers (US Department of Justice, 2018).

In spite of these flaws, 23,034 exemptions have been granted as of March 31, 2018; many of which resulted from the situation- and group-based waivers enabled by the 2008 provision (Data on file with the authors). The Leahy–Kyl Amendment was therefore a considerable improvement on previous TRIG regulations, and paved the way for waivers to be granted on behalf of thousands of refugees over the coming years.

The safeguards during Obama's and Trump's presidencies

Despite several delays and some notable resistance,[41] the Obama administration utilized the newly extended waiver authority to expand protections against TRIG. Specifically, eight situation- and fifteen group-based waivers, some of which include several different groups, have been issued for applicants who otherwise meet all admission requirements. Among the most important situation-based waivers were exemptions for "material support", "solicitation", and "military-type training" while under duress, as well as the voluntary provision of *de minimis* support to members of Tier III groups (referred to as "certain limited" and "insignificant" material support). Similarly, waivers were created for individuals who voluntarily provided medical care; solicited funds, resources, or individuals for membership in a Tier III organization; or for those who participated in the Iraqi uprising against the government of Saddam Hussein in Iraq from March 1 through April 5, 1991. Additionally, waivers were made available for individuals who had voluntarily provided material support for or associated with several groups despite their classification by the overly broad Tier III definition.[42]

Although TRIG rarely became a public issue after President Donald Trump came into office in January 2017, his administration made very clear its intentions to significantly increase security measures and reduce immigration across the board, including for refugees and asylum seekers. Despite initially keeping the tradition of including advocates from the resettlement community in TRIG working group negotiations, which had continued throughout the Obama administration, representatives from the NGO community were informed in a working group meeting in February 2018 that they would no longer be invited to future meetings.[43] Moreover, and more importantly, there is evidence that the number of TRIG exemptions granted to refugees in connection with the US resettlement program significantly declined after Trump took office. Although the Obama administration had not always been receptive to using its exemption authority, the majority of the waivers that had eventually been created since the adoption of the Leahy–Kyl Amendment were issued between 2008 and 2016, while significantly fewer waivers were issued after 2017.[44]

The decline in the issuance of waivers is, among other things, a direct consequence of the safeguard's discretionary nature, and is reflective of the Trump administration's broader immigration policy. In spite of this, perhaps the biggest threat to the safeguard has been the cumulative effect of Trump's so-called "refugee" and "travel bans" (Executive Orders 13769 and 13780, White House 2017 and 2017b). Whereas Section 7 of EO 13780 ordered a review of the TRIG waivers, the rest of the order, which attempted to restore the travel restrictions that had been blocked by courts ("Travel Ban 2.0"), predominantly overshadowed it (White House, 2017b). Although the review ultimately rejected withdrawing existing waivers, and despite several litigation efforts to limit the impact of Trump's immigration restrictions, resettlement under the US resettlement program significantly declined during Trump's tenure of office. Between 2017 and 2020, approximately 118,063 refugees were resettled in the United States, in comparison to the 84,994 refugee arrivals during the final year of the Obama administration alone (Migration Policy Institute, 2021). Consequently, advocates within the resettlement community feared that TRIG exemptions have become a secondary issue, because so few refugees and asylum seekers have been admitted at all under Trump.[45]

Nonetheless, it is noteworthy that despite the Trump administration's efforts to undermine US refugee and asylum policies generally, the reforms established by the Leahy–Kyl Amendment remained in place. Despite issuing a review of the waiver authority, the Trump administration did not revoke the existing waivers. In fact, on a few occasions the Trump administration issued waivers for additional groups and individuals who had not been granted exemptions by previous administrations.[46] Although it is not public as to how many individuals have been exempted by waivers since 2018, these actions nonetheless suggest that even the Trump administration has determined the safeguard to be of strategic value.

Conclusion

The Leahy–Kyl Amendment to the CAA08 has reformed the overly broad application of the existing TRIG provisions that had curtailed foreigners' right to seek asylum and access to resettlement in the United States. The amendment provided the framework for future waivers, including a *duress* and *de minimis* exemption, which better protected individuals who had been falsely associated with terrorism and therefore excluded from protection in the United States. Specifically, the amendment expanded the authority of the Secretaries of State and Homeland Security in consultation with the Attorney General to exempt the application of TRIG for certain groups or individuals, and provided for automatic relief for eight groups including former allies and Burmese refugees who had been severely affected by the TRIG bars, which had been expanded following 9/11. Through the application of these exemptions, the United States was able to restore much of its refugee resettlement program, which had been paralyzed by the previous expansion of the application of TRIG. Although the law made a significant improvement after the expansion of TRIG by the 2001 PATRIOT Act and the 2005 REAL

ID Act, it preserved the discretionary authority of the respective Secretaries, thereby limiting the effectiveness of the provisions. The amendment survived the Trump presidency, despite the administration's openly exclusionist immigration and humanitarian policies.

The process leading up to the Leahy–Kyl Amendment reflects the strategic learning mechanism. Although attempts to shame and morally persuade members of Congress and government officials could be observed, their effect was limited. Yet, due to the complex legal nature of the TRIG bars, advocates from the resettlement community with valuable expertise on the issue enjoyed considerable access to key policymakers in Congress and cabinet officials in the Bush administration via the TRIG interagency working group. Eventually, these advocates, with the support of State Department and Department of Defense officials and influential members of Congress, convinced other key actors in Congress and in the administration of the long-term strategic benefits of a reform that could limit the overly broad application of TRIG bars. Specifically, the Leahy–Kyl Amendment reformed the inflexibility of the previous provisions, which enabled forthcoming administrations to limit the application of TRIG and respond to crises as they deemed appropriate. In sum, thus, safeguards were not enacted because US policymakers considered it to be their moral duty to give *bona fide* refugees a fair chance to apply for resettlement in the United States; neither were policymakers coerced to introduce safeguards, be it through shaming, litigation, or sanctions from foreign governments. Rather, the reforms enacted were the result of a rational cost–benefit analysis and driven by the desire to make resettlement provisions more efficient and to protect key foreign and defense policy interests.

Despite its notable limitations, the provisions in the Leahy–Kyl Amendment have paved the way for several waivers on behalf of refugees and asylum seekers who had been arbitrarily barred from international protection. Although the reluctance during the Trump administration to issue waivers is perhaps a natural consequence of the executive's discretion on the issue, the safeguard is not necessarily doomed to fail. Rather, the potential for future administrations to recognize the strategic benefits of protecting the right to seek asylum in the context of the US resettlement program, as several administrations have done, might help the safeguard survive even administrations that have little appreciation for the right to seek asylum as such.

Notes

1 Foreign Terrorist Organizations (Tier I) include groups that expressly threaten the security of the US such as Hamas, al-Qaeda, and the Islamic State of Iraq and the Levant (ISIL). In contrast, organizations on the Terrorist Exclusion List (Tier II) include groups that are nonetheless excluded for immigration purposes due to the nature of their terrorist activities, even if they do not explicitly target the US or its nationals, for example the Red Brigades (BR-PCC), the New People's Army (NPA), and the Lord's Resistance Army (LRA).
2 A *bona fide* refugee is someone who is genuinely a refugee, meeting all the necessary criteria under international law without fraud or deceit.

3 See specifically the 1990 Immigration Act, the 1996 Antiterrorism and Effective Death Penalty Act and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.
4 Interview with Melanie Nezer, Senior Vice President, HIAS, Washington D.C., 1 April 2019.
5 The UNHCR is particularly involved in the recognition of refugee status according to international law and therefore makes the majority of referrals for resettlement.
6 Interview with Larry Yungk, former Senior Resettlement Officer, UNHCR, Washington D.C., 2 April 2019; interview with Melanie Nezer.
7 Appeals are heard before the BIA.
8 See for example comments by Senators Jon Kyl, John Cornyn, and Tom Coburn (US Congress, 2005c).
9 Interview with Erol Kekic, Director of the Immigration and Refugee Program, Church World Service, 21 March 2019.
10 Interview with Larry Yungk.
11 See for example editorials in the *Washington Post* (2006) and in the *New York Times* (2006a, 2006b).
12 See for example: Trammel (2006), Barton (2006), and Ceaser (2006).
13 Interview with Kevin Appleby, former Director of Migration and Public Affairs, US Council of Bishops, Washington D.C., 25 March 2019; Interview with Melanie Nezer.
14 Interview with Larry Yungk.
15 Interview with Kevin Appleby.
16 Interview with Melanie Nezer.
17 Cosponsors of H.R. 5918 included 12 Democrats and nine Republicans.
18 Cosponsors of S. 4117 included three Republicans and four Democrats.
19 Interview with Larry Yungk.
20 Interview with Melanie Nezer.
21 Interview with Larry Yungk.
22 Interview with Kevin Appleby.
23 Interview with Melanie Nezer.
24 Ibid.
25 See for example: "Oversight Hearing: U.S. Refugee Admissions and Policy" (27 September 2006); "The Plight of Iraqi Refugees" (16 January 2007); "Comprehensive Immigration Reform" (Senate Judiciary Committee, 28 February 2007); "Casualties of War: Child Soldiers and the Law"(24 April 2007); "The 'Material Support' Bar: Denying Refuge to the Persecuted?" (19 September 2007).
26 Assistant Secretary, Bureau of PRM, DoS.
27 Regional Representative for the United States of America and the Caribbean, UNHCR.
28 Vice Chair of RCUSA, the largest conglomerate of resettlement partners in the US.
29 See for example statements by Andrew McCarthy, a Senior Fellow from the Foundation for the Defense of Democracies and Daniel Meron, the Principal Deputy Assistant Attorney General of the DoJ (US Congress, 2005c, 14–15).
30 See, for example, the witness testimonies of "Sami Al-Obiedy" (pseudonym), former translator for the US Armed Forces; "John" (pseudonym), former truck driver (sub-contractor) for the US Armed Forces; and Farqad Moshili, a former employee of the Coalition Provisional Authority.
31 Interview with Larry Yungk.
32 Interview with Larry Yungk.
33 This is evident by the fact that this was the core addition to the previously failed Senate Amendment 4117 of 2006.
34 Interview with Melanie Nezer.
35 Although the provision also expanded the authority for waivers to be issued on behalf of asylum seekers, it would only rarely be implemented due to the DHS' discretion.

36 Under the new law, an individual may *not* be exempted if he or she is "expected to engage in future terrorism, is a member or representative of a Tier I or II group, voluntarily and knowingly engaged in terrorist activity or endorsed terrorism on behalf of a Tier I or II group, or has voluntarily and knowingly received military-type training from a Tier I or II group" (Kyl in US Congress, 2007d, 15875).
37 Specifically, Montagnards, Cuban Alzados, Tibetan Mustangs, and the Hmong.
38 Specifically, Karen National Union/Karen National Liberation Army (KNU/KNLA) Arakan Liberation Party (ALP), Kayan New Land Party (KNLP), and the Chin National League for Democracy (CNLD).
39 In addition to the original eight groups, Congress added the African National Congress in 2008, and the Rwandan Patriotic Front and the Rwandan Patriotic Army in 2018 to the list of groups to be excluded from Tier III considerations.
40 Interview with Melanie Nezer.
41 Interview with Melanie Nezer.
42 As of December 1, 2020, group-based waivers were created for the following organizations: All Burma Students' Democratic Front; All India Sikh Students Federation-Bittu Faction; "Certain Burmese groups"; Democratic Movement for the Liberation of the Eritrean Kunama; Eritrean Liberation Front; Ethiopia People's Revolutionary Party; Farabundo Marti National Liberation Front; Iraqi National Congress; Kurdish Democratic Party; Patriotic Union of Kurdistan; Kosovo Liberation Army; "Lebanese Forces or Kataeb militias"; Nationalist Republican Alliance; Oromo Liberation Front; Tigray People's Liberation Front; African National Congress; Rwandan Patriotic Front/Rwandan Patriotic Army (US Citizenship and Immigration Services, 2019).
43 Interview with Melanie Nezer.
44 Ibid.
45 Interview with Kevin Appleby.
46 In 2018, Trump approved an amendment from Congress that excluded the Rwandan Patriotic Front and the Rwandan Patriotic Army from Tier III designation in 2018 (US Congress, 2018, Sec. 1291). Similarly, Secretary of State Mike Pompeo issued waivers in 2019 for individuals who had been associated with or who had voluntarily supported the Lebanese Forces militias or the Kataeb militias during the Lebanese Civil War of 1975–1990 (US Citizenship and Immigration Services, 2019).

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7 Foreign surveillance and the right to privacy

Introduction[1]

Foreign surveillance has a long history, not only in the United States. With technological progress and especially digitalization, however, capacities to comb through vast amounts of data of foreign citizens to filter out ostensibly security-relevant information have risen dramatically. Furthermore, 9/11 ignited a debate about intelligence failures in various US agencies that had not "connected the dots", thus providing additional incentives to further expand and make use of such new capacities. Against this background, the United States has developed various ways of getting access to large quantities of data of foreign citizens not residing in the United States. It has obtained telephone records from US telecommunications providers. It has compelled US technology companies to grant access to communications of foreign customers that match specified selectors. It has also vacuumed off data directly from the fiber-optic cables through which Internet traffic flows. Not only were foreign leaders affected by US foreign surveillance, but also countless individuals whose data was combed through in search for information that could be relevant for counterterrorism purposes. The entire scope of US mass surveillance likely remains unknown. Importantly, however, and in contrast to the other case studies covered in this book in which rights violations were concentrated against individuals from specific countries or regions, the reach of the United States' foreign surveillance operations was global.

Whereas foreign surveillance *per se* is not prohibited by international law, warrantless mass surveillance is widely considered to be a violation of the right to privacy. As per the Universal Declaration of Human Rights, "(n)o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence (…). Everyone has the right to the protection of the law against such interference" (UN General Assembly, 1948, Art. 12). The International Covenant on Civil and Political Rights reiterates the statement, rendering respect of the right to privacy obligatory for all signatory states (UN General Assembly, 1966, Art. 17). In recent years, UN bodies have issued more specific guidance on what privacy means in the digital age. UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein, for instance, has defined privacy as the "presumption that individuals should have an area of autonomous development, interaction and liberty, a

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'private sphere' with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals". He has also made clear that states must grant the same privacy protections to foreigners, even if they reside outside their territory, that they grant to their nationals (UN General Assembly, 2018, 3). Moreover, interference with the right to privacy must be guided by the principles of legality, necessity, and proportionality (ibid., 4).

Prior to 2014, the legal basis of US foreign surveillance did not provide for privacy safeguards for non-US persons beyond US territory. This applies both to laws and regulations dating back to the 1970s and 1980s and to those enacted and amended in the 2000s. In the mid-2000s, a scandal revealed domestic mass surveillance after the 9/11 terrorist attacks (Risen and Lichtblau, 2005). Yet, the heightened attention to the US government's indiscriminate surveillance practices did not lead to the extension of protections for non-US persons (i.e. non-US citizens who do not permanently reside in the United States). This changed in 2014, when President Barack Obama issued Presidential Policy Directive 28 – Signals Intelligence Activities (PPD-28), which for the first time explicitly acknowledged that US foreign surveillance operations needed to take foreigners' privacy concerns into account (White House, 2014a). Two years later, in 2016, the US Department of Commerce agreed to the EU–US Privacy Shield Framework Principles, which provided for more specific privacy safeguards for EU citizens not residing in the US (US Department of Commerce, 2016a and 2016b). Meanwhile, PPD-28 has been criticized for being vague, whereas the Privacy Shield has been declared invalid by the CJEU in 2020, resulting in new talks between the United States and the EU about stronger provisions. Nonetheless, both safeguards are important documents that signal a public commitment on the part of the United States that foreign surveillance operations must not ignore foreigners' privacy concerns.

We argue in this chapter that the emergence of privacy safeguards in US foreign surveillance can be explained with the material sanctions variant of the coercion mechanism. As we will show below, both PPD-28 and the Privacy Shield have been direct responses by the US government to sanctions, and the threat thereof, applied by US technology companies whose data on non-US persons was vital for US foreign surveillance. In the wake of incriminating revelations about the NSA operations, major US technology companies, including Google, Microsoft, Facebook, and Yahoo, that possessed the data of foreign citizens that the NSA had obtained access to, came under pressure from foreign customers who turned to non-US competitors. To coerce the US government into publicly recognizing the privacy concerns of non-US citizens abroad, the companies not only threatened to store data of foreign customers on servers abroad, but also took steps to strengthen their encryption capabilities. In response, the US government, which depended on access to the data possessed by the tech companies, agreed to issue PPD-28 to publicly signal that it cared about the privacy concern of foreigners beyond US borders. Subsequently, the CJEU issued a judgment that invalidated the Safe Harbor Agreement between the US and the EU that many US companies had used to transfer data of EU citizens to the United States, citing a lack of adequate

privacy protections in the United States. Once more, the US tech companies turned to the government, and pressured the United States to strengthen the safeguards so that they could satisfy the concerns of the CJEU. The US government eventually conceded and negotiated the EU–US Privacy Shield Framework Principles, once again in direct response to the pressure exerted by powerful US tech companies.

This chapter is structured as follows. The next section traces the process leading up to the enactment of PPD-28 and shows that pressure from US tech companies has been decisive. The following section traces the process leading up to the agreement on the Privacy Shield Framework Privacy between the US and the EU, showing that pressure from tech companies whose freedom of action had been critically constrained by the CJEU has again been key. Subsequently, the chapter briefly centers on the fate of the privacy safeguards during the Trump presidency, while the conclusion summarizes the findings.

Toward Presidential Policy Directive 28 – Signals Intelligence Activities

Extraterritorial human rights violations

At the time of the revelations by Edward Snowden in mid-2013, US foreign surveillance was based on a number of different legal foundations, most notably the Foreign Intelligence Surveillance Act (FISA), the FISA Amendments Act, EO 12333 – United States Intelligence Activities, and the USA PATRIOT Act. All of them contained privacy safeguards for US citizens or residents; however, none of them provided for meaningful privacy safeguards for non-US persons. Enacted in 1978, FISA established rules about the authorization of electronic surveillance for the acquisition of foreign intelligence. It provided for various privacy safeguards for US persons, namely US citizens and aliens lawfully admitted for permanent residence in the United States. FISA stipulated, among others, that the Attorney General could only authorize electronic surveillance without a court order, if there was "no substantial likelihood that the surveillance will acquire content of any communication to which a United States person is a party" (US Congress, 1978, 5). It also prescribed minimization procedures that limit the collection, retention, and dissemination of information on US persons (ibid., 3). Regarding non-US persons, FISA technically created the possibility of bringing civil action against US government officials who have violated specified FISA rules (ibid., 14). However, given that it is generally out of reach for a non-US person to be granted standing and be admitted before an ordinary court, this possibility was merely theoretical (European Commission, 2016, 27).

EO 12333 had been issued by President Ronald Reagan in 1981[2] and set out what US agencies and departments involved in the collection and processing of foreign intelligence were permitted to do. It determined, rather generally, that the collection of

> information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents (…) will be pursued in a

> (…) manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded.
>
> (White House, 1981, 8)

More specific privacy safeguards were only established for US citizens and US residents. Accordingly, intelligence agencies were to "use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad" (ibid., 9). EO 12333 also instructed US agencies and departments to exchange information among each other "with full consideration of the rights of United States persons" (ibid., 1). Comparable protections for non-US persons were not included.

In the immediate aftermath of 9/11, Congress enacted the USA PATRIOT Act, which, besides many other provisions, contained Section 215, titled "Access to Records and Other Items under the Foreign Intelligence Surveillance Act". Section 215 permitted the Federal Bureau of Investigation Director, or a designee of the Director, to make applications to the Foreign Intelligence Surveillance Court (FISC) to order private companies to hand over "tangible things (including books, records, papers, documents, and other items) that are relevant for an investigation to protect against international terrorism or clandestine intelligence activities". Like EO 12333, Section 215 of the USA PATRIOT Act provided for safeguards for US persons but not for non-US persons. Specifically, it stipulated that applications to the FISC "shall specify that the records concerned are sought for an authorized investigation conducted (…) to obtain foreign intelligence information not concerning a United States person" (US Congress, 2001, Sec. 215).

Furthermore, in 2008, Congress enacted the FISA Amendments Act, which included Section 702, titled "Procedures for Targeting Certain Persons outside the United States other than United States Persons". Section 702 licensed the Attorney General and the Director of National Intelligence (DNI) to "authorize (…) the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information". The FISA Amendments Act also contained specific privacy safeguards for US persons. It explicitly prohibited to "intentionally target any person known at the time of acquisition to be located in the United States". It also forbade to "intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States" (US Congress, 2008, 1). Yet, the FISA Amendments Act did not specify any privacy safeguards for non-US persons who may be negatively affected by US foreign surveillance.

It is against this background of lacking privacy safeguards for non-US persons, or very weak ones at best, that the NSA built up extensive foreign surveillance capacities in the aftermath of the 9/11 terror attacks. The NSA had obviously engaged in the surveillance of foreigners beyond US territory already before 9/11, yet, it was after 9/11 that the agency turned to mass surveillance and significantly expanded its programs (Edgar, 2017). At that time, two developments converged. On the one hand, there was a widely shared assumption in

the intelligence community and among public officials that improved foreign surveillance capacities were indispensable to acquire sufficient information on foreigners plotting against the United States. On the other hand, advancements in computer technology had vastly enhanced the capacities of intelligence agencies to gather valuable data (White House, 2014b). The NSA also got information on foreign citizens from other governments (Greenwald, 2013, 118–26). However, obtaining information from US companies that were in possession of large amounts of data of non-US persons became essential (Rozenshtein, 2018, 112), with the NSA "piggyback(ing) on corporate capabilities" (Schneier, 2015, 82). In fact, access to data of US technology companies became so important that their relationship with the US government has been described as a "public-private surveillance partnership" (ibid., 78), and as one in which the companies were being used as "tools of national intelligence" (Farrell and Newman, 2016, 131).

Three surveillance programs stood out particularly. First, based on Section 215 of the USA PATRIOT Act, the NSA obtained the telephone records of Verizon and other major US telecommunications providers. Based on orders issued by the FISC, the NSA attained bulk telephony metadata both on calls within the US and on calls between the US and foreign countries. As a consequence, while the NSA was not formally given access to the content of such calls, it was able to collect information on the numbers of the parties to the calls, their date and time and their duration (Ackerman, 2013; Greenwald, 2013).

Second, the NSA developed PRISM,[3] which was based on Section 702 of FISA and relied on broad surveillance orders. PRISM allowed the NSA direct access to communications "to" and "from" targeted selectors stored on or transferred through the servers of major technology companies including Microsoft, Yahoo, Google, Facebook, AOL, Skype, YouTube, and Apple, that were legally forced to hand over data on selected individuals. PRISM did not aim at metadata but at the content of communications, including emails, chats, and videos. Targets of PRISM were persons outside the United States and persons within the United States who communicated with persons outside the United States. Because US technology companies frequently routed communications between persons who are located outside the United States through servers located in the United States, access to the companies' US servers played a key role in US foreign surveillance (Gellman and Poitras, 2013; Greenwald and McAskill, 2013).

Third, again relying on section 702 of FISA, the NSA also undertook so-called upstream collection. Upstream collection implies that communication is tapped not from the servers of Internet companies (as in PRISM or downstream collection) but from the fiber-optic cables that form the Internet backbone and through which Internet traffic travels. To be able to do so, the NSA relied on the "compelled assistance" of US telecommunications providers like AT&T and Verizon, and installed equipment on their infrastructure that enabled it to extract data. Once in the possession of the data, the NSA could then search the data for communication "to", "from", and "about" specified selectors, while filtering out purely domestic communications (Gorski and Toomey, 2016).

Hence, foreign surveillance, though by no means a novel exercise, experienced a great boost after 9/11. Due to its global reach, it violated the right to privacy of countless foreign citizens outside the United States. It is important to remember, as mentioned in the introduction, that foreign surveillance is not principally prohibited by international law. If foreign surveillance is targeted and if there is a legitimate reason, international law allows the collection of information on foreign citizens beyond a state's borders by its intelligence agencies (Bignami and Resta, 2018, 359–65). Yet, even though the full extent of US foreign surveillance is not known to this day, it is hard to negate that the scope of US foreign surveillance was beyond what was permitted by international law – a position supported, among others, by the UN Human Rights Committee (2014, 9–10), which used its periodic review on the United States' implementation of the International Covenant on Political and Civil Rights in 2014 to point to the "adverse impact on individuals' right to privacy" of US foreign surveillance.

Intervention

Little of this was known to the public, however, until NSA contractor Edward Snowden felt the need to become a whistleblower and inform the public about the extent of NSA surveillance activities. Snowden had gained access to internal NSA records that documented the magnitude of NSA surveillance, both domestic and foreign, and contacted filmmaker and journalist Laura Poitras and Glenn Greenwald from the *Guardian*, who would then involve Barton Gellman from the *Washington Post* to break the story. The first articles appeared in the two newspapers in early June 2013 and described how the FISA court had compelled Verizon to hand over metadata of all phone calls Americans had made within the United States and with contacts abroad (Greenwald, 2013) and how the NSA had gained access to customer data from the servers of US technology companies (Gellman and Poitras, 2013; Greenwald and MacAskill, 2013). More articles on various aspects of NSA domestic and foreign surveillance followed in the two newspapers over the following months (Electronic Frontier Foundation, 2021).

The leaks triggered a great deal of pushback from a variety of different actors. Most immediately, the Snowden leaks sparked efforts to build a global shaming campaign. While the *Guardian* and the *Washington Post* published more and more articles, other newspapers, NGOs, UN and EU bodies took up the issue as well and publicly assailed the United States for its operations. Foreign newspapers, like for instance the Indian *The Hindu*, harshly criticized the NSA for spying on Indian citizens, political leaders, and scientists, using the slogan "Uncle Sam's Watching Us" (Saxena, 2013). Amnesty International started a campaign called "Log Off, Mr. President" (Amnesty International, 2015), while the Chair of the European Parliament's Foreign Affairs Committee proclaimed that the United States had "lost all balance – George Orwell is nothing by comparison" (Abel, 2018, 405). However, while the topic was in the spotlight for a while, shaming failed to effectively corner the US government. According to an Amnesty International poll, foreign mass surveillance was not an issue US citizens cared

much about, or opposed, in significant numbers, with only 35% of respondents stating that the US government "(s)hould not intercept, store and analyse internet use and mobile communications" of "people living in other countries" (Amnesty International, 2015). Moreover, the US government was able to portray digital surveillance as necessary to spot foreign terrorists (White House, 2014b), while officials and lawmakers deflected attention to Snowden and his ostensibly treacherous behavior, calling him the "greatest traitor in American history" and suggesting that he had cooperated with Russia (Knight, 2014).

Actors who cared about privacy infringements in the context of foreign surveillance not only experimented with naming and shaming, however, but also made both moral and strategic arguments against foreign mass surveillance to convince government officials that such practices were either not in line with the values the United States stood for or not in the US's own interest. Putting forth both moral and strategic arguments, Senator Christopher Murphy (D), Congressman Mario Diaz-Balart (R), and Congressman Gregory W. Meeks (D), for example, sent a public letter to President Barack Obama in which they underlined the importance that US foreign surveillance "respects our (…) fundamental values", while also warning that "recent revelations threaten to undermine transatlantic cooperation in critical areas such as counterterrorism and trade and investment negotiations" (Murphy et al., 2014). However, there is little evidence that moral arguments resonated with US policymakers, especially as moral arguments had a hard time competing with countervailing security concerns. Meanwhile, actors who made strategic arguments in favor of privacy safeguards for non-US persons failed to draw up a credible scenario in which establishing effective privacy safeguards for foreigners would generate higher payoffs than carrying on without.

There were also several efforts to sue the NSA, all of which eventually fell short of coercing the US into producing relevant safeguards. In Austria, the Office of Public Prosecutor in Vienna initiated investigations into alleged NSA surveillance of Austrian targets based on a complaint submitted by a Green member of parliament and by the Federal Office for the Protection of the Constitution and Counterterrorism (Schmid, 2014). In Switzerland, the Federal Prosecutor's office opened investigations into the NSA's building up of eavesdropping infrastructure in the country, citing prohibited acts for a foreign state (Sperlich, 2013). In France, the Federal Prosecutor's office commenced criminal proceedings against the NSA in relation to suspicion of violations of French privacy law, including violation of the right to a private life and unlawful gathering of personal data, after two human rights groups, the International Federation for Human Rights and the Human Rights League, had filed a complaint (Brändle, 2013). There is no evidence, though, that these developments exerted substantial pressure on the US government, especially as the government was not handed out a judgment by a foreign court that would have made a response necessary. What is more, suing the NSA or the US government before a US court was not a feasible option for non-US persons in light of the height of the hurdles to establish standing.[4]

Finally, some states whose citizens were affected by large-scale US foreign surveillance attempted to force the US government into stepping up privacy

protections for foreigners by applying or threatening sanctions, but did not succeed. Brazil abandoned plans to close a multi-billion dollar deal with Boeing for fighter jets, turning instead to Belgian company Saab, presumable over worries about NSA spying (Klein et al., 2016, 20). The European Commission's Vice-President Viviane Reding threatened to suspend negotiations of the Transatlantic Trade and Investment Partnership, citing concerns about spying on EU negotiators (Abel, 2018, 405). Brazil and the EU also decided to build their own submarine cable, so as to no longer have to route their transoceanic Internet traffic through cables that pass through the United States (Donohue, 2015, 18). Yet, overall reactions by other states tended to be half-hearted and failed to create sufficient pressure that would have compelled the United States to introduce safeguards that would shield non-US citizens against bulk surveillance. Many foreign governments knew that they were sitting in glass houses as they also engaged in large-scale foreign surveillance and therefore had no interest in making a great fuss about such practices. Moreover, many foreign governments depended on good relations with the United States generally or with regard to cooperation in the realm of counterterrorism specifically, which made applying sanctions against the United States an unattractive policy choice (Pfister et al., 2013; Severson, 2015, 490-2). Germany's domestic intelligence agency, for instance, had secretly cooperated with the NSA and had swapped access to data it had collected against the NSA's spy software XKeyscore (Biermann and Musharbash, 2015). Similarly, the Danish Defense Intelligence Service had allowed the NSA to access the underwater cables in its territorial waters through which Internet traffic between the United States and Europe flowed in exchange for intelligence and "political weight in Washington" (Seibt, 2021).

Whereas the US government had been mostly immune to sanctions or the threat thereof by foreign governments, the US technology companies who were (in) voluntary accomplices to NSA operations proved to be significantly more vulnerable to such coercive measures. Following the leaks that exposed how Facebook, Google, Yahoo, and other tech heavyweights had provided data on foreign users to the NSA, these firms came under strong pressure from the customers whose trust they had betrayed (see Rozenshtein, 2018, 116). Especially painful was press coverage that alleged that tech companies were not always forced to hand over data on their foreign users to the NSA but had also voluntarily colluded with the NSA (e.g. MacAskill and Rushe, 2013). As a consequence, non-US citizens turned to foreign competitors where they believed their data would be better protected against government surveillance and US companies lost precious market shares. It is estimated that in the immediate aftermath of the Snowden leaks US technology companies, and especially US cloud providers, lost billions of dollars on account of the leaks (Donohue, 2015, 15–6). There were also predictions that the losses for US technology companies would be enormous in the years following the leaks. A widely noticed analysis of the Information Technology & Innovation Foundation on the likely implication for the US cloud computing industry predicted that the industry would suffer a loss of between $22 and $35 billion until summer 2016 as a consequence of the revelations about NSA spying (Castro, 2013).

Alarmed by the financial losses and the prospects of even greater losses, US tech companies turned to the US government for help, unwilling to bear the costs of the fallout the Snowden leaks had produced (Timberg, 2013b). Yahoo President and Chief Executive Officer Marissa Mayer, for instance, announced that "(r)ecent revelations about government surveillance activities have shaken the trust of our users, and it is time for the United States government to act to restore the confidence of citizens around the world" (Tummarello, 2013). Facebook began to express warnings that it would consider storing data on foreign users abroad and no longer on its US servers (Romm, 2014), which would make government access to their data more difficult. Microsoft made it very clear that it intended to make information on national security orders that required it to hand over data of foreign users to the US government available to affected users and that it was ready to take legal action against gag orders that would prevent it from informing affected users (Ribeiro, 2014). US tech firms also combined their forces and formed an alliance, the Reform Government Surveillance coalition, to have a united voice in pressuring the government on surveillance reform – a move described as a "game changer" in surveillance reform by Leslie Harris, president of the Center for Democracy & Technology (Timberg, 2013b).

In addition to threatening the US government with sanctions, tech companies also began to increase security efforts to protect customers' data against further intrusion. Most importantly, a number of key US technology companies intensified efforts to encrypt the data of their customers that they held (Timberg, 2013b). Google, for instance, in response to the Snowden revelations sped up its encryption of the data that traveled between its data centers all across the world in an effort to complicate access by the NSA. Google's Vice-President for Security Engineering Eric Grosse even went so far as to describe the relationship with government agencies on the issue as an "arms race" (Timberg, 2013a). Furthermore, Yahoo not only announced that it had plans to encrypt all communications transferred between its data center by the end of the first quarter of 2014, but also already made by default https encryption for its email services available to its users in early January 2014 (Tung, 2014). Essentially, technology companies became "a de facto pressure group for privacy protections" (Rascoff, 2016, 644), used by foreign customers to feed in their disapproval of NSA surveillance.[5]

Processing

The US government had little appetite for introducing safeguards that would significantly curtail the leeway of the NSA when it came to gathering data on foreign citizens outside the US (Severson, 2015). Generally, minor problems notwithstanding, foreign surveillance was seen as a lawful and appropriate measure in the fight against terrorism and an essential tool to protect the country against terror attacks (Litt, 2013; see also White House, 2014b). It was also seen as unfair that the United States was singled out for criticism while the intelligence agencies of other countries engaged in large-scale foreign surveillance as well, and quite often

with less regulation, but could do so without extensive public scrutiny (see White House, 2014b).

However, access to the data of foreign users that the technology companies collected was seen as indispensable without which foreign surveillance capacities would be considerably weakened (White House, 2014b). Specifically, the US government eyed the push for stronger encryption on the part of many large technology companies with discontent, as it saw access to data for foreign surveillance becoming more complicated. In fact, already before the Snowden leaks and US tech companies' increased investment in encryption, the NSA had viewed encryption as being a threat to its intelligence gathering and counterterrorism effort and had set up a decryption program, Bullrun, that among others involved installing backdoors into companies' encryption software (Ball et al., 2013). The government also feared unwanted knock-on effects on domestic law enforcement insofar as companies' encryption efforts were seen as complicating access to information relevant for law enforcement purposes held by US companies. Beyond that, the government did not want US tech companies to follow through with their announcements to focus more strongly on storing data of their foreign customers abroad.

Eventually, the US government felt compelled to send out a public statement that the privacy concerns of foreigners were taken seriously in foreign surveillance operations. Such a public statement was hoped to "cut Silicon Valley a break" (Levy, 2014). Sending out such a public commitment was also believed to prevent future damage to the United States' reputation and to respond to calls from foreign governments for surveillance reform (Deeks, 2016, 81).[6] Moreover, in doing so the administration would follow some of the recommendations made by the Review Group on Intelligence and Communications Technology that President Obama had installed in response to the Snowden leaks. Yet, the key factor behind the US government's decision to introduce a first set of privacy safeguards for foreign citizens beyond US territory was pressure from the US tech companies (Rascoff, 2016, 669, 689). There is little evidence that the administration would have responded to criticism from other governments or followed the recommendations of the review board in the same way had this pressure not built up. On the contrary, pressure from US technology companies, whose economic weight made them too powerful to be ignored, was seen as a "catalyst for more constrained surveillance practices" (Rascoff, 2016, 689),[7] while especially their forming a united front was considered to have had the potential to "rebalance the scales" (Timberg, 2013b).

Outcome

In January 2014, only seven months after the Snowden leaks, President Obama issued Presidential Policy Directive 28 – Signals Intelligence Activities – not only a landmark document as regards the recognition of privacy concerns of foreigners in foreign surveillance but also a document that has been described as "a bow to the tech giants" (Levy, 2014). PPD-28 for the first time recognized that all persons,

and not just US persons, have privacy interests worthy of recognition. PPD-28 explicitly acknowledged that in the execution of signals intelligence activities "all persons should be treated with dignity and respect, regardless of their nationality or wherever they may reside, and that all persons have legitimate privacy interests in the handling of their personal information" (White House, 2014a, opening paragraphs). It affirms furthermore that "(p)rivacy and civil liberties shall be integral considerations in the planning of U.S. signals intelligence activities" (ibid., Sec. 1b) and that such activities must "include appropriate safeguards for the personal information of all individuals, regardless of the nationality of the individual to whom the information pertains or where that individual resides" (ibid., Sec. 4). The directive also proclaims that "signals intelligence activities shall be as tailored as feasible" (ibid., Sec. 1d), and that the United States will "impose new limits on its use of signals intelligence collected in bulk (to) protect the privacy and civil liberties of all persons, whatever their nationality and regardless of where they might reside" (ibid., Sec. 2).

PPD-28 also contained various requirements regarding implementation. It obligated the DNI to ensure that all elements of the intelligence community develop policies and procedures that guarantee that the principles laid down in the directive are put into practice. For instance, PPD-28 required all relevant agencies and departments to "establish policies and procedures reasonably designed to minimize the dissemination and retention of personal information" (White House, 2014a, Sec. 4a i). It also determined that only personnel who has received "appropriate and adequate training" were allowed to get access to obtained information (ibid., Sec. 4a ii). Importantly, PPD-28 explicitly stated that "(t)o the maximum extent feasible consistent with the national security, these policies and procedures are to be applied equally to the personal information of all persons, regardless of nationality" (ibid., Sec. 4a), thus softening the hitherto sharp distinction between US and non-US persons. In addition, the directive provided for the possibility of informing relevant foreign governments in cases in which non-US persons are harmed as well as for a point of contact in the Department of State that accepts complaints from foreign governments (ibid., Sec. 4a and d). Finally, PPD-28 established several layers of internal review, including through the DNI, the Privacy and Civil Liberties Oversight Board (PCLOB), and the President's Intelligence Advisory Board (ibid., Sec. 5). At the same time, it pledged the intelligence community to an unprecedented level of transparency, requiring all elements of the intelligence community to make sure that "updated or newly issued policies and procedures (are) publicly released to the maximum extent possible" (ibid., Sec. 4b).[8]

Without doubt, PPD-28 had important shortcomings that would soon be taken up by critics who would eventually call for further reforms (see below). Yet, it was still an important document. It signaled that indiscriminate surveillance of non-US persons was not acceptable. It signaled that the stark distinction between privacy safeguards for US and non-US persons was no longer justifiable. And it committed all agencies and departments involved in the collection and processing of signals intelligence to publish information on what they do to respect

the privacy interests of non-US persons. The directive was, at least on paper, an "unprecedented act of self-restraint",[9] and went beyond what other states had at that time in terms of regulation of foreign surveillance (Klein et al., 2016).

Toward the EU–US Privacy Shield Framework Principles

Extraterritorial human rights violations

Although PPD-28 was an important document, it also had important flaws. Indeed, it has been described as an "exceedingly clever document, one that conveys and writes into policy a great deal of values without constraining a great deal of practice" (Wittes, 2014). Other critics have similarly lambasted the directive's "empty promises", arguing that it "has not resulted in meaningful protections for foreigners" (Cohn, 2016).

Notably, PPD-28 did not rule out the collection of signals intelligence in bulk, stating that the "United States must (…) collect signals intelligence in bulk in certain circumstances", even if "the collection of signals intelligence in bulk may consequently result in the collection of information about persons whose activities are not of foreign intelligence or counterintelligence value" (White House, 2014a, Sec. 2). PPD-28 also permitted a number of exceptions: certain policies and procedures, such as data minimization, did not have to be applied to the personal information of non-US persons if this was not "consistent with the national security" (ibid., Sec. 4). Moreover, the directive explicitly stated that it was not meant to "prevent (the President) from exercising (her/his) constitutional authority, including as Commander in Chief, Chief Executive, and in the conduct of foreign affairs, as well as (her/his) statutory authority" (ibid., Sec. 6).

There were three further weaknesses, particularly: PPD-28 did not grant enforceable rights to non-US persons. In fact, it explicitly determines that it "is not intended to, and does not create any rights or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person" (ibid., Sec. 6). In addition, even though it proclaimed loftily that "signals intelligence policies and practices appropriately take into account (…) the leadership role that the United States plays in upholding (…) universal human rights" (ibid., opening paragraphs), it consistently refrained from using human rights language. Hence, although "its language clearly invokes the discourse of human rights" (Bignami and Resta, 2018, 369), it did not use the term "privacy rights" but rather the term "privacy interests". Finally, as a presidential directive, PPD-28 could be revoked by any president at any time without the consent of Congress.

Intervention

It was therefore little surprising that PPD-28, despite its huge symbolic value, did not stop disaffected stakeholders from trying to convince or push US policymakers to do more to protect the privacy rights of non-US citizens abroad. A

contribution on the website of the ACLU mobilized against NSA "dragnet spying", lamenting that "countless innocent people will be caught up in the NSA's massive net" (Toomey, 2015). Furthermore, the UN Human Rights Committee admonished the US government to take steps to "ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity" (UN Human Rights Committee, 2014, 10). The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in turn, emphasized the principle of non-discrimination, arguing that states must protect the privacy rights of citizens and of non-citizens outside their territory in equal measure (UN General Assembly, 2014, para. 42–43). Academics brought strategic arguments into the debate, such as Georgetown University's Law Professor Laura Donohue, who argued that "(t)o the extent that non-U.S. companies are picking up customers and business overseas, the United States' ability to conduct surveillance may be further harmed – thus going directly to the country's national security interests" (Donohue, 2015, 35). Foreign governments also never fully ceased from exerting pressure, even more so after reports were published according to which the mobile phones of foreign leaders had been wiretapped by the NSA. The German government, for example, terminated its contract with Verizon, referring to concerns about NSA access, while China deleted Cisco and other US telecommunications companies from its lists of companies that are approved for public purchases (Nakashima, 2015).

Yet, as before, none of these interventions had much of an effect. Attempts at shaming proved little effective, especially as the media had meanwhile for the most part lost interest in the issue (Severson, 2015, 491). Moral arguments for stronger privacy safeguards for non-US citizens outside the United States did not resonate much with US policymakers (Bignami and Resta, 2018, 364, 378). More and more legal investigations and criminal proceedings against the NSA were halted, as for example in Switzerland, where the government was believed to have interfered with judicial investigations following pressure from the United States (e.g. Jirát, 2016). Pressure from foreign governments continued to be half-hearted, as their dependency on the United States had essentially remained the same. EU countries still had their hands tied, given their desire to benefit from the United States' intelligence capabilities and security guarantees (Farrell and Newman, 2016, 126). Similarly, Brazilian President Dilma Rousseff, initially a vocal critic of NSA surveillance, felt forced to tone down her rhetoric when she realized that her fragile political position at home and the economic problems of her country did not allow her to openly break with the United States (Bevins, 2015).

What turned out to be effective, however, was once again pressure from US technology companies that had already been highly instrumental in leading the Obama administration to consider a first set of privacy protections for foreigners as stipulated, that is PPD-28. Even after the publication of PPD-28, the companies believed that the issue deserved further attention, while the Reform Government Surveillance coalition hired and registered a lobbying group in Washington

(Romm, 2014). This time, however, US technology companies came under pressure from a court, namely the CJEU, which demanded safeguards that would reliably protect data of EU citizens in the United States from overly intrusive NSA access as a precondition for transatlantic data flows. As before, the tech companies failed to see that they should bear the costs of the NSA's alleged continued misconduct and turned to the government, as previously with sanctions and threats thereof, to make the government adjust the respective privacy provisions in a way that they would satisfy the CJEU – turning in a way into allies of the European Commission.

After the Snowden revelations, Max Schrems, an Austrian privacy activist and then a law student at the University of Vienna, had submitted a complaint against Facebook, where he had an account, to the Irish Data Protection Commissioner. His argument was that Facebook's Irish subsidiary collected data from European citizens in its European headquarters in Dublin, before sending them to the company's servers in the United States. However, once in the United States, the data of European users could be accessed by the NSA due to insufficient protections. The Irish High Court, where the case had meanwhile landed, transferred the complaint to the CJEU, which in October 2015 ruled in *Schrems I* that Facebook's Irish subsidiary was no longer entitled to transfer the data of its European users to the United States because the data was not sufficiently safe from NSA access when on servers in the United States. Implicitly, the CJEU therefore decided that PPD-28 did not provide sufficient privacy protections to EU citizens. Based on this assessment, the court also repealed the Safe Harbor Agreement between the US government and the European Commission, an agreement from 2000 that many US companies had thitherto used to transmit data of European citizens to the US (Court of Justice of the EU, 2015).

The judgment equaled an earthquake and had significant ramifications far beyond the specific case of Facebook. Safe Harbor was used by about 4,500 US companies to transfer personal data of EU citizens to their servers in the United States (Weiss and Archick, 2016, 6). Losing the Safe Harbor Agreement was therefore believed to not only be extremely costly to a number of companies, but also to seriously disrupt the way they did business (Drozdiak and Schechner, 2015; Rozenshtein, 2018, 118). For an interim period, Safe Harbor could still be used. However, if the US government did not substantially constrain NSA access to private data of European customers of US technology companies, the companies would soon have to look for other ways to transfer the data of their European customers to the United States, or, alternatively, store the data abroad, which would however come with its own costs.

Like before, the tech companies approached the US government to remedy the situation,[10] as they did not want to be seen as accomplices of the US government and had already before the CJEU's judgment announced that they would not stop pressurizing the government for further reforms (Rascoff, 2016, 665). What followed were a number of hearings in Congress during which business leaders aired their frustration and expressed their desire for an adequate response to the CJEU's *Schrems I* judgment.[11] Importantly, technology companies also took a

number of steps that further complicated government access to their data of US and non-US citizens. Many companies set up data centers in Europe, so as to be able to store the data on foreign users outside the United States. Some US technology companies also reconsidered their position on cooperating with the US government in domestic law enforcement matters, which implied that the conflict over NSA data access spilled over to other areas in which the US government also relied on the data private firms possessed. In one famous case, Apple declined to unlock the iPhone of one of the San Bernardino terror suspects. Similarly, Facebook, Instagram, and Twitter began insulating their data from developers that shared data with law enforcement agencies (Rozenshtein, 2018, 102, 140–1). Interestingly, heads of US technology companies, including Microsoft President Brad Smith, also echoed the CJEU in framing privacy protections against surveillance as a fundamental human right in an effort to urge US policymakers to agree to reforms (Rotenberg, 2015, 17–8) so as to put additional weight to their attempts to press the US government to consider additional safeguards.

Processing

Once more, the US government was thus confronted with pressure from the US tech industry to do more to reassure foreign citizens outside the US that their private data was safe even if transferred to the companies' US servers. As before, US policymakers had no appetite for major reforms.[12] There was a widespread belief that the changes made with PPD-28 were far-reaching enough, especially if compared with the privacy protections other countries had in place. In fact, following the Snowden leaks, many other countries had rather tried to catch up with the United States when it comes to foreign surveillance capacities rather than introducing or improving privacy safeguards for foreigners (Severson, 2015, 503; Brown et al., 2017, 463). US Secretary of Commerce Penny Pritzker, for instance, aired her frustrations in a press release on the CJEU's *Schrems I* judgement that progress on foreigners' privacy protections that had been made had not been honored by the court (US Department of Commerce, 2015).

Yet, it was also hard to resist that there were compelling reasons for why the US government should give in to the pressure from the US tech industry. As before, the US government did not want US technology companies to store their data on foreign users abroad as this would clearly complicate access to that data – data that was considered vital for the United States' counterterrorism agenda, but also for domestic law enforcement purposes and other matters. Likewise, and for the same reasons, the US government was still averse to the companies' encryption initiatives. Furthermore, Commerce Secretary Pritzker was especially concerned about the disruptive potential of *Schrems I* for the transatlantic digital economy and the high costs that US technology companies would have to shoulder (Farrell and Newman, 2016, 124). More generally, the tech industry was widely seen as vital for sustained economic growth of the US economy, while business leaders "enjoy(ed) high status with (…) officials", which put them in a position to "shape surveillance policy" (Rozenshtein, 2018, 144-5).

In the end, in light of its continued dependence on the tech companies' data, the US government felt it had little choice other than to strengthen the protections for EU citizens against NSA access to their data. Indeed, Commerce Secretary Pritzker, even though she did not share the CJEU's concerns, was clear in her statement in response to the court's invalidation of the Safe Harbor Framework that the judgment made reforms to Safe Harbor necessary (US Department of Commerce, 2015). Therefore, a delegation of the US Department of Commerce met with counterparts from the European Commission to negotiate a follow-up agreement to the moribund Safe Harbor Agreement. Although such negotiations had already started before the CJEU's *Schrems I* judgment, namely in late 2013 in response to the Snowden leaks and allegations that increased suspicions of loopholes in the Safe Harbor Agreement, they only really gained momentum after *Schrems I* (Weiss and Archick, 2016, 8–9). The US delegation went into the negotiations less with an honest desire for reform (McLaughlin, 2016), but rather with the aim to come to an agreement that would benefit the US tech sector. Once a new deal with the EU was reached, Secretary of Commerce Pritzker remarked that "this historic agreement is a major achievement for privacy and for businesses (…) it provides certainty that will help grow the digital economy" (Weiss and Archick, 2016, 12).

Outcome

In early 2016, and less than four months after the CJEU's *Schrems I* judgment, the US Department of Commerce published the EU–US Privacy Shield Framework Principles, an agreement described by Victoria Espinel, President and Chief Executive of BSA (Business Software Alliance, currently known as The Software Alliance) as "hugely significant" (Nakashima and Peterson, 2016). The Privacy Shield was a self-certification regime US companies could use to transfer personal data of EU data subjects to the United States. Although participation in the Privacy Shield was voluntary for US companies, once a company self-certified to the Department of Commerce for the Privacy Shield, its compliance with the requirements became obligatory (US Department of Commerce, 2016b, 1). Companies had to renew their self-certification annually and the Department of Commerce was instructed to assess whether the self-certified companies complied with the Framework Principles (ibid., 2). In mid-2016, the European Commission accepted the Privacy Shield as providing equivalent protection to EU rules. Specifically, the Commission declared that "the United States ensures an adequate level of protection for personal data transferred from the Union to self-certified organisations in the United States under the EU-U.S. Privacy Shield". The Commission also stated explicitly that the Principles "ensure a level of protection of personal data that is essentially equivalent to the one guaranteed by the basic principles" enshrined in relevant EU law (European Commission, 2016, 32). Based on this assessment, the European Commission allowed the transfer of data of EU data subjects by US companies to the United States that abide by the principles laid down in the Privacy Shield.

The Privacy Shield had the potential to strengthen privacy protections for EU citizens against US foreign surveillance in two particular ways. First, it determined that

> (i)n order to provide transparency in respect of lawful requests by public authorities to access personal information, Privacy Shield organizations may voluntarily issue periodic transparency reports on the number of requests for personal information they receive by public authorities for law enforcement or national security reasons, to the extent such disclosures are permissible under applicable law.
>
> (US Department of Commerce, 2016b, 31)

Thus, the Privacy Shield provided for a certain level of transparency so as to enable non-US citizens to learn about the frequency with which and the extent to which intelligence agencies demand access to data of EU citizens held by US companies in the United States.

Second, the agreement provided for the establishment of a Privacy Shield Ombudsperson in the US State Department who is to be formally independent from the intelligence community, and who is tasked with the "processing of requests relating to national security access to data transmitted from the EU to the United States pursuant to the Privacy Shield" (US Department of Commerce, 2016a, 2).[13] Although EU citizens could not submit requests to the Ombudsperson directly, they could submit their requests to "supervisory authorities in the Member States competent for the oversight of national security services and/or the processing of personal data by public authorities" who would then, after successful prescreening via an "EU individual complaint handling body" forward the complaint to the Ombudsperson. Importantly, a requester did not have to prove that her or his data was actually targeted by the US government in the context of signals intelligence (ibid., 4). Upon receipt of the request, the Ombudsperson was to investigate the request in coordination with relevant US agencies and bodies (ibid., 4–5). At the end of the investigation, the Ombudsperson was to inform the "EU individual complaint handling body" that it did not detect non-compliance with relevant regulations or that "non-compliance has been remedied" (ibid., 5).

In practice, however, the Privacy Shield also suffered from a number of shortcomings (Massé and Stepanovich, 2016).[14] In many ways, the adequacy decision of the European Commission was based on confidential assurances by US officials on the effectiveness of existing privacy safeguards. These assurances, however, could not be independently verified.[15] Besides, the document made room for the possibility that participating companies could under certain circumstances deviate from the Principles, as it declared that "(a)dherence to these Principles may be limited (…) to the extent necessary to meet national security (…) requirements" (US Department of Commerce, 2016b, 2). The Ombudsperson mechanism had a number of in-built weaknesses, too. Much of the process was left in the dark, as it was stated that the "Privacy Shield Ombudsperson will neither confirm nor deny whether the individual has been the

target of surveillance nor will the Privacy Shield Ombudsperson confirm the specific remedy that was applied" (US Department of Commerce, 2016a, 5). What is more, even though EU citizens could in principle request access to information under the Freedom of Information Act (ibid., 5), access to information could be limited if this, among others, concerned "access to classified national security information" (ibid., 6). Finally, for the eventuality that the number of requests sent to the Ombudsperson "exceed reasonable resource constraints", the US government reserved itself the right to "discuss with the European Commission any adjustments" (ibid., 5).

Nonetheless, the Privacy Shield Framework Principles, at least on paper, improved privacy protections for EU citizens, especially with regard to the reforms relating to the issue of redress. Moreover, there was the CJEU, as an indirect accountability mechanism, so to speak, that could intervene again in the future when dealing with complaints against US technology companies, and determine whether the US safeguards as mentioned in the Privacy Shield Framework Principles complied with EU law.

The safeguards during Trump's presidency

When Donald Trump assumed office in January 2017, his rhetoric left no doubt that he did not value the safeguards inscribed in PPD-28 and the Privacy Shield. Initially, there were suspicions that President Trump considered scrapping PPD-28 altogether, but he was convinced otherwise with arguments that PPD-28 was one of the key foundations of the Privacy Shield, and that both documents were extremely important for the US economy (e.g. Sensenbrenner, 2016). What soon became clear, however, was that the Trump administration had little intention of seriously implementing many of the provisions foreseen in the Privacy Shield Framework Principles. For instance, President Trump stalled full staffing of the PCLOB until July 2019 (US Privacy and Civil Liberties Oversight Board, 2021), which meant that the Board lacked the necessary quorum to function effectively (Kerry, 2017). It also increased the risk that the CJEU would look at the Privacy Shield critically, given that PCLOB was a central pillar on which government surveillance oversight rested (Klein, 2017). There was generally little transparency in terms of implementation of the Privacy Shield Framework Principles. Essentially, as it was arranged for that the EU and the US side meet annually to take stock of how the Principles were implemented, the European Commission could have revoked the Privacy Shield, citing lack of commitment and compliance of the US side. However, the European Commission was reluctant to confront the US harshly, let alone withdraw from the agreement. In fact, the European Commission itself was keen on upholding the deal, as it benefited not only US but also EU companies. Therefore, the European Commission was not inclined to risk the deal over strong privacy protections for EU citizens. Hence, for several years the European Commission certified that the Privacy Shield Principles provided protections to EU citizens adequate to EU law (e.g. European Commission, 2018), in spite of widespread criticism of the agreement by many concerned

stakeholders, including relevant EU institutions (e.g. European Data Protection Supervisor, 2016).

While the EU Commission was hesitant to seriously challenge the Trump administration over its foot-dragging when it came to implementing the requirements enshrined in the Privacy Shield, privacy activists were not. Max Schrems, dissatisfied with not only how policymakers on both sides of the Atlantic but also with how Facebook itself had responded to the CJEU's landmark judgment of 2015, once more lodged a complaint with the Irish Data Protection Authority, this time focusing on the use of standard contractual clauses for the transfer of data. When the case reached the Irish High Court, the court forwarded the case to the CJEU, which then enacted a further landmark judgment on the issue in July 2020, *Schrems II*. In this judgment, the CJEU invalidated the European Commission Implementing Decision that had attested the EU–US Privacy Shield providing adequate protection[16] to EU citizens when their data was transferred to the United States (Court of Justice of the EU, 2020, 46–7). In doing so, the court by implication invalidated the Privacy Shield Framework Principles. Specifically, the court argued that the US surveillance programs constituted disproportionate interference, while not providing EU citizens with access to courts to file legal complaints (ibid., 43–7). At the same time, the Court also demanded stricter requirements for the transfer of personal data of EU citizens to the US on the basis of standard contractual clauses (ibid., 46).

Subsequently, US technology companies once again lobbied US policymakers to adjust the existing privacy protections for foreigners abroad to satisfy the demands of the CJEU so that data transfers could continue (Espinel, 2020). Negotiations on a follow-up agreement with the European Commission only gained momentum, however, after President Joe Biden took office in early 2021. As of writing, no new deal has been made.

Conclusion

This chapter has traced the introduction of privacy safeguards for non-US persons in relation to US foreign surveillance operations. We have shown that after 9/11 the US had significantly expanded its capacities for foreign surveillance, with major implications for infringements of the privacy rights of non-US citizens residing outside US territory. In the mid-2010s, however, the Obama administration introduced two sets of privacy safeguards that, at least on paper, signaled a stronger commitment to protect non-US citizens outside the United States against indiscriminate surveillance by the NSA. PPD-28 acknowledged that all individuals, irrespective of nationality and location, had legitimate privacy interests and announced that foreign surveillance was to be as targeted as possible. In addition, the EU–US Privacy Shield Framework Principles established a self-certification regime for US companies that transferred personal data of EU citizens to the United States that provided for transparency and redress provisions.

Both PPD-28 and the Privacy Shield can be traced back to the material sanctions variant of the coercion mechanism. In both cases, US technology companies

(which had come under pressure from falling customer trust and a landmark CJEU judgment) had pressurized the US government to announce safeguards that would impress relevant foreign publics (PPD-28) or the CJEU (Privacy Shield). US technology companies not only credibly threatened sanctions (data localization) but also followed through on some of their threats (encryption) to build up pressure on the US government to move on the issue of privacy safeguards for non-US persons. Eventually, the Obama administration, which could not afford to lose access to the companies' data, bowed to the pressure and announced safeguards, expecting that such steps would take off pressure from the companies.

The privacy safeguards for foreigners that have been enacted are certainly no panacea. For some critics they amount to nothing more than paper tigers, as they point to "(g)aping (h)oles in (p)rivacy (p)rotections" in PPD-28 (Gorski, 2018) or describe that Privacy Shield as a "broken framework that is ill-suited to protect people's rights to privacy and data protection" (Access Now, 2020). Not least the most recent decision by the CJEU on the issue in *Schrems II* strongly suggests that the safeguards cannot reliably guarantee that foreigners' privacy rights are effectively protected, if this was ever their intention. If we look beyond US–EU relations, it is even more difficult to identify safeguards that would reliably protect non-US citizens against US foreign surveillance. The United States does participate in the Cross-Border Privacy Rules System that Asia-Pacific Economic Cooperation countries have agreed on (Cross-Border Privacy Rules System, 2021), but which is even weaker than the US–EU framework. Nonetheless, that privacy safeguards for non-US persons, however weak they may be, have been introduced at all, matters. With them the US government publicly recognizes that it cannot ignore what it calls the "privacy interests" or foreign citizens beyond US territory. It also shows that the United States can be vulnerable to pressure from those actors who are being made complicit in its right violations. The US government itself was able to fend off public pressure and it did not have to fear a CJEU judgment. Yet, that the actors on whose voluntary or involuntary support it relied were vulnerable to such interventions proved decisive in the development of limited safeguards against indiscriminate foreign surveillance.

Notes

1 In addition to the references to specific interviews made in this chapter, this chapter is based on information gained in background conversations with US government officials (both past and present), Congressional staff members, as well as a senior European Union (EU) official.
2 EO 12333 has since been amended by three executive orders, namely EO 13284 (White House, 2003), EO 13355 (White House, 2004), and EO 13470 (White House, 2008).
3 PRISM stands for Planning Tool for Resource Integration, Synchronization, and Management.
4 Interview with Neema Singh Guliani, American Civil Liberties Union (ACLU), 13 March 2019, Washington D.C.
5 Interview with Amie Stepanovich, US Policy Manager and Global Policy Counsel Access Now, 28 February 2017, Washington D.C.

6 See also interview with Robert S. Litt, former General Counsel to the Office of the Director of National Intelligence, 14 March 2019, Washington D.C.
7 See also interview with Neema Singh Guliani.
8 The website is available at https://icontherecord.tumblr.com/ (accessed 27 March 2019).
9 Interview with Greg Nojeim, Senior Counsel, Center for Democracy & Technology (CDT), 28 February 2017, Washington D.C.
10 Interview with a US Senate staffer, 27 February 2017, Washington D.C.; interview with Marc Rotenberg, President and Executive Director, Electronic Privacy Information Center (EPIC), Washington D.C., 28 February 2017.
11 Interview with Marc Rotenberg.
12 Interview with Greg Nojeim.
13 The Ombudsperson mechanism also applies to data transferred from the EU to the United States based on standard contractual clauses and binding corporate rules, among others (US Department of Commerce, 2016a, 2).
14 See also interview with Neema Singh Guliani.
15 In its decision on adequacy, the European Commission mentioned that "in its representations the U.S. government has given the European Commission explicit assurances that the U.S. Intelligence Community 'does not engage in indiscriminate surveillance of anyone, including ordinary citizens'" (European Commission, 2016, 18).
16 Adequate protection in the sense of equivalence to the protections granted to EU citizens in the EU's General Data Protection Regulation and the EU Charter of Fundamental Rights.

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8 The power of "universal human rights"

Results and implications

Introduction

This book has sought to gain insights into why states introduce safeguards that are to protect non-citizens beyond their borders from harm caused by their policies. Specifically, we have examined why the United States has established safeguards that provide protections for non-US citizens outside US territory against harm caused by its counterterrorism policies following 9/11. We have conducted five case studies on the emergence of safeguards related to the right to be free from torture, the right not to be arbitrarily detained, the right to life in relation to targeted killing operations, the right to seek asylum in the context of refugee resettlement, and the right to privacy in connection with foreign surveillance. Most safeguards that have emerged in these cases are unlikely to reliably protect foreigners abroad against human rights violations by US agencies, with anti-torture safeguards, despite their own weaknesses, being a notable exception. Thus, if we return to the book's subtitle, the gloves have only halfway been put back on. Yet, the safeguards' mere existence is nevertheless meaningful. That such safeguards have emerged at all testifies to the need US policymakers have felt to publicly recognize that there are limits to how the United States can treat foreigners abroad.

In this concluding chapter we summarize the book's results and present our findings on the mechanisms that underlie the introduction of what we call "extraterritorial human rights safeguards" and their enabling conditions. We also discuss the theoretical implications of our findings and embed the findings in the broader empirical trend of states introducing such safeguards and rhetorically lending support to the idea that states have extraterritorial human rights obligations. In the final section we delineate avenues for future research.

Results

Mechanisms

There is no single path leading to "extraterritorial human rights safeguards" in US counterterrorism. Our cases rather point to equifinality, in that two mechanisms – coercion and strategic learning – can account for the introduction of safeguards

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in different cases. Moral persuasion did play a role as well, but not in the way in which we conceptualized the mechanism (see Table 8.1).

There is evidence of the *coercion* mechanism in three cases, with each case displaying a different variant of the mechanism. In the case study on the emergence of anti-torture safeguards, Congress passed the DTA (US Congress, 2005) in response to a powerful *shaming* campaign. The campaign was sparked by a television broadcast on torture in the US-run Abu Ghraib prison in Iraq published in the US media that contained photographs that documented severe mistreatment of foreign detainees in US custody. Thereupon, NGOs and further media outlets amplified the impact of the photographs by launching a shaming campaign that soon gained wide publicity in the United States and beyond. Other leaks followed, including leaks of the so-called "torture memos" that not only gave evidence of the United States' abhorrent interrogation practices but also of the implication of senior officials in justifying and condoning the practices. The broad coverage of the issue damaged the United States' reputation, which, in turn, threatened to jeopardize important US foreign policy goals. In response, Congress led by Senator John McCain, a staunch opponent to the use of torture, enacted the DTA, which prohibited the US military from using interrogation techniques that amounted to torture or CIDT.

In the detention case study, our first set of due process safeguards for detainees of the Guantánamo Bay detention facility was introduced by US policymakers not in response to a shaming campaign, but to *litigation*. In the 2008 landmark decision, *Boumediene v. Bush*, the Supreme Court confirmed Guantánamo detainees' constitutional right to *habeas corpus*, declaring that the then effective version of the MCA unconstitutionally stripped Guantánamo inmates of that right. The decision was the culmination of a series of court cases, which had gradually strengthened the right of detainees who had been imprisoned for several years to challenge their indefinite detention. Specifically, Lakhdar Boumediene, the namesake of the case, had disputed his alleged connections to al-Qaeda while working

Table 8.1 Mechanisms, cases, and safeguards

Mechanisms	*Cases*	*Safeguards*
Coercion		
Shaming	• Torture	• Detainee Treatment Act (2005)
Litigation	• Detention	• Military Commissions Act (2009)
Material sanctions	• Foreign surveillance	• Presidential Policy Directive 28 (2014), Privacy Shield (2016)
Strategic learning		
	• Torture	• Executive Order 13491 (2009), McCain–Feinstein Amendment (2015)
	• Detention	• Executive Order 13567 (2011)
	• Targeted killing	• Presidential Policy Guidance (2013), Executive Order 13732 (2016)
	• Refugee resettlement	• Leahy-Kyl Amendment (2007)

for a non-profit in Bosnia, and had demanded the right to challenge his detention. Boumediene was eventually released in 2009, nearly eight years after being captured and transferred to Guantánamo by Bosnian authorities. In response to the surge of new *habeas* cases following the judgment, Congress amended the MCA so as to provide Guantánamo detainees with a set of procedural rights before military commissions, among them provisions relating to the non-admissibility of evidence that has been obtained under duress and to access to appeal before federal courts (US Congress, 2009).

In the case study on foreign surveillance, the US government enacted privacy safeguards in response to *material sanctions*. Such sanctions came from US technology companies that lost customers to foreign competitors and saw their practice of transferring foreign user data to their US servers under threat. The NSA depended on access to data on non-US persons collected by US tech companies. Yet, following the Snowden leaks, US tech companies were increasingly penalized for their alleged collusion with the NSA not only by their foreign users, who began to turn away from them, but also by the CJEU, which prohibited the transfer of data of EU citizens to the US unless reliable privacy protections were set up. Under pressure themselves, US tech companies applied sanctions (data encryption), and in some cases credibly threatened sanctions (data localization), against the NSA and the US government more broadly by complicating government access to their data. Eventually, to ease relations with the tech industry, President Obama introduced PPD-28: Signals Intelligence Activities which, for the first time, declared that the privacy interests of foreigners abroad were to be taken into account in foreign surveillance operations (White House, 2014). Furthermore, two years later, the US Department of Commerce and the European Commission agreed on the EU–US Privacy Shield Framework Principles that provided for more specific safeguards for EU citizens (US Department of Commerce, 2016).

Strategic learning was behind the creation of safeguards in four cases. In the torture case, the second important set of safeguards, namely President Obama's EO 13491: Ensuring Lawful Interrogations (White House, 2009) and its codification into law through the McCain–Feinstein Amendment to the 2016 NDAA (US Congress, 2015), was the result of policymakers in the White House and in Congress thoroughly examining arguments as to whether additional safeguards were in the United States' strategic interest. This time, there was no immediate pressure to act. Yet, in light of the obvious weaknesses of the DTA, both the administration and members of Congress found themselves confronted with arguments as to why it was in the country's interest to strengthen the protections. One prominent argument, for instance, was that more comprehensive safeguards would help the United States preempt further attacks to its reputation that could make allies reconsider their support to the United States in the "War on Terror" or facilitate anti-US propaganda. Both in the White House and in Congress such arguments were carefully considered and weighed against potential costs associated with stronger safeguards. Eventually, policymakers came to the conclusion that the anticipated benefits outweighed the costs and enacted additional

safeguards that, most importantly, also explicitly committed the CIA to refrain from torture and CIDT in their interaction with foreign detainees.

Strategic learning can also explain the second set of safeguards that were introduced to protect Guantánamo inmates against illegal detention, namely President Obama's EO 13567: Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force (White House, 2011). Similar to the torture case, there was little immediate pressure to further strengthen the safeguards after the first set of safeguards were established, despite their weaknesses. Notably, the Supreme Court did not issue a further judgment that would have made additional safeguards inevitable. Nonetheless, policymakers were confronted with arguments as to why it was nevertheless in the United States' strategic interest to strengthen existing safeguards. A number of different strategic arguments were made, among them that Guantánamo was becoming a powerful symbol that would help terror groups attract evermore new members, that questionable detention practices might further complicate cooperation with allies in detention and intelligence matters, and that a reliable safeguard could prevent future judicial interventions. After thorough consideration of expert recommendations, White House officials and their advisors concluded that additional safeguards were in the United States' own strategic interest and provided a number of benefits.

The creation of safeguards that established protections for terror suspects and civilians in relation to targeted killing operations can also be traced back to strategic learning. Again, there was no immediate pressure to introduce safeguards, as there were no actors who effectively sanctioned the United States' behavior, civil society actors did not succeed in building up a powerful shaming campaign, and no court issued a judgment that would have required reforms. However, once again policymakers in the White House were confronted with a number of instrumental arguments as to why it was rational for them to institute safeguards. Among others, arguments were made that terrorists might use photographs of civilian casualties for their propaganda, that other states might at some point revoke their information-sharing agreements with the United States, and that it was unreasonable to squander the opportunity to set standards that could later be emulated by other countries. Finally, after lengthy mulling over the pros and cons of such safeguards, the Obama administration concluded that it was in the United States' strategic interest to introduce safeguards and introduced PPG: Procedures for Approving Direct Action Terrorist Targets Located outside the United States and Areas of Active Hostilities (White House, 2013), followed by EO 13732: United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in US Operations Involving the Use of Force (White House, 2016). Together, the two directives provided for protections for foreign terror suspects and civilians affected by the use of "lethal force" in targeted strikes, by, among others, providing for a "catch first" policy and requiring "near certainty" that civilians are not harmed.

Congress' adoption of legislation to prevent *bona fide* refugees from being excluded from the US resettlement program on unfounded allegations of links to

terrorism was once again the result of strategic learning among US lawmakers. Following 9/11, Congress had passed laws that had substantially broadened the definition of "terrorist organization", "terrorist activities", and "material support". Consequently, many refugees were indiscriminately barred from participating in the US resettlement program, even if they had actually been victims of terrorist organizations. When the laws' full impact on the resettlement program became obvious, a broad coalition of religious and non-religious NGOs, as well as the UN High Commissioner for Refugees, utilized their contacts with State Department officials and began to present a number of arguments to relevant members of Congress as to why an easing of the restrictions was in the United States' strategic interest. For instance, the reform coalition argued in Congressional hearings that a blanket application of TRIG was not only likely to strain diplomatic relations with states that harbored large refugee communities, but could also tarnish the United States' reputation as a reliable partner, especially as individuals who had supported the US forces in Iraq had also been affected by TRIG restrictions. Lawmakers weighed these arguments against the potential costs of easing the TRIG restrictions, and eventually concluded that the creation of exemptions could mediate the "unintended consequences" of the wide-sweeping terrorism bars while maintaining broad discretionary powers. Eventually, they included the Leahy–Kyl Amendment in the Consolidated Appropriations Act for 2008, entitled Relief for Iraqi, Montagnards, Hmong, and Other Refugees Who Do Not Pose a Threat to the United States, that expanded the authority to issue TRIG waivers, which enabled a series of situation- and group-based exemptions affecting thousands of refugees and asylum-seekers over the following years (US Congress, 2007).

In contrast, *moral persuasion* as conceptualized in the introduction and Chapter 2, did not have a direct effect on policymakers in any of our cases. Namely, there was insufficient evidence that US policymakers introduced safeguards because they believed that non-US citizens deserved protections and that there was therefore a moral duty to introduce safeguards. Hence, there is little evidence that a substantial number of US policymakers subscribed to a truly cosmopolitan understanding of the universality of human rights according to which states owe human rights to all human beings and not just to their own citizens or aliens on their territory. This is not to disguise that there were committed stakeholders that subscribed to such an understanding. Many civil society actors were motivated by such an understanding and provided arguments as to why it was the United States' moral duty to ensure that it did not violate the human rights of non-US citizens beyond US borders – but for the most part these arguments did not resonate. Nor do we dispute that there were US policymakers who abhorred the human rights violations that took place. There is considerable reason to believe that Senator John McCain, for example, firmly believed that torture was morally wrong, no matter against whom and by whom and for whatever purpose it was used: yet, US policymakers, when introducing safeguards, for the most part were not moved by moral arguments but responded to strategic arguments or to immediate pressure. Finally, we do not claim that US policymakers would not have preferred not to

commit extraterritorial human rights violations. However, unless strategic considerations pointed the other way or coercive pressure was overwhelming, human rights considerations tended to be relegated to second place.

Finally, what pattern can we detect and how do the mechanisms interact with each other? In our case studies, safeguards emerge, either as the result of one mechanism (coercion or strategic learning), that sometimes occur in iterations, or as the result of a combination of the two mechanisms. If the two mechanisms operate together, they are combined in a sequential pattern, with coercion preceding strategic learning (see Table 8.2).

In the case studies on the emergence of safeguards against torture and arbitrary detention, safeguards resulted from a combination of coercion and strategic learning. In both cases, a first set of safeguards emerged following coercive pressure that compelled US lawmakers to introduce protections for non-US citizens outside United States territory. In the torture case, pressure materialized in the form of a powerful shaming campaign, while in the detention case pressure emanated from a Supreme Court judgment. In both cases the safeguards that were first introduced had significant flaws, however. Subsequently, US policymakers were confronted with strategic arguments as to why it was in their country's interest to strengthen the safeguards, to which they responded with a second set of safeguards. As we show in Chapters 3 and 4, the unfolding of the second mechanism, strategic learning, was not independent from the unfolding of the first mechanism, coercion. Actors who provided strategic arguments in favor of additional safeguards often referred, among others, to the pressure that had built up in the past to convince policymakers of the need to improve the safeguards so as to avoid being confronted once more with a shaming campaign or a court judgment that would significantly constrain their scope of action. Eventually, policymakers were motivated to further strengthen the safeguards to avoid coercive pressure from building up again and compelling more far-reaching reforms.

In the remaining three cases, safeguards emerged as a result of only one mechanism. In the cases on the emergence of safeguards related to targeted killing operations and refugee resettlement, strategic learning was at play, which unfolded twice in the former case and once in the latter. Strategic learning therefore does not need to be preceded by coercion. Rather, policymakers were capable of anticipating the negative consequences of not introducing safeguards and taking measures to avert them. In the case on the emergence of privacy protections in foreign surveillance, the coercion mechanism unfolded twice. Thus, policymakers, when introducing safeguards, repeatedly responded to immediate pressure rather than to

Table 8.2 Pattern

Coercion ⟶ Strategic learning	*Strategic learning*	*Coercion*
• Detainee treatment and interrogations • Military detention	• Targeted killing • Refugee resettlement	• Foreign surveillance

arguments about likely future strategic gains. The case suggests that policymakers who have once been coerced into introducing safeguards do not necessarily from then on proactively take further steps to improve the safeguards so as to avoid facing such pressure in the future. Rather, in some cases coercion may be the only way to make policymakers introduce safeguards that are to protect foreigners against harm.

Enabling conditions

The case studies have also helped us gain insights into the enabling conditions of each mechanism. We could confirm many of the existing assumptions about the mechanisms' enabling conditions. We could also specify some of the existing assumptions and gather evidence of further conditions (see Table 8.3).

As for *material sanctions*, the first variant of the *coercion* mechanism, we could find evidence of two enabling conditions already established in the literature. First, we could confirm the expectation that it is key that the sender of the sanctions can credibly convey the message that it will indeed uphold the sanctions as long as the target of the sanctions does not alter its behavior (Elliot, 2018, 59). This condition was present in the foreign surveillance case, the only case in which the material sanctions mechanism played a role. US tech companies made it very clear that they would not yield unless safeguards were introduced. They could take this stance as it was obvious that they were themselves heavily under pressure, not only because consumers had begun to look for alternative providers they associated with stricter data security, but also in light of a landmark judgment of the CJEU that jeopardized their data transfer model. They could therefore portray themselves as being in a position that would not allow them to retreat from their demands. In contrast, in the remaining case studies, disaffected actors were much less in a position to utter credible threats to enact and uphold sanctions. In the targeted killing case, for instance, the Pakistani government threatened to bar the United States from conducting drone strikes on their territory, when

Table 8.3 Enabling conditions

Mechanisms	*Enabling conditions*
Coercion	
Material sanctions	• Credible sender • Vulnerable target
Shaming	• Visualization of rights violations • Taboo-like character of violated norm
Litigation	• Legal precedent • Right to judicial review violated
Strategic learning	• Trustworthy messenger • High perception of future risk
Moral persuasion	• No perceived counter-norm • Moral ambiguity

civilian casualty numbers soared and the government was under heavy pressure domestically. However, given the importance of the security cooperation with the United States for the Pakistani government, it was unable to credibly threaten that it would follow through with its threats over a longer period and, therefore, was only able to reach a temporary halt to the US drone program in Pakistan.

Secondly, our cases could also corroborate the assumption that material sanctions can only have their intended effect if the target is vulnerable in the sense that it can neither retaliate nor substitute the sender of sanctions in case of a cooperation relationship (Bapat et al., 2013, 94; Donno and Neureiter, 2018, 336–7). In the surveillance case, this condition was given, as the US government was vulnerable to the pressure from US tech companies that had taken steps to deny the NSA access to their data on foreign users in a move to compel the government to send out a clear public signal that it took the privacy concerns of foreign citizens outside the United States seriously. This kind of vulnerability was unique to this case and was not given in the other cases in which the coercion mechanism did not unfold. In the torture case, for instance, European allies demanded talks with their US counterparts to reevaluate intelligence sharing after the Abu Ghraib scandal had broken. Yet, as European countries tended to depend more on the United States sharing intelligence with them than *vice versa*, the United States hardly had to fear that their European allies would apply sanctions against them. Similarly, in the refugee resettlement case, the governments of Thailand and Jordan, which harbored substantial numbers of Burmese and Iraqi refugees, respectively, were dissatisfied with the United States' tightening of TRIG bars. However, as they had little leverage over the US government, they asked for help rather than considering sanctions.

Regarding *shaming*, the second variant of the *coercion* mechanism, we could find support for the expectation that it is important for campaigners to be able to visualize the behavior that they intend to scandalize (Keck and Sikkink, 1998, 205) and, in doing so, directly attribute responsibility for the right violations to the target actor. In the one instance in which shaming had a decisive impact, that is, the establishment of the first anti-torture safeguards, journalists had access to photographs depicting gruesome cases of torture in Abu Ghraib with which they could illustrate their reporting. In the remaining cases, it was considerably more difficult to use pictures that could have captured the severity of the human rights violations that took place in similarly powerful ways. Targeted killing operations seldom leave behind pictures that can be used in campaigns, often because operations are conducted in secret. Those pictures that do exist tend to create a video-game–like effect in which the victims are difficult to distinguish from a birds-eye view. Furthermore, the destruction of buildings in the aftermath of a targeted strike often fails to capture the human destruction that also occurred. Reporting on restrictions to refugee resettlement on terrorism-related grounds can be illustrated with pictures of refugees who are barred from the United States on unfounded allegations and are stuck in refugee camps elsewhere, yet, such pictures are unlikely to capture the effect of the United States' specific refugee resettlement policies on refugees' prolonged stay in camps. Mass surveillance is

an entirely opaque activity that harms countless individuals across the globe who for the most part do not even know that their privacy rights are infringed upon. The only other case in which journalists and campaigners did use photographs extensively was the detention case, in which photos of Guantánamo detainees in orange jumpsuit and handcuffs were widely used. However, as impressive as these photos were, they did not directly speak to the issue of due process rights violations but were rather seen as expressing acts of humiliation.

We could also corroborate the assumption that for a shaming campaign to be effective it is helpful that the norm that is violated is widely accepted (see Goddard, 2009, 123). In the case in which we found shaming, the norm against torture was violated, which is undoubtedly a widely accepted norm. At the same time, however, we also conclude from our case studies that the violation of a widely accepted norm is not a sufficient condition of an effective shaming campaign. For in other cases in which there were efforts to build a powerful shaming campaign, too, widely accepted norms were violated as well – most notably in the targeted killing case in which the right to life was violated and in the detention case in which the right to due process was infringed upon. What distinguished the torture case from the other cases, however, is the existence of a taboo against torture (Barnes, 2017), whereas infringements against the right to life and the right to due process are not considered breaches of a taboo. Possibly, the "mere" violation of a widely accepted norm may not be enough to garner sufficient attention for cases in which the victims of human rights violations are foreigners on foreign soil and not nationals. Possibly, for extraterritorial human rights violations to be suitable for a powerful shaming campaign, it is highly conducive that they involve the violation of a taboo so as to garner sufficient support for the campaign.

Finally, as regards *litigation*, the third variant of the *coercion* mechanism, our findings suggest that precedents have indeed a great impact on how judges deal with cases of alleged extraterritorial human rights violations (see Duffy, 2008, 594; Gerhardt, 2011). In the case study on the emergence of due process safeguards for terror suspects detained in the Guantánamo Bay detention facility, the US Supreme Court issued an influential judgment in *Boumediene v. Bush* that paved the way for a first set of safeguards. Importantly, the court had passed key judgments on related issues several years earlier to which it could refer to justify its decision in *Boumediene v. Bush.* This was different in the other case studies. In the surveillance case, cases against the NSA had only been brought before US courts by US citizens, so that no similar precedent existed judges could have drawn on when deciding whether to accept complaints against the NSA or the US government by foreign citizens. In the torture and targeted killing cases, invocations of the state secrecy privilege by the US government impeded FOIA requests, so that claimants frequently lacked evidence to support their claims. Furthermore, in the torture case there was a Supreme Court decision in *Hamdan vs. Rumsfeld* of 2006, in which the court decided that al-Qaeda members were entitled to protections by the Geneva Conventions. Whereas this case was important for developments in the detention case study, it neither led to significant policy changes nor, however, was it later on used as a precedent in the torture case study. In the

resettlement case, the DoJ BIA consistently affirmed the position of the DHS in cases brought before it, so that no case law of granting protections for *bona fide* refugees in relation to the US resettlement program could emerge.

The case studies suggest furthermore that there is another enabling condition of the litigation mechanism, namely whether courts' "core business" is affected. It is striking indeed that the only case in which a court intervened with a judgment against the US government or one of its agencies or representatives was the case of the emergence of safeguards related to the right to due process of detainees. In this case, the US Supreme Court intervened after the US government had restricted judicial review involving Guantánamo inmates who wished to challenge their continued detention. Thus, by granting Guantánamo inmates limited due process rights, the court not only granted rights to those whose rights had been violated, but also secured for courts the right to be concerned with the matter and hear cases on alleged due process rights violations. This was different in the other cases, when the question was "only", or primarily, which constraints the US government should face when engaging with non-US citizens outside US territory, and not so much what the courts' involvement should look like. It seems, thus, that there are high hurdles for courts to intervene in cases relating to extraterritorial human rights violations and that it might matter whether their own interests are at stake.

As regards the *strategic learning* mechanism, we could find evidence of two enabling conditions mentioned in the literature. As expected, we found that it was highly beneficial when the instrumental arguments in favor of safeguards came from a messenger who was considered trustworthy (Haas, 2004; Clay, 2018, 136). In the targeted killing case, in which policymakers were responsive to strategic arguments in favor of safeguards, it made a difference that the arguments in support of introducing safeguards were brought forward by State Department officials and from well-known NGOs. In the refugee resettlement case, strategic arguments that eventually resonated with policymakers were predominantly made by policy stakeholders – the so-called "resettlement community" and State Department officials – who together managed the US resettlement program. The most obvious use of trustworthy messengers was visible in the case study on the emergence of anti-torture safeguards. In that case, civil society actors intentionally enlisted retired military and intelligence officers for their campaign, assuming that them telling policymakers about the strategic benefits of anti-torture safeguards for foreigners would have a greater effect as compared to when the very same arguments came from civil society actors alone. The approach paid off, as policymakers did engage with and listened to the former officers, with President Obama even inviting them to the Oval Office when he later signed the executive order on the matter, as a demonstration to the public who endorsed his decision.

Moreover, we could also confirm that it mattered whether policymakers believed that there was a high risk that not introducing new or improving existing safeguards would bring forth negative consequences (Bapat et al., 2013, 89–90). In the torture case, policymakers over time became convinced that adding further anti-torture safeguards was advisable to prevent new cases

of torture that could again do damage to the United States' reputation. In the detention case, policymakers were particularly worried that, if further reforms to its Guantánamo detention policy were not contemplated, US courts might intervene once again and significantly constrain the administration's leeway. In the targeted killing case, policymakers eventually came to the conclusion that not introducing safeguards bore a high risk of undermining a number of the United States' strategic interests, as it was likely to further alienate allies whose support the United States relied upon, while rising numbers of civilian casualties were believed to aid further recruitment to terrorist organizations. Finally, in the resettlement case, policymakers believed that not introducing safeguards would likely strain relations with allies in geostrategically important regions, but also paralyze the United States' refugee resettlement program and further raise administrative costs.

Regarding *moral persuasion*, the mechanism that did not come up in our case studies as conceptualized, the evidence we gathered suggests that two obstacles stood in the way. One such obstacle seemed to have been the presence of a strong presumably countervailing norm, namely the norm to provide security for US citizens (see also Cardenas, 2004, 222–4; Sikkink, 2013). Associated with this was a widely held belief that to provide security for US citizens it was vital that the policies that were considered crucial for the fight against terrorism could be applied without overly strict restrictions. Accordingly, ensuring security was accorded priority over the protection of human rights. Consequently, in light of the widely held belief that security was to trump a consistent and comprehensive consideration of human rights, there was little openness to thoroughly contemplate whether there was a moral duty to grant human rights protections to foreigners abroad as well and what such an acknowledgment would entail in terms of practical steps.

Furthermore, moral persuasion might also have been hampered by a lack of clarity of states' human rights obligations toward foreigners beyond their borders generally but also with regard to the human rights covered in our case studies particularly. If norms are imprecise, actors have little guidance in terms of what behavior constitutes norm-following or norm-violating behavior. Hence, they might believe that their behavior conforms to a specific norm, even if others believe that their behavior violates that norm. As a consequence, it becomes difficult to persuade other actors of a moral duty to change their behavior, if they believe that their behavior already is morally appropriate. It is obviously impossible to tell what policymakers really believe and what they only claim to believe. Nonetheless, it seems plausible that some US policymakers did believe that "enhanced interrogation practices" did not amount to torture, that protections for civilians in targeted killing operations were sufficient, or that foreign surveillance was proportionate – and that none of this behavior amounted to human rights violations. In any case, however, under such circumstances moral persuasion becomes very challenging, as it would involve specifying in the first place what behavior can be justified as morally acceptable before, in a second step, trying to convince relevant actors of subscribing to such an understanding.

Theoretical implications

Cosmopolitanism meets realpolitik

At first glance, our findings seem to suggest that a genuinely cosmopolitan understanding of the human rights norm, in the sense that universal human rights imply obligations toward all human beings and not just nationals, has not yet gained substantial ground. As we have shown in the previous section, we did not find a single case in which the moral persuasion mechanism unfolded as conceptualized. Rather, in all cases "extraterritorial human rights safeguards" were introduced primarily for instrumental reasons. US policymakers introduced safeguards either because they faced pressure which, in their perception, gave them little choice but to bow to the pressure, or because a forward-looking cost–benefit calculation made them conclude that safeguards were in the United States' long-term strategic interest. In any case, safeguards only materialized if there were strong incentives. There is thus little indication that a substantial number of US policymakers has generally internalized a norm according to which the United States has human rights obligations to foreigners beyond US borders. In other words, an understanding of the human rights norm that includes duties to foreigners abroad has, for the most part, not had a constitutive effect on US policymakers in the sense that it would have changed their beliefs.

What is more, most safeguards that have thus far emerged are rather weak, while there is uncertainty about their implementation. Most likely, had a substantial number of US policymakers believed that they owed human rights protections to foreigners, we should have seen more far-reaching safeguards. In the detention case, even after the introduction of various safeguards, Guantánamo inmates still faced considerable delays when applying for the cases to be reviewed. The restrictions introduced for targeted killing operations have been rather vague and, moreover, have been set out not in laws but in executive documents, which enabled President Trump to suspend some important requirements after taking office. In the refugee resettlement case, it was left to the discretion of the administration as to whether and to what extent the safeguards would be applied. Finally, the safeguards that have been introduced to guide foreign surveillance operations have been widely lambasted as paper tigers, while the CJEU declared in 2020 that the EU–US Privacy Shield provided inadequate protections for EU citizens. Only the safeguards against torture and CIDT are widely believed to be effective constraints against abuse of non-US citizens in US custody.

It is also noteworthy that US policymakers have in most cases been careful to not call the safeguards they have introduced human rights safeguards or make references to international human rights law. Only two of the ten safeguards that we cover in our case studies are partial exceptions: EO 13491 explicitly states that US agencies involved in detention and interrogation operations have obligations under the Convention against Torture (White House, 2009, Sec. 6), while PPD-28 affirms the government's intent to "ensure that our signals intelligence policies and practices appropriately take into account (…) the legitimate privacy and civil liberties concerns of U.S. citizens and citizens of other nations" (White House,

2014, Preamble). All remaining safeguards, however, refrain from referring to international human rights law or using human rights language. The DTA that introduced a set of basic safeguards against torture and CIDT refers to "standards" and to "rights under the US Constitution" persons in US custody have (US Congress, 2005, Sec. 1002), but not to human rights or the right to be free from torture explicitly. The Military Commissions Act of 2009 does not use human rights language or refer to due process rights specifically (US Congress, 2009), while EO 13567 determines that "(d)etainees at Guantánamo have the constitutional privilege of the writ of habeas corpus" (White House, 2011, Sec. 1b), but does not mention due process rights specifically. As regards the safeguards for terror suspects and civilians in targeted killing operations, the PPG determines that "direct action must be conducted lawfully and taken against lawful targets" (White House, 2013, Preamble), without referring to human rights law, however, while EO 13732 merely mentions "precautions" (Sec. 2 iv), "heightened policy standards", and the aim to "enhance the protection of civilians" (Sec. 1). The Privacy Shield Framework Principles mention the "goal of enhancing privacy protection" (US Department of Commerce, 2016, 3), but fall short of explicitly mentioning the right to privacy. Finally, as regards the safeguards related to the US refugee resettlement program, the respective law speaks of "relief" (US Congress, 2007, Title of Sec. 691) and "beneficiary" (US Congress, 2007, Sec. 691a), but does not view applicants for resettlement as rights holders.

Nonetheless, the introduction of safeguards for non-US citizens beyond US territory is still an indication that a cosmopolitan understanding of human rights in the sense that universal implies obligations vis-à-vis all human beings is becoming more important. Had there been no one who believed that states owe human rights not just to their own citizens on their territory but also to non-citizens beyond their territory, coercion and strategic learning, albeit mechanisms based on instrumental reasoning, would not have worked. Shaming can only have an impact if there are actors who genuinely believe in the value of the norm that has been violated. Thus, had there been no audience that was convinced that torture was morally wrong, public allegations of torture against US agencies would have had little effect. Litigation only works if there are plaintiffs who believe that they must not accept that their rights are violated by foreign powers and if there are judges who are of the opinion that individuals deserve protection not just against their own government but against any power holder. Likewise, US tech companies would not have sanctioned the US government had foreign consumers not signaled that they had little intention to accept infringements of their privacy rights on the part of the US government. Eventually, as our case studies in which we have exposed the strategic learning mechanism suggest, that relevant stakeholders believed that it was morally imperative for the United States to introduce human rights safeguards for foreigners abroad played a role when US policymakers weighed arguments in favor and against safeguards against each other.

Furthermore, the safeguards that have emerged are an important symbol and meaningful just by having been established. They demonstrate that there

are limits to how even the most powerful country can treat foreigners beyond its borders – all the more so as they cannot be brushed aside as mere "Obama exceptionalism", given that two laws that established safeguards were enacted before President Obama took office, while one of the laws that came into being during President Obama's tenure as president was approved by a Congress with a Republican majority. The safeguards undoubtedly have loopholes; some of them may be mere paper tigers and others have been rolled back by the Trump administration, which did not have the least sympathy for the idea of voluntary constraints on US counterterrorism policies, let alone extraterritorial human rights obligations. Yet, safeguards have been introduced and most of them have survived the Trump years. They have shaped the way US policymakers thought about their interactions with non-US citizens outside the United States and they have shaped similar debates in other countries. Overall, they have contributed to shifting our understanding of what human rights obligations mean in relation to counterterrorism operations and what human rights states owe to foreigners beyond their borders.

It thus seems that cosmopolitanism and *realpolitik* hold each other at bay. On the one hand, there are certainly indications that power politics stifles a cosmopolitan understanding of human rights. As we have shown, US policymakers were, for the most part, not genuinely convinced that they owed human rights protections to non-citizens abroad; rather they acted upon instrumental considerations. They introduced safeguards if this furthered their interests, and they did not if it did not. As a consequence, safeguards emerged, but for the most part only weak ones, some of which were even revoked by the Trump administration. And yet, on the other hand, US policymakers were for their part constrained by the emerging cosmopolitan understanding that states ought to respect human rights standards in their interaction with foreigners beyond their borders. They had incentives to introduce safeguards even if they were, save some notable exceptions, largely not moved by moral arguments. Moreover, even the Trump administration was constrained to the extent that it realized that abolishing the safeguards in their entirety was not an option as it would run counter to the United States' and the administration's perceived interests. Thus, President Trump opted for delaying implementation (as in the foreign surveillance case), annulling parts of the safeguards (as in the targeted killing case), or rhetorically attacking the safeguards (as in the torture case) – but he refrained from doing away with the safeguards altogether. Hence, the truly cosmopolitan understanding of the human rights norm did, for the most part, not have a constitutive effect on US policymakers but it did have a regulative effect (generally see also Klotz, 1995; Wendt, 1999, 47–91; Glanville, 2016). In other words, the understanding of human rights as rights against abuse by any government or power holder was not widely accepted and internalized and US policymakers' beliefs were, in most instances, not changed. Yet, this specific understanding of human rights, as it was internalized by relevant others, did constrain US policymakers and thus regulate their behavior.

Norm specification through contestation

This book's findings also speak to the debate on norm specification and norm contestation. Norms are not static but constantly evolve. While their core remains stable, unless their validity is successfully contested their meaning is constantly reinterpreted and altered (Van Kersbergen and Verbeek, 2007, 219; Sandholz and Stiles, 2009, 1; Wiener, 2009; Krook and True, 2012, 109; Sandholz, 2019, 139). One recurrent feature in the process of norm evolution is norm specification, that is, the process through which the scope of application of a norm, which is initially vague and open to manifold interpretations, is specified. When the content of a norm is specified, its scope of application may be restricted, as was the case, for example, with the sovereignty norm. The Treaty of Westphalia clearly established states' right to non-interference, thus bolstering states' sovereignty rights. Of course, sovereignty has never been understood in absolute terms, but, for long, rhetorical commitment has been high. Over time, however, sovereignty has increasingly been made conditional on how rulers treat their subordinates or citizens, to the extent that states eventually formally accepted the Responsibility to Protect paradigm in 2005 (Welsh, 2013).

Yet, norm specification may also mean that a norm's scope of application is broadened. This is what happened to the human rights norm, which has been described as "a moving target, with its definition constantly being expanded" (Sikkink, 2017, 228). The UDHR of 1948 was the first document that laid down human rights obligations for states, albeit in rather broad terms. Since then, states have agreed on nine human rights conventions that have specified what types of rights individuals have, stirred into action by norm entrepreneurs who aimed at "constantly raising the bar of what constitutes a human right" (Sikkink, 2017, 167–8; see also Bob, 2009, 1; Krook and True, 2012, 110). Furthermore, while initially the dominant idea had been that only states can violate human rights and therefore must make sure that they do not do so, today ever more activists, scholars, judges, and states accept that private actors and international organizations have human rights obligations, too (e.g. Clapham, 2006; Heupel and Zürn, 2017).

Norm specification is the result of applicatory norm contestation, defined as a struggle about the scope of application of a norm (Deitelhoff and Zimmermann, 2019; see also Günther, 1993, 44). While the core of the norm remains unaltered, contestants differ as to whether a norm is valid in a specific context and which concrete actions a norm necessitates (Deitelhoff and Zimmermann, 2019). Coming back to the examples mentioned above, the core of the sovereignty norm, namely the idea that there are limits to how external actors can encroach upon other states' internal affairs, is still accepted, but the limits have been whittled down more and more. Likewise, the core of the human rights idea, namely that human beings have inalienable rights just because they are humans, continues to be widely accepted, but what this entails in practice in terms of what aspirations constitute rights and against whom individuals have human rights entitlements, has changed over time. The broadening of a norm's scope of application thus

resembles layering, understood as the "crafting of new elements onto an otherwise stable institutional framework" (Thelen, 2004, 32).

The concept of applicatory contestation guides one to take agency and structure equally into account. As we have shown in this book's case studies, there are actors, norm entrepreneurs and antipreneurs, who contend with each other for the meaning of a norm. While the former aim at altering the norm's meaning, deploying different rhetorical and non-rhetorical strategies, the latter aim at maintaining the status quo (Wunderlich, 2013, 20, 30–32; Bloomfield, 2016). Yet, their action is embedded in enabling and constraining structures. Ideational structures facilitate the making of specific normative claims, while complicating other claims. Institutional structures provide entry points for some, but not for others. This mutual constitution of agency and structure has also become obvious when tracing mechanisms of social influence in our case studies. Specific actors have been the driving forces behind the mechanisms' unfolding, be it by providing arguments for the introduction of safeguards or by exercising various forms of pressure on policymakers. Yet, these stakeholders have operated within existing structures. Prevailing norms have had an impact on what claims resonated with relevant audiences and which institutional structures constrained or enabled access to policymakers.

Finally, applicatory norm contestation and, ultimately, norm specification are believed to be propelled by either incremental changes or shocks. In the former case, incremental changes to the context in which a norm emerged in the first place occur that gradually lay open a misfit between this norm's interpretation and the purpose it originally was meant to achieve (see Checkel, 1999). In the latter case, a shock exposes such a misfit instantly (Welsh, 2013, 380; Wunderlich, 2013, 30; see also Sandholz and Stiles, 2009, 11). The debate on states' extraterritorial human rights obligations shows that applicatory norm contestation can be a function of both incremental changes and external shocks. On the one hand, globalization and the concomitant increased reach of states across their borders and interaction with non-citizens beyond their borders have led to a gradually increasing questioning of the idea that states have obligations only toward their own citizens or non-citizens on their territory. On the other hand, the United States' widespread perpetration of extraterritorial human rights violations with policies of the post 9/11 "War on Terror" framework has created a crisis that has put the issue of extraterritorial human rights obligations firmly on the agenda and that has in a short time span sparked a debate on what obligations states have toward non-citizens beyond their borders.

Accountability in the international sphere

A widely accepted definition of accountability is that of a "relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences" (Bovens, 2007, 450). Essentially, then, accountability is about standard-setting, monitoring, and sanctions (Hirschmann, 2020,

6). Hence accountability – be it for (extraterritorial) human rights violations or other wrongdoings – is an important mechanism not only to hold actors responsible for wrongdoings, but also to make them abstain from committing wrongdoings in the first place. However, as many have pointed out, accountability faces particular challenges beyond the state, that is when IOs commit wrongdoings or when states harm the citizens of other countries beyond their territory. Electoral accountability, for instance, is largely confined to domestic politics (Macdonald and Macdonald, 2006, 97-8). Legal accountability faces hurdles in a global context, too, given the want of international courts that claim jurisdiction on matters related to IOs or states' extraterritorial conduct.

Nonetheless, many scholars have developed ideas as to what forms accountability relationships can take on and how accountability can be accomplished in the international sphere. Grant and Keohane (2005, 35–7), for example, differentiate between hierarchical, supervisory, fiscal, legal, market, peer, and public reputational accountability as accountability mechanisms available beyond the state. Koenig-Archibugi and Macdonald (2013) draw attention to the possibility of both beneficiary and proxy accountability, with the former referring to situations in which aggrieved actors themselves claim accountability and the latter referring to situations in which others who are in a better position to do so demand accountability for them. Others distinguish between direct and indirect (or first-order and second-order) accountability – conditional on whether accountability fora address their demands to the perpetrator directly or rather to third parties who then forward the demands to the primary target – and suggest that indirect ways of holding perpetrators of rights violations or other wrongdoings to account might be a promising alternative if direct accountability is not an option (Keck and Sikkink, 1998, 12–4; Rubenstein, 2007, 625–6; Heupel, 2020). Finally, Hirschmann (2020) has coined the term pluralist accountability to describe all forms of accountability in which third parties that are not part of a formal delegation relationship seek to hold actors for abuses of power to account, again pointing to the promise of such forms of accountability beyond the state.

Our empirical findings suggest that such "unconventional" forms of accountability do matter when it comes to holding the United States responsible for extraterritorial human rights violations. Among the different types of accountabilities listed by Grant and Keohane, we particularly found evidence of legal, market, and public reputational accountability. In the case study on the development of privacy safeguard in foreign surveillance, for instance, both legal and market accountability have been important, as the EU–US Privacy Shield Framework Principles has, as we have shown, ultimately been a response to a judgment by the CJEU, while PPD-28 was an attempt to accommodate the demands of US technology companies who feared for their market shares. In the case study on anti-torture safeguards, in contrast, we could detect evidence of public reputational accountability, as a powerful shaming campaign prompted the US government to introduce safeguards. There have also been traces of public reputational accountability in the cases in which we observed the strategic learning mechanism, when

US policymakers were motivated by concerns about future reputational damage, as the targeted killing and the refugee resettlement cases show, for example.

We could also find evidence of both beneficiary and proxy accountability. In some cases, aggrieved individuals were indeed in a position to hold perpetrators of human rights violations to account for themselves. As the case study on military detention in Guantánamo shows, inmates did bring cases against US government officials, and eventually it was the case *Boumediene v. Bush* that paved the way for the first set of safeguards. In most cases, it was proxies, however, that claimed accountability on behalf of aggrieved individuals. In the torture case, a network of activists organized a powerful shaming campaign. In the surveillance case, it was US technology companies that sanctioned the US government and not the numerous individuals who were spied upon. And in the cases in which the strategic learning mechanism occurred, it was primarily intermediaries who brought forward instrumental arguments in favor of safeguards rather than aggrieved individuals themselves. Likewise, we could also find evidence of both direct and indirect accountability. In the torture case, shaming was aimed at the US government directly, and in the detention case litigation was directed at US government representatives as well. Similarly, in the cases in which strategic learning occurred, arguments were primarily targeted at US policymakers and their advisors. However, in the surveillance case, we see indirect accountability at work: the US government was largely immune to direct pressure, which meant that stakeholders focused their interventions against the actors the government relied upon, that is, US tech companies, in the expectation that they would forward the accountability pressure to the US government, which they did.

Hence, our case studies suggest that there are multiple ways in which accountability can work beyond the state, even though differently than in the domestic context, and most likely facing greater challenges. Importantly, however, the pluralist features of the "beyond the state" context not only complicate conventional ways of holding power holders to account, but also open up novel possibilities for contestation – as they provide options for forum shopping and enable stakeholder to invoke the normative orders most useful and involve the institutions most accessible to them (Krisch, 2010; Klabbers and Piiparinen, 2013).

Broader empirical trend

While this book has zoomed in on the United States and safeguards that have emerged to guide US counterterrorism policies, the United States is not alone in introducing safeguards that are, at least on paper, aimed at preventing its policies from causing harm to non-citizens abroad. When we take a look at the very same policies and related rights violations that we covered in this book, we can see that other democracies have also introduced safeguards, even if, like in the cases covered in this book, mostly rudimentary ones. As for anti-torture safeguards, the Parliament of Australia, for instance, in 2010, adopted the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act (Parliament of Australia, 2010). The act defines the offense of torture and provides for

imprisonment in cases of violations (ibid., 274.2). It also determines that claims that acts of torture occurred in extraordinary circumstances or were executed at the orders of superiors cannot be used as defense in a proceeding (ibid., 274.4). Importantly, the act stipulates that, provided the consent of the Attorney General, proceedings against alleged perpetrators can take place also when "the conduct constituting the alleged offence occurs wholly outside Australia" (ibid., 274.3), and hence does not restrict the application of the law to cases that occurred on Australian territory but explicitly provides for its extraterritorial application.

Safeguards that give foreign detainees who are held abroad rudimentary due process protections have, for example, also emerged in the United Kingdom. In 2020, the Ministry of Defence, in response to several Supreme Court judgments, updated its doctrine on captured persons (CPERS) that set important standards on how foreign detainees on foreign soil are to be treated and what rights are to be accorded to them. The document explicitly acknowledges that various international human rights treaties, including the International Covenant on Civil and Political Rights, confer rights to CPERS. It also states clearly that CPERS can only be detained as long as this is "necessary for imperative reasons of security" (UK Ministry of Defence, 2020, 31–2). Furthermore, the doctrine introduced novel provisions for the review of detention decisions. It created an independent Detention Review Authority that is to "undertake an impartial and fair review of the grounds for the CERPS' internment or detention" not only at an early stage in the detention but also at frequent intervals (ibid., 33). Furthermore, detainees are entitled to the support of an assisting officer who is to help detainees to present their cases before the Detention Review Authority (ibid., 43–4).

As regards targeted killing, other states that employ armed drones have introduced safeguards as well, the most prominent example being Israel. Indeed, the Israeli High Court of Justice issued a landmark decision in 2006 in the *Targeted Killing* case that established specific criteria under which a targeted killing operation can be carried out lawfully, as well as additional compliance procedures. Accordingly, Israel was only allowed to kill an individual if that individual (a) directly participated in hostilities and posed an ongoing threat, (b) if there are no non-lethal alternatives available, (c) if the number of civilian casualties is not disproportional to the "military advantages", and (d) if before the launch of the strike compliance with the three aforementioned criteria has been established. The judgment also provided for an independent committee with the power to review each operation in which there is an initial suspicion that innocent civilians might have been harmed. Lastly, the judgment opened the way for judicial review of each operation (Israeli High Court of Justice, 2006).

As for refugee resettlement, we can see that in a number of countries schemes have been devised to enable local employees who have worked for their armed forces while stationed abroad for counterterrorism purposes to seek protection and apply for residence permits. Germany, for instance, has introduced provisions according to which Afghan local employees who have worked for the German armed forces in Afghanistan could apply for residence permits for themselves and their core family in Germany if they are exposed to danger in Afghanistan.

If the German armed forces received such applications, they were to consider each application separately and issue a recommendation to the Federal Ministry of the Interior. Thereupon, the Ministry of the Interior, based on Germany's residence law which foresees residence permits on humanitarian grounds, was to try to establish whether the applicant, or members of his/her core family, may constitute a threat to Germany. If the assessment is negative, applicants were to receive a residence permit for three years, with the option of extension. Public officials were advised to be generous when taking decisions and consider Germany's duty of care (Bundesministerium der Justiz und für Verbraucherschutz, 2004; Bundeswehr, 2021). As became obvious even before the fall of Kabul, very few Afghans actually benefited from the provisions – yet on paper they did exist.

When it comes to foreign surveillance, other states have thus far been reluctant to introduce safeguards that are to make sure that the privacy concerns of foreign citizens outside their territory are taken into account. In fact, it seems that oftentimes the Snowden revelations rather had the opposite effect in that other countries have used the leaked documents as an inspiration to emulate features of the United States' surveillance programs. Evidence of this can be found, for instance, in reforms undertaken in Canada, the United Kingdom, and Germany that expanded the countries' foreign surveillance powers rather than restraining them. Nonetheless, at a closer look one can still see that human rights language, even at a very abstract level, has found its way into some of the documents that provided for reforms. Canada's National Security Act of 2017 (Bill C-59), for instance, while widely criticized for expanding Canada's surveillance powers, nevertheless states that certain

> measures shall be reasonable and proportional in the circumstances, having regard to the nature of the threat, the nature of the measures, the reasonable availability of other means to reduce the threat and the reasonably foreseeable effects on third parties, including on their right to privacy.
>
> (House of Commons Canada, 2019, 108)

Similarly, New Zealand's Intelligence and Security Act of 2017 determines that "(w)hen performing its functions, an intelligence and security agency must act (…) in accordance with (…) all human rights obligations recognised by New Zealand law" (Parliament of New Zealand, 2021, 27).

Looking beyond the safeguards in relation to counterterrorism policies we have covered in this book, we see that democratic states have also introduced safeguards that aim at making sure that their policies do not violate the human rights of non-nationals abroad or do not contribute to such violations. For instance, it has become rather common for democracies to establish guidelines according to which development cooperation must make sure that it does not violate human rights or contribute to rights violations. Norway's guidelines in this regard are a case in point, as they stipulate that the allocation of foreign aid is dependent on the recipient countries taking steps to promote human rights (Norwegian Ministry of Foreign Affairs, 2014). Democracies also frequently put export control legislation

in place that is to make sure that their export of military and dual-use items does not contribute to harm. The EU's recent export control legislation, for example, commits its member states to make sure that they honor their human rights obligations under international law in relation to the export of dual-use items (European Parliament and Council of the EU, 2021). Democracies have also established rules that provide guidelines for private entities that operate in foreign countries to prevent them from violating human rights or otherwise harming foreign individuals they interact with. Many states have established corporate social responsibility requirements for companies that operate abroad. France, for instance, has enacted the Corporate Duty of Vigilance Law that obligated large French companies to abide by the UN Guiding Principles on Business and Human Rights, accept that they and their contracting companies have human rights responsibility, and established respective preventive measures (Assemblé Nationale, 2017). Another example is the case of South Africa, which has established rules on the conduct of private military companies outside of South Africa's territory (South African Government, 2007).

Even autocracies have taken steps to signal commitment to protections for foreign citizens beyond their borders against harm caused by their policies. Saudi Arabia, for example, in part responding to pressure from the United States, has set up a Joint Incidents Assessment Team (JIAT) composed of representatives of members of the Saudi-led military alliance in Yemen. JIAT was to scrutinize alleged cases of civilian casualties brought about by attacks by the Saudi-led coalition in Yemen. It was also mandated to conduct investigations and hold individuals that were found responsible for such attacks to account and to compile lessons learned on remedial measures and other relevant matters (US State Department, 2018, 21). Another interesting case is that of China publicly committing to taking social and environmental considerations into account in its overseas resource extractive operations and infrastructure projects. China's National Human Rights Action Plan (2016–2020) states that "China shall urge its overseas enterprises to abide by the laws of the countries in which they are stationed, and fulfill their social responsibilities in the process of conducting foreign economic and trade cooperation" (China's State Council, 2016, Sec. V). Moreover, China's State Council published a guidance on the regulation of outbound investment that labels "investments that do not meet the environmental protection, energy consumption, and safety standards of the target country" as "restricted investment" (Covington, 2017, 2). It is also noteworthy that during the country's last Universal Period Review, China accepted several recommendations related to Chinese overseas operations, including the recommendation to "(p)romote measures that ensure that development and infrastructure projects inside and outside its territory are fully consistent with human rights" (UPR Info, 2019, 9–10).

If we look beyond safeguards and turn to rhetoric, we can discern that states have begun to rhetorically embrace the idea that states have extraterritorial human rights obligations. As one of the authors has shown in a recent study on states' rhetoric in the UN Human Rights Council, states still ascribe more relevance to domestic than to extraterritorial human rights violations. However, a relevant

number of states do accept that states not only have domestic but also extraterritorial human rights obligations. Furthermore, states from all UN regional groups refer to extraterritorial human rights obligations. States do frame extraterritorial human rights obligations primarily as negative obligations rather than positive ones. Yet, they do not make extraterritorial human rights obligations conditional on control over territory (such as transitional administration of foreign territory) but are also open to the idea that extraterritorial human rights obligations arise in contexts in which there is merely factual control, as is the case in the context of targeted killing or foreign surveillance, for instance (Heupel, 2018).

For sure, that states introduce what we call "extraterritorial human rights safeguards" and rhetorically embrace the idea that states have extraterritorial human rights obligation does not mean that their commitment is necessarily sincere. Studies have shown that the safeguards that democratic states have introduced to guide counterterrorism operations are not always fully implemented (e.g. Rabi and Plaw, 2020; Knipp and Shams, 2021). The same applies to safeguards unrelated to counterterrorism, such as guidelines that prohibit arms exports to human-rights–abusing countries but are set aside when conflicting interests come to the fore (e.g. Perkins and Neumayer, 2010). Furthermore, safeguards that have been introduced by autocracies with abysmal human rights records at home have rather unsurprisingly been lambasted by critics as mere paper tigers and public relations tools (e.g. Human Rights Watch, 2018). Lastly, much of states' public rhetoric on extraterritorial human rights obligations can certainly not be taken at face value. Nonetheless, the emergence of such safeguards, even if they are paper tigers, and the utterance of such rhetoric, even if hypocritical, is still meaningful. After all, as argued already earlier with a view to the United States, even insincere action and rhetoric tell us something about what actors believe relevant audiences expect them to do or say. Thus, safeguards and rhetoric made purely or mainly for strategic reasons would not make sense if there was no one who believed in the importance of human rights protections against foreign governments.

Avenues for future research

We have shown that the US has introduced a number of safeguards for foreigners beyond US territory that are to guide its counterterrorism policies. We have also shown that safeguards were, for the most part, not introduced due to a conviction that the United States owed protections to foreigners but because of instrumental considerations. US policymakers generally introduced safeguards if there was overwhelming pressure or if they believed that safeguards were in the United States' long-term strategic interests. There are a number of worthwhile avenues for future research on states' extraterritorial human rights obligations. We conclude by sketching out three of them.

First, to what extent are our findings generalizable, that is can we expect the mechanisms that we have discovered in our cases studies to occur also in other cases? There is some evidence that other states have also established safeguards for foreigners beyond their territory in response to pressure (or coercion, in our

terminology). Israel's rules for targeted killing operations, for example, have been ordered in a court judgment (Israeli High Court of Justice, 2006), while China's Corporate Social Responsibility standards are in part a response to a perceived image problem (Schatz, 2013). In other cases, however, in which security-related or geostrategic concerns are less paramount, moral persuasion might well be at the basis of the introduction of safeguards. A case in point might be the trend toward establishing human rights standards for the provision of foreign aid. Finally, looking at cases from different countries together could help us ascertain whether diffusion is at play, that is, whether states emulate the safeguards others have developed. If this is increasingly the case, then states might at a given time no longer have to feel pressured or be effortfully convinced with strategic or moral argument, but they would do what others do because they think this is appropriate.

Secondly, future research should look into whether the safeguards that have emerged are actually implemented and what their impact is on the enjoyment of human rights. In this book we have concerned ourselves only with the emergence of the safeguards and less with their implementation. We have argued that the creation of safeguards is important in its own right. Yet, especially for the victims of extraterritorial human rights violations, it is key whether the safeguards that have emerged are implemented, that is, if they do guide behavior or if they are paper tigers and possibly even expressions of organized hypocrisy that impede meaningful reforms. Moreover, it would be interesting to gain insights into the conditions on which the safeguards are implemented. Potentially, implementation also hinges on strategic considerations, which would imply that coercive pressure and/or strategic incentives would have to be upheld. However, there might also be socialization effects in that at a given time safeguards that have been introduced under pressure or based on strategic considerations are taken for granted.

Thirdly, if we look beyond safeguards and focus more on the rhetoric about states' extraterritorial human rights obligations, we can learn more about the strength of the norm that states have extraterritorial human rights obligations and hence the idea that "universal human rights" implies that individuals deserve protections not just against their own government but against any authority that might infringe upon their rights. How has states' discourse about their extraterritorial obligations changed over time and what kinds of obligations are accepted and under which circumstances? What extraterritorial obligations do civil society actors ascribe to states and based on what arguments? How do IOs frame states' extraterritorial human rights obligations and how do they try to convince their member states to accept such obligations? In answering these questions, we can explore whether the norm that states have extraterritorial human rights obligations is gaining in strength or whether the general backlash against human rights (Vinjamuri, 2017), or the backlash against the liberal international order more broadly (Börzel and Zürn, 2021), has an impact on its trajectory. But even if the latter is true, the findings of this book give hope that the idea that states have human rights obligations, not just toward their citizens and aliens on their territory but also toward foreigners abroad, remains sufficiently strong to constrain even the most powerful actors.

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Appendix

Interviews

Chapter 3 (Torture)

1 July 2019: Former Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, via Skype.

3 May 2019: Mark Fallon, former Director of the Criminal Investigative Task Force, Department of Defense, via Skype.

25 April 2019: Douglas Johnson, former Director of the Center for Victims of Torture, via Skype.

12 April 2019: Amnesty International staffer, Washington D.C.

10 April 2019: John Bellinger, former Senior Associate Counsel to the President and Legal Adviser to the National Security Council, Washington D.C.

10 April 2019: Glenn Carle, former CIA Agent and Deputy National Intelligence Officer for Transnational Threats on the National Intelligence Council, via Skype.

9 April 2019: Former US Special Representative for Afghanistan and Pakistan, Washington D.C.

8 April 2019: Philip Zelikow, former Member of the President's Intelligence Advisory Board and Executive Director of the 9/11 Commission, via Skype.

4 April 2019: Alberto Mora, former General Counsel of the US Navy, Washington D.C.

2 April 2019: Colonel Steven Kleinman, former Head of the Strategic Interrogation Program, US Air Force, via Skype.

29 March 2019: Lieutenant General Robert G. Gard, US Army, Washington D.C.

28 March 2019: Elisa Massimino, former President and CEO of Human Rights First, Washington D.C.

28 March 2019: Retired Rear Admiral, US Navy, Washington D.C.

28 March 2019: Ian Fishback, former US Army officer, via Skype.

25 March 2019: Andrea Prasow, Deputy Washington Director of Human Rights Watch, Washington D.C.

25 March 2019: Retired Brigadier General, US Army, Washington D.C.

20 March 2019: Scott Roehm, Washington Director of the Center for Victims of Torture, Washington D.C.

20 March 2019: Retired Admiral, US Navy, Washington D.C.

19 March 2019: Benjamin Wittes, Senior Fellow, Brookings Institution, Washington D.C.

19 March 2019: Elizabeth G. Arsenault, Associate Professor and Director of Teaching, Center for Security Studies, Georgetown University, Washington D.C.

19 March 2019: Former CIA Agent, Washington D.C.

Chapter 4 (Detention)

5 April 2019: Eric T. Jensen, former Special Counsel to the Department of Defense, via telephone.

3 April 2019: Colonel William Lietzau, former Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, Department of Defense, Washington D.C.

30 March 2019: Lieutenant Colonel Geffrey Corn, former Judge Advocate Officer, US Army, via telephone.

29 March 2019: Andrea Prasow, Deputy Washington Director of Human Rights Watch, Washington D.C.

28 March 2019: Jonathan Hafetz, former Senior Attorney, American Civil Liberties Union (ACLU), via telephone.

27 March 2019: Leon Panetta, former Secretary of Defense and Director of the CIA, via telephone.

27 March 2019: John Negroponte, former Deputy Secretary of State, Washington D.C.

21 March 2019: Joshua Denbeaux, Attorney, Guantanamo Bay Bar Association, via telephone.

20 March 2019: Senior US District Judge, via telephone.

19 March 2019: Laura Dickinson, Professor of Law, George Washington University, Washington D.C.

Chapter 5 (Targeted killing)

2 July 2019: Luke Hartig, former Senior Director for Counterterrorism, National Security Council, via Skype.

9 April 2019: Former US Special Representative for Afghanistan and Pakistan, Washington D.C.

3 April 2019: US House of Representatives staffers, Washington D.C.

3 April 2019: Larry Lewis, Director of the Center for Autonomy and Artificial Intelligence at Center for Naval Analysis, Washington D.C.

26 March 2019: Patricia Stottlemyer, Litigation Staff Attorney, Human Rights First, Washington D.C.

25 March 2019: Andrea Prasow, Deputy Director of Human Rights Watch, Washington D.C.

22 March 2019: Sarah Holewinski, Board of Directors of Civilians in Conflict, Washington D.C.

21 March 2019: Kenneth Anderson, Professor of Law, American University, Washington D.C.

Chapter 6 (Refugee resettlement)

4 April 2019: Nicholas Micinski, Assistant Professor of Political Science, University of Maine, via Skype.

2 April 2019: Larry Yungk, former Senior Resettlement Officer, UNHCR, Washington D.C.

2 April 2019: Richard Hertling, former Staff Director and Chief Counsel, House Judiciary Committee, Washington D.C.

1 April 2019: Melanie Nezer, Senior Vice President, Hebrew Immigrant Aid Society (HIAS), Washington D.C.

27 March 2019: John Negroponte, former Deputy Secretary of State, Washington D.C.

26 March 2019: Kevin Appleby, former Director of Migration and Public Affairs, US Conference of Catholic Bishops, Washington D.C.

21 March 2019: Erol Kekic, Director of the Immigration and Refugee Program, Church World Service, Washington D.C.

Chapter 7 (Foreign surveillance)

14 March 2019: US Senate staffer, Washington D.C.

14 March 2019: US House of Representatives staffer, Washington D.C.

14 March 2019: Robert S. Litt, former General Counsel to the Office of the Director of National Intelligence, Washington D.C.

13 March 2019: Neema Singh Guliani, Senior Legislative Counsel, ACLU, Washington D.C.

12 March 2019: Former senior US government official, Washington D.C.

12 March 2019: US Senate staffer, Washington D.C.

12 March 2019: US government official, via telephone.

5 May 2017: Senior EU official, Florence.

28 February 2017: Amie Stepanovich, US Policy Manager and Global Policy Counsel, Access Now, Washington D.C.

28 February 2017: Drew Mitnick, Policy Counsel, Access Now, Washington D.C.

28 February 2017: Greg Nojeim, Senior Counsel, Center for Democracy & Technology (CDT), Washington D.C.

28 February 2017: Marc Rotenberg, President and Executive Director of the Electronic Privacy Information Center (EPIC), Washington D.C.

27 February 2017: US Senate staffer, Washington D.C.

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