

The Authoritarianization of U.S. Counterterrorism

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The Authoritarianization of U.S. Counterterrorism

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I. Introduction

[W]e will not hesitate to take decisive action. We will always do so legally, discriminately, proportionally, and bound by strict accountability and strong oversight. The United States—not our adversaries—will define the nature and scope of this struggle, lest it define us.¹

More than seventeen years since the “War on Terror” began, the United States has failed to recognize how its authoritarian allies, rather than its adversaries, have defined its counterterrorism practices. Western democracies have adopted signature practices of authoritarian regimes.² Torture, secret renditions to black sites, indefinite detention, mass surveillance, targeted killings, selective anti-terrorism enforcement against dissidents and minorities, criminalization of political beliefs, and decreased due process rights are among the counterterrorism practices found in both the United States and their Middle East allies, albeit in varying degrees.³

Human rights are de-coupled from security, or worse, treated as an impediment to preserving national security. Although the balance between security and liberty has been the topic of lively debate since 9/11, I proffer that the impetus behind rights violations is not limited to perennial tensions between security and liberty in times of war. Increased international coordination in

1. EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 9 (2015).

2. See HUMAN RIGHTS WATCH, WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 140–46 (2004) (discussing the threat to individual rights); Jessica Wolfendale, *Terrorism, Security, and the Threat of Counterterrorism*, 29 STUD. CONFLICT & TERRORISM 753, 761–62 (2016) (noting the tactics of military dictatorships in South America who invoked the threat of internal and external terrorism to justify torture and extrajudicial killings); Sudha Setty, *Country Report on Counterterrorism: United States of America*, 62 AM. J. COMP. L. 643, 644 (2015) (describing the sweeping executive power to investigate and neutralize potential threats).

3. See ANTON DU PLESSIS, A SNAPSHOT OF INTERNATIONAL CRIMINAL JUSTICE COOPERATION AGAINST TERRORISM SINCE 9/11 31–32 (Larissa van den Herrick & Nico Schrijver eds., 2013) (describing the extraordinary rendition program); SUSAN N. HERMAN, TAKING LIBERTIES: THE WAR OF TERROR AND THE EROSION OF AMERICAN DEMOCRACY 177 (2011) (noting targeting of Greenpeace by NSA surveillance); LALEH KHALILL, TIME IN THE SHADOWS: CONFINEMENT IN COUNTERINSURGENCIES 58–64 (2013) (describing the rights infringing tactics deployed by the Israeli government against Palestinians).

counterterrorism between authoritarian regimes and liberal democracies also adversely affects human rights.

As terrorism crosses borders with ease, transnational counterterrorism has become a necessity.⁴ International organizations and states coordinate preventing terrorism, identifying and apprehending known terrorists, and prosecuting terrorism suspects between nations.⁵ One consequence of such coordination is the normalization of illiberal counterterrorism norms and practices common among democratic nations.⁶

While coordinated counterterrorism is warranted to combat transnational terrorists, the current rights-subordinating approach is counterproductive.⁷ Western governments that engage in or directly support rights-infringing practices ultimately aid terrorists as they proclaim themselves legitimate defenders against transnational state violence.⁸ Aggressive state measures trigger backlash attacks as new grievances arise; thereby feeding a cycle of state and non-state violence at the expense of civilian lives.⁹ The challenge for Western democratic nations is to avoid a race to the bottom in their counterterrorism coordination with authoritarian regimes.

4. See, e.g., Ayaz R. Shaikh, *A Theoretic Approach to Transnational Terrorism*, 80 GEO. L.J. 2131, 2157 (1992) (“[T]ransnational terrorism, by definition, involves the participation of more than one nation.”). *But see* TODD SANDLER ET AL., *TRANSNATIONAL TERRORISM 2* (2008) (noting that Western nations’ views that transnational terrorism is a major threat is contradicted by the fact that approximately 1,249 people are killed from transnational terrorist attacks in comparison to 30,000 from annual highway accidents in the U.S.).

5. See Shaikh, *supra* note 4, at 2158–59 (stating the goals of international cooperation). The role of non-state actors in transnational terrorism further facilitates international cooperation. See Monika Heupel, *Adapting to Transnational Terrorism: The UN Security Council’s Evolving Approach to Terrorism*, 38 SECURITY DIALOGUE 477, 494–95 (2007) (emphasizing contemporary terrorism’s fluid territorial affiliation).

6. See *infra* Part IV (detailing the impact of counterterrorism coordination)

7. See Wolfendale, *supra* note 2, at 760 (noting the inadvertent consequences of Western counterterrorism).

8. See, e.g., DALIA DASSA KAYE ET AL., *MORE FREEDOM, LESS TERROR? LIBERALIZATION AND POLITICAL VIOLENCE IN THE ARAB WORLD* 13 (2008) (stating that U.S. support for authoritarian regimes unintentionally promoted extremism).

9. See SANDLER ET AL., *supra* note 4, at 2 (describing competing considerations for liberal democracies responding to transnational terrorism).

To be sure, the deplorable techniques used in the “War on Terror” did not originate solely in the authoritarian regimes of the Middle East and Central Asia.¹⁰ Such practices originated from colonial powers in Algeria, Palestine, Afghanistan, and were subsequently adopted by new ruling elites post-independence.¹¹ Other practices, such as rendition and targeted killings with drones, were innovated by the United States.¹² The Article, thus, explores the narrow issue of the impact on democratic states’ conformity with human rights arising from working with authoritarian states in the Middle East. Specifically, I proffer that counterterrorism coordination with dictatorships normalizes the use of violence and dehumanization of suspects by the U.S. government.¹³ As more agents work with foreign agents who operate in a legal and political context where rights are subordinate to authoritarian security practices, the toleration, aiding and abetting, or direct violations of human rights may rise as the institutional culture of an agency shifts towards a more authoritarian mentality.

The adverse consequences of this drift away from liberal principles are not limited to the subordination of individual rights. Security interests are also compromised. Terrorists astutely exploit state violence and rights violations to legitimize their claims as defenders of justice against state oppression.¹⁴ Terrorist

10. See KHALILI, *supra* note 3, at 7–10 (showing the historical roots of the post-9/11 detention and torture of terrorism suspect in the racialized manipulation of law by European and American governments to repress colonized people).

11. See *id.* at 7 (describing mass slaughter as a routine colonial warfare technique).

12. See Mary Ellen O’Connell, *When Are Drone Killings Illegal?*, CNN, <http://www.cnn.com/2012/08/15/opinion/oconnell-targeted-killing/index.html> (last updated Aug. 16, 2012) (last visited Sept. 10, 2018) (describing the development of the drone program) (on file with the Washington and Lee Law Review).

13. See AM. CIVIL LIBERTIES UNION, INTERNATIONAL CAMPAIGN AGAINST MASS SURVEILLANCE 39–45 (2005) (detailing the normalization of rendition, torture, and death); HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 548–50 (2d ed. 2015) (critiquing international counterterrorism coordination as marginalizing human rights).

14. See, e.g., Sahar F. Aziz, *Losing the ‘War of Ideas’: A Critique of Countering Violent Extremism Programs*, 52 TEX. INT’L L.J. 255, 261–62 (2017)

recruiters point to the wide net of suspicion and prosecution cast upon Muslim minorities as evidence of the state's illegitimacy.¹⁵ Such trends are consistent with some scholars' findings that human rights abuses may correlate with terrorism.¹⁶

Prescriptively, I recommend that financial and legal restrictions should be imposed on U.S. intelligence and security agencies' collaboration with authoritarian regimes with a track record of rights violations in their counterterrorism practices. Existing legal restrictions on the delivery of U.S. foreign aid to countries that violate human rights should be expanded to encompass financial support and coordination in counterterrorism.¹⁷ Put simply, U.S. security agencies should be

(arguing that narratives of oppression and injustice work to recruit vulnerable individuals).

15. See, e.g., Wolfendale, *supra* note 2, at 763 (noting that the majority of people arrested for terrorism in Britain are Muslim although the majority actually convicted are non-Muslim). *But see* James A. Piazza & James Igoe Walsh, *Transnational Terror and Human Rights*, 53 INT'L STUD. Q. 125, 129 (2009) (challenging the normative claim that "transnational terrorist attacks lead governments to restrict rights with the objective of improving security").

16. See James I. Walsh & James A. Piazza, *Why Respecting Physical Integrity Rights Reduces Terrorism*, 43 COMP. POL. STUD. 551, 556 (2010) (arguing that government violations of physical integrity promote terrorism). *But see* Emilie M. Hafner-Burton & Jacob N. Shapiro, *Tortured Relations: Human Rights Abuses and Counterterrorism Cooperation*, 43 PS: POL. SCI. & POL. 415, 419 (2010) (noting that further research is needed to determine if human rights restrictions are counterproductive to international counterterrorism goals).

17. See NINA M. SERAFINO, ET AL., CONG. RESEARCH SERV., R43361, "LEAHY LAW" HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW 1 (2014)

Section 620M of the Foreign Assistance Act of 1961 . . . prohibits the furnishing of assistance authorized by the FAA and the Arms Export Control Act . . . to any foreign security force unit that is credibly believed to have committed a gross violation of human rights. The other provision, inserted annually in DOD appropriations legislation, for years prohibited the use of DOD funds to support any training program (as defined by DOD) involving members of a unit of foreign security or police force if the unit had committed a gross violation of human rights. For FY2014, the prohibition has been expanded to also include "equipment, or other assistance."

See also Kristina Daugirdas & Julian Davis Mortensen, *United States Adjusts Aid to Egypt in Light of Legal and Political Developments*, 109 AM. J. INT'L L. 644,

restrained in the degree to which they can cooperate with countries that violate human rights in counterterrorism.

This Article looks to the authoritarian practices of Egypt, one of the U.S.'s major allies, as a case study. Having long practiced torture, indefinite detention, trial of civilians in military courts, and other human rights violations, Egypt was a destination, among other nations, of terrorism suspects in the U.S. extraordinary rendition program.¹⁸

In comparing the United States counterterrorism practices with Egypt's, the authoritarianization effect of coordination is brought to the forefront. Specifically, American national security policies and practices post-9/11 have become rights-infringing in ways that mirror those of Middle Eastern authoritarian regimes, and their predecessor colonial powers.¹⁹ Hawkish U.S. government national security rhetoric and fear mongering translates into fewer civil liberties and more human rights violations—first for Muslims and eventually for the American public at large.²⁰ Ranging from the extreme practices of torture, indefinite detention, and targeted assassinations to prosecutions that deny defendants' due process, habeas corpus, and confrontation rights, America's counterterrorism practices are troublingly similar to those of their authoritarian partners in the "War on Terror."²¹

II. Theorizing the Causes of Terrorism

For centuries, people have fought asymmetrical wars against sovereign nations in pursuit of political, social, economic, and religious goals.²² The conflicts are often grounded in local

648 (2015) (describing the Leahy Act and restrictions on foreign aid to countries with human rights violations).

18. See DANIEL BYMAN, *THE FIVE FRONT WAR: THE BETTER WAY TO FIGHT GLOBAL JIHAD* 165 (2008) (detailing Egypt's authoritarian practices).

19. See KHALILI, *supra* note 3, at 14–16 (describing repressive colonial practices).

20. See, e.g., Wolfendale, *supra* note 2, at 754 (“[T]he fear of terrorism is as much a product of counterterrorism rhetoric as it is of terrorism itself.”).

21. See *infra* Part IV.B (detailing human rights violations in Egypt).

22. See, e.g., SANDLER ET AL., *supra* note 4, at 1 (detailing terrorist campaigns from 48 A.D. through the current era of transnational terrorism).

grievances against the ruler, ruling elites, and external powerful actors.²³ The surge in international travel, trade, and migration has expanded the reach of terrorist groups.²⁴ Access to the Internet, social media, and other technological advancements provides ample opportunity for non-state actors to recruit and perpetuate violence transnationally.²⁵ As a result, the constrictive effects of state borders are dissipating while asymmetrical conflicts between state and non-state actors surge.²⁶

To effectively counter transnational terrorism, policy makers look to what causes individuals to use violence in pursuit of their aims. This central question has triggered lively debates among scholars and policy makers.²⁷ Among the cacophony of competing theories, two schools of thought have emerged that inform

23. See RICHARD JACKSON ET AL., *TERRORISM: A CRITICAL INTRODUCTION* 18 (2011) (noting that violent Islamist groups in the contemporary era pursue grievances in their local and national contexts); FRANÇOIS BURGAT, *ISLAMISM IN THE SHADOW OF AL-QAEDA* 40–41 (Patrick Hutchison trans., 2008) (noting the Arab governing elite are devoid of public support).

24. See SANDLER ET AL., *supra* note 4, at 1 (listing the high-profile transnational terrorist attacks in the three decades prior to 9/11).

25. See Quan Li & Drew Schaub, *Economic Globalization and Transnational Terrorism: A Pooled Time-Series Analysis*, 48 *J. CONFLICT RESOL.* 230, 249 (2004) (noting that terrorists want to be heard and watched by large audiences, and thus seek out media attention); JESSICA STERN & J.M. BERGER, *ISIS: THE STATE OF TERROR* 124, 172–73 (2015) (describing ISIS's electronic army that used social media to spread its propaganda and recruit); Edward Marks & Michael B. Kraft, *The Evolving Terrorist Threat from Nixon to Trump*, *AM. DIPLOMACY* (2017) http://www.unc.edu/depts/diplomat/item/2017/0106/ca/markskraft_counterterr.html (last visited Sept. 10, 2018) (describing terrorist groups' sophisticated use of the Internet for recruiting) (on file with the Washington and Lee Law Review).

26. See Piazza & Walsh, *supra* note 15, at 127 (explaining that terrorist groups adopt strategies to compensate for controlling fewer material resources than governments); RONALD CRELINSTEN, *COUNTERTERRORISM* 3 (2009) (noting that terrorist groups require less infrastructure than government actors). *But see* Alex Braithwaite & Quan Li, *Transnational Terrorism Hot Spots: Identification and Impact Evaluation* 24 *CONFLICT MGMT. & PEACE SCI.* 281, 289 (2007) (“[A]ll else being equal, if a country is located within a hot-spot neighborhood, it is likely to experience more future terrorist incidents than another country that does not currently belong to such a neighborhood.”).

27. See, e.g., Katerina Dalacoura, *Democracy as Counter-Terrorism in the Middle East: A Red Herring?*, 8 *ULUSLARARASI İLİŞKİLER* 101, 103–06 (2012) (describing political and socio-economic factors driving Islamist terrorism); CRELINSTEN, *supra* note 26, at 2 (examining how terrorist groups choose victims of violent attacks).

counterterrorism policies and practices.²⁸ The first argues that political and socio-economic factors such as poverty, authoritarianism, human rights violations, political repression, an absence of the rule of law, and inequality contribute toward political violence by non-state actors.²⁹ The second argues ideological factors such as religious fundamentalism, anti-capitalism, Marxism, xenophobia, hyper-nationalism, or racism drive political violence.³⁰ The school of thought followed by a particular country influences its counterterrorism strategy. The first school of thought leads to a development and rights-based approach and the second leads to a militarized approach. Although the United States pays lip service to the political and socio-economic factors that contribute to terrorism, its counterterrorism strategies and practices follow the militarized approach.³¹

The development-focused approach connects violence and militancy to poor development indicators such as illiteracy, poverty, rootlessness, poor governance, and rights abuses by the state.³² Grievances arising from such conditions fester to push

28. See KATERINA DALACOURA, ISLAMIST TERRORISM AND DEMOCRACY IN THE MIDDLE EAST 24–25 (2011) (noting ideational, material, and structural causes of terrorism).

29. See Li & Schaub, *supra* note 25, at 237 (posing multiple critiques of Kruger and Maleckova’s 2002 study that found no correlation between poverty and terrorism at the individual level in Hezbollah suicide missions); Dalacoura, *supra* note 27, at 103 (arguing that materialist or structural factors drive Islamic terrorism because ideas are epiphenomenal to the underlying reasons).

30. See CRELINSTEN, *supra* note 26, at 196–97 (listing the ideological influences); see also ALAN KRUEGER, WHAT MAKES A TERRORIST: ECONOMICS AND THE ROOTS OF TERRORISM (2007) (arguing that the rich are as likely as the poor to participate in terrorist acts); Quan Li, *Does Democracy Promote or Reduce Transnational Terrorist Incidents?*, 49 J. CONFLICT RESOL. 278, 294 (2005) (“[D]emocratic participation reduces transnational terrorist incidents in a country. Government constraints, subsuming the effect of press freedom, increase the number of terrorist incidents in a country.”).

31. See *infra* Part III (discussing the authoritarianism of U.S. counterterrorism).

32. See, e.g., Dalacoura, *supra* note 27, at 103 (discussing political impacts of an authoritarian regime); see also Owen Frazer & Christian Nünlist, *The Concept of Countering Violent Extremism*, 183 CSS ANALYSIS IN SECURITY POL’Y 1, 3 (2015) (arguing that countering violent extremism programs should also address structural causes of terrorism, such as intolerance and political, economic, or social marginalization); Edward Newman, *Exploring the “Root*

indigenous groups into violently opposing the state and becoming recruits for foreign terrorist groups.³³ Although the majority of poor people are not terrorists, poverty combined with structural inequalities may facilitate terrorism recruitment.³⁴ Relatedly, rapid urbanization coupled with bulges of educated youth unable to find employment commensurate with their education may explain why middle and upper middle class individuals join terrorist groups.³⁵ When democratic processes are not equally accessible to all residents or rule of law is selectively enforced to the detriment of marginalized groups, violence becomes an attractive means to effectuate change.³⁶

A study of sixty-one “Islamic extremist terrorists” in the U.S., for example, found most of the suspects were at the margins of society.³⁷ Friendless, petty criminals, drug addicts, from broken homes, or suffering a personal identity crisis,³⁸ few of the would-be terrorists sought to spread Islam or establish a caliphate. Instead, they saw themselves as defenders of their religion against what they perceived as America’s war on Islam.³⁹ The American citizen who attempted to bomb Times Square in 2010 admitted to being

Causes” of Terrorism, 29 *STUD. CONFLICT & TERRORISM* 749, 750 (2006) (explaining tactics used by terrorists to recruit new members to support their cause).

33. See KAYE ET AL., *supra* note 8, at 45–46 (discussing socio-economic factors that make individuals susceptible to terrorist group recruitment); Bassam Tibi, *Religious Extremism or Religionization of Politics: The Ideological Foundations of Political Islam*, in *RADICAL ISLAM AND INTERNATIONAL SECURITY: CHALLENGES AND RESPONSES* 93–94 (Efraim Inbar & Hillel Frisch eds., 2007) (arguing that high unemployment rates and social marginalization among North African Muslim youth in France have made them more sympathetic to violent Islamist groups).

34. See CRELINSTEN, *supra* note 26, at 198 (noting economic factors driving terrorism). For an analysis examining how counterterrorism programming also disparately impacts poor and working-class communities in the U.S., see Khaled A. Beydoun, *Between Indigence, Islamophobia and Erasure: Poor and Muslim in “War on Terror” America*, 104 *CALIF. L. REV.* 1463 (2016).

35. See DALACOURA, *supra* note 28, at 34 (describing how recruitment spans across various socioeconomic classes).

36. See BYMAN, *supra* note 18, at 191 (noting the impact of a lack of democratic process).

37. See John Mueller & Mark G. Stewart, *Terrorism, Counterterrorism, and the Internet: The American Cases*, 8 *DYNAMICS ASYMMETRIC CONFLICT* 176, 177 (2015) (examining the “radicalization” process of potential terrorists).

38. See *id.* (noting that many could not keep employment).

39. See *id.* (describing that potential terrorists are motivated by revenge).

motivated by the U.S. terrorizing Muslim people and Muslim countries through drone strikes, among other practices.⁴⁰ Ironically, the more the U.S. government imputes a criminal connotation to the term “Islamist,” the more members of terrorist organizations believe their violent acts are a form of legitimate revolt against state oppression.⁴¹ That is, calling terrorism “Islamist jihad” validates terrorist groups’ propaganda that America is at war with Islam.⁴²

Armed conflict also correlates with terrorism. The Global Terrorism Index found that state violence and the presence of an armed conflict are closely associated with terrorist activity.⁴³ Ninety-two percent of terrorist attacks over twenty-five years occurred where state violence was prevalent.⁴⁴ In contrast, fewer than 0.6% of terrorist attacks occurred in states without conflict or state violence.⁴⁵ Predictably, failed states are a magnet for terrorist groups to set up bases from which to launch domestic and transnational attacks.⁴⁶ Indeed, the Middle Eastern countries of Iraq, Syria, and Libya with governments who lack a monopoly over the use of force are now hosts to branches of Al Qaeda, ISIS, and other transnational terrorist groups.⁴⁷

Taking stock of this data, the Bush administration made democracy promotion the defining component of its post-9/11

40. See *id.* at 178 (detailing a desire to be part of the solution to U.S. attacks).

41. See BURGAT, *supra* note 23, at 8 (discussing the impact of the American narrative on terror).

42. See Aziz, *supra* note 14, at 261 (describing the recruiting narrative of violent American military intervention and support of dictators).

43. See INST. FOR ECON. & PEACE, GLOBAL TERRORISM INDEX 2015 68 (2015) (describing contributing factors such as armed conflict, conflict within the country, and corruption).

44. See *id.* at 70 (“92 percent of all terrorist attacks occurred in countries where the Political Terror Scale was very high.”)

45. See *id.* at 68 (emphasizing the link between terrorism and state security); see also Li & Schaub, *supra* note 25, at 242 (finding that countries with a history of terrorist activities have more terrorist incidents than those without a history of terrorism).

46. See KAYE ET AL., *supra* note 8, at 25 (arguing that a lack of state legitimacy bolsters support for terrorists as defenders against state injustice).

47. See Heupel, *supra* note 5, at 481 (stating that terrorist groups turned to failing states instead of relying on state-provided safe havens); Walsh & Piazza, *supra* note 16, at 533 (discussing terrorist groups’ strategy for growth).

Freedom Agenda, thereby continuing America's long history of spreading democracy as a mainstay of its foreign policy.⁴⁸ The U.S. National Security Strategy in 2006, 2010, and 2015 acknowledges that for democracy to exist, civil liberties, minority rights, and equality of all citizens must be preserved.⁴⁹ The U.S. strategy rhetorically commits to using "economic assistance, development aid, trade, and good governance" to support new democracies.⁵⁰ By promoting democracy in Muslim majority countries, the U.S. government believed Western security also would be improved.⁵¹ But contrary to its rhetoric, the U.S.'s counterterrorism practices bred violence.

The second school of thought attributes ideology as the cause of terrorism, ranging from ethno-nationalism, separatism, anarchism, anti-capitalism, neoliberalism, and religious fundamentalism.⁵² During the end of the Cold War, non-state actors using religion to justify political violence emerged.⁵³ The Middle East and Central Asia became the center of fundamentalist, extremist groups seeking to overthrow

48. See Daniel Byman & Sara Bjergand Moller, *The United States and the Middle East: Interests, Risks, and Costs*, in SUSTAINABLE SECURITY: RETHINKING AMERICAN NATIONAL SECURITY STRATEGY 291 (Jeremi Suri & Benjamin Valentino eds., 2016) (discussing that spreading democracy was essential to the administration's counterterrorism strategy); see also MUSLIMS IN THE WEST AFTER 9/11: RELIGIONS, POLITICS AND LAW 93–97 (Jocelyne Cesari ed., 2010).

49. See generally EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 6 (2006); EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 5, 37–38 (2010); EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 19, 21 (2015).

50. See generally EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 4 (2006); EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 5 (2010); EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 21 (2015).

51. See, e.g., Dalacoura, *supra* note 27, at 102 ("[T]he assumption on which the Bush counter-terrorism policy was based . . . was that authoritarianism in the Middle East was at least one important cause of Islamist terrorism.").

52. See Victor Asal & R. Karl Rethemeyer, *The Nature of the Beast: Organizational Structures and the Lethality of Terrorist Attacks*, 70 J. OF POL. 437, 439 (2008) ("[T]he most lethal terrorist organizations are those motivated by both religion and ethnonationalism.").

53. See, e.g., Walter Enders & Todd Sandler, *After 9/11: Is it all Different Now?*, 49 J. CONFLICT RESOL. 259, 263 (2005) (noting the rising influence of fundamentalist terrorism even though state sponsored terrorism was decreasing).

authoritarian regimes beholden to American interests.⁵⁴ These terrorists began by targeting Middle East regimes deemed the “Near Enemy” and eventually spread to their Western backers—the “Far Enemy.”⁵⁵

Al Qaeda and its progeny ISIS reject the Westphalian nation-state European model and seek to replace it with an Islamic caliphate order.⁵⁶ Attributing the Middle East’s delayed development and moral corrosion to Western political and economic models and American imperialism, these transnational terrorists call for a pan-Islamic caliphate ruling all states with Muslim-majority populations.⁵⁷ To them, the Middle East’s problems are a direct result of European colonialism that continues to the present day through lackey dictators.⁵⁸ Muslims, therefore, have a religious duty to revolt against Western hegemony through an Islamic awakening that will return Islamic civilization as a dominant actor in world politics.⁵⁹ For these reasons, some scholars argue that political reforms, economic development, or democracy promotion in Muslim majority countries will not affect the behavior of transnational terrorists.⁶⁰

54. See BURGAT, *supra* note 23, at 32–33 (noting the geographical concentration of fundamentalist views).

55. See INST. FOR ECON. & PEACE, *supra* note 43, at 2 (noting that ISIS has advocated for attacks against the United States, Canada, Australia, and European countries). *But see* Gary LaFree et al., *Trajectories of Terrorism: Attack Patterns of Foreign Groups That Have Targeted the United States, 1970–2004*, 8 CRIMINOLOGY & PUB. POL’Y 445, 470 (2009) (“[M]ost terrorist attacks by foreign groups deemed dangerous to national security by the U.S. government are in fact directed at non-U.S. targets.”).

56. See JACKSON ET AL., *supra* note 23, at 46–47 (noting that counterterrorism aims to preserve the legitimacy of the existing order and maintaining political authority).

57. See *id.* at 17 (noting that modern pan-Islamism has roots in the anti-colonial movement by Muslim intellectuals).

58. See BURGAT, *supra* note 23, at 40–41 (describing the lingering effects of colonialism).

59. See, e.g., STERN & BERGER, *supra* note 25, at 117 (detailing ISIS propaganda disclaiming democracy, secularism, nationalism, and other Western ideals); DALACOURA, *supra* note 28, at 15, 21 (critiquing terrorism studies for engaging in Islamic “exceptionalism”).

60. See generally F. Gregory Gause III, *Can Democracy Stop Terrorism?*, FOREIGN AFF. (Sept. 2005), <https://www.foreignaffairs.com/articles/middle-east/2005-09-01/can-democracy-stop-terrorism> (last visited Sept. 10, 2018) (on file

This reasoning, however, incorrectly assumes the rise of Islamic political movements in the Middle East take both violent and nonviolent forms; and overlooks that most political Islamists are nonviolent.⁶¹

A nation's position on the causes of terrorism shapes its counterterrorism practices. Those who believe terrorism is ideologically driven are more likely to adopt militaristic, rights-infringing practices based on essentialized perceptions of the target group's identity.⁶² In contrast, a more nuanced understanding of the social and economic causes of terrorism recognizes the importance of civil and human rights in preventing terrorism, thereby leaning towards a development-based approach.⁶³

While international legal instruments acknowledge the importance of human rights, civil liberties, and development, it is up to each individual nation to determine the extent to which its counterterrorism practices comport with domestic and international rights norms.

III. The Legal and Policy Framework for Transnational Counterterrorism

The old adage that one person's terrorist is another person's freedom fighter is no less true today than it has been throughout

with the Washington and Lee Law Review); Alan B. Krueger & Jitka Malečková, *Education, Poverty and Terrorism: Is There a Causal Connection?*, 17 J. ECON. PERSP. 119 (2003).

61. See DALACOURA, *supra* note 28, at 15, 21 (noting an assumption of an inherent association between terrorism and Islam). See *id.* at 123 (noting that majority of Islamist groups in the Middle East are non-violent and integrated in their respective political systems); see also Jacob Poushter, *In Nations With Significant Muslim Populations, Much Disdain for ISIS*, PEW RES. CTR. (Nov. 17, 2015), <http://www.pewresearch.org/fact-tank/2015/11/17/in-nations-with-significant-muslim-populations-much-disdain-for-isis/> (last visited Sept. 10, 2018) (finding that data collected in 11 Muslim-majority countries demonstrated overwhelmingly negative views of ISIS) (on file with the Washington and Lee Law Review).

62. See generally Jeremy Pressman, *Rethinking Transnational Counterterrorism: Beyond a National Framework*, WASH. Q., Autumn 2007, at 63.

63. See generally *id.*

history.⁶⁴ Motivated by political, social, and economic goals, transnational terrorists proclaim their violence is necessary to defend against state injustice and oppression.⁶⁵ Followers accept skewed interpretations of religious and secular ideologies because they believe their cause is just.⁶⁶ Because terrorism is what one scholar characterizes as a “gray-area phenomenon, something between crime and war, state violence and insurgent violence, conflict and violence, and propaganda and direct action,” the international community cannot agree on a universal definition.⁶⁷ Indeed, there is no universal definition of terrorism.⁶⁸ Nonetheless, most competing definitions of terrorism include four essential components: (1) a violent act; (2) civilian victims; (3) the

64. See M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L.J. 83, 101 (2002) (“[T]he phenomenon is as old as history, even as its manifestations have changed as a result of new technology.”); Kennedy Graham, *The Security Council and Counterterrorism: Global and Regional Approaches to an Elusive Public Good*, 17 TERRORISM & POL. VIOLENCE 37, 40 (2005) (highlighting modern usage of the phrase).

65. See Graham, *supra* note 64, at 40–45 (providing a succinct typology of different groups that use violence for political purposes).

66. See STERN & BERGER, *supra* note 25, at 224 (noting that violent apocalyptic groups such as Al Qaeda and ISIS see themselves as fighting a cosmic war between good and evil).

67. CRELINSTEN, *supra* note 26, at 39. The political science literature offers the following generic definition of terrorism: “the premeditated use or threat to use violence by individuals or subnational groups against noncombatants in order to obtain a political or social objective through the intimidation of a large audience beyond that of the immediate victim.” SANDLER ET AL., *supra* note 4, at 5; see also Enders & Sandler, *supra* note 53, at 260 (“Terrorism is the premeditated use or threat of use of violence by individuals or subnational groups to obtain a political or social objective through intimidation of a large audience beyond that of the immediate victims.”).

68. See, e.g., Krueger & Malečková, *supra* note 60, at 121 (stating there are over 100 scholarly or diplomatic definitions of terrorism). U.S. law defines international terrorism as an intentional violent act or acts dangerous to human life that violate U.S. criminal laws and appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occurs primarily outside of the United States. See USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 363 (2001). The European Union goes further to define terrorism as a set of criminal tactics that destabilize or destroy fundamental principles of democratic societies. See EUROPOL, TE-SAT 2010: EU TERRORISM SITUATION AND TREND REPORT 5 (2010).

perpetrators have a political, religious, or social motive; and (4) terrorists seek to provoke a political reaction and spread fear.⁶⁹ Notably, terrorism is not war, guerilla warfare, or insurgency even though terrorist acts may be deployed in those contexts.⁷⁰

Historically, terrorism was domestic insofar as its effect on the citizens, institutions, property, and policies of a defined geography. The perpetrators and the victims were from the same host country, and the terrorist act occurred within the host country's jurisdiction.⁷¹ Transnational terrorism, in contrast, occurs when individuals or entities from two or more states directly participate in a terrorist act.⁷² Attacks by perpetrators in one country against targets in another country, as well as against multilateral organizations,⁷³ emerged during the late 1960s when left wing anti-capitalist terrorist groups and Palestinian liberation groups attacked foreign corporations, multilateral organizations, and foreign military targets.⁷⁴ In the years following the September 11th attacks against the World Trade Center in New York City, U.S. property and citizens were targeted more frequently than other nations in large part because the U.S. military had a large contingency in Iraq and surrounding countries.⁷⁵

As transnational terrorism grew, so too did the need for cooperation between states to counter it. In contrast to nationalist groups, Al Qaeda and ISIS target Middle Eastern governments in their quest to replace the Westphalian nation-state model with a

69. See STERN & BERGER, *supra* note 25, at 142–43 (describing terrorist groups' tactics and motivations); CRELINSTEN, *supra* note 26, at 78 (describing common characteristics of terrorism).

70. See generally BRUCE HOFFMAN, *INSIDE TERRORISM* (2006); SANDLER ET AL., *supra* note 4; STERN & BERGER, *supra* note 25.

71. See SANDLER ET AL., *supra* note 4, at 7–8 (describing the internal impacts of terrorism).

72. See Shaikh, *supra* note 4, at 2133 (including incidents originating in one country and ending in another).

73. See SANDLER ET AL., *supra* note 4, at 8 (discussing the various models of transnational terrorist attacks).

74. See *id.* at 12; DALACOURA, *supra* note 28.

75. See SANDLER ET AL., *supra* note 4, at 8 (citing data showing that in 2006, 40% of transnational terrorism was directed at U.S. interests); David P. Oakley & Patrick Proctor, *Ten Years of GWOT, the Failure of Democratization and the Fallacy of "Ungoverned Spaces"*, 5 J. STRATEGIC SECURITY 8, 8 (2012) (noting the U.S. spent eight years and approximately \$806 billion in Iraq since 2003).

pre-modern pan-Islamic caliphate.⁷⁶ The rise in transnational terrorism has made states' counterterrorism policies interdependent, and generated multiple international counterterrorism instruments.⁷⁷ Even before the September 11th attacks triggered a flurry of interstate coordination, the United Nations was coordinating counterterrorism among states.⁷⁸

A. Prioritizing Terrorism Prevention

In 1994, the UN General Assembly issued the Declaration on Measures to Eliminate International Terrorism.⁷⁹ The UN urged states "to take all appropriate measures at the national and international levels to eliminate terrorism"⁸⁰ and emphasized "the need further to strengthen international cooperation between States."⁸¹ The Security Council invoked its authority under Article 39 of Chapter VII of the UN Charter to demand that states actively root out terrorists within their territories.⁸² Security Council Resolution 1373 (drafted primarily by the United States) was issued on September 28, 2001 and declared that terrorism is a *per se* threat to international peace and security.⁸³ Similarly, Security

76. See, e.g., DALACOURA, *supra* note 28, at 12 (explaining that terrorist groups oppose Western forms of government). *But see* JACKSON ET AL., *supra* note 23, at 22–23 (noting that Western military interventions or civil war situations allow Islamist extremist groups to fight alongside resistance groups and to impose their politico-religious narrative on the national struggle).

77. See G.A. Res. 60/1, ¶ 71 (Oct. 24, 2005) ("We acknowledge that we are living in an interdependent and global world and that many of today's threats recognize no national boundaries, are interlinked and must be tackled at the global, regional and national levels in accordance with the Charter and international law.").

78. See Graham, *supra* note 64, at 45–49 (discussing modern counterterrorism coordination before 2001); see generally RAPOPORT, *supra* note 53.

79. See G.A. Res. 49/60, ¶ 1 (Dec. 9, 1994) (calling for international cooperation and development of international law).

80. *Id.* ¶ 4.

81. G.A. Res. 51/210, annex (Dec. 17, 1996).

82. See U.N. Charter art. 43 (authorizing investigation into any dispute or situation which might threaten international security).

83. See S.C. Res. 1373, ¶ 1 (Sept. 28, 2001) (calling for states to complement all international counterterrorism efforts).

Council Resolutions 1377 (2001), 1540 (2004), 1566 (2004), and 1624 (2006) situated international terrorism as the most serious threat to international peace and called on states to participate in a “sustained, comprehensive approach involving the active participation and collaboration of Member States of the United Nations . . . to combat the scourge of international terrorism.”⁸⁴

The Security Council called on all states to impose anti-terrorism criminal sanctions in domestic laws and prosecute any person who finances, plans, prepares, or perpetrates terrorists acts or supports such acts.⁸⁵ States were obliged to prevent individuals and groups from using their territory for transnational terrorism, prohibit terrorists from moving through their territory, strengthen security of international borders, combat fraudulent travel documents, and share relevant counterterrorism information with other states.⁸⁶

To monitor states’ compliance with counterterrorism obligations and facilitate technical assistance with limited implementation capacities, Resolution 1373 established the Counter-Terrorism Committee (CTC)—which notably left out the importance of compliance with human rights law.⁸⁷ Instead, the

84. S.C. Res. 1377, at 2 (Nov. 12, 2001).

85. See S.C. Res. 1373, *supra* note 83, ¶ 1 (criminalizing direct or indirect funding); Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT’L SECURITY L. & POL’Y 437, 449 (2010) (arguing the UN’s demands for states to change their domestic laws were unprecedented).

86. See Heupel, *supra* note 5, at 489 (noting that the strategy addresses the distinct features of transnational terrorism); see also U.S. DEPT OF STATE, PATTERNS OF GLOBAL TERRORISM 2001 viii (2002) (noting the coordination of intelligence sharing between U.S. and its Middle East allies in global war on terror).

87. See DUFFY, *supra* note 13, at 546 (linking the resolution to human rights violations). Like other international obligations, counterterrorism implementation is not consistent across countries. To address compliance problems, policy makers adopt one of two methodologies. The Enforcement School deters non-compliance by “controlling the cost-benefit calculation of states through monitoring and the threat or use of sanctions in the cases of norms violation.” Heupel, *supra* note 5, at 483. The Management School assumes that states intend to comply with international rules but fail to do so due to insufficient economic or political capacity. As such, proponents of this school recommend problem-solving and capacity building strategies rather than enforcement strategies. *Id.*; see also Scheppele, *supra* note 85, at 443 (“[W]idespread compliance with the Resolution 1373 framework makes the anti-terrorism

CTC focuses on UN member states' compliance with counterterrorism practices through periodic reports.⁸⁸

By 2005, there were at least thirteen international instruments related to the prevention and suppression of terrorism and the Security Council had issued five resolutions.⁸⁹ In 2006, the United Nations issued its first Global Counter-Terrorism Strategy based on four pillars: (1) addressing the conditions conducive to the spread of terrorism; (2) preventing and combatting terrorism; (3) building states' capacity and strengthening the role of the United Nations; and (4) ensuring human rights and the rule of law.⁹⁰ In the years following 9/11, the second pillar of the UN's counterterrorism strategy—preventing and combatting terrorism—dominated international efforts, at the expense of human rights, rule of law, and civil liberties.⁹¹

B. Unfulfilled Commitments to Human Rights

Shortly after the September 11th terrorist attacks, the General Assembly emphasized the importance of “promot[ing] and protect[ing] human rights and fundamental freedoms, as well as due process and the rule of law, while countering terrorism” in its multiple resolutions calling for the protection of human rights and fundamental freedoms while countering terrorism.⁹² The Security Council also recognized that counterterrorism measures should comply with international human rights, refugee, and

campaign an extraordinary example in international law.”).

88. See PLESSIS, *supra* note 3, at 45 (noting that the CTC identifies priority areas by reviewing states' reports).

89. See, e.g., Heupel, *supra* note 5, at 488–90 (describing resolutions prohibiting the movement of terrorists, implementing sanctions, and suppressing weapons proliferation).

90. See G.A. Res. 60/288, at 1–2 (Sept. 20, 2006) (reaffirming the need for cooperation among states).

91. See DUFFY, *supra* note 13, at 554 (highlighting the emphasis on security over individual rights).

92. See generally G.A. Res. 57/219 (Feb. 27, 2003); G.A. Res. 58/187 (Mar. 22, 2004); G.A. Res. 59/191 (Mar. 10, 2005); G.A. Third Comm., *Recognizing the Role of Human Rights Defenders and the Need for Their Protection*, U.N. Doc. A/C.3/70/L.46/Rev. 1 (Nov. 13, 2015).

humanitarian law.⁹³ The 2005 General Assembly World Summit Outcome Resolution declared “[s]tates must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.”⁹⁴ As egregious human rights violations came to light, the UN Commission on Human Rights appointed a special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁹⁵ That same year, the United Nations developed a Global Counter-Terrorism Strategy.

The UN emphasized human rights as an integral part of effective counterterrorism, and reiterated its commitment to sponsor programs that “promote dialogue, tolerance and understanding among civilizations, cultures, peoples and religions, and to promote mutual respect for and prevent the defamation of religions, religious values, beliefs, and cultures.”⁹⁶ In rejecting the clash of civilizations narrative, the Secretary General launched the Alliance of Civilizations.⁹⁷ This initiative brought together governments and civil society to “improve understanding and cooperative relations among nations and peoples across cultures and religions—in particular, between the so called Western and Muslim societies—and in the process, to help counter the forces that fuel polarization and extremism.”⁹⁸

93. See G.A. Res. 60/288, annex (Sept. 20, 2006) (emphasizing the legal obligations for prosecuting terrorist suspects). Notably, some Security Council resolutions did not include provisions recognizing the importance of protecting human rights. See S.C. Res. 1377 (Nov. 12, 2001); S.C. Res. 1455 (Jan. 17, 2003). *But see* S.C. Res. 1456, ¶ 6 (Jan. 20, 2003) (“States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”).

94. G.A. Res. 60/1, ¶ 85 (Oct. 24, 2005).

95. See Human Rights Council Res. 2005/80, ¶ 14 (Apr. 21, 2005) (appointing a special rapporteur to identify best practices to counter terrorism).

96. G.A. Res. 60/288, *supra* note 90, at 4.

97. See *id.* (promoting dialogue, tolerance and understanding); *History, UNITED NATIONS ALLIANCE OF CIVILIZATIONS*, <https://www.unaoc.org/who-we-are/history/> (last visited Sept. 10, 2018) (noting the Alliance’s formation against the backdrop of the global war on terror) (on file with the Washington and Lee Law Review).

98. *History, supra* note 97.

In direct contradiction to these commitments, the U.S. military and intelligence agencies bombed suspected terrorist training camps, kidnapped suspected terrorists into secret rendition programs, tortured terrorism suspects, and placed suspects in indefinite detention in Guantanamo and other military bases in Central Asia and the Middle East.⁹⁹ Law enforcement agencies created travel screening watchlists and No Fly Lists, spied on Muslim and Arab communities based on racial and ethnic profiling, designated Muslim civil society groups as terrorists, prosecuted Muslims for material support to terrorism, froze assets of Islamic charities, and deported Muslims suspected of holding anti-Western political views or religious associations.¹⁰⁰

Counterterrorism practices treated Muslim, Arab, and South Asian individuals and communities as potential terrorists.¹⁰¹ Security discourse grounded in fear and stereotypes equating terrorism with Islam, thereby propagating the narrative that Islam and the West are engaged in a clash of civilizations.¹⁰² Islam and Muslims replaced Communism and Russians, respectively, as the civilizational threat to Western democracy.¹⁰³ Transnational

99. See Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 3 (describing aggressive methods of torture).

100. See DUFFY, *supra* note 13, at 550 (arguing that counterterrorism efforts lead to marginalization of individual rights); JACKSON, *supra* note 23, at 66 (discussing how the “evil international terrorist” became associated with “Eastern” otherness, thereby resulting in increased insecurity for Muslim communities due to intensified counterterrorism focused on them); see also G.A. Res. 54/109, ¶ 1 (Feb. 25, 2000) (adopting the International Convention for the Suppression of the Financing of Terrorism to criminalize and punish terrorist financing acts).

101. See HERMAN, *supra* note 3, at 197 (describing targeted surveillance tactics).

102. See JACKSON, *supra* note 23, at 23 (detailing the impact of divisive rhetoric); President George W. Bush, Address to Congress (Sept. 20, 2001) (“This is the world’s fight. This is civilization’s fight. This is the fight of all who believe in progress and pluralism, tolerance, and freedom.”).

103. See LISA STAMPNITZKY, DISCIPLINING TERROR: HOW EXPERTS INVENTED “TERRORISM” 49–83 (2013) (arguing that political discourse crafted Islam as a threat to Western ideals); Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 475 (2012) (noting that the U.S. disproportionately focuses on terrorist acts committed by Muslims); Dalia F. Fahmy, *The Green Scare is not McCarthyism 2.0: How Islamophobia is Redefining the Use of Propaganda in Foreign and Domestic*

terrorists leveraged this apocalyptic narrative to recruit disaffected, impoverished, and oppressed young men in Muslim majority and Western countries to join their proclaimed just cause.¹⁰⁴ And human rights groups added the United States to their list of nations who violated human rights.¹⁰⁵

IV. The Authoritarianization Effect of Transnational Counterterrorism

The commitment to cooperate with Middle Eastern nations to stop transnational terrorism has been a consistent message from the White House since 2001.¹⁰⁶ President Bush pledged “to strengthen our partnership with every nation that joins in the fight against terror. We deepened our security cooperation with allies like Jordan and Egypt, and with our friends in the Gulf.”¹⁰⁷ President Obama proclaimed in his 2011 National Strategy for Counterterrorism that the “United States alone cannot eliminate every terrorist or terrorist organization that threatens our safety, security, or interests . . . we must join with key partners and allies to share the burdens of common security.”¹⁰⁸ While the Obama administration admitted these partners do not share America’s values, it believed through cooperation the United States would “demonstrat[e] through our example the value of upholding human rights and responsible governance [and] these partners will ultimately be more stable and successful if they move toward these principles.”¹⁰⁹

Affairs, 39 *DIALECTICAL ANTHROPOLOGY* 63, 67 (2015).

104. See STERN & BERGER, *supra* note 25, at 194–95 (discussing the deployment of identity-based extremism in the Middle East and use of narratives of battles between good and evil).

105. See HUMAN RIGHTS WATCH, *IN THE NAME OF SECURITY: COUNTERTERRORISM LAWS WORLDWIDE SINCE SEPTEMBER 11 10–16* (2012) (describing the UN’s unprecedented counterterrorism resolutions).

106. See Byman & Moller, *supra* note 48, at 288–99 (noting that Egypt, Jordan, Saudi Arabia, and Yemen were especially valued for their cooperation).

107. President George W. Bush, Address at the Saban Forum (Dec. 5, 2008).

108. EXEC. OFFICE OF THE PRESIDENT, *NATIONAL STRATEGY FOR COUNTERTERRORISM* 7 (2011).

109. *Id.*

What appears to have occurred, however, is the opposite. The United States violated human rights abroad and expanded executive power at the expense of civil liberties at home. All the while, Middle East partners have become more authoritarian in their practices using national security as pretext. Human rights are not advancing as a result of transnational counterterrorism coordination. Instead, authoritarian practices are spreading to Western nations.¹¹⁰

To be sure, I am not arguing the United States has become an authoritarian state. Rather, I posit that formal and informal transnational counterterrorism coordination facilitates Middle East authoritarian practices influencing the United States in ways that erode civil liberties at home and human rights abroad.¹¹¹ The shift from a criminal law enforcement paradigm to an open-ended war model, for example, places the U.S. in an unofficial state of emergency.¹¹² With that comes deference to rights-infringing national security practices. Fewer rights and liberties become the new normal.

Expansions in executive authority under the auspices of national security coupled with legislative changes have circumscribed the oversight role of the courts.¹¹³ Politicians' rhetoric inflates fears of terrorists waiting to strike at any moment.¹¹⁴ The media exacerbates the public's fears through extensive coverage of terrorism while leaving out data showing the likelihood of being killed by a terrorist attack is miniscule; not to mention the overwhelming majority of terrorist attacks are directed at non-U.S. targets.¹¹⁵ Nevertheless, Congress passes laws

110. See *infra* Part IV.C (detailing the normalization of torture and surveillance by the U.S. government).

111. See Hafner-Burton & Shapiro, *supra* note 16, at 415 (arguing that the U.S. must protect human rights to effectively fight the war on terror).

112. See Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (declaring a national state of emergency due to the immediate threat of future terror attacks).

113. See Setty, *supra* note 2, at 671–72 (arguing that the judiciary has acquiesced to the aggressive counterterrorism methods); DUFFY, *supra* note 13, at 593–94 (noting the shift in power from the judiciary to the political branches).

114. See *generally* President George W. Bush, State of the Union Address (Jan. 29, 2002).

115. See Gary LaFree et al., *supra* note 55, at 468 (“[B]etween 1970 and 2004,

granting the president expansive authorities and judges defer to executive action.¹¹⁶ Over time, such trends have led to abuses of authority arising from the concentration of power in the executive branch.¹¹⁷

By comparing the national security practices of a dominant Middle East country and longtime U.S. ally, Egypt, with those of the United States, I demonstrate how transnational counterterrorism may be contributing toward the normalization of human rights and civil liberties violations in Western democracies.¹¹⁸ Although counterterrorism coordination is not the sole cause of U.S. rights violations, it is an overlooked factor that warrants further scrutiny by government officials and citizens seeking to reverse the misguided subordination of rights to security. My comparison focuses on five practices: (1) torture; (2) indefinite detention; (3) inhumane conditions of detention; (4) mass surveillance; and (5) selective enforcement of anti-terrorism laws against Muslims and dissidents.

A common theme permeating these rights-infringing practices is the reduced levels of due process afforded targets as a result of judicial inaction, legislative mandate, or executive fiat in a secretive counterterrorism regime.¹¹⁹ Moreover, these practices occurred despite ratification of international human rights agreements that prohibit both Egypt and the United States from engaging in such practices.¹²⁰ That the United States is

more than 96% of more than 16,000 terrorist attacks were in fact directed at non-U.S. targets.”).

116. See generally DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2009).

117. See Setty, *supra* note 2, at 644 (emphasizing the lack of accountability and oversight of the executive branch); Joanna Baltes et al., *Convicted Terrorists: Sentencing Considerations and Their Implications on Foreign Policy*, 8 J. NAT'L SECURITY L. & POL'Y 347, 348 (2016) (noting the lack of transparency surrounding the executive's discretion on whether or not to seek execution).

118. See JEREMY M. SHARP, CONG. RESEARCH SERV., RL33003, *EGYPT: BACKGROUND AND U.S. RELATIONS* 11 (2017) (detailing Egypt's use of mass trials and anti-protest laws).

119. See DUFFY, *supra* note 13, at 902 (describing the loss of individual rights).

120. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (obligating states to protect the right to life; right to be free from torture, cruel, inhuman or degrading treatment; right to a fair trial by an independent and impartial court; and right to humane conditions of detention).

systemically violating these commitments with impunity evinces a troubling race to the bottom transnationally.¹²¹

A. Coordination in Counterterrorism Between the United States and Middle East Countries

While international coordination predated the September 11th terrorist attacks, the frequency and scope of counterterrorism coordination afterward expanded dramatically.¹²² United States national security strategy documents emphasized working with foreign partners as essential to counterterrorism efforts.¹²³ Law enforcement agents share intelligence, conduct joint trainings and operations, and collaborate on countering radicalization.¹²⁴ Coordinated intelligence gathering is also an essential component of transnational counterterrorism.¹²⁵ For instance, thousands of FBI agents work with their foreign counterparts to prevent terrorist attacks from Al Qaeda, ISIS, and other organizations.¹²⁶ Egyptian officials tout their intelligence sharing and participation

Egypt was the first Arab country to sign the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and yet it is among the most egregious torturers in the region. *See* James J. Napoli, *Egypt's Campaign Against Islamists, and Human Rights Concerns, Heat Up*, WASH. REP. ON MIDDLE E. AFF., Aug. 1993, at 54; CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES (2010).

121. *See generally* CHALLENGING U.S. HUMAN RIGHTS VIOLATIONS SINCE 9/11 (Ann Fagan Ginger ed., 2005).

122. *See, e.g.*, PLESSIS, *supra* note 3, at 43 (describing 9/11 as the catalyst for new areas of cooperation to combat terrorism).

123. *See, e.g.*, EXEC. OFFICE OF THE PRESIDENT, *supra* note 108, at 9 (stating the necessity of partnering with states that face terrorist threats).

124. *See id.* at 7 (stating that partnering leads to increased stability); PLESSIS, *supra* note 3, at 37–38 (describing efforts to gather evidence across borders). *But see* WADIE E. SAID, CRIMES OF TERROR 14–16 (2015) (critiquing counter-radicalization as using religious orthodoxy as a proxy for terrorism).

125. *See generally* Letter from Donald J. Trump, President of the U.S., to Congressional Leaders (June 6, 2017) (on file with the Washington and Lee Law Review); Byman & Moller, *supra* note 48.

126. *See* U.S. DEP'T OF JUSTICE, COUNTERING THE THREAT OF TERRORISM, INCLUDING COUNTERTERRORISM AND INTELLIGENCE 2 (2014) (noting that federal agent work in surveillance, infrastructure, and partnerships).

in coalition meetings aimed at coordinating counterterrorism strategy and operations.¹²⁷ But the disparate legal regimes governing U.S. and Middle Eastern security officers result in U.S. officials having access to intelligence obtained through torture and other human rights violations.¹²⁸

Separate from questions about the veracity of the information, intelligence sharing incentivizes outsourcing intelligence collection to Middle East officials unrestrained by laws and norms that protect human rights and civil liberties. Moreover, joint intelligence gathering operations provide opportunities for American counterterrorism officers to participate in rights-infringing methods of intelligence gathering, as is the case in the extraordinary rendition program.¹²⁹

Military cooperation with Middle Eastern countries has also increased.¹³⁰ Since 9/11, the United States military has expanded its basing and access rights; bolstered defense cooperation; and sold military equipment to Jordan, Egypt, the United Arab Emirates, and Saudi Arabia.¹³¹ U.S. military bases in Kuwait, Bahrain, Saudi Arabia, Qatar, Oman, the UAE, Turkey, and Afghanistan facilitate counterterrorism coordination among military personnel.¹³² Additionally, a secret unmanned aerial

127. See *Egypt-U.S. Relations*, EMBASSY OF EGYPT, <http://www.egyptembassy.net/egypt-us-relations/> (last visited Sept. 10, 2018) (stating a mutual commitment to advancing regional stability) (on file with the Washington and Lee Law Review).

128. See U.S. DEP'T OF STATE, *supra* note 86, at viii (describing U.S. law enforcement's ability to investigate potential terrorists).

129. HUMAN RIGHTS WATCH, "WORK ON HIM UNTIL HE CONFESSES" 21–26 (2011) (detailing regular torture by Egypt's federal law enforcement). An additional concern is the abuse of shared intelligence by a foreign agency to persecute a citizen rather than prevent a crime or terrorist act. See Petra Bartosiewicz, *Deploying Informants, the FBI Stings Muslims*, THE NATION (June 14, 2012), <https://www.thenation.com/article/deploying-informants-fbi-stings-muslims/> (last visited Sept. 10, 2018) (reporting on the arrest and torture of Yonas Fikre, a Muslim American from Portland, Oregon, while he was in the United Arab Emirates on the instruction of the U.S. intelligence services) (on file with the Washington and Lee Law Review).

130. See HUMAN RIGHTS WATCH, *DANGEROUS DEALINGS 2* (2002) (citing increased international presence).

131. See Byman & Moller, *supra* note 48, at 263–64 (documenting personnel and equipment expansion).

132. See *id.* at 265–66 (describing operations of U.S. military bases in the

vehicle base is reportedly operating out of Saudi Arabia that is used for drone attacks against targets in Yemen.¹³³

As transnational terrorism spread across the Middle East, U.S. military arms sales soared. In 2011, the United States finalized a \$29 billion arms deal with Saudi Arabia and a \$10 billion deal with the UAE.¹³⁴ In 2017, the Trump administration signed a \$110 billion multi-year arms sale to Saudi Arabia, the largest in history between the two countries, and sold \$12 billion of U.S. arms to Qatar.¹³⁵ Cooperation also comes in the form of training programs aimed at enhancing transnational counterterrorism. Through the Antiterrorism Assistance Program, for example, the U.S. trains law enforcement and security services of foreign allies.¹³⁶ Similarly, “the U.S. Central Command (USCENTCOM), which covers the Middle East, North Africa, and Asia, conducted forty-five multilateral and bilateral training exercises” with Middle Eastern, North African, and Asian countries¹³⁷ and hosts a biennial multinational training exercise hosted by Egypt and the United States.¹³⁸

The Combatting Terrorism Fellowship Program (CTFP) trains foreign midlevel and senior level security and military officials. The Department of Defense (DoD) manages the CTFP to build

Middle East).

133. See Micah Zenko & Emma Welch, *Where the Drones Are*, FOREIGN POL’Y (May 29, 2012, 11:36 PM), <http://foreignpolicy.com/2012/05/29/where-the-drones-are/> (last visited Sept. 10, 2018) (reporting that the U.S. uses the base for surveillance and combat missions) (on file with the Washington and Lee Law Review).

134. See Byman & Moller, *supra* note 48, at 267 (outlining the weapons deal).

135. See *US State Department Approves Saudi Arabia Arms Sale*, BBC NEWS (Nov. 16, 2015), <http://www.bbc.com/news/world-us-canada-34838937> (last visited Sept. 10, 2018) (stating the Saudi Arabia is one of the biggest buyers of U.S. weapons) (on file with the Washington and Lee Law Review).

136. See U.S. DEP’T OF STATE, *supra* note 86, at xiii (noting training areas including airport security and hostage rescue).

137. DAKOTA L. WOOD, 2018 INDEX OF U.S. MILITARY STRENGTH 145 (2018)

138. See *U.S., Egypt kick off Exercise Bright Star 2017*, U.S. CENT. COMMAND, <http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1308877/us-egypt-kick-off-exercise-bright-star-2017/> (last visited Sept. 10, 2018) (detailing the combined field training exercise between Egypt and the United States) (on file with the Washington and Lee Law Review).

partnerships with foreign allies.¹³⁹ According to the DoD, “[t]he CTFP provides unique relationship and capacity-building opportunities that enable partner nations to address threats of terrorism within their borders and regions and strengthens collaboration with and support for U.S. and partner efforts to defeat terrorism.”¹⁴⁰ Over 250 foreign officials have participated in the program.¹⁴¹ In 2015, a CTFP alumni event was held in Amman, Jordan where more than forty alumni from twenty countries discussed strategies on how to respond to ISIS, Boko Haram, Al-Shabaab, and Al Qaeda.¹⁴²

Additionally, American police and intelligence officers are sent to foreign countries through bilateral arrangements where they build relationships and a network for international cooperation.¹⁴³ Through these interactions, information, skills, and norms are exchanged at the institutional and individual level.¹⁴⁴

Contrary to commonly held assumptions that Western liberal democratic norms are transferred to foreign allies, the exchange is two-way. Western officials learn from their Middle East counterparts that the only way to eradicate terrorism is with an iron-fisted, militarized approach.¹⁴⁵ As a result, rights infringing practices and norms have infected how the United States counters terrorism both at home and abroad.¹⁴⁶

139. See U.S. DEP’T OF DEFENSE, REGIONAL DEFENSE COMBATING TERRORISM FELLOWSHIP PROGRAM 1 (2015) (outlining the program’s objectives).

140. *Id.* at 3.

141. See *id.* at 1 (reporting a budget of \$4,767,190 for the 256 participants).

142. See *id.* at 11 (describing alumni panels on combatting radical extremism).

143. See *International Operations*, FBI, <https://www.fbi.gov/about/leadership-and-structure/international-operations> (last visited Sept. 10, 2018) (providing an overview of the FBI’s international program) (on file with the Washington and Lee Law Review).

144. See *id.* (describing the exchange of training information).

145. See Steven Erlanger, *Israeli Leader Promises to Use ‘Iron Fist’ to Stop Terrorism*, NY TIMES (Mar. 2, 2006), <http://www.nytimes.com/2006/03/02/international/middleeast/israeli-leader-promises-to-use-iron-fist-to-stop.html> (last visited Sept. 10, 2018) (discussing Israel’s acting prime minister, Ehud Olmert’s, advice to remove all restrictions on the counterterrorism security establishment) (on file with the Washington and Lee Law Review).

146. See Scheppele, *supra* note 85, at 451 (“The problem with the rights-

B. Rights-Infringing Counterterrorism in the Middle East: The Case of Egypt

Middle Eastern regimes have long invoked national security as a ruse to eliminate political opposition, silence dissenters, and quash civil society.¹⁴⁷ The mantra of counterterrorism grants the state unfettered discretion to kill, torture, indefinitely detain, surveil, and prosecute those deemed a threat to the regime.¹⁴⁸ These practices pre-dated 9/11, and in fact have been the basis of international calls for democratization of the region.¹⁴⁹

Egypt—a longtime ally and counterterrorism partner of the United States—illustrates how a Middle Eastern state uses counterterrorism to violate human rights and civil liberties. Some of these authoritarian practices have shaped U.S. counterterrorism practices, albeit not to the same degree. Egregious forms of physical abuse have been a mainstay of Egyptian counterterrorism strategies for decades.¹⁵⁰ By making the cost of dissent prohibitively costly, torture is a strategy that deters citizens from challenging the state’s authority.¹⁵¹ Causing the population to cower in fear, the regime proclaims harsh counterterrorism practices are necessary to preserve the security of the state.¹⁵² The regime’s autocratic grip on political power, not the people’s security, is the real objective.¹⁵³

violating aspects of the Security Council framework, then, is not with the intentions of the Security Council, but with the terrible quality of governance in many states in the world . . .”).

147. See Jason Brownlee, *A New Generation of Autocracy in Egypt*, 14 BROWN J. WORLD AFF. 73, 77 (2007) (“This political elite still employs national security rhetoric to justify draconian assaults on civilian activists.”).

148. See *id.* at 78 (describing violent assaults on protestors).

149. See *id.* at 83 (noting that parties calling for democratization included the United States).

150. See *Egypt: 7,400 Civilians Tried in Military Courts*, HUMAN RIGHTS WATCH (Apr. 13, 2016, 12:00 AM), <https://www.hrw.org/news/2016/04/13/egypt-7400-civilians-tried-military-courts> (last visited Sept. 10, 2018) (stating that most were sentenced after mass trials with no due process rights) (on file with the Washington and Lee Law Review).

151. See HUMAN RIGHTS WATCH, BEHIND CLOSED DOORS: TORTURE AND DETENTION IN EGYPT 72 (1992) (reporting torture as deterrence and punishment).

152. See *id.* (discussing the regimen’s motivation for torture).

153. See *id.* (“[T]he policy of the political security apparatus is to keep things

The Mubarak regime engaged in widespread and systematic torture.¹⁵⁴ A new counterterrorism law passed in 1992 granted police and security forces extensive powers to arrest, detain, and torture hundreds of people accused of belonging to political Islamist organizations.¹⁵⁵ Terrorist detainees first disappeared into secret prisons outside the purview of law in order to be subjected to torture to extract information and coerce false confessions.¹⁵⁶ Police also tortured detainees to pressure them to be informants on their friends, family, and co-workers upon release.¹⁵⁷ Employing thousands of informants expanded the reach of intelligence services' extensive monitoring and mass surveillance of the population—a feature of the post-9/11 national security regime in the United States.¹⁵⁸

Although dissidents of various political stripes have been victims of torture by the state, political Islamists have borne the brunt of the abuse.¹⁵⁹ Detainees are forcibly disappeared and tortured by the state in locations unknown to their families or lawyers.¹⁶⁰ Human rights reports document cases of torture by Egyptian security forces as far back as the 1980s. For instance,

under control.”).

154. See HUMAN RIGHTS WATCH, *WORLD REPORT 2011: EGYPT*, 2–3 (2011) (depicting regular torture by police and security forces).

155. See HUMAN RIGHTS WATCH, *EGYPT: HUMAN RIGHTS BACKGROUND, 2001* 1 (2001) (stating that hundreds of civilians were sent to military court).

156. See HUMAN RIGHTS WATCH, *supra* note 129, at 4 (stating that security court trials relied on coerced confessions).

157. See AMNESTY INT'L, *EGYPT: TEN YEARS OF TORTURE 2* (1991) (reporting that citizens were forced to collect information on friends or colleagues).

158. See David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 *UCLA J. ISLAMIC & NEAR E.L.* 85, 94–95 (2011–2012) (outlining the FBI's post-9/11 counterterrorism strategy).

159. See AMNESTY INT'L, *supra* note 157, at 1 (describing wide-scale political arrests); HUMAN RIGHTS WATCH, *POLICE, MILITARY TORTURE AND ABUSES 530* (2013) (reporting at least 11 custodial deaths caused by police torture and several cases of torture by the military).

160. See *Egypt: Counterterrorism Law Erodes Basic Rights*, HUMAN RIGHTS WATCH (Aug. 19, 2015, 1:45 AM), www.hrw.org/news/2015/08/19/egypt-counterterrorism-law-erodes-basic-rights (last visited Sept. 10, 2018) (noting that citizens were forcibly disappeared without access to lawyers) (on file with the Washington and Lee Law Review).

Amnesty International's report "Ten Years of Torture" documents myriad forms of torture of Egyptian prisoners including being:

[B]lindfolded, stripped of their clothes and suspended from their wrists, bound or handcuffed together, sometimes in contorted positions, from the tops of doors or from barred windows. Victims have described how they have been forced to lie on their backs, their hands and feet bound together, a chair forced up under their armpits, another keeping their knees apart to restrict the body's involuntary spasms as electric shocks were applied repeatedly to their nipples and genitals. Between torture sessions they were forced to stand in unnatural positions, often with arms and legs outstretched, for hours on end and beaten if they moved. Some were sexually abused.¹⁶¹

These same torture tactics were unleashed on post-9/11 terrorism suspects held in Guantanamo, Abu Ghraib, and multiple extraordinary rendition sites.

Detainees in Egyptian jails also frequently died from torture in what amounted to extrajudicial killings.¹⁶² The lucky ones survived only after they confessed to the state's accusations.¹⁶³ Similar to the U.S. military round ups in Afghanistan and Pakistan after 9/11, most victims were innocent civilians rounded up arbitrarily after a terrorist attack.¹⁶⁴ Confessions extracted

161. AMNESTY INT'L, *supra* note 157, at 1.

162. See HUMAN RIGHTS WATCH, *supra* note 129, at 60–71 (detailing various torture-related deaths).

163. See *Egypt: 7,400 Civilians Tried in Military Court*, *supra* note 150 (documenting cases of systemic torture by the Egyptian security service).

164. See AMNESTY INT'L, *supra* note 157, at 2 (noting that many are held without charge or trial); *Only Three of 116 Guantanamo Detainees Were Captured by US Forces*, THE GUARDIAN, <https://www.theguardian.com/us-news/2015/aug/25/guantanamo-detainees-captured-pakistan-afghanistan> (last updated Aug. 27, 2015) (last visited Sept. 10, 2018) (describing the U.S. Guantanamo detainees) (on file with the Washington and Lee Law Review).

under torture were then used as evidence in political trials without question to their veracity.¹⁶⁵

Because of legal and political impunity for security forces, very few torture victims obtain a remedy for their abuse, including in the United States.¹⁶⁶ Calls for prosecution of high-level U.S. intelligence officials for torture of terrorism suspects have fallen on deaf ears.¹⁶⁷ This system of impunity signals to officials that although torture may be illegal under international and domestic law, abusing detainees can continue without fear of prosecution.¹⁶⁸

In addition to being tortured, detainees are subjected to inhumane prison conditions in violation of human rights law.¹⁶⁹ According to a 1993 Human Rights Watch report, detainees were crammed in cells without toilets or running water.¹⁷⁰ They were forced to sleep on filthy floors without mattresses or blankets.¹⁷¹ Breaks were insufficiently afforded to detainees, and those granted ranged from merely five minutes to thirty minutes.¹⁷² Beatings and solitary confinement for weeks were common disciplinary tools imposed by abusive guards beyond external oversight or accountability.¹⁷³ Similar allegations surfaced in Guantanamo, Bagram, and Abu Ghraib prisons managed by U.S. officials and

165. See SAID, *supra* note 124, at 84–85 (discussing the case of Ahmed Omar Abu Ali wherein a confession extracted by Saudi officials allegedly during torture was used to prosecute Abu Ali in U.S. court).

166. See HUMAN RIGHTS WATCH, *supra* note 129, at 84 (noting the government's failure to investigate and prosecute perpetrators of torture); TRUDY BOND ET AL., SHADOW REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE ON THE REVIEW OF THE PERIODIC REPORT OF THE UNITED STATES OF AMERICA 16 (2014) (stating that U.S. courts refused jurisdiction).

167. See BOND ET AL., *supra* note 166, at 6–10 (arguing that the U.S. has neither investigated nor prosecuted torture claims).

168. See HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES 30 (2005) (detailing that the U.S. selectively complies with international law).

169. See HUMAN RIGHTS WATCH, PRISON CONDITIONS IN EGYPT: A FILTHY SYSTEM 29 (1993) (stating the government's noncompliance with prisoner rights law).

170. See *id.* at 48 (describing that facilities were inadequate or inoperative).

171. See *id.* at 54 (detailing prisoners' sleeping accommodations).

172. See *id.* at 78 (noting that daily breaks were short and infrequent).

173. See *id.* at 66 (documenting periods of solitary confinement up to four months).

their contractors.¹⁷⁴ More than ten years later, another Human Rights Watch report found torture in Egypt remained pervasive.¹⁷⁵ Interviews in 2015 with nineteen torture victims found that Egyptian security officers electrocuted, beat, and hung detainees by their limbs to force suspects to read prewritten confessions.¹⁷⁶

When faced with allegations of violating human rights laws, the Egyptian regime points to national security laws granting the executive broad leeway to take all appropriate measures to maintain the general order and security of the nation.¹⁷⁷ Emergency law, intermittently in effect since 1967 and continuously in effect since Sadat's assassination in 1981, provided security forces legal cover for human rights violations.¹⁷⁸ Emergency law grants the president broad authority to detain persons deemed a threat to security and public order, leaving it to prosecutors and security forces to define "threat," "security," and "public order" when conducting investigations.¹⁷⁹ With the legal authority to hold detainees for up to forty-five days renewable indefinitely, the Interior Ministry has free reign to indefinitely detain and torture these disappeared detainees.¹⁸⁰ For those

174. See Matt Apuzzo et al., *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES, <https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html> (last visited Sept. 10, 2018) (reporting prisoner conditions in Guantanamo Bay) (on file with the Washington and Lee Law Review).

175. See generally HUMAN RIGHTS WATCH, "WE DO UNREASONABLE THINGS HERE:" TORTURE AND NATIONAL SECURITY IN AL-SISI'S EGYPT (2017).

176. See *id.* at 1–6 (noting that these individuals could not contact relatives or an attorney).

177. See generally Mohamed A. Arafa, *Egypt between Fear & Reform in its Second Revolution: The Failure to Protect the Fundamental Human Rights Over and Over Again*, 7 PHX. L. REV. 1 (2013).

178. See TAMIR MOUSTAFA, LAW AND RESISTANCE IN AUTHORITARIAN STATES: THE JUDICIALIZATION OF POLITICS IN EGYPT 154 (Tom Ginsburg ed., 2008) (detailing Egypt's emergency laws); Lisa Reynolds Wolfe, *Cold War Legacy: Egypt's Emergency Law 162 of 1958*, COLD WAR STUD. (Feb. 1, 2011), <https://coldwarstudies.com/2011/02/01/cold-war-legacy-egypts-emergency-law-162-of-1958/> (last visited Sept. 10, 2018) (outlining key provisions of Egypt's law) (on file with the Washington and Lee Law Review).

179. See MOUSTAFA, *supra* note 178, at 154 (noting arbitrary execution of the laws).

180. See AMNESTY INT'L, *supra* note 157, at 2 (stating that the government could hold detainees without charge or trial); MOUSTAFA, *supra* note 178, at 154 (discussing reports by the Egyptian Organization for Human Rights documenting

charged with a crime, the prosecution delays the trial for years, denying them due process rights.¹⁸¹

Although the Egyptian government claims stringent anti-terrorism laws are necessary to deter and prosecute terrorists, the laws are frequently applied to civil society organizations and leaders who report on the state's human rights violations. In the 1990s, the president of the Egyptian Organization for Human Rights (EOHR), Hafez Abu Saada, was arrested and interrogated in retaliation for EOHR's report documenting torture, deaths in custody, disappearances and horrible prison conditions.¹⁸² The case of Professor Sa'ad Eddin Ibrahim in 2001 further proved how far the government would go to quash non-violent challenges to corruption, election irregularities, and abuse of power.¹⁸³ Ibrahim, who held dual Egyptian and American citizenship, investigated election fraud and requested that the U.S. link foreign aid to Egypt's human rights performance.¹⁸⁴ In retaliation, the Egyptian government prosecuted Ibrahim in the Supreme State Security Court where he was charged with conspiring to bribe public officials, disseminating false information harmful to Egypt's interest, and embezzling foreign funds.¹⁸⁵

over 7,800 cases of recurrent detention).

181. See Damian Cullen, *Trial of Ibrahim Halawa in Egypt Delayed for 13th Time*, IRISH TIMES (Mar. 6, 2016, 1:05 PM), <http://www.irishtimes.com/news/ireland/irish-news/trial-of-ibrahim-halawa-in-egypt-delayed-for-13th-time-1.2562118> (last updated Mar. 6, 2016) (last visited Sept. 10, 2018) (reporting that one detainee was imprisoned for 942 days) (on file with the Washington and Lee Law Review); Marwa Al-Asar, *Egyptian Rights Group Accuses Justice System of Double Standards*, MIDDLE E. EYE, <http://www.middleeasteye.net/news/egyptian-rights-group-accuses-justice-system-double-standards-525727160> (last updated June 3, 2015) (last visited Sept. 10, 2018) (reporting that multiple defendants were held for over two years after an amendment to the code of criminal procedure changed the two year limit for pretrial detention to periods of forty-five renewable days) (on file with the Washington and Lee Law Review).

182. See BENJAMIN STACHURSKY, *THE PROMISE AND PERILS OF TRANSNATIONALIZATION* 97 (2013) (describing that the government used military decrees to criminalize human rights activists).

183. See STEVEN A. COOK, *RULING BUT NOT GOVERNING: THE MILITARY AND POLITICAL DEVELOPMENT IN EGYPT, ALGERIA, AND TURKEY* 72 (2007) (depicting Ibrahim's charge and prosecution).

184. See *id.* (describing Ibrahim's election rights work).

185. See *id.* (detailing the various politically motivated charges against

Prosecutions of civil society leaders soared after the 2011 mass uprisings as the regime sought to regain its authoritarian grip on power.¹⁸⁶ Journalists, lawyers, and human rights advocates were arrested and charged with threatening national security in ordinary and military courts.¹⁸⁷ In detention, many were subjected to abuse and torture.¹⁸⁸

Egypt's human rights violations are no secret. Much has been written about authoritarianism in the Middle East and failed attempts both by domestic and international actors to democratize the region and hold Middle Eastern regimes to their human rights commitments.¹⁸⁹ These failures are partly due to Western nations' continuation of foreign aid to dictators notwithstanding stated human rights conditions on aid, including \$41 billion to Egypt in security-related assistance since 1979.¹⁹⁰

Rather than focus on how the U.S. facilitates human rights violations abroad, I now turn to America's counterterrorism laws, policies and practices to demonstrate how counterterrorism coordination may have contributed to authoritarian norms and practices in the Middle East infecting U.S. counterterrorism practices. The systematic use of torture in secret black sites and at

Ibrahim).

186. *See id.* (noting an uptick in arrests against anyone opposing the regime).

187. *See id.* (detailing that charges were brought in the interest of national security).

188. *See supra* notes 159–173 and accompanying text (detailing the Egyptian regime's torture of prisoners).

189. *See supra* notes 150–165 (providing an overview of various human rights abuses).

190. *See* U.S. GOV'T ACCOUNTABILITY OFF., SECURITY ASSISTANCE: U.S. GOVERNMENT SHOULD STRENGTHEN END-USE MONITORING AND HUMAN RIGHTS VETTING FOR EGYPT 1 (2016) ("Since the signing of the Egypt-Israel Peace Treaty in 1979, the United States has provided Egypt with about \$41 billion in security-related assistance, making Egypt one of the top recipients of such assistance in the world."). Former U.S. Secretary of State John Kerry asked Congress to grant Egypt a waiver to the Human Rights Vetting Law (the Leahy Law) that otherwise prohibited aid to nations in gross violation of human rights. At the time, the Egyptian military led a coup ousting democratically elected Mohamed Morsi and killed hundreds of protesters in Rabi'a Square. Nicole Gaouette, *U.S. Seeks to Roll Back Human Rights Conditions on Egypt Aid*, CNN, <https://www.cnn.com/2016/02/26/politics/egypt-u-s-aid-kerry-military-human-rights/index.html> (last updated Feb. 26, 2016) (last visited Sept. 10, 2018) (on file with the Washington and Lee Law Review).

Guantanamo prison, inhumane conditions of detention, mass surveillance, and selective enforcement of counterterrorism against Muslim political dissidents are troublingly similar to Egypt's authoritarian practices; as is the justification for rights violations—national security.¹⁹¹

C. The Authoritarianization Effect on U.S. Counterterrorism

Although much ink has been spilled critiquing the United States' human rights violations abroad and civil liberties infringements at home since 9/11, little is written on the relationship between United States-Middle East counterterrorism coordination and rights infringements in the U.S.¹⁹² In the years immediately following the September 11th terrorist attacks, two themes predominated U.S. rhetoric on national security. First, the United States would do whatever was necessary to bring to justice the perpetrators of the September 11th attacks in the "Global War on Terror."¹⁹³ This entailed working with dictators in the Middle East as partners to fight a war on terrorism.¹⁹⁴ Second, the United States would promote democracy in the Middle East and South Asia to eliminate the repressive political conditions that some

191. See HERMAN, *supra* note 3, at 177 (depicting U.S. counterterrorism methods noting that the U.S. conducts detention and surveillance in the interest of national security).

192. Some readers may mistakenly interpret my thesis as perpetuating Orientalism by implying that the Middle East is hopelessly authoritarian and thereby inferior to the West. To the contrary, I have written on the pivotal role that Western nations have played in propping up dictatorships in the Middle East to serve their geopolitical and economic interests. See generally SAHAR AZIZ & ABDULLAH MUSALEM, *CITIZENS, NOT SUBJECTS: DEBUNKING THE SECTARIAN NARRATIVE OF BAHRAIN'S PRO-DEMOCRACY MOVEMENT* (2011). Hence, in some ways my thesis here argues there is a boomerang effect wherein dictatorial practices arising from Western imperialism is now infiltrating Western democracies in part as a result of counterterrorism coordination and international efforts to fight the so-called "war on terror."

193. See U.S. DEP'T OF STATE, *supra* note 86, at iii (noting that the U.S. must be prepared for a long campaign against terrorism).

194. See EXEC. OFFICE OF THE PRESIDENT, *supra* note 108, at 4 ("U.S. efforts with partners are central to achieving our [counterterrorism] goals, and we are committed to building security partnerships even as we recognize and work to improve shortfalls in our cooperation with partner nations.").

believed spawned terrorism.¹⁹⁵ This neoconservative agenda was a remnant of the U.S.'s Cold War global politics.¹⁹⁶ The contradiction between a war model and democracy promotion for countering terrorism was glaring.

On the one hand, President Bush wanted unfettered discretion to do whatever he deemed necessary, including torture and assassination, to fight an open-ended war against an ambiguously defined enemy. On the other hand, he wanted to promote democracy and strengthen civil society in Muslim majority countries where international terrorists recruited and set up bases.¹⁹⁷ Obama continued his predecessor's militarized counterterrorism practices but paid more rhetorical homage to human rights as he dropped the use of "War on Terror" in official U.S. documents.¹⁹⁸ While the importance of democratic and representative governance was recognized in multiple U.S. National Security Strategy documents under Obama, his administration deprioritized democracy promotion programs.¹⁹⁹ The result was a schizophrenic flip-flopping between the development and ideological schools of thought in counterterrorism.

1. *Rights Promoting Rhetoric*

195. See EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 4 (2002) ("We will speak out honestly about violations of the nonnegotiable demands of human dignity using our voice and vote in international institutions to advance freedom.").

196. See generally CONDOLEEZZA RICE, DEMOCRACY: STORIES FROM THE LONG ROAD TO FREEDOM (2017).

197. See *supra* Part III.B (discussing the U.S. democracy promotion agenda post-9/11).

198. See Paul D. Shinkman, *Obama: 'Global War on Terror' Is Over*, U.S. NEWS & WORLD REP. (May 23, 2013, 3:30 PM), <https://www.usnews.com/news/articles/2013/05/23/obama-global-war-on-terror-is-over> (last visited Sept. 10, 2018) (noting Obama's shift in rhetoric on the global war on terror) (on file with the Washington and Lee Law Review).

199. See EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 35–36 (2010) (stating that America would not impose any system of government on another country); Byman & Moller, *supra* note 48, at 281–82 (listing the reasons for the failure of the U.S. democracy promotion agenda).

Both the Bush and Obama administrations rhetorically promoted human rights, civil rights, and civil liberties in counterterrorism strategy. On multiple occasions, Bush stated America was not at war with Islam.²⁰⁰ Bush's 2006 National Security Strategy states "Not only do we fight our terrorist enemies on the battlefield, we promote freedom and human dignity as alternatives to the terrorists' perverse vision of oppression and totalitarian rule."²⁰¹ The ultimate goal of the War on Terror is "to help create a world of democratic, well-governed states that can meet the needs of their citizens . . . this is the best way to provide enduring security for the American people . . . for the misrule of tyrants at home leads to instability abroad."²⁰² Likewise, Obama began his first term with a historic speech in Cairo where he declared that the war on terrorism is not a war on Islam and "no system of government can or should be imposed on one nation by another."²⁰³

To fight the War on Terror, however, the United States needed cooperation from Middle Eastern governments—all of which were authoritarian to varying degrees.²⁰⁴ Both the Bush and Obama administrations sought to expand international partnerships in U.S. counterterrorism efforts. In its priority to defeat Al Qaeda and then ISIS, the U.S. committed to "underwrite global security—through our commitments to allies, partners, and institutions."²⁰⁵

200. See *Backgrounder: The President's Quotes on Islam*, THE WHITE HOUSE, <https://georgewbush-whitehouse.archives.gov/infocus/ramadan/islam.html> (last visited Sept. 10, 2018) (documenting President Bush's remarks on Islam) (on file with the Washington and Lee Law Review).

201. EXEC. OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COMBATTING TERRORISM 1 (2006).

202. *Id.* In furtherance of this policy, the Bush administration committed funds for economic assistance, development aid, trade, and good governance in the Millennium Challenge that rewards countries with demonstrated democratic reforms. EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 21–22 (2002).

203. See President Barack Obama, Speech at Cairo University: A New Beginning (June 4, 2009) ("In Ankara, I made clear that America is not—and never will be—at war with Islam.").

204. See EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 24 (2010) (noting the need for cooperation with Israel, Iraq, and the Palestinian people).

205. *Id.* at 1.

But the U.S. government knew that authoritarian regimes would not share intelligence, provide sites for extraordinary rendition, torture U.S. terrorist suspects, accept U.S. military bases, and otherwise assist in the war on terror if their existence were threatened by democratization programs.²⁰⁶ The regimes gladly took the military and economic aid without making serious efforts to liberalize their political systems.²⁰⁷ By the end of Obama's administration, U.S. promotion of democracy was no longer taken seriously.

At the same time the U.S. stated its adherence to "respecting human rights, fostering good governance, respecting privacy and civil liberties, committing to security and transparency, and upholding the rule of law," its Middle East partners received billions of dollars in military weapons, sometimes used against their own citizens.²⁰⁸ The 2015 National Security Strategy admitted that despite America's vision for a peaceful and prosperous Middle East, "nowhere is the violence more tragic and destabilizing than in the sectarian conflict from Beirut to Baghdad, which has given rise to new terrorist groups such as ISIL."²⁰⁹ Many of the laws and practices authorized under Bush continued under Obama.²¹⁰ The increased coordination between nations resulted in direct U.S. involvement in human rights violations, including against its own citizens.²¹¹

206. See BYMAN, *supra* note 18, at 53–54 (noting that the U.S. depended on these regimes for critical counterterrorism operations).

207. See *id.* (noting that providing aid did not bring regimes in line with human rights norms).

208. EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY FOR COUNTERTERRORISM 4 (2011); see Mark Landler & Steve Lee Myers, *With \$30 Billion Arms Deal, U.S. Bolsters Saudi Ties*, N.Y. TIMES (Dec. 29, 2010), <http://www.nytimes.com/2011/12/30/world/middleeast/with-30-billion-arms-deal-united-states-bolsters-ties-to-saudi-arabia.html> (last visited Sept. 10, 2018) (outlining the weapons deal with the Saudi Royal Air Force) (on file with the Washington and Lee Law Review).

209. EXEC. OFFICE OF THE PRESIDENT, *supra* note 1, at 26.

210. See, e.g., Amos N. Guiora, *Due Process and Counterterrorism*, 26 EMORY INT'L L. REV. 163, 170 (2012) (arguing that Obama reinstated trials before Military Commissions at Guantanamo).

211. See SAID, *supra* note 124, at 24–26 (discussing the NYPD's mapping and mass surveillance of Muslims in the tri-state area).

The contradictions between rights infringing practices and rhetorical commitments to democracy and human rights discredited the United States both internationally and domestically.²¹² The U.S. had compromised its fidelity to international human rights norms.²¹³

2. *The Normalization of Torture and Indefinite Detention*

The divergence between rights-supporting rhetoric and rights-infringing practices is due in large part to the adoption of the war model to counterterrorism—the same template historically adopted by authoritarian Middle East regimes.²¹⁴ One Department of Justice official forthrightly stated, “The United States cannot afford to retreat to a pre-September 11 mindset that treats terrorism solely as a domestic law enforcement problem.”²¹⁵ Consequently, terrorism is treated as an act of war rather than a criminal act.²¹⁶ By claiming the nation is facing an existential threat, the government justifies military and police actions that systemically violate human rights.²¹⁷ It also accepts theories that terrorism is caused by ideology as opposed to socio-economic underdevelopment and material deprivation.²¹⁸

212. See PLESSIS, *supra* note 3, at 31–32 (noting that cooperation practices ignored due process protections).

213. See EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 10 (2010) (stating that certain security measures sacrificed human rights norms).

214. See CRELINSTEN, *supra* note 26, at 93–94 (detailing the historical Middle Eastern counterterrorism model). See generally Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

215. Adam Liptak, *In War of Vague Borders, Detainee Longs for Court*, N.Y. TIMES (Jan. 5, 2007), <http://www.nytimes.com/2007/01/05/washington/05terror.html> (last visited Sept. 10, 2018) (on file with the Washington and Lee Law Review).

216. See CRELINSTEN, *supra* note 26, at 72–73 (explaining that terrorism receives unique treatment); JENNIFER ELSEA, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 10 (Dec. 2001) (“A terrorist act is not seen as an act of war unless it is part of a broader campaign of violence directed at the state.”).

217. See CRELINSTEN, *supra* note 26, at 79 (explaining the prioritization of national security).

218. See *id.* (detailing the government’s explanation for terrorism).

The counterterrorism war model blurs the line between police and military functions. Targets are unlawful combatants instead of criminal suspects.²¹⁹ Due process rights afforded in ordinary criminal procedures do not apply.²²⁰ Executive authorities resist judicial review of surveillance, investigative techniques, and interrogation. Selective targeting of suspects is infected by stereotypes and prejudice against groups deemed collectively dangerous merely because they share the same religion or ideology as suspected terrorists.²²¹

The war model also grants the executive branch an open-ended mandate to fight whomever is deemed an enemy of the state.²²² If left unchecked, such powers can be unleashed against political dissidents and opposition under the guise of national security.²²³ Torture is legalized and systemic, civilians are tried in military courts, ordinary criminal offenses are prosecuted as terrorism, and infringements on civil liberties become the norm—as is the case in Egypt and other authoritarian allies.²²⁴ Ultimately, the rule of law is undermined

219. See *supra* note 3 and accompanying text (outlining the targeting of terrorist suspects).

220. See CRELINSTEN, *supra* note 26, at 86 (distinguishing terrorists' prosecution from criminal prosecution).

221. See Nicolas Brooklier, *Islamophobia: The Stereotyping and Prejudice Towards Muslims Since 9/11*, WASH. ST. U. (Dec. 17, 2015), <https://hub.wsu.edu/law-justice-realttime/2015/12/17/islamophobia-the-stereotyping-and-prejudice-towards-muslims-since-911/> (last visited Sept. 10, 2018) (discussing that since 9/11, Muslims have been stereotyped and have been feared as a group merely due to their religion and culture) (on file with the Washington and Lee Law Review).

222. See Jack R. Greene & Sergio Herzog, *The Implications of Terrorism on the Formal and Social Organization of Policing in the US and Israel: Some Concerns and Opportunities*, in TO PROTECT AND TO SERVE: POLICING IN AN AGE OF TERRORISM 146 (David Weisburd et al. eds., 2009) (discussing how the War Model allows for more extreme force normally not permitted by the government due to the increasing strength, danger, and level of violence applied by terrorists).

223. See John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice System's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1093 (2002) (arguing that amendments to the Patriot Act may sweep too broadly).

224. See PLESSIS, *supra* note 3, at 35–36 (arguing for a criminal justice approach to terrorism). See generally HUMAN RIGHTS WATCH, "NO BLOOD, NO FOUL": SOLDIERS' ACCOUNTS OF DETAINEE ABUSE IN IRAQ (2006).

The proliferation of black site detention centers and rampant torture are among the gravest consequences of U.S. counterterrorism. In violation of the Convention on Enforced Disappearances, the Convention Against Torture, the universal human right to personal liberty, and the prohibition of arbitrary arrest and detention, the Central Intelligence Agency (CIA) and its foreign counterparts covertly abducted individuals to secret locations in the Middle East, North Africa, and other countries where torture has long been a standard practice.²²⁵ Hundreds of individuals, predominantly of Arab and Central Asian origin, were extra-judicially delivered to interrogators in Egypt, Jordan, Syria, and other countries where detainees were systematically abused and tortured.²²⁶

The extraordinary rendition program was a complex and coordinated program between the United States and its foreign allies, authorized at the highest level of the Bush administration.²²⁷ According to UK parliamentary reports, over twenty countries participated in the rendition program.²²⁸ Some directly participated in torture while others provided airports, airspace, and military bases for staging and stopover flights carrying detainees.²²⁹ Victims of extraordinary rendition were not limited to citizens of Middle Eastern countries, but also included Canadian, German, and American citizens, most of whom were

225. See Setty, *supra* note 2, at 653 (detailing that post 9/11, the CIA set up a network of black sites abroad to capture, detain and interrogate suspected terrorists).

226. See DUFFY, *supra* note 13, at 808 (describing the secrecy of the extraditions). See generally Joint Study on Global Practices in Relation to Secret Detention, U.N. Doc. A/HRC/13/42 (2010).

227. See Ariane de Vogue, Classified Detainee Memos at Center of Legal War, ABC NEWS (Apr. 9, 2008), <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4620002&page=1> (last visited Sept. 10, 2018) (discussing President Bush's Presidential Memorandum of Notice signed September 17, 2001, which authorized extraordinary rendition) (on file with the Washington and Lee Law Review). See generally Jane Mayer, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008).

228. See generally Intelligence and Security Committee, Rendition (2007).

229. Countries involved in extraordinary rendition in various ways included Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, Egypt, Jordan, and Syria. See Duffy, *supra* note 13, at 786–87.

Muslim.²³⁰ Children as young as thirteen and adults as old as eighty-four were among those detained and tortured.²³¹

After years of denial, investigative journalism forced the Bush administration to confirm extraordinary rendition was occurring. But instead of stopping the program, the administration legalized torture by renaming it “enhanced interrogation,” and proclaiming national security justified the practice.²³² Government officials pointed to legal memos issued in 2002 and 2003 by the Office of Legal Counsel at the U.S. Department of Justice advising that individuals suspected of membership in Al Qaeda are not protected by international law, including prohibitions against torture.²³³ Even if they were protected, the DOJ argued, only treatment that caused “injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function” met the U.S. legal threshold of torture.²³⁴

As a result, approved interrogation techniques included

[W]hipping by the neck into concrete walls; chaining to a chair for a period of weeks; the use of the ‘box’, including forcing into a small box for up to eighteen hours; stripping and hanging naked from the ceiling; sleep deprivation, including keeping detainees awake for eleven consecutive days; exposure to extreme noise; exposure to cold until the victim turned blue; denial of pain medication for injuries; waterboarding or simulated drowning; and threats of imminent death.²³⁵

Conditions of detention were equally severe. Detainees were hooded to disorient them and to keep them from learning their

230. See DUFFY, *supra* note 13, at 670–71 (detailing the wide reach of the rendition program).

231. See generally *id.*

232. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, U.S. Dep’t. of Justice 4 (Aug. 1, 2002) (concluding that violating torture laws requires specific intent) (on file with the Washington and Lee Law Review); DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 2–7 (2009) (analyzing six Justice Department memos on torture).

233. See Setty, *supra* note 2, at 668 (“Those memos were subsequently rescinded, and several members of the military were convicted at courts-martial for detainee abuse.”).

234. Memorandum from Jay S. Bybee, *supra* note 232, at 13.

235. DUFFY, *supra* note 13, at 784.

location or the layout of the detention facility; shackled to chairs; placed in solitary confinement for years; and subjected to continuous noise and light.²³⁶ Detainees were cramped in small unsanitary rooms and subjected to extreme heat.²³⁷ Such treatment was legally justified by necessity and self-defense.²³⁸

The torture and abuse of detainees in U.S.'s extraordinary rendition program was systemic and unprecedented. Some individuals were detained in secret locations for three or more years incommunicado.²³⁹ Many were subjected to waterboarding, including as frequently as a hundred times in a single month.²⁴⁰ Others were interrogated for eighteen to twenty hours a day for more than fifty consecutive days.²⁴¹ One Ethiopian citizen was detained for over a year and a half during which his interrogators repeatedly sliced his genitals with razor blades and poured stinging hot liquid on his open wounds.²⁴² A Canadian citizen of Syrian origin, Maher Arar, was mistakenly suspected of ties with terrorists, arrested by U.S. officials in transit home to Canada, and sent to Syria where he endured prolonged torture and other brutal forms of interrogation.²⁴³

236. See generally Joint Study on Global Practices in Relation to Secret Detention, *supra* note 226.

237. DUFFY, *supra* note 13, at 673.

238. See Memorandum from Steve G. Bradbury, Principal Deputy Assistant Attorney Gen., Dep't of Justice, to John A. Rizzo, Acting General Counsel, Cent. Intelligence Agency 3 (July 20, 2007) (discussing the President's ability to interpret the Geneva Convention by executive order) (on file with the Washington and Lee Law Review).

239. See DUFFY, *supra* note 13, at 807–08 (describing how detainees were not able to call family or attorneys).

240. *Extraordinary Rendition, Extraterritorial Detention, and Treatment of Detainees*, HUMAN RIGHTS WATCH (July 25, 2007, 8:00 PM), <https://www.hrw.org/news/2007/07/25/extraordinary-rendition-extraterritorial-detention-and-treatment-detainees> (last visited Sept. 10, 2018) (describing enhanced interrogation at CIA black sites) (on file with the Washington and Lee Law Review).

241. See DUFFY, *supra* note 13, at 598–99 (noting that interrogation techniques were meant to exhaust detainees).

242. See *R (on the application of Binyam Mohamed) v. Sec. of State for Foreign and Commonwealth* [2010], EWCA Civ 65 [124] (UK) (noting that the prisoner was also deprived of sleep and food).

243. See Hafner-Burton & Shapiro, *supra* note 16, at 417 (noting that authoritarian regimes permit U.S. rendition for intelligence purposes).

After weeks, months, or years of secret coercive interrogation, when interrogators determined there was no intelligence value in a detainee, he was sent to Guantanamo Bay, Abu Ghraib, and other prisons where torture was commonplace.²⁴⁴ In Abu Ghraib, U.S. military and intelligence officials systematically subjected detainees to physical and sexual abuse, torture, rape, sodomy, and murder.²⁴⁵ The few detainees set free were denied reparation or a public apology.²⁴⁶

When news broke in 2004 of widespread torture at the hands of U.S. intelligence and military officials, Americans were surprised to learn that the White House and DOJ had authorized the torture. Pressure mounted on Congress to pass the Detainee Treatment Act of 2005 that prohibited abuse and torture of detainees.²⁴⁷ In 2009, President Obama issued an executive order banning “enhanced interrogation techniques” and limited interrogation techniques to those authorized under the Army Field Memo.²⁴⁸ The Military Commissions Act of 2009 and Defense Authorization Bill of 2015 legislated the order into law.²⁴⁹

In contrast to Middle Eastern authoritarian countries, the U.S. has a vibrant civil society and cadre of independent investigative journalists. As a result, the nation’s drift toward authoritarianism was structurally constrained by a group of courageous lawyers, activists, and journalists.²⁵⁰ Nevertheless, the

244. See Khalili, *supra* note 3, at 80–81 (arguing the racialized manipulation of law in the war on terror resulted in the Supreme Courts’ denial of relief to Maher Arar notwithstanding the U.S.’s direct role in sending him to be tortured based on false intelligence).

245. See generally Alette Smeulers & Sander Niekirk, *Abu Ghraib and the War on Terror*, 51 CRIME, L., AND SOC. CHANGE 327 (2008).

246. See HERMAN, *supra* note 3, at 203–04 (discussing the case of Khaled el-Masri).

247. See Mayer, *supra* note 99 (reporting torture practices leading up to 2005).

248. See generally COLE, *supra* note 232 (providing a thorough assessment of the legal analysis underlying the six memos authorizing torture by U.S. officials).

249. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, 123 Stat. 2190 (2009); Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal 2015, Pub. L. No. 113–291, 128 Stat. 3292 (2015).

250. See generally AM. CIVIL LIBERTIES UNION, ACLU STATEMENT ON TEN YEARS OF GUANTANAMO (2018); CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT OF PRISONERS AT

U.S. War on Terror contributed to the normalization of torture. Indeed, lawyers from the most elite law schools manipulated interpretations of the law to legalize torture.²⁵¹ That no high-level official involved in the torture program has been prosecuted is further proof that torture is an acceptable national security practice under certain circumstances.²⁵² Indeed, should there be another major terrorist attack on U.S. soil, the Trump administration has admitted that torture is an option it would consider.²⁵³

Along with torture came indefinite detention. Hundreds of detainees from black sites were transferred to Guantanamo Bay, Abu Ghraib, and Bagram Air Base where they were denied basic due process rights in violation of the 1949 Geneva Convention, among other laws.²⁵⁴ In Guantanamo Bay, where most detainees suspected of being associated with Al Qaeda were sent, the Bush administration intentionally sought to evade legal protections afforded by U.S. and international human rights laws by labeling them “unlawful enemy combatants.”²⁵⁵

A Presidential Military Order authorizing indefinite detention declared that

GUANTANAMO BAY (2006).

251. See OFFICE OF PROF. RESP., U.S. DEP’T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 251–59 (2009) (documenting individuals involved in the “Torture Memos”).

252. See HUMAN RIGHTS WATCH, NO MORE EXCUSES: A ROADMAP TO JUSTICE FOR CIA TORTURE 23 (2016) (noting that the highest ranking officer prosecuted was a lieutenant colonel).

253. See Dan Merica, *Trump on Waterboarding: ‘We Have to Fight Fire with Fire’*, CNN, <http://www.cnn.com/2017/01/25/politics/donald-trump-waterboarding-torture/index.html> (last updated Jan. 26, 2017) (last visited Sept. 10, 2018) (reporting that the administration would consider enhanced interrogation techniques) (on file with the Washington and Lee Law Review).

254. See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (outlining minimum requirements for treatment of prisoners); CRELINSTEN, *supra* note 26, at 48–49 (documenting various rights violations of detainees abroad).

255. See Setty, *supra* note 2, at 660 (describing that this strategy provided a way to send detainees to military court).

[T]he individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.²⁵⁶

Labeled “enemy combatants” based on secret evidence, the detainees were denied access to lawyers or their families, and could not petition for independent review of their detention.²⁵⁷ To protest their indefinite detention, prisoners attempted to commit suicide and undertook in months-long hunger strikes.²⁵⁸

Had it not been for investigative reporting followed by years of contentious litigation that reached the U.S. Supreme Court, this system of indefinite detention in a lawless zone could have remained secret and unchecked.²⁵⁹ In a series of cases starting in 2004, the Supreme Court held that U.S. citizens designated as unlawful enemy combatants by the executive branch still had a right for their detention to be challenged before a neutral arbiter.²⁶⁰ Justice O'Connor warned the executive branch that “[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.”²⁶¹ The Court also held that non-U.S. citizens held in Guantanamo Bay had a right to habeas corpus where they could

256. Military Order of November 13, 2001, 66 Fed. Reg. 57,831 (Nov. 16, 2001).

257. See Whitehead & Aden, *supra* note 223, 1117–18 (noting that detainees were discouraged or blocked from seeking counsel). The U.S. used the same legal arguments in the early 1990s when it refused Haitian asylum seekers access to the press or lawyers and due process rights, and disavowed U.S. sovereignty over Guantanamo. KHALILI, *supra* note 3, at 76–77.

258. See Setty, *supra* note 2, at 664–65 (stating that the strikes led to force-feeding prisoners); *Guantanamo: Facts and Figures*, HUMAN RIGHTS WATCH (Mar. 30, 2017), <https://www.hrw.org/video-photos/interactive/2017/03/30/guantanamo-facts-and-figures> (last visited Sept. 10, 2018) (reporting that six detainees committed suicide) (on file with the Washington and Lee Law Review).

259. See HERMAN, *supra* note 3, at 203–04 (noting the impact of the litigation).

260. See *generally* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

261. *Hamdi*, 542 U.S. at 536.

challenge their detention before regular Article III courts.²⁶² In response, the U.S. sent captured detainees to Bagram Air Force Base outside of U.S. courts' jurisdiction.²⁶³

The limited due process afforded by habeas petitions revealed many detainees were innocent victims of local bounty hunters.²⁶⁴ Contrary to U.S. government claims, many detainees were civilians kidnapped by local warlords in Afghanistan, Pakistan, and Iraq to be delivered to the U.S. military in exchange for a bounty.²⁶⁵ Never having posed a threat to the U.S., they lost years of their lives and suffered severe mental and physical health problems due to torture and prolonged detention.²⁶⁶ Those who filed human rights claims in U.S. courts were impeded by the state secret privilege, which granted the executive immunity for violating international law.²⁶⁷

After years of advocacy and revelations of a pattern of human rights violations, the U.S. administration under President Obama finally announced it would close the Guantanamo Bay prison and prosecute detainees in U.S. federal courts.²⁶⁸ But Congressional leaders obstructed these efforts by passing a law prohibiting any detainee transfers to U.S. soil, in part, because defendants' access

262. See *Boumediene*, 553 U.S. at 771 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.”).

263. See Setty, *supra* note 2, at 664 (noting that detainees have no habeas rights at the base).

264. See, e.g., David Cole, *Where Liberty Lies: Civil Society and Individual Rights After 9/11*, 57 WAYNE L. REV. 1203, 1267 (2012) (arguing that civil society groups served reinforced the checking function of constitutional and international law through litigation and advocacy).

265. See, e.g., *Egypt: 7,400 Civilians Tried in Military Court*, *supra* note 150 (documenting cases of systemic torture by the Egyptian security services).

266. See HUMAN RIGHTS WATCH, LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTANAMO 20 (2008) (reporting insomnia, hallucinations, and psychosis in detainees).

267. See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 87 (2010) (stating that the government invoked state secret privilege in over 100 cases).

268. See President Barack Obama, Remarks by the President on Plan to Close the Prison at Guantanamo Bay (Feb. 23, 2016) (stating that the detention facility undermines, not promotes, national security). *But see* SAID, *supra* note 124, at 113–14 (arguing that U.S. federal courts are highly deferential to prosecutors and go out of their way to ensure convictions of terrorism suspects).

to due process might result in their acquittal.²⁶⁹ Over seventeen years after September 11th, Guantanamo Bay remains a destination for suspected terrorists captured abroad by U.S. officials seeking to evade international human rights law and U.S. domestic law.²⁷⁰ A practice that used to be considered within the realm of authoritarian regimes has now become an openly American practice.²⁷¹

The authoritarianization of U.S. counterterrorism did not end with torture and indefinite detention abroad.²⁷² At home, Americans' civil liberties fall prey to the prying eyes of a burgeoning surveillance state.²⁷³

3. Establishing a Surveillance State and Selective Counterterrorism Enforcement

Technological advancements, the rise of international terrorism, and normalization of authoritarian practices proved ominous for domestic civil liberties.²⁷⁴ Gathering intelligence and mass surveillance to justify *ex ante*, pre-crime objectives became bureaucratized in what Jack Balkin and Sanford Levinson call the "National Surveillance State."²⁷⁵ Multiple covert programs collect information from a wide range of government and private databases to produce mammoth amounts of personal data at the fingertips of law enforcement.²⁷⁶

269. See CRELINSTEN, *supra* note 26, at 49 (detailing the law as part of the National Defense Authorization Act).

270. See HUMAN RIGHTS FIRST, GUANTÁNAMO BY THE NUMBERS 1 (2018) (providing an overview of the number of detainees over the last three administrations).

271. See *id.* (reporting that the U.S. has held 780 detainees at Guantanamo).

272. See DUFFY, *supra* note 13, at 636–37 (describing U.S. surveillance techniques).

273. See *id.* (discussing that surveillance sacrifices citizens' privacy).

274. See generally INT'L CAMPAIGN AGAINST MASS SURVEILLANCE, THE EMERGENCE OF A GLOBAL INFRASTRUCTURE FOR MASS REGISTRATION AND SURVEILLANCE (2005); Whitehead & Aden, *supra* note 223.

275. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 520–21 (2006).

276. See Margaret Hu, *Taxonomy of the Snowden Disclosures*, 72 WASH. & LEE

Soon after the 9/11 attacks, the Bush administration secretly authorized a program known as Total Information Awareness (TIA).²⁷⁷ The program collected information from government and private databases about Americans' transactions, and then applied algorithms to the data as a means of identifying terrorist patterns.²⁷⁸ This form of predictive policing looked at financial, educational, travel, medical, housing, and other transactions to target individuals as potential terrorists.²⁷⁹ Rather than focusing on individualized suspicion or predicate acts of terrorism, the government adopted a risk-assessment model.²⁸⁰ People deemed to be of higher risk levels would then be targeted for investigation and prosecution.²⁸¹ Applying the ideological causation theory, the risk criteria were closely associated with religious beliefs, associations, and political activities of Muslims and Arabs.²⁸²

Traveling to the Middle East, transferring money to family abroad, donating to Muslim charities, associating with people from the Middle East, studying Arabic, doing business with other Muslims, and regularly attending mosques also triggered government suspicion and surveillance.²⁸³ As these minority groups become increasingly scrutinized by the state, stereotypes of the Muslim terrorist that animate government surveillance are

L. REV. 1679, 1689–91 (2015) (providing a comprehensive list of the various big data and small data programs that buttress the national security state); Steven R. Morrison, *The System of Domestic Counterterrorism Law*, 25 STAN. L. & POL'Y REV. 341, 345 (2014) (listing the Total Information Awareness system, Multistate Anti-Terrorism Information Exchange, and Disposition Matrix as a few of the aggregators of mass surveillance).

277. See Morrison, *supra* note 276, at 345 (describing the use of TIA in New York City).

278. See *id.* (detailing that law enforcement uses the program to find patterns of terrorist planning).

279. See *id.* (stating that the data comes from informants, undercover agents, and wiretaps).

280. See *id.* (noting that the data often provides enough to make an arrest).

281. See AM. CIVIL LIBERTIES UNION, *supra* note 13, at 5–8 (discussing how biometric data is used to target individuals).

282. See Aziz, *supra* note 103, at 482 (arguing that the focus on religion led to misinterpretation of Islamic practices as indicia of terrorism).

283. See SAID, *supra* note 124, at 102–04 (detailing activity that was captured in surveillance methods).

reinforced and intensified against Muslim communities.²⁸⁴ The predictive, risk-assessment model facilitates racial and religious profiling of Muslims and Arabs based on an interpretation of ordinary activities as ideologically associated with Islam.²⁸⁵

Although public and Congressional pushback ultimately ended the TIA, the Bush administration secretly authorized another version of the program wherein the National Security Agency spied on people in the United States, including American citizens, who communicated with persons outside the country.²⁸⁶ Without a court order, the NSA secretly intercepted tens of millions of telephone calls and emails and stored them in massive databases.²⁸⁷ Breaking from the standard law enforcement practice of long term monitoring of select individuals based on individualized suspicion, the U.S. government was now collecting massive amounts of data on hundreds of thousands of individuals that could be mined at any time.²⁸⁸ Although the contents of the conversations were not retained, the metadata collected—e.g., time, location, duration, to and from phone numbers and emails—gave the government a window into a person’s activities and associations.²⁸⁹

Another program, PRISM, gathered contents of communications from non-U.S. persons reasonably believed to be abroad even if the communication includes a U.S. citizen.²⁹⁰

284. See Morrison, *supra* note 276, at 344 (explaining the disparate impact on Muslims of the feedback loop created by social network surveillance programs).

285. See Aziz, *supra* note 103, at 488 (arguing that Muslims are perceived as terrorists in waiting instead of ordinary citizens).

286. See HERMAN, *supra* note 3, at 166 (noting surveillance on U.S. citizens); see also Katherine L. Wong, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517, 519 (2007) (stating that the NSA harvested large quantities of data searching for terrorist patterns).

287. See generally Peter Margulies, *Surveillance by Algorithm: The NSA, Computerized Intelligence Collection, and Human Rights*, 68 FLA. L. REV. 1045(2016) (examining whether such surveillance violated the International Covenant on Civil and Political Rights to which the U.S is a party).

288. See Wong, *supra* note 286, at 518–19 (“Surveillance activity . . . has encompassed the communications of potentially thousands of Americans . . .”).

289. See Setty, *supra* note 2, at 653 (discussing that the NSA defends the collection under the Patriot Act).

290. See USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (allowing the government to obtain a warrant from the Foreign Intelligence

Although these searches require a warrant from the secret Foreign Intelligence Surveillance Court, these broad warrants do not identify the people or places searched or impose meaningful restrictions on the collection, retention, or dissemination of the foreign intelligence obtained.²⁹¹

When the New York Times broke the story about these mass surveillance programs, the Bush administration pointed to the Patriot Act as authorizing his secret collection programs.²⁹² A 300-page law hurriedly passed within only forty-five days of the September 11th attacks, the Patriot Act legalized expansive government surveillance and investigative powers.²⁹³ Legal standards restricting searches of email and telephone communications were relaxed, as was government access to medical, financial, and other personal records.²⁹⁴ For example, the legal standard for obtaining a wiretap related to foreign intelligence was loosened from probable cause of a crime to mere relevancy to terrorism prevention.²⁹⁵ FISA warrants no longer had to show that the primary purpose of the pertinent investigation was to collect foreign intelligence, merely a significant purpose.²⁹⁶ Meanwhile, courts regularly deferred to FBI agents' lax definitions of significant purpose and relevancy.²⁹⁷

Surveillance Court to collect contents of information related to foreign intelligence).

291. See HERMAN, *supra* note 3, at 172–73 (noting the ease of obtaining a warrant).

292. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?_r=0 (last visited Sept. 10, 2018) (reporting that the Bush administration dismissed any civil liberties concerns) (on file with the Washington and Lee Law Review).

293. See generally MICHAEL KRAFT & EDWARD MARKS, U.S. GOVERNMENT COUNTERTERRORISM (2016); CHARLES DOYLE, CONG. RESEARCH SERV., RL31377, THE USA PATRIOT ACT: A LEGAL ANALYSIS (2002).

294. See generally DOYLE, *supra* note 293.

295. See Whitehead & Aden, *supra* note 223, at 1106 (describing the “trap and trace” orders).

296. See USA Patriot Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001) (listing requirements for surveillance).

297. See AM. CIVIL LIBERTIES UNION, RECLAIMING PATRIOTISM 10 (2009) (noting that the agency claimed there were no substantiated allegations of abuse).

The relaxed standards likely contributed to the increased number of FISA orders from 934 in 2001 to 2,370 in 2007.²⁹⁸ The Patriot Act also authorized law enforcement officials to apply for roving wiretaps on any communication service provider without geographical limitations or naming the target.²⁹⁹ Pen registers and trap and trace orders applied anywhere in the United States rather than within the jurisdiction of the ordering court.³⁰⁰ Sneak and peak searches allowed law enforcement to conduct searches without notice to the target.³⁰¹

Secret warrants from a secret court permit federal authorities to investigate U.S. citizens and residents based on factors tangentially related to national security.. Thus, warrants authorized under Section 215 of the Patriot Act were especially problematic.³⁰² The type of information that could be obtained expanded to “any tangible thing” on persons who were not necessarily under suspicion for involvement in terrorism or espionage.³⁰³ Information sought included library records, which resulted in librarians across the country being served with Section 215 warrants and national security letters seeking the Internet and reading lists of patrons.³⁰⁴ Gag orders barred the librarians from challenging or disclosing the requests for facially First Amendment protected activity.³⁰⁵ Enlisting librarians in

See generally Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009) (discussing the courts’ tendency to defer to executive branch agencies in national security cases).

298. *See id.* at 11 (including electronic surveillance and physical searches).

299. *See* USA Patriot Act of 2001, § 206 (amending the Foreign Intelligence Surveillance Act to authorize roaming wiretaps); Whitehead & Aden, *supra* note 223, at 1105 (discussing surveillance of unspecified persons instead of specific communications providers).

300. *See* USA Patriot Act of 2001, § 206 (amending the geographic limits of surveillance).

301. *See* Whitehead & Aden, *supra* note 223, at 1083–84, 1111 (2002) (outlining impositions on Americans’ freedoms).

302. *See id.* at 1111 (arguing that the law led to warrants served against innocent individuals).

303. *See* AM. CIVIL LIBERTIES UNION, *supra* note 297, at 14 (noting the significant expansion of government authority).

304. *See id.* (describing Section 215 as the “library provision”).

305. *See id.* (“Section 215 orders come with compulsory non-disclosure orders, or ‘gags,’ which contributed to the secrecy surrounding how they were being

counterterrorism was part of a broader system of delegating intelligence collection to private and public local actors.

Deputizing citizens to spy on each other is another powerful tool of authoritarian regimes for instilling fear and paranoia among their citizens.³⁰⁶ In the U.S., state and local police manage state fusion centers that produce suspicious activity reports with minimal oversight.³⁰⁷ The private sector assists government intelligence collection through suspicious activity reporting. In 2002, the Bush administration initiated the Terrorism Information and Prevention System (TIPS) wherein truck drivers, utility workers, cable guys, banks, and other businesses would report suspicious activity.³⁰⁸ TIPS invited racial and ethnic profiling as citizens reported Muslims praying, wearing headscarves, donning beards, and engaging in other religious activities as suspicious terrorist activity.³⁰⁹ Consequently, the number of suspicious activity reports skyrocketed from approximately 163,000 in 2000 to 1.25 million in 2007.³¹⁰ Banks are also required to collect more information about their customers, share it with the government, and err on the side of inclusivity in submitting reports of suspicious transactions.³¹¹ Predictably, customers with family and businesses in the Middle East and North Africa found themselves

used.”); HERMAN, *supra* note 3, at 122, 126 (noting that 137 librarians had been asked by federal, state, and local law enforcement for information about their patrons between October 2001 and June 2005).

306. See *Watchdog: Syria, China, Iran And Bahrain Spy On Their Citizens Online The Most*, BUS. INSIDER (Mar. 12, 2013, 7:11 AM), <http://www.businessinsider.com/government-that-spy-on-their-citizens-2013-3> (last visited Sept. 10, 2018) (detailing regimes that use surveillance to fight dissent) (on file with the Washington and Lee Law Review).

307. See Setty, *supra* note 2, at 652 (stating that the centers are meant to help law enforcement synthesize information from communities).

308. See *Establishing the USA Freedom Corps*, WHITE HOUSE (Jan. 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/freedom-corps-policy-book-05.html> (last visited Sept. 10, 2018) (noting how citizens can contribute to homeland security) (on file with the Washington and Lee Law Review).

309. See HERMAN, *supra* note 3, at 90–91 (describing TIPS usage in the U.S.).

310. See AM. CIVIL LIBERTIES UNION, *supra* note 297, at 12 (reporting that the Patriot Act increased the number of financial institutions required to file reports).

311. See *id.* (“These reports include detailed personal and account information and are turned over to the Treasury Department and the FBI.”).

targets of heightened bank scrutiny that led to sudden bank account closures, refusal of service, and surprise visits by law enforcement.³¹²

The most widely used method of government surveillance has become the National Security Letter, an administrative subpoena issued by the FBI to private entities for information about their customers.³¹³ No longer must the FBI show specific and articulable facts that the target was a foreign power or agent of a foreign power.³¹⁴ Instead, the Patriot Act relaxes the standard to mere relevance to a national security investigation.³¹⁵ Because NSLs are subpoenas, no court order is required prior to issuing them.³¹⁶

Unsurprisingly, issuance of NSLs surged. By 2006, the FBI issued nearly 50,000 NSL requests to car rental companies, banks, casinos, internet service providers, Google, Facebook, financial institutions, libraries, and other businesses as compared to 8,500 in 2000.³¹⁷ The DOJ Inspector General found that over 60% of NSLs reviewed violated FBI internal controls and 22% violated internal reporting requirements resulting in at least 3,000 violations.³¹⁸

Most troublingly, the line between the FBI's domestic surveillance powers and the CIA's international surveillance

312. See *Bank Account Closures*, ADC, <http://www.adc.org/bank-account-closures/> (last visited Sept. 10, 2018) (“The financial institution often cites the Patriot Act generally as the reason for the account closure.”) (on file with the Washington and Lee Law Review).

313. See *National Security Letters*, ELEC. PRIVACY INFO. CTR., <https://epic.org/privacy/nsl/#stats> (last visited Sept. 10, 2018) (documenting a drastic increase in National Security Letters following the Patriot Act) (on file with the Washington and Lee Law Review).

314. See Andrew E. Nieland, *National Security Letters and the Amended Patriot Act*, 92 CORNELL L. REV. 1201, 1211 (2007) (noting that an agent can issue an NSL if the information is relevant to an investigation).

315. See *id.* (stating that the Patriot Act eliminated the requirement of a foreign connection).

316. See *id.* at 1209 (describing the NSL exception to court orders).

317. See AM. CIVIL LIBERTIES UNION, *supra* note 297, at 32 (noting that many recipients are two or three times removed from a suspected terrorist).

318. See U.S. DEP'T OF JUSTICE, *A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS* 16–25 (2014) (providing recommendations for compliance with internal regulations).

powers is blurred.³¹⁹ The CIA has had access to vast amounts of personal information gathered by the FBI.³²⁰ Under the guise of information sharing, the U.S. regressed back to an era when the FBI and CIA engaged in egregious rights violations under the infamous COINTELPRO of the 1960s and 1970s.³²¹ During this era, civil rights leaders, anti-war activists, and persons suspected of being Communists were spied on, investigated, and in some cases, prosecuted.³²² Tellingly, the FBI and CIA primarily targeted African Americans, Jews, or leftists whose ideology and race were deemed a threat to the state.³²³

The same is happening in the post-9/11 era as Muslim students, businesses, mosques, and homes are subjected to intensive surveillance for no other reason than their religion or ethnic origin.³²⁴ Muslims are disproportionately on multiple watch lists containing hundreds of thousands of names.³²⁵ Ranging from No Fly Lists that preclude them from traveling by air altogether to Terrorist Screening Lists that subject them to secondary screening every time they travel, Muslims do not receive notice of their selection nor are they offered meaningful opportunity to be removed from these secret lists.³²⁶ Consequently, a large percentage of names are false positives due to incorrect or outdated information and mistaken identities.³²⁷ Over time, selective

319. See Whitehead & Aden, *supra* note 223, at 1091–92, 1109 (noting unprecedented CIA access to intelligence on U.S. citizens).

320. See *id.* at 1090–92 (detailing inter-agency information sharing).

321. See *id.* at 1109 (stating that Section 203(b) of the Patriot Act authorizes agencies to share any communication intercepted under the Wiretap Act).

322. See *id.* at 1090–92 (discussing that the government reserved the right to surveil religious groups and charitable organizations).

323. See *id.* at 1091–92 (noting the chilling effect on First Amendment freedoms.)

324. See, e.g., Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslims-Americans*, 7 U. MD. L.J. RACE, RELIG., GENDER & CLASS 375, 376 (2007) (arguing that surveillance disrupts ordinary life for Muslims).

325. See, e.g., DUFFY, *supra* note 13, at 88 (detailing that Muslims account for the majority of names on counterterrorism watch lists).

326. See HERMAN, *supra* note 3 at 71, 73 (discussing the secrecy behind adding individuals to the watch lists).

327. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES xxiii

enforcement of counterterrorism laws produces a palpable chilling effect in Muslim American communities.³²⁸

As authoritarian norms seep into governance, government scrutiny eventually shifts from politically vulnerable minorities that serve as convenient scapegoats to political dissidents and opposition groups.³²⁹ In a 2010 report, the Inspector General for the United States Department of Justice found that the FBI had improperly targeted domestic advocacy groups for investigation solely on account of their First Amendment protected activities.³³⁰ FBI agents secretly attended meetings, took pictures, and gathered intelligence about anti-war, animal rights, and anti-globalization meetings without a legitimate law enforcement purpose.³³¹ Confidential informants infiltrated the organizations reporting back to the FBI on the organizations' First Amendment protected activities.³³²

V. *Reversing the Race to the Bottom*

These negative domestic externalities of counterterrorism coordination are sufficiently serious that they can no longer be ignored. Not only have laws and practices changed, but also a culture of intolerance has arisen in American political culture.³³³ The effects were glaringly evident during the 2016 presidential campaign. Republican candidates competed for who was most

(2009) (finding that nearly 24,000 identities in the consolidated watchlist were associated with outdated or non-terrorism designations).

328. *See generally* TUFYAL CHOUDHURY & HELEN FENWICK, *THE IMPACT OF COUNTER-TERRORISM MEASURES ON MUSLIM COMMUNITIES* (2011).

329. *See generally* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS* (2010) (reporting on the FBI's treatment of five advocacy groups).

330. *See id.* at 59–70 (documenting FBI's targeting and monitoring groups' speech and assembly)

331. *See id.*

332. *See id.*

333. *See generally* Lawrence D. Bobo, *Racism in Trump's America*, 68 *BRITISH J. SOCIOLOGY* S85 (2017) (outlining a new wave of racism following the 2016 campaign and election).

hawkish on national security and immigration, which manifested in scapegoating Muslims and equating Islam with terrorism.³³⁴

Calls to keep America safe included registering all Muslims in the U.S., barring Muslims from entering the country, and surveilling mosques under the presumption that they are hotbeds of terrorism.³³⁵ Government officials betrayed America's historical commitment to granting refuge to civilians victimized by war abroad as they called to ban Syrian refugees from entering the U.S.³³⁶ Then presidential candidate Trump condemned Syrian refugees as a collective security risk when he stated

[W]hen the Syrian refugees are going to start pouring into this country, we don't know if they're ISIS, we don't know if it's a Trojan horse. And I definitely want a database and other checks and balances. We want to go with watch lists. We want to go with databases. And we have no choice.³³⁷

The fear mongering and collective suspicion cast upon minorities lead to changes in laws that jeopardized their rights.³³⁸

334. See Jenna Johnson & Abigail Hauslohner, *I think Islam hates us: A timeline of Trump's Comments about Islam and Muslims*, WASH. POST (May 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?noredirect=on&utm_term=.ef514dcb42ca (last visited Sept. 10, 2018) (discussing the Republicans' defamatory language towards Islam and Muslims) (on file with the Washington and Lee Law Review).

335. See Greg Sargent, *Paul Ryan Joins Barack Obama in Condemning Anti-Muslim Bigotry*, WASH. POST (Dec. 8, 2015), https://www.washingtonpost.com/blogs/plum-line/wp/2015/12/08/paul-ryan-joins-barack-obama-in-condemning-anti-muslim-bigotry/?utm_term=.3c12e1070812 (last visited Sept. 10, 2018) (demonstrating the polarizing views of the Trump administration) (on file with the Washington and Lee Law Review). See generally Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2018 B.Y.U. L. REV. 101 (2018) (examining the legality of a special registration program targeting Muslims).

336. See *id.* (noting politicians who expressed the need for a ban, or did not condemn a call for a ban).

337. Aaron Blake, *Trump Says We've Known His Muslim Ban and Database Plans 'All Along.' But We Still Don't—Not Really*, WASH. POST (Dec. 21, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/the-evolution-of-donald-trump-and-the-muslim-database/?utm_term=.1e65950c16b2 (last visited Sept. 10, 2018) (on file with the Washington and Lee Law Review).

338. See, e.g., *Middle East Overview*, MINORITY RTS. GROUP INT'L (Sept., 2012), <http://minorityrights.org/minorities/overview-of-middle-east/> (last visited Sept. 10, 2018) (discussing rights violations of minorities in Egypt and other middle

In January 2017, for example, President Trump issued executive orders banning citizens from seven Muslim majority countries from entering the U.S. and indefinitely barring Syrian refugees many of who were victims of terrorism themselves.³³⁹ When the acting Attorney General Sallie Yates refused to enforce the ban on grounds that it was unconstitutional, Trump immediately fired her.³⁴⁰ Similarly, Trump fired FBI Director James Comey when he refused to pledge absolute loyalty to the president.³⁴¹ Removing civil servants who do not blindly obey the president is a frequent occurrence in authoritarian regimes.³⁴²

Just as the U.S. does not negotiate with terrorists, neither should it coordinate counterterrorism operations with state human rights violators. That Middle Eastern regimes' authoritarian rights-infringing practices have made the region more, not less, susceptible to terrorist violence should further caution Western nations adopting similar practices.³⁴³ Indeed, the region has the highest concentration of transnational terrorist attacks causing

eastern countries) (on file with the Washington and Lee Law Review).

339. See Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (invoking authority under the Immigration and Nationality Act).

340. See Evan Perez & Jeremy Diamond, *Trump Fires Acting AG After She Declines to Defend Travel Ban*, CNN (Jan. 31, 2017), <https://www.cnn.com/2017/01/30/politics/donald-trump-immigration-order-department-of-justice/index.html> (last visited Sept. 10, 2018) (detailing the acting AG's dismissal) (on file with the Washington and Lee Law Review).

341. See Michael D. Shear & Matt Apuzzo, *FBI Director James Comey is Fired by Trump*, N.Y. TIMES, <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html> (last visited Sept. 10, 2018) (reporting on the political consideration surrounding Comey's firing) (on file with the Washington and Lee Law Review).

342. See Heba Afify, *New Law Further Shields Government from Accountability*, MADA, <https://www.madamasr.com/en/2015/07/12/feature/politics/new-law-further-shields-government-from-accountability/> (last updated Jan. 31, 2017) (last visited Sept. 10, 2018) (discussing how the President of Egypt was able to pass a law, providing him with the power to remove immunized heads of supervisory bodies) (on file with the Washington and Lee Law Review).

343. See, e.g., Braithwaite & Li, *supra* note 26, at 283 (“[T]he Middle East has the highest concentration of transnational terrorist incidents, with Europe ranked second.”).

over tens of thousands of civilians killed over the past four decades.³⁴⁴

Financial restraints should be imposed on federal agencies who coordinate with counterparts who violate rights in counterterrorism. The U.S. has established the promotion of internationally recognized human rights as a component of its foreign policy.³⁴⁵ Toward that end, a pair of amendments to the Foreign Assistance Act of 1961 and the National Defense Authorization Act, also known as the Leahy Laws, prohibit the State and Defense Departments from giving foreign aid to any unit of a security or military force of a foreign country if that unit has committed gross human rights violations.³⁴⁶ Financial restraints should be imposed on federal agencies that coordinate with counterparts who violate rights in counterterrorism.

Gross human rights are defined as including “torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person.”³⁴⁷ Such conditions are intended to incentivize and deter foreign security forces from committing human rights violations.³⁴⁸ With the increase in coordination in counterterrorism operations between the U.S. and foreign security forces, such conditions should not be limited to the behavior of foreign security forces. U.S. security and intelligence officials must also be held accountable. One way to do so is through budgetary and policy restraints.

344. *See id.* at 294 (“[Policy makers] should invest more resources directed at combating terrorist activities in countries located in hot-spot neighborhoods because these represent countries that are highly likely to experience a sharp increase in terrorist attacks in subsequent years.”).

345. *See generally* U.S. DEP’T OF STATE, U.S. HUMAN RIGHTS COMMITMENTS AND PLEDGES (2017).

346. *See* Foreign Assistance Act of 1961, § 620M, 22 U.S.C. § 2151 (2012); Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal 2015, Pub. L. No. 113-291, § 1204(a)(1), 128 Stat. 3292, 3531 (2015).

347. 1961 Foreign Assistance Act, § 116. Extrajudicial killing and politically motivated rape are also included in this definition. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, SECURITY ASSISTANCE 9 (2016).

348. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 347, at 8 (discussing that the Leahy Laws prevent U.S. assistance to human rights violators).

Funding of government security agencies' coordination or cooperation with their foreign counterparts should be conditional on their adherence to domestic civil rights and constitutional law as well as international human rights law. While the means in which such conditions can be incorporated into law is a separate project beyond the scope of this Article, I proffer the following conceptual framework: (1) reporting on counterterrorism coordination; (2) monitoring of coordination to ensure U.S. officials are not participating directly or indirectly in human rights violations; and (3) conditioning funding of government agencies engaged in transnational counterterrorism coordination. As the overarching coordinator of intelligence and national security operations, the Office of the Director of National Intelligence (ODNI) is a potential candidate as the implementing authority.³⁴⁹

First, agencies would be required to submit an annual report to the ODNI about their counterterrorism coordination with foreign governments in which they demonstrate that they are not cooperating with counterparts that violate human rights.³⁵⁰ For instance, when Afghan police and military units abuse and torture detainees, the U.S. should not be cooperating with such units, much less funding them.³⁵¹ The same applies for FBI and CIA agents or DOJ lawyers who work with foreign intelligence and anti-terrorism counterparts.³⁵² Not only do such restrictions

349. See *Who We Are*, OFF. DIR. NAT'L INTELLIGENCE, <https://www.dni.gov/index.php/who-we-are> (last visited Sept. 10, 2018) (stating that the ODNI serves as the head of the U.S. intelligence community) (on file with the Washington and Lee Law Review).

350. The agencies subject to this process should include the Department of Homeland Security, the Federal Bureau of Investigations, the Department of Justice, the Central Intelligence Agency, the Department of Treasury, and the National Security Agency.

351. See Jeremy Kelly, *US-backed Afghan Militias Accused of Human Rights Abuses*, GUARDIAN (Sept. 12, 2011, 3:53 AM), <http://www.theguardian.com/world/2011/sep/12/us-backed-afghan-militias-abuses> (last visited Sept. 10, 2018) (reporting U.S. support for the Afghan Local Police) (on file with the Washington and Lee Law Review).

352. See *'We Left Our Most Important Prisoners To Amateurs'*, SPIEGEL ONLINE (Jan. 23, 2015, 4:06 PM), <http://www.spiegel.de/international/world/former-fbi-official-ali-soufan-condemns-guantanamo-torture-a-1014475.html> (last visited Sept. 10, 2018) (providing an interview with former FBI agent Ali Soufan, discussing the CIA using torture techniques after 9/11) (on file with the Washington and Lee Law Review).

prevent violations against civilians abroad, but they also prevent the long-term exposure of U.S. counterterrorism personnel to authoritarian practices permissible under the foreign countries' laws and policies. Such exposure contributes toward normalizing these human rights violations within the American national security community.

Second, the ODNI would monitor U.S. counterterrorism coordination through review of the reports and auditing processes to ensure compliance. The ODNI would have a similar role in counterterrorism coordination human rights compliance as the State Department in enforcing compliance with the Leahy law in the foreign aid context.³⁵³

Third, should an agency be found out of compliance, funding for counterterrorism coordination should be suspended until the agency takes effective measures to bring itself into compliance.³⁵⁴ This may include repealing memorandums of understanding for cooperation with foreign units, cancellation of particular training programs, and providing additional training to U.S. personnel on U.S. law and international human rights law. Corrective measures for noncompliance should be adopted with the goal of preventing short-term human rights and civil rights violations and

Review).

353. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 347, at 10 (describing the process in the State Department that monitors compliance with the Leahy Laws).

354. This proposal is taken from the language in the Leahy amendment stating:

No assistance shall be furnished under this Act or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights. The prohibition in subsection (a) shall not apply if the Secretary determines and reports to the Committee on Foreign Relations of the Senate, the Committee on Foreign Affairs of the House of Representatives, and the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.

Foreign Assistance Act of 1961, § 620(j), 22 U.S.C. § 2378(d) (2012).

longer-term compliance through a culture of democracy and respect for individual rights.³⁵⁵

To be sure, implementation of human and civil rights conditions will not be free of challenges.³⁵⁶ Information about U.S. partners' counterterrorism efforts may not always be available to U.S. officials. Nor will documentation always be available to prove U.S. compliance. Because what constitutes a violation must be clearly defined and consistently applied, the proposed framework requires an iterative and inclusive process wherein the various affected agencies participate in the process.

VI. Conclusion

The authoritarianization of U.S. counterterrorism spans multiple administrations in the post-9/11 era. At the same time that Western nations focus on the democratization of Muslim majority countries, citizens in the West experience attrition in their civil liberties.³⁵⁷ "Hard on terror" approaches where the rulebook is figuratively thrown out the window are mistaken for "smart" national security measures.³⁵⁸ National security is used to justify rights violations, emergency law, prosecutions, and military trials of civilians.

355. See U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 23 (2003) (discussing the role of law enforcement culture in promoting rights compliance among the police).

356. See Andrew M. Leonard, *Getting the Leahy Law Right*, FOREIGN AFF. (June 29, 2017), <https://www.foreignaffairs.com/articles/2017-06-29/getting-leahy-law-right> (last visited Sept. 10, 2018) (highlighting the flaws with implementation of the Leahy law) (on file with the Washington and Lee Law Review).

357. See Piazza & Walsh, *supra* note 15, at 129 (noting that Western countries face diminishing civil liberties).

358. See, e.g., Daniel L. Byman, *Trump and the Next Terrorist Attack*, BROOKINGS (May 3, 2017), <https://www.brookings.edu/blog/markaz/2017/05/03/trump-and-the-next-terrorist-attack/> (last visited Sept. 10, 2018) (arguing that harsh Western rhetoric will lend support to terrorist groups) (on file with the Washington and Lee Law Review).

Those advocating for a development approach to terrorism prevention are dismissed as naïve.³⁵⁹ Human rights and individual freedoms are characterized as a luxury the West cannot afford to preserve in the face of a transnational terrorist threat.³⁶⁰ These are the same views long held by Middle Eastern authoritarian regimes mired in political instability.

Although transnational counterterrorism is necessary for the security of both Western and Middle East nations, the exchange of information, skills, and strategy may be contributing towards a normalization of illiberal practices among U.S. officials. Countries such as Egypt with a higher rate of terrorism become the experts advising their U.S. counterparts that violence and brutality is the only effective means of preventing terrorism. Consequently, a cultural transformation occurs within the U.S. law enforcement and intelligence community that subordinates rights, particularly of groups with the same religious or racial identity of the terrorists, to militarized counterterrorism practices.

Although evidence of a causal link between rights violations and counterterrorism coordination is far from conclusive, the United States' post-9/11 national security practices troublingly mirror those frequently found in authoritarian states. Abuse of detainees, torture, indefinite detention, mass surveillance, secret courts, selective enforcement of criminal and immigration law based on race and religion, and extrajudicial killings are some obvious examples. The acculturation of American security officials into an authoritarian, militaristic approach is more insidious and rights infringing over the long run. As such, concrete accountability measures on federal security and intelligence agencies coordinating with their foreign counterparts shields the U.S. from meandering down the slippery slope that leads to authoritarianism. For once a nation surpasses the tipping point, reversing course may be insurmountable.³⁶¹

359. See Wolfendale, *supra* note 2, at 762.

360. See DUFFY, *supra* note 13, at 544, 567 (noting the U.S. denying the relevance of international human rights law in the war on terror).

361. See generally Sahar F. Aziz, *Bringing Down an Uprising: Egypt's Stillborn Revolution*, 30 CONN. J. INT'L L. 1 (2014) (examining why the attempt to remove an authoritarian regime proved to be insurmountable for Egyptians, notwithstanding years of U.S.-sponsored democracy promotion projects and a popular uprising).