

SWP Research Paper

Johannes Thimm

From Exception to Normalcy

The United States and the War on Terrorism



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The war on terrorism waged by the United States is in its 17th year. To a large extent, it has defined three very different presidencies and no end is in sight. In the time since the terrorist attacks of September 11, 2001, the initial shock has gradually given way to a new normalcy. The time seems right to assess the US's approach to combating terrorism — an assessment this study attempts to provide.

A key finding of this report is that the global war on terror is not only continuing, but that it is also becoming increasingly difficult to end. What began as a secret war is now firmly established US policy, both legally and institutionally.

In the early years of the global war on terror, US methods were strongly criticized by Europe's governments. This criticism has now largely ceased. Detention without a trial, targeted killings, mass surveillance — all of this is at least tolerated, and in some cases even supported.

This development is problematic in several respects. Its consequences include the systematic erosion of human and civil rights; the concentration of decision-making power in the hands of the executive at the expense of the separation of powers principle; and the expansion of the national security state. Since victory is unlikely, the question of whether to continue supporting the United States on its present course is all the more urgent.

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From Exception to Normalcy The United States and the War on Terrorism

The war on terrorism waged by the United States (US) is in its 17th year. To a large extent, it has defined three very different presidencies and no end is in sight. In the time since the terrorist attacks of September 11, 2001, the initial shock has gradually given way to a new normalcy, and the time seems right to assess how the US's approach to combating terrorism has affected the rule of law, democracy, and human rights over almost the past two decades.

Such an assessment is advisable for three reasons. *First*, the policies for combating terrorism have undergone a number of changes. The methods have been continually changed, new ones introduced, and existing ones abolished; the legal framework has been adapted; and the fight has been extended to new terrorist groups. This study should help in keeping track of the many twists and turns and to clarify the current situation. *Second*, the methods being used to combat terrorism have since found imitators. Not only do autocrats of all kinds justify human rights abuses and the persecution of political opponents as being anti-terror measures, European democracies have not remained unaffected by these changes either. Whereas in the early years following 9/11 European governments had repeatedly and clearly voiced criticisms of some of the controversial methods used for fighting the war, these have now largely ceased. Detentions without trials, targeted killings, indiscriminate surveillance – all of this is at least tolerated, if not supported. Moreover, European governments are following the US example in many respects. In France, a constitutional state of emergency was in force for almost two years after a series of terrorist attacks in 2015; subsequently, many of the powers then issued for the police and military have been permanently enshrined in a new anti-terror law. Britain had one of its citizens killed in Iraq using a drone attack without even attempting to provide any legal justification. And in almost all European countries, the security agencies are constantly demanding new powers to monitor communications. All this leads to a normalization of problematic practices without sufficient discussions of the consequences.

Third, the presidency of Donald Trump has given the issue of the fight against terrorism new urgency. Trump inherited from his predecessors a remarkable degree of power in the field of security policy. In contrast to Barack Obama, however, there is no guarantee that he will deal with it cautiously. There is much talk of Trump's control over the metaphorical red button of the US nuclear arsenal. On the other hand, his power over the joysticks that steer Predator drones equipped with Hellfire missiles attracts relatively little attention.

A key finding of this report is that the global war on terror is not only continuing, but that it is also becoming increasingly difficult to end. What began as a secret war of a (strongly ideological) presidency is now firmly established as US policy, both legally and institutionally. The fight against terrorism by military means continues, with the aim of preventing terrorist attacks entirely. The logic of war and prevention has led the US to take a number of controversial measures after 9/11. In the context of a partially secret detention and interrogation program, alleged terrorists were abducted, arrested, and tortured in order to obtain information about planned attacks. The secret prisons are now closed and torture has ceased, but the practice of detaining suspects in Guantánamo for an unlimited period without trials continues. Targeted killings of terrorist suspects, often by drones, have been expanded due to greater technical possibilities and are a rarely questioned part of this war. When the public learned of the indiscriminate surveillance of the communications and online activities of Americans and foreigners and its questionable legal basis, there were some minor corrections. However, the far-reaching powers of the intelligence agencies remained largely untouched and were subsequently legalized. Although each of these areas — detentions, targeted killings, and surveillance — has its own dynamics and individual measures have continuously evolved, the overall picture reveals continuity.

This development is problematic in several respects. Its consequences include the systematic ero-

sion of human and civil rights; the concentration of decision-making power in the hands of the executive at the expense of the separation of powers principle; and the expansion of the national security state. The national security establishment requires considerable resources and has itself become a powerful actor in US security policy as a type of "intelligence industrial complex." Despite some policy revisions and the discontinuation of the worst excesses — especially the use of torture — the measure of what is considered acceptable in the name of security has permanently shifted over the last two decades. Legal and moral norms that were long regarded as undisputable in the US have suffered lasting damage.

The effectiveness of the war on terror remains disputed. The aim of the present analysis is not to measure the war's effectiveness because, in order to do so, it would be necessary to argue counterfactually as to whether there would have been less terrorism today if the war had not been conducted in this way — a methodologically questionable undertaking. However, it seems doubtful whether we are closer to the goal of defeating terrorism today than in 2001. Since victory is unlikely, the question of whether to continue on the present course is all the more urgent.

There have been a few changes in US policies that have provoked criticisms from European governments after 9/11, however the issue has lost urgency. Because Europe held President Obama in high regard, he was not under the same pressure to justify himself as his predecessor, although he continued many of the controversial measures. Now, with Donald Trump in the White House, European governments have other concerns and do not want to open up another area of conflict with Washington. But on their own, US practices will not change, and the longer German and European officials remain silent about them, the more that creeping normalization prevents the possibility of a policy change.

Introduction: Continuity and Change in the Fight against Terrorism

“We will [...] unite the civilized world against Radical Islamic Terrorism, which we will eradicate completely from the face of the Earth.”

Donald Trump, 20 January 2017

“We have to be mindful of James Madison’s warning that ‘No nation could preserve its freedom in the midst of continual warfare.’ [...] This war [on terror], like all wars, must end. That’s what history advises. That’s what our democracy demands.”

Barack Obama, 23 May 2013

“It [the war on terror] is different than the Gulf War was, in the sense that it may never end. At least, not in our lifetime.”

Dick Cheney, October 2001

In the nationalist worldview of President Donald Trump, the threat of terrorism occupies a central place. In his typically provocative manner, Trump has contemplated all kinds of drastic measures to combat terrorism. He told the press that the controversial interrogation technique of waterboarding is an effective means of obtaining information.¹ His plan to revive secret prisons operated by the Central Intelligence Agency (CIA) was the subject of a leaked draft Executive Order.² Trump has no intention of closing the prison at Guantánamo Bay Naval Base in Cuba and is openly considering bringing new prisoners there.

As usual, Trump has not put everything he contemplated aloud into action, but it is also not all just

rhetoric. One of his first official acts was to order an operation of special forces against an Al-Qaeda cell in Yemen; 14 people — including several civilians — were killed in the operation.³ The president is said to have declared Yemen and Somalia “areas of active hostilities,” and thus relaxed the criteria for the use of deadly force there.⁴ The controversial practice of the CIA operating its own fleet of armed drones to carry out targeted killings was not phased out as planned, but expanded. As the agency’s new director, Trump appointed Gina Haspel, who ran a secret CIA prison in George W. Bush’s first term. The fact that alleged terrorists were also tortured there attests to Haspel’s strength, according to Trump.

The methods for fighting the war against terrorism, which has now lasted for more than 17 years, have been repeatedly adapted. However, there is continuity in two respects. First, the terrorist threat has brought preventive action to the fore. Because deterrence is ineffective against terrorists who are prepared to sacrifice their own lives, the investigation and prosecu-

¹ “Transcript: ABC News Anchor David Muir Interviews President Trump”, *ABC News*, 25 January 2017, <http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602>. During his election campaign, he also said he would not only go after terrorists, but also their families. See Tom LoBianco, “Donald Trump on Terrorists: ‘Take Out Their Families’”, *cnn.com*, 3 December 2015, <https://edition.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/>.

² Charlie Savage, “White House Pulls Back from Bid to Reopen C.I.A. ‘Black Site’ Prisons”, *New York Times*, 4 February 2017, <https://nyti.ms/2kApFS9>.

³ Eric Schmitt, “U.S. Commando Killed in Yemen in Trump’s First Counterterrorism Operation”, *New York Times*, 29 January 2017, <https://nyti.ms/2jETG1Q>.

⁴ See section “Targeted killing”, p. 22.

tion of crimes already committed does not prevent future attacks. However, since the electorate demands prevention, law enforcement and the intelligence services often turn to methods that undermine constitutional principles and human rights. Second, in certain parts of the world, the struggle against terrorism is conducted by military means. The term “war on terrorism” is not a metaphor; rather, the war paradigm is the legal and moral prerequisite for the use of military means, including lethal force. The application of preventive measures and the war paradigm have led to a lasting shift in the perception of what seems legitimate in the fight against terrorism. This has been the common denominator of all US administrations since 9/11.

The Normalization of the Global War on Terrorism

Immediately after the terrorist attacks on the New York World Trade Center and the Pentagon in 2001, the US government was concerned that further attacks were already underway. Those responsible for preventing them acted under the impression of an imminent threat and critical time pressure, leading Congress to give President Bush largely free rein in his choice of means. Both the authorization by Congress and the action by the executive on that basis outlived the immediate shock after 9/11 and still form the basis of the war against terrorism today.

A resolution authorizing the war on terrorism

The legal basis for the war on terrorism is the Authorization for Use of Military Force (AUMF), which was adopted as a joint resolution by both chambers of Congress on September 14, 2001, and signed by President Bush on September 18, 2001.⁵ The AUMF authorizes the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on 9/11, or harbored such organizations or persons.” That this force was authorized not only against states but also against organizations and individuals was a novelty.⁶ The resolution sanctioned the military intervention in Afghanistan, which was initially aimed at

overthrowing the Taliban regime, eliminating Al-Qaeda, and capturing or killing the backers of the 9/11 attack.

But the power to use military force was not limited to Afghanistan or certain countries or areas of operation. The war on terrorism was global from the very beginning.⁷ The decision as to who or what was a legitimate target was primarily a matter for the president. In a speech to Congress, Bush declared that the war would continue until every global terrorist group was found and defeated.⁸

⁷ In 2005, the Bush administration, initiated by the Department of Defense, attempted to replace the term “global war on terror” (GWAT) with “global struggle against violent extremism” (G-SAVE). The Obama administration also tried to avoid the term “war on terror” but continued to talk about the war against Al-Qaeda and its associates. Eric Schmitt and Thom Shanker, “US Officials Retool Slogan for Terror War”, *New York Times*, 26 July 2005, <http://nyti.ms/1LjBiUK>; Jay Solomon, “US Drops ‘War on Terror’ Phrase, Clinton Says”, *Wall Street Journal*, 31 March 2009, <http://www.wsj.com/articles/SB123845123690371231>; Trevor B. McCrisken, “Ten Years On: Obama’s War on Terrorism in Rhetoric and Practice”, *International Affairs* 87, no. 4 (2011): 781 – 801. Donald Trump uses the term “radical Islamic terrorism”. Peter Holley, “‘Radical Islamic Terrorism’: Three Words That Separate Trump from Most of Washington”, *Washington Post*, 1 March 2017, <http://wapo.st/2mCfBpR?>

⁸ “On September the 11th, enemies of freedom committed an act of war against our country [...]. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.” George W. Bush, “Address to a Joint Session of Congress and the American People”, 20 September 2001, <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

⁵ *Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Public Law 107-40*, 18 September 2001. See also Daniel Bethlehem, “Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors”, *American Journal of International Law* 106, no. 4 (2012): 770 – 77.

⁶ Richard F. Grimmet, *Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History*, CRS Report for Congress RS22357 (Washington, D.C.: Congressional Research Service, updated 16 January 2007).

A small circle of decision-makers

A small group of confidants played an outsized role in deciding important aspects of how to conduct the war on terror. In addition to Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, and National Security Advisor Condoleezza Rice, a circle of advisers who called themselves the “War Council” was particularly influential. It consisted of the White House Counsel, Alberto Gonzales; his deputy Tim Flanigan; Vice President Cheney’s Chief of Staff and Counsel, David Addington; the Department of Defense Legal Counsel, William “Jim” Haynes II; and John Yoo, the Deputy Assistant Attorney General and the number two at the Justice Department’s Office of Legal Counsel (OLC) — the institution whose interpretations of US laws are authoritative and binding on the entire executive branch. Sometimes the members coordinated among themselves before involving other staff of relevant departments. At other times, they dispensed entirely with the usual interagency process, which normally involves a large number of staff.⁹

The people included in the War Council were likely also selected because of their extreme positions regarding the president’s powers in the system of checks and balances. Vice President Cheney and Defense Secretary Rumsfeld believed that the president enjoyed almost unlimited authority in matters of national security, based on the idea of a “unitary executive.” After the Watergate scandal in the early 1970s, Congress’s oversight powers over the executive were strengthened. The revelation that under President Richard Nixon the White House had violated numerous laws and, in particular, abused the law enforcement and intelligence agencies for its own political purposes led to a number of legislative reforms. They culminated in 1980 in the adoption of a law requiring newly established Intelligence Committees in both chambers of Congress to be briefed about any covert operations by the CIA. The supporters of the unitary executive model rejected such an oversight role by Congress as being unconstitutional.¹⁰ John Yoo argued in an OLC legal memo-

⁹ See Jack L. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York, NY: W. W. Norton & Company, 2007), 22.

¹⁰ Goldsmith, *The Terror Presidency*, 85f.: “Addington had no such instincts. To the contrary, long before 9/11 he and his boss had set out to reverse what they saw as Congress’s

random that the president’s role as Commander-in-Chief allowed him to ignore existing laws such as the prohibition of torture.¹¹ The general perception of threat after 9/11 and the recourse to secret measures enabled the supporters of the unitary executive to implement their extreme positions into the powers of the presidency, initially without much resistance.

Covert operations as a defining characteristic

President Bush made covert operations a central part of the fight against terrorism.¹² On September 17, 2001, he signed a secret order giving the CIA far-reaching powers to capture or kill terrorists.¹³ For this purpose, which was named Operation Greystone, the

illegitimate decades-long intrusions on ‘unitary’ executive power.”

¹¹ “Even if an interrogation method arguably were to violate Section 2340A [‘committing or attempting to commit torture’], the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy.” See Jay S. Bybee (Assistant Attorney General), “Memorandum for Alberto R. Gonzales, Counsel to the President”, 1 August 2002, in *The Torture Papers. The Road to Abu Ghraib*, ed. Karen J. Greenberg and Joshua L. Dratel (Cambridge: Cambridge University Press, 2005), 172–217 (200).

¹² To this day, there is no official public account of these activities. Certain aspects of it, such as the CIA’s so-called detention and interrogation program, have been the subject of official investigations and government reports. Through them and the work of investigative journalists and human rights organizations, as well as through investigations by the EU, a relatively extensive picture has now emerged, partly complemented by accounts of former government employees. This study is based on this range of sources.

¹³ According to the law, covert operations require a Memorandum of Notification by the president, including a presidential finding that the operation is in the national security interest of the United States. See James M. McCormick, *American Foreign Policy and Process* (Belmont, California: Thomson Wadsworth, 2004); Robert Chesney, “Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate”, *Journal of National Security Law and Policy* 5 (2012): 539–629 (University of Texas Law, Public Law Research Paper no. 212), <https://ssrn.com/abstract=1945392>.

CIA received \$1 billion of additional funding.¹⁴ In contrast to previous covert programs, the president did not authorize each operation individually. Instead, he delegated the approval of specific operations, including targeted killings, to the head of the CIA Counterterrorism Center.¹⁵ Details were kept secret from the public. Vice President Cheney said in a television interview that, in order to succeed, the intelligence services would have to work in the dark, and without much discussion of their methods.¹⁶ In Congress only the leadership of each party and the chairmanship and ranking members of the relevant committees were informed, likely only on the most general terms (see section “The detention and interrogation program,” p. 13). Only years later did the public find out exactly what the new powers included.

At the initiative of Defense Secretary Rumsfeld, not only were the CIA but also the military’s special forces increasingly called upon. The special forces of the various branches of the armed forces were expanded and given greater autonomy in carrying out operations under the Joint Special Operations Command (JSOC). After 9/11, the number of troops under JSOC increased from 30,000 to approximately 70,000.¹⁷ Over time, the CIA and military special

forces have become increasingly interlinked in conducting operations — a phenomenon discussed in the legal literature under the term “convergence” (see section “The National Security State and the Power of the Executive,” p. 29).

Rising criticism leads to some limited reversals

As the public’s knowledge of the administration’s extreme measures grew, so did the opposition to it. The criticism was most pronounced with respect to the conditions governing the detention, treatment, and interrogation of terrorist suspects — it was in this area that the resulting reversals were most significant. US courts claimed jurisdiction over the prisoners against the will of the White House, regardless of where they were held. Prisoners’ complaints against their detention and the conditions of their imprisonment, as well as trials of those accused of terrorism, led to a series of rulings that gradually restricted the government’s flexibility and strengthened prisoners’ rights. As the systematic nature of the abuse became known, Congress also intervened to ban violent practices. This was not a straightforward process; rather, over many years, there was a continuous tug-of-war between the executive, legislative, and judicial branches over the appropriate laws regarding the treatment of potential and actual terrorists. The administration was forced to give in on crucial points; the situation of the prisoners at the end of the Bush era was different from the one shortly after 9/11. But despite the changes, the rule of law and human rights standards remained significantly lower than before the beginning of the global war on terror. President Obama’s ascent to the presidency made little difference in this regard.

One crucial difference between Obama and his predecessor was that the new president unequivocally condemned and ended the system of secret prisons and torture. But even under Obama, indefinite detentions without a trial — whether in Guantánamo or elsewhere — trials by military commissions with more limited rights for the accused, and the possibility of the “extraordinary rendition” of alleged terrorists to third countries continued.

¹⁴ Dana Priest and William M. Arkin, *Top Secret America. The Rise of the New American Security State* (New York, NY: Little, Brown and Company, 2011), 6.

¹⁵ Jeremy Scahill, *Dirty Wars. The World Is a Battlefield* (London: Nation Books, 2013), 20. In the words of the later deputy CIA director Michael Morell: “Never before had the Agency had as much latitude to conduct paramilitary operations, and it used those authorities aggressively to protect the country.” Michael Morell and Bill Harlow, *The Great War of Our Time: The CIA’s Fight Against Terrorism. From Al Qaeda to ISIS* (New York, NY: Twelve, 2015), 73.

¹⁶ “We also have to work, though, sort of the dark side, if you will. We’ve got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful. That’s the world these folks operate in, and so it’s going to be vital for us to use any means at our disposal, basically, to achieve our objective.” Dick Cheney, “The Vice President Appears on Meet the Press with Tim Russert”, 16 September 2001, <http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/print/vp20010916.html>.

¹⁷ Mark Danner et al., “In the Darkness of Dick Cheney”, *The New York Review of Books*, 6 March 2014, <http://www.nybooks.com/articles/archives/2014/mar/06/darkness-dick->

[cheney/](#); Andrew Fieckert, *US Special Operations Forces (SOF): Background and Issues for Congress*, CRS Report for Congress 7-5700 (Washington, D.C.: CRS, 8 April 2016).

Obama's criticism was less about the human rights violations than about the fact that Bush had acted without sufficient legal basis.

On the question of government surveillance, the public's lack of knowledge of the extent of the government's measures long prevented any critical discussions. Obama's inauguration had no consequences here, at first. In 2013, with the publication of internal documents by former intelligence contractor Edward Snowden, the government's secret surveillance authorities became public, and the legal justifications for this claim to power were questioned. Only now did political protests emerge, which led to some corrections.

The policy of targeted killings, on the other hand, never triggered a major public outcry, even after the Obama administration publicly admitted it. That the government used drones to kill alleged terrorists had never been a real secret. Rather, classifying such measures as "covert operations" allowed them to avoid defining clear criteria for the legality of individual operations and of having to assume responsibility for civilian victims. At the same time, the US drone strikes were kept secret in order to conceal the fact that allied governments such as Pakistan and Yemen tacitly tolerated them. The expansion of the drone program under Obama also provoked little political resistance, despite numerous critical campaigns by human rights organizations.

The Obama administration not only continued the controversial measures, but also institutionalized them more firmly. Whereas the Bush administration had introduced some methods in violation of existing laws and justified them – if they were justified at all – as being contained within the inherent powers of the executive, Obama put his policy on a more solid institutional basis. He established new decision-making procedures within the executive, had new justifications for the legality of measures drawn up and, with the involvement of Congress, succeeded in creating a new statutory basis for existing practices. Journalist Charlie Savage convincingly shows that, from the outset, Obama's criticisms of Bush's approach to the war on terror was not so much on substantive issues. Instead of condemning civil or human rights violations, he lamented the fact that Bush acted on his own – without a legal basis – and bypassed the Constitution and the system of checks and balances. Accordingly, Obama did not fundamentally

question Bush's anti-terrorist policy after taking office; rather, he created a more sophisticated legal justification, often through new justifications for existing practices.¹⁸

President Trump's policy does not yet have a clear outline. On the one hand, the terrorist threat was a central issue in his election campaign, and on the other hand, he seems to be paying more attention to relations between the major powers. However, his statements have made it clear that he lacks any concern for the situation of a permanent state of war. Beyond rhetoric, continuity also seems to predominate under Trump; the thrust of his early actions seems to indicate an escalation rather than a limitation of the war. At the same time, his ignorance and lack of interest in the details of policy give the national security bureaucracy every opportunity to pursue its own agenda.

¹⁸ Charlie Savage, *Power Wars. Inside Obama's Post-9/11 Presidency* (New York, NY, Boston, and London: Little, Brown and Company, 2015).

The Evolution of the War on Terror under Three Presidents

As more time following the 9/11 attacks passed, some measures were reversed (such as the use of torture), some mitigated (such as the inadvertent surveillance of US citizens), some maintained (such as indefinite detention without trial), and some expanded (such as targeted killings using drones).

The detention and interrogation program

On February 7, 2002, President Bush stated in a memorandum that the war on terrorism created a “new paradigm” to which the Geneva Conventions did not apply.¹⁹ On the basis of the secret directive signed by Bush on September 17, 2001, the CIA established a program to capture individuals “posing a continuing, serious threat of violence or death to U.S. persons and interests or planning terrorist activities.” Interrogation methods were not mentioned, but the directive formed the basis for the so-called High Value De-

tainee Program.²⁰ This gave the intelligence agencies maximum flexibility to capture, transport, detain, or transfer prisoners from one country to another outside of normal processes and, if necessary, without the consent of the host country. The CIA created a system of secret prisons spread over several countries in which prisoners from whom the US expected important information in the war on terror (“high-value detainees”) were detained and interrogated without any legal protections and had no contact with the outside world.²¹

Torture in the name of fighting terrorism

Not only CIA prisoners, but also military prisoners were held in locations without access to US courts. They were either detained in military prisons in Afghanistan or taken to Guantánamo Bay Naval Base. The CIA requested instructions from the government on which interrogation methods were allowed. The CIA staff in the field and the decision-makers on the War Council apparently quickly agreed that the brutal interrogation techniques would be permitted in the quest for intelligence.

The OLC at the Department of Justice prepared a series of memorandums with the aim of giving the

¹⁹ According to the memo, the Third Geneva Convention was not applicable to the conflict with Al-Qaeda, because the network was neither a state nor “a High Contracting Party to Geneva”. Common Article 3 of the Convention was neither applicable to Al-Qaeda nor to the Taliban, because the conflict was international in character, whereas Article 3 only applied to non-international conflicts. Neither were the Taliban and Al-Qaeda as unlawful combatants entitled to prisoner-of-war status according to Article 4. The White House, “Memorandum by the President”, 7 February 2002, in *The Torture Papers*, ed. Greenberg and Dratel (see note 11), 134f. Especially Secretary of State Colin Powell and his legal advisor William H. Taft IV had contradicted this assessment. Bush, however, followed his Attorney General, John Ashcroft, who was also supported by legal advisers Alberto Gonzales (White House) and William Haynes (Pentagon), both members of the War Council. On the controversy over the applicability of the Geneva Conventions, see the memoranda of the relevant actors in *The Torture Papers*, ed. Greenberg and Dratel (see note 11), 38–133.

²⁰ Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 9 December 2014 (S. Rpt. 113–288), xviii, 11. The Memorandum of Notification itself is still classified.

²¹ Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, xviii, 11. Also see Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York, NY: Holtzbrinck Publishers, 2006); a map with the location and duration of operation of these “black sites” is available at Matt Apuzzo, Sheri Fink, and James Risen, “How U.S. Torture Left a Legacy of Damaged Minds”, *New York Times*, 9 October 2016, <https://nyti.ms/2k5yq2W>.

government maximum flexibility in dealing with prisoners. Its lawyers came up with new interpretations of existing laws to (1) construe the prohibition of torture so narrowly that many of the intended methods were supposedly not covered; (2) create legal loopholes that allowed the government to circumvent the prohibition of cruel, inhuman, and degrading treatment; and (3) immunize the persons responsible for the interrogations from criminal prosecution – from the political decision-makers to the perpetrators on the ground.²²

It was permitted to confine detainees for hours in boxes into which they could barely fit.

Initially, the CIA had permission to employ 10 coercive measures, euphemistically called “enhanced interrogation techniques,” to interrogate terrorism suspects.²³ Although the official list of techniques remains secret, it has become known that they include sleep deprivation over long periods of time, often achieved through forced standing or other painful “stress positions,” deafening noise, and/or bright lights.²⁴ Interrogators were also permitted to expose prisoners to extreme heat and cold; to confine them for hours in boxes into which they could barely fit; to bang them against walls and slap them in the face with an open hand; to exploit their phobias, for example fear of dogs or insects; and to employ the so-

called waterboarding,²⁵ the use of which had to be approved in individual cases and has been confirmed with respect to three suspects.²⁶ Through extraordinary rendition, prisoners were also handed over to the intelligence services of allies in the war on terror, including numerous states that are well-known to torture, such as Egypt, Syria, and Uzbekistan. This was done both for interrogations – a practice referred to by critics as the “outsourcing of torture” – and to permanently remove people who were considered dangerous.²⁷

25 During waterboarding, the prisoner is tied to a board and his nose and mouth are covered with a cloth on which water is poured. When the subject tries to breathe, water slowly enters the lungs. In the press, waterboarding is often referred to as “simulated drowning”. However, the only aspect of it that can be called simulation is that the process is interrupted before the subject suffocates. Christopher Hitchens, “Believe Me, It’s Torture”, *Vanity Fair*, 2 July 2008, <https://www.vanityfair.com/news/2008/08/hitchens200808>; Malcolm Nance, “I Know Waterboarding Is Torture – Because I Did It Myself”, *New York Daily News*, 31 October 2007, <http://www.nydailynews.com/opinion/waterboarding-torture-article-1.227670>. CIA interrogation protocols show that Abu Zubaydah had to be reanimated after one of the multiple waterboarding sessions he had to endure. See Senate Select Committee on Intelligence, *Committee Study* (see note 20), 423.

26 The US government has admitted to the use of waterboarding by the CIA with respect to three persons. Morell (with Harlow, *The Great War of Our Time* [see note 15], 246) claims that these were the only cases, and that the technique was last employed in 2003, and after 2006 it was no longer authorized. Senator Dianne Feinstein casts doubts on Morell’s version: “Fact Check: Inaccurate and Misleading Assertions Related to the CIA Detention and Interrogation Program in *The Great War of Our Time: The CIA’s Fight Against Terrorism – From al Qa’ida to ISIS* by Michael Morell and William Harlow, https://www.feinstein.senate.gov/public/_cache/files/e/3/e369f4a2-6993-43d2-aa99-23c15075dd4d/78FA199F8373D4FA360335AA07372B80_fact-check--response-morell-and-harlow-book-6-2-15.pdf. The journalist James Risen reports that special forces in Afghanistan also used waterboarding. See James Risen, *Pay Any Price. Greed, Power, and Endless War* (Boston: Houghton Mifflin Harcourt, 2014), 172. See also Human Rights Watch, *Delivered into Enemy Hands. US-Led Abuse and Rendition of Opponents to Gaddafi’s Libya*, September 2012, <https://www.hrw.org/report/2012/09/05/delivered-enemy-hands/us-led-abuse-and-rendition-opponents-gaddafis-libya>.

27 Grey, *Ghost Plane* (see note 21); Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (New York, NY: Open Society Foundations,

22 Johannes Thimm, *Farewell to the Laws Against Torture? The American Treatment of Detainees in the Fight Against Terrorism*, SWP Comment 12/2005 (Berlin: Stiftung Wissenschaft und Politik, March 2005); Department of Justice, Office of Professional Responsibility, *Investigation into the Office of the Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists*, 29 July 2009; see also Goldsmith, *The Terror Presidency* (see note 9); *The Torture Papers*, ed. Greenberg and Dratel (see note 11).

23 Morell and Harlow, *The Great War of Our Time* (see note 15), 246.

24 See Senate Select Committee on Intelligence, *Committee Study* (see note 20). The International Committee of the Red Cross (ICRC) concluded in 2007 that the interrogation techniques described by prisoners, individually and collectively, constitute torture and/or cruel, inhuman, and degrading treatment. See International Committee of the Red Cross, *ICRC Report on the Treatment of 14 “High Value Detainees” in CIA Custody*, September 2007.

The origins of the “enhanced interrogation techniques”

The aggressive techniques were adopted from a training program designed to prepare US soldiers for their capture by enemy forces — the so-called Survival, Evasion, Resistance and Escape (SERE) training. In this training, certain soldiers are exposed to treatment they might face if captured by enemy troops in order to increase their ability to resist coercion. These methods, which outside of a training situation are generally considered to violate humanitarian law (they are based on practices used by the Chinese on US soldiers to coerce false confessions during the Korean War), were adopted as a model for US interrogations of alleged terrorists. At the center of the techniques’ development were two psychologists who had been SERE trainers for the Air Force: James Mitchell and Bruce Jessen. They convinced those in government that these techniques could, on the one hand, make prisoners tell the truth and, on the other hand, that they did not constitute torture.^a In 2002/2003, SERE staff trained the Afghan, Iraqi, and Guantánamo commandos as well as CIA and Defense Intelligence Agency staff in the use of aggressive interrogation techniques.^b After some time as government employees, Mitchell and Jessen continued to consult the military and intelligence agencies as private contractors. Over the years, the fees for their consultancy work accumulated to almost \$70 million.

a OLC Head Steven Bradbury argued to CIA Counsel John Rizzo that the SERE methods were safe and did not cause mental harm. James Risen, *Pay Any Price. Greed, Power, and Endless War* (Boston: Houghton Mifflin Harcourt, 2014), 187.

b Senate Select Committee on Intelligence, *Committee Study* (see note 20).

Aggressive methods were also approved for the interrogation of prisoners detained at the Guantánamo military base. The task force responsible for Guantánamo asked US Central Command for the authorization to use aggressive interrogation techniques, following training of its personnel by the same SERE officers who had already advised the CIA (see box). Although the military lawyers of all branches of the armed forces expressed legal and political concerns about aggressive interrogation techniques, the Pentagon’s leading legal adviser, William Haynes, recommended that a number of

February 2013), <http://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>.

such practices be approved. On December 2, 2002, Defense Secretary Rumsfeld approved by memo a list of 15 of 18 requested interrogation techniques that went beyond the non-coercive standard techniques permitted in the relevant Army Field Manual.²⁸

Methods that were originally only approved for Guantánamo quickly found their way into the military prisons in Afghanistan and Iraq. There was confusion as to what exactly was permitted where. For example, in Iraq, the Third Geneva Convention relative to the treatment of prisoners of war applied, granting captives there full prisoner-of-war status with all the corresponding protections. Yet, members of the CIA and military intelligence nevertheless used brutal interrogation methods. As a consequence, lower ranked military troops, such as prison guards, also mistreated prisoners there. This happened both when they were following instructions from the intelligence personnel in connection with interrogations and when following their own initiative. A direct result of this development were the abuses in the Iraqi prison Abu Ghraib, graphic pictures of which were leaked and made headlines worldwide.²⁹

Cruel conditions of detention, ill-treatment, and torture were probably the cause of death among about 100 prisoners who died in US custody between 2001 and 2006. The human rights organization Human Rights First concludes that 34 cases are suspected or confirmed homicides; it is likely that another 11 prisoners died in prison as a result of “physical abuses or the harsh conditions of their detention.”³⁰ In eight to twelve cases, the organiza-

28 “Action Memo for Secretary of Defense from William J. Haynes II, General Council, Re: Counter Resistance Techniques”, 27 November 2002 (approved on 2 December 2002), in *The Torture Papers*, ed. Greenberg and Dratel (see note 11), 236ff.; see also United States Senate, *Inquiry into the Treatment of Detainees in U.S. Custody. Report of the Committee on Armed Services*, 20 November 2008, https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.

29 Ibid. See in particular *Article 15-6 Investigation of the 800th Military Police Brigade (Tabuga Report)*, March 2004; *Final Report of the Independent Panel to Review DoD Detention Operations (Schlesinger Report)*, August 2004; *Investigation of Intelligence Activities at Abu Ghraib/Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, LTG Anthony R. Jones/Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, MG George R. Fay (Fay-Jones Report)*, August 2004.

30 Hina Shamsi, *Command’s Responsibility. Detainee Deaths in U.S. Custody in Iraq and Afghanistan*, ed. Deborah Pearlstein (Human Rights First Report, February 2006), <http://www>.

tion assumes that prisoners were tortured to death. Five deaths involved the CIA.³¹ In 2005, the military admitted investigating 26 cases of criminal homicide in Afghanistan and Iraq.³²

In 2006, President Bush publicly defended CIA actions against Al-Qaeda member Abu Zubaydah, one of the first prisoners to be tortured in a secret prison. Bush claimed that the “alternative methods” were necessary to save lives and insistently defended their legality.³³

Opposition from civil society and the other government branches

As more information about the secret prisons and detention conditions became public, criticisms grew. The Guantánamo Bay Naval Base prison was a focus

humanrightsfirst.org/wp-content/uploads/pdf/06221-etn-hrf-dic-rep-web.pdf.

31 Ibid., 9.

32 Douglas Jehl and Eric Schmitt, “U.S. Military Says 26 Inmate Deaths May Be Homicide”, *New York Times*, 16 March 2005, <https://nyti.ms/2FUeOKE>. “The Torture Database”, maintained by the American Civil Liberties Union, contains hundreds of report about criminal investigations inside the US military. See <http://www.thetorturedatabase.org>.

33 The White House, “President Discusses Creation of Military Commissions to Try Suspected Terrorists”, 6 September 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/print/20060906-3.html>: “We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used — I think you understand why — if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary.” The protocol of a CIA interrogation of Abu Zubaydah is available here: “Details Regarding the Cycle of Interrogations of Abu Zubaydah on August 6, 2002”, August 2002, accessible through the UC Davis Center for the Study of Human Rights in the Americas, <http://humanrights.dss.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/prisoner-testimonies/prisoner-testimonies/details-regarding-the-cycle-of-interrogations-of-abu-zubaydah-on-august-6-2002-august-2002>.

of attention early on. Private attorneys, human rights lawyers, and university law clinics took on pro bono cases representing inmates to defend their rights and access to the justice system. Investigative journalists and non-governmental organizations raised awareness; government sources repeatedly leaked information and documents to the press — indicating the degree of internal controversy surrounding the policy.

The situation of the prisoners sprung to the attention of a wider public when the press got hold of photos from the Iraqi prison Abu Ghraib in May 2004. The pictures documented in detail instances of cruel abuse and sexual humiliation, including pictures of a prisoner’s dead body. The Abu Ghraib scandal led to a series of internal military investigations, which in turn revealed that brutal methods were used systematically during interrogations. Shortly afterwards, the first legal opinions from the Justice Department’s OLC — in which coercive interrogation methods had been declared legal — also leaked.³⁴

Investigative reporters finally uncovered the CIA’s detention and interrogation program. Through statements of released prisoners and the tracking of the flights that the CIA had used to transport prisoners between various secret prisons, reporters eventually managed to put pieces of the puzzle together.³⁵ The judicial authorities of concerned countries investigated³⁶ and the United Nations and the European Union took action.³⁷ Slowly, a more comprehensive

34 In December 2004, the *Wall Street Journal* published a memorandum for White House Counsel Alberto Gonzales. Authored by John Yoo and signed by Jay Bybee, it argues, inter alia, that in order to rise to the level of torture, treatment must cause severe pain at “a level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions” (p. 6). Most leaked memos are compiled in *The Torture Papers*, ed. Greenberg and Dratel (see note 11).

35 Early pointers to the CIA program were the cases of Canadian citizen Maher Arar and of German citizen Khaled El-Masri, who were freed after prolonged CIA detention when their innocence finally became clear. On how journalists of various countries uncovered the secret CIA flights, see Grey, *Ghost Plane* (see note 21).

36 After the CIA had abducted a Muslim religious leader suspected of terrorism from the streets of Milan (probably with the knowledge of the Italian government), the Italian state prosecutor investigated. His prosecution led to the conviction *in absentia* of 22 CIA agents on charges of kidnapping.

37 See e.g. Council of Europe: Parliamentary Assembly, *Lawfulness of Detentions by the United States in Guantánamo Bay*, 8 April 2005, Doc. 10497; UN Economic and Social Council:

picture of the various aspects of imprisonment and torture emerged.

From 2004, the Bush administration was increasingly forced to defend its practices to the other government branches. The US Supreme Court granted Guantánamo prisoners the right to challenge their detentions in US courts on the basis of the *habeas corpus* principle.³⁸ It also decided that the military commissions authorized by President Bush in 2001 were inadmissible in their existing form because they were incompatible with the Uniform Code of Military Justice and the Geneva Conventions.³⁹

The Detainee Treatment Act was intended to strengthen prisoners' rights – but loopholes remained.

Congress played an ambivalent role, at times restricting the executive's freedom of action and at other times reaffirming it. On December 30, 2005, the Detainee Treatment Act was passed as part of a supplemental defense appropriations bill in order to eliminate ambiguities in the legal status quo that allegedly had led to the mistreatment of prisoners.⁴⁰ It was sponsored by the Republican Senator John McCain, who had particular credibility as Chairman of the Armed Forces Committee and a known foreign policy hawk in addition to having first-hand experience with torture as a prisoner of war in the Vietnam War.

The law explicitly rejects the reasoning that the Justice Department lawyers had relied on to justify brutal interrogation methods.⁴¹ It protects all prisoners under the effective control of the US government – including non-US citizens detained outside the US – from cruel, inhuman, and degrading treatment (based on the definition laid down by Washington when it ratified the UN Convention against

Torture).⁴² In addition, the law stipulates that all prisoners under control of the Defense Department must be treated in accordance with the standards of the relevant Army Field Manual, which prohibits cruel, inhumane, and degrading treatment in accordance with Common Article 3 of the Geneva Conventions.⁴³ However, there are loopholes in the law. The standards of the Army Field Manual apply only to prisoners of the army, not to those held by the intelligence services. It is possible to change the corresponding Army Field Manual. Nor does the legislation outlaw extraordinary renditions. The law also strengthens the protection of government employees against attempts to prosecute them under civil or criminal law for the abuse of prisoners – in their legal defense, they can claim to have acted in the belief that the interrogation methods were legal. Furthermore, the jurisdiction of US courts to hear *habeas corpus* lawsuits of prisoners against their detention in Guantánamo is restricted.⁴⁴

Congress strengthened the powers of the administration with respect to the detention of enemy combatants and their trial before military commissions. After the Supreme Court in 2006 declared military commissions based on the 2001 Bush order illegal, Congress created a new legal basis for commissions with the Military Commissions Act (MCA).⁴⁵ Unlawful enemy combatants of foreign nationality could now be tried before military commissions. This category includes, for example, members of Al-Qaeda, the

Commission on Human Rights, *Situation of the Detainees at Guantánamo*, 15 February 2006, U.N. Doc. E/CN.4/2006/120 (2006).

³⁸ Supreme Court of the United States, *Rasul v. Bush*, 542 U.S. 466 (2004).

³⁹ Daniel Bodansky and Peter J. Spiro, "Hamdan v. Rumsfeld. 126 S.Ct.2749", *American Journal of International Law* 100, no. 4 (2006), 888–95.

⁴⁰ *Detainee Treatment Act of 2005*, Public Law No. 109–148, 30 December 2005.

⁴¹ Arsalan M. Suleman, "Detainee Treatment Act of 2005", *Harvard Human Rights Journal* 19 (2006): 257–65.

⁴² This was necessary because the torture memos argued that the prohibition of cruel, inhuman and degrading (C.I.D.) treatment in the Convention Against Torture only applied to US persons (on the term, see note 53) protected by the US Constitution, since in a reservation to the treaty, Washington had based its definition of C.I.D. treatment on the meaning of "cruel, unusual and inhumane treatment or punishment" in the US Constitution. The court explicitly rejects that only US persons are protected by the convention.

⁴³ At the time the Detainee Treatment Act passed, this was Army Field Manual 34-52: *Intelligence Interrogation* (1992). It was later replaced by FM 2-22.3: *Human Intelligence Collector Operations* (2006).

⁴⁴ President Bush continued to undermine the law's intent to close loopholes. Upon approving the legislation, he added in a signing statement that the executive would construe the law consistent with his inherent authority as Commander-in-Chief to protect the American people from further terrorist attacks. In other words: If the law hindered this objective, it would be unconstitutional and he could ignore it.

⁴⁵ *Military Commissions Act of 2006*, Public Law No. 109–366, 17 October 2006.

Taliban, and forces allied with them who have participated in, or materially supported, hostile actions. In addition, tribunals appointed by the Secretary of Defense may declare prisoners unlawful enemy combatants.⁴⁶ New procedural rules have strengthened the rights of the defendants compared to the previous military commissions, but they are still not comparable with the rule of law standards in civilian criminal proceedings or courts martial. Statements made under torture are inadmissible; however, coerced statements may be used under certain circumstances. Rulings of military commissions can be appealed only once in a federal appeals court. The law reaffirms that unlawful combatants cannot make *habeas corpus* claims in US courts, even if their cases are already pending.⁴⁷ Those detained as unlawful combatants have no way to challenge their detention before a tribunal has established their status; this way, they can potentially be detained indefinitely.

With the MCA, Congress came to the administration's aid after the Supreme Court overturned the system of military commissions. The direct applicability of the Geneva Conventions to the standards of detention and the definitions of torture and cruel, inhuman, and degrading treatment were more limited than in international law, although not as restricted as in the administration's legal memoranda. The legislators did not follow the executive in all respects and guaranteed a minimum of rule of law standards. Nevertheless, they gave the government much more flexibility in dealing with enemy combatants than would have been possible under a traditional legal process.⁴⁸

In September 2006, President Bush publicly admitted that secret prisons existed and ended the practice at the same time. The remaining 14 high-value detainees were transferred to Guantánamo and the International Committee of the Red Cross was granted access to them. Formally, the CIA's detention and

interrogation program remained in place, but most likely it was no longer used after 2006.

Ending torture under Obama

Shortly after taking office, President Obama issued an Executive Order mandating all government authorities, including the CIA, to follow the relevant Army Field Manual in the treatment of prisoners.⁴⁹ The administration admitted the use of torture in the past and ruled it out for the future. First, the designated candidate for Attorney General, Eric Holder, publicly admitted that the use of waterboarding constitutes torture. Later, Obama also declared that prisoners had been tortured in US custody — a fact that the Bush administration had denied to the very end, not least because of the implications for criminal prosecution.⁵⁰

But Obama deliberately kept open the possibility of imprisoning prisoners without a trial for an unlimited period of time. After recognizing how many of the Guantánamo detainees were potentially dangerous but could not be tried due to lack of evidence, the administration successfully defended the possibility of unlimited detention in the courts. Obama's legal justification was not based on the president's inherent power, but on the AUMF. However, in practice, nothing changed for the prisoners. Obama's attempts to close Guantánamo were defeated by Congress. In a series of laws, Congress prohibited the president from transferring prisoners from Guantánamo to the US. The number of inmates there was further reduced, but at the end of Obama's final term in office, there were still 41 prisoners in Guantánamo. Among them were five recommended for release by a government body and 26 who were found to be

46 For this and for the following, see Arsalan M. Suleman, "Military Commissions Act of 2006", *Harvard Human Rights Journal* 20 (2007): 325–37.

47 In contrast, in the case of *Hamdan v. Rumsfeld*, the Supreme Court had exempted pending cases from the Detainee Treatment Act's restrictions on *habeas corpus* challenges.

48 See also Jack Goldsmith, "How Obama Learned to Love Military Commissions", *Slate* (21 March 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/military_commissions_now_have_broad_political_support_from_republicans_and_democrats_alike_.html.

49 Executive Order No. 12491, *Ensuring Lawful Interrogations*, Fed. Reg. 4893 (22 January 2009).

50 David Stout, "Holder Tells Senators Waterboarding Is Torture", *New York Times*, 15 January 2009, <https://nyti.ms/2F5c2kE>; The White House, "Press Conference by the President", 1 August 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president>: "We did a whole lot of things that were right, but we tortured some folks. We did some things that were contrary to our values. [...] And when we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line."

too dangerous to release.⁵¹ Obama also kept open the option for extraordinary rendition. However, from what we know, it was not used to outsource torture, as had been alleged of the Bush administration. In the time since Trump has taken office, one Guantánamo prisoner has been transferred to Saudi Arabia to serve out the remainder of his sentence; he was convicted after pleading guilty to war crimes.⁵²

Indiscriminate surveillance of communication

The ability of the intelligence and law enforcement communities to monitor electronic communications has continuously evolved over the years to keep pace with technological developments. The terrorist attacks on 9/11 revealed gaps in intelligence gathering and sharing. As a result, the technical capabilities and legal license to collect and store electronic data have been massively expanded, and the ability to exchange data between different authorities has been enhanced. Neither Obama's time in office nor the criticisms that followed Snowden's revelations about the existing practices fundamentally changed this trend. As a result, the US government now has a variety of means to monitor communications and internet activities at home and abroad and to share the insights gained within security and law enforcement agencies. The use of surveillance measures is not limited to combating terrorism but includes all purposes of foreign intelligence, as well as some law enforcement activities, such as the war on drugs.

Overview of the legal basis of the surveillance regime

The debate in the US focuses primarily on the handling of data of US persons,⁵³ who are protected from

unreasonable searches and seizures by the Fourth Amendment of the Constitution, which also applies to intrusions on their communication. The current practice is under criticism because even the statutory rights of US persons are not sufficiently safeguarded (non-US persons lack corresponding rights under US law). We can distinguish between three legal regimes, which are used as the basis for monitoring. The first, Section 215 of the USA Patriot Act, adopted in 2001, relates mainly to domestic intelligence. On this basis, the Federal Bureau of Investigation (FBI) and the National Security Agency (NSA) temporarily operated programs to routinely collect and store – in cooperation with the major telephone and internet providers – the metadata of all electronic communications for five years. When these programs became known publicly, they were widely criticized for being disproportionate. The collection of e-mail metadata was discontinued in 2011. Three different institutions concluded unanimously that the program was ineffective and based on a problematic interpretation of Section 215. The three groups were: the President's Review Group on Intelligence and Communications Technologies, an expert commission set up by Obama in response to the Snowden revelations; the Privacy and Civil Liberties Oversight Board (PCLOB), a bipartisan advisory council on privacy and civil rights established by Congress in 2004; and finally the Inspector General of the Department of Justice. Subsequently, the handling of telephone connection data was also modified, and Congress passed the USA Freedom Act (see below).

The more important surveillance programs fall under the category of foreign intelligence. The second legal basis is codified in Section 702 of the FISA Amendments Act (FAA), a modified version, adopted in 2008, of the Foreign Intelligence Surveillance Act (FISA) of 1978. Third, the president claims inherent authorities based on the Constitution that are described in Executive Order 12333.

FISA is the result of efforts by Congress at that time to better control the activities of the intelligence services. It defined rules for foreign intelligence gathering on US territory. Accordingly, persons in the US suspected of foreign espionage could only be monitored based on a warrant by the then newly established Foreign Intelligence Surveillance Court (FISC, or the FISA Court). All forms of electronic intelligence

the United States. US persons are under US jurisdiction and are entitled to the protection of the US Constitution.

51 Carol Rosenberg, "Guantánamo. By the Numbers", *Miami Herald*, 25 October 2016 (last modified 16 July 2018), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2163210.html>.

52 Carol Rosenberg, "U.S. Releases Guantánamo Convict to Saudi Arabia in First Transfer of Trump Era", *Miami Herald*, 2 May 2018, <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article208718319.html>.

53 The legal term "US person" refers to US citizens regardless of their location as well as permanent legal residents in

not covered by FISA — in particular the surveillance of non-US citizens outside the US — were carried out on the basis of Executive Order 12333.⁵⁴ Such foreign intelligence was the responsibility of the NSA, which specializes in signals intelligence and is part of the Defense Department.

The evolution of surveillance since 9/11

After 9/11, the Bush administration relaxed the provisions for the work of the NSA to allow it to operate domestically. But instead of seeking a change in the law, Bush authorized the NSA on October 4, 2001, based on his authority as president, to circumvent the rules of FISA.⁵⁵ As a result, the NSA, in cooperation with the major telephone companies, began to monitor telephone calls and e-mails in which either the sender or the recipient of the communication were located abroad. The content of communications suspected of being related to Al-Qaeda was scrutinized. In addition, the metadata of millions of telephone calls and e-mails were collected and stored in bulk and without specific cause. During the initial years, this generated controversies within the administration about the legality of the measures, and the legal justifications changed several times.⁵⁶

In December 2005, the *New York Times* uncovered a program of the NSA to intercept calls on American territory without judicial authorization and in violation of FISA.⁵⁷ As a result, the Bush administration

abandoned the secrecy of this measure.⁵⁸ The other programs for storing telephone and e-mail metadata initially remained secret, although the newspaper *USA Today* reported on the monitoring of telephone metadata in May 2006.⁵⁹

The Bush administration simply regarded all data as “relevant” to prevent terrorist attacks.

At the insistence of the Bush administration, on May 26, 2006, the FISA Court began — initially without public knowledge — to approve the collection of telephone metadata in bulk for certain periods instead of issuing specific judicial decisions for individual surveillance measures. According to FISA, the Court may order the collection of information relevant to espionage or terrorism investigations. The administration convinced the judges that all the data was relevant to prevent terrorist attacks.⁶⁰ Based on the FISA Court’s approval, the government was able to refute the allegation of an outright violation of the law. The Court’s interpretation of the law, however, remained highly controversial after its publication. At the time, the decision was taken in secret, without public knowledge or debate.

In response to the *New York Times* revelation of the surveillance of telephone conversations, the FISA Amendments Act was passed in 2008, legalizing key aspects of existing practices.⁶¹ Under Section 702,

ministration declassified the program, it called it “Terrorist Surveillance Program”.

⁵⁸ The reporters James Risen and Eric Lichtblau had had the relevant information since October 2004, but under pressure from the government, the *New York Times* held back the story. See Risen, *Pay Any Price* (see note 26), 270.

⁵⁹ Lesley Cauley, “NSA Has Massive Database of Americans’ Phone Calls”, *USA Today*, 11 May 2006, https://usatoday30.usatoday.com/news/washington/2006-05-10-nsa_x.htm.

⁶⁰ A further argument was a reference to the Patriot Act, which mandated that the collection and “business records” did not require a court order. Since telecommunications companies routinely collected and stored metadata, they were considered business records. To justify the e-mail metadata collection, reference was made to the possibility under the original FISA to use “pen-register/trap-and-trace” techniques to collect telephone metadata. This justification was then transferred to internet communications.

⁶¹ The FAA replaced the temporary Protect America Act of 2007. It also granted immunity from civil or criminal charges to the telecommunications companies involved.

⁵⁴ Daniel Severson, “American Surveillance of Non-U.S. Persons: Why New Privacy Protections Offer Only Cosmetic Change”, *Harvard International Law Journal* 56, no. 2 (2015): 465–514 (468–69).

⁵⁵ The Bush administration viewed the FISA Court as an unconstitutional limit on the president’s power. The participants of the War Council played prominent roles in this decision. David Addington wrote the authorization, whereas John Yoo authored a legal memorandum confirming the legality of the order. See Savage, *Power Wars* (see note 18), 183ff.

⁵⁶ When Jack Goldsmith took over as head of the OLC, he reversed Yoo’s legal opinions and temporarily halted some activities. However, he came up with new justifications for the measures and managed to convince the FISA Court of their legality. For more details, see Savage, *Power Wars* (see note 18), 192–95.

⁵⁷ Internally, the measure was initially called “President’s Surveillance Program”; from 2005 onward, the press referred to it as “Warrantless-Wiretapping Program”. When the ad-

the Attorney General, together with the Director of National Intelligence (DNI), may authorize communication surveillance directed against non-US citizens abroad. Interception may take place on US territory as long as at least one of the communicating persons is a non-US person abroad. In contrast to the original FISA, it is not necessary to establish a proper cause or to obtain a warrant for individual surveillance measures. Moreover, unlike the previous Terrorist Surveillance Program, it is not a requirement that surveillance targets have a link to terrorism; rather, *any* purpose of foreign intelligence is permitted. Incidental collection of data from US persons is legal, as this is not the original objective of the monitoring measure. The use of the data thus collected is not limited to national security investigations. The FBI received extensive powers to use the data for law enforcement.⁶²

Two of the NSA's most important programs — Upstream and Prism — are conducted under Section 702 of the FAA. Under Upstream, the NSA taps into the internet infrastructure — the so-called backbone of the internet — and searches all traffic according to certain criteria. Data filtered out in this way is stored on its own servers. With Prism, providers of internet services, such as social media or cloud services, are obliged to transmit the data of certain users to the US authorities. Both programs are not limited to meta-data and can also access content. In the years between the adoption of the FAA in 2008 and the Snowden leaks in 2013, the rules in Section 702 on how information collected can be searched, processed, and shared became less and less restrictive. Obama's assumption of office did nothing to change this continuous expansion of surveillance powers.⁶³

Upstream and Prism also collect large amounts of data from US citizens incidentally. In principle, the FISA Court authorizes the activities under Section 702 on condition that the sensitive data of US persons is made unrecognizable before it is processed further; however, the information does not have to be deleted. Each agency has its own minimization procedures, according to which sensitive data is handled.⁶⁴ The

minimization procedures contain rules limiting the retention, dissemination, and use of the information. In consultation with the FISA Court, the details of the rules were repeatedly changed. One important rule concerns the question of what criteria each agency has to apply in using selectors, that is, the search terms that determine legitimate surveillance targets the scope of the information searched. The FBI, for example, as a domestic agency, has broader authority to use the data of US citizens than institutions dealing with foreign intelligence. It can search the data collected under Section 702, including information about US citizens, and even has full access to the raw data collected under Prism. Since this procedure circumvents the need for a court order, it is referred to as a backdoor search.⁶⁵ While the FISA Court approves the various minimization procedures, only the executive checks the compliance with these rules. The FISA Court has repeatedly complained in the past that the intelligence services did not observe the rules for the protection of US persons.⁶⁶ But despite repeated disregard of the guidelines, the Court has continued to reauthorize the program.

A changed debate after the Snowden revelations

In the years immediately following the adoption of the FAA, which fell in Obama's first term, the executive — with the approval of the FISA Court — further relaxed the restrictions on the handling of data.⁶⁷ Only the leaking of information about the classified programs by Edward Snowden reversed this trend. The leaks sparked a broad public debate and had the effect of making the procedures somewhat more re-

[Granick-Correcting-the-Record-Scope-of-702.pdf](#); see also Office of the Director of National Intelligence, "Release of 2015 Section 702 Minimization Procedures", *IC on the Record* (11 August 2016), <https://icontherecord.tumblr.com/post/148797010498/release-of-2015-section-702-minimization>.

⁶⁵ Granick, *Reigning in Warrantless Wiretapping* (see note 62), 18.

⁶⁶ See e.g. Tim Johnson, "Secret Court Rebukes NSA for 5-year Illegal Surveillance of U.S. Citizens", McClatchy DC Bureau, 26 May 2017, <http://www.mcclatchydc.com/news/nation-world/national/national-security/article152947909.html>; United States Foreign Intelligence Surveillance Court, "Memorandum Opinion and Order", 6 November 2015 (classified), https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

⁶⁷ See e.g. Savage, *Power Wars* (see note 18), 555–58.

⁶² Jennifer Granick, *Reigning in Warrantless Wiretapping of Americans* New York (New York, NY: The Century Foundation, 16 March 2017), 16.

⁶³ See Savage, *Power Wars* (see note 18), 560f.

⁶⁴ See Jazdia Butler and Jennifer S. Granick, "Correcting the Record on 702: A Prerequisite for Meaningful Surveillance Reform", *Just Security* (15 September 2016): 10, <https://www.justsecurity.org/wp-content/uploads/2016/09/Butler->

strictive again. In response to the controversy, Obama appointed a panel of five experts to review the surveillance regime — the President’s Review Group on Intelligence and Communications Technologies. It published a report with numerous policy recommendations, some of which were taken up. The revelations also influenced two reports from the Privacy and Civil Liberties Oversight Board (one on the telephone metadata program under Section 215 of the Patriot Act, and one on surveillance under Section 702 of the FAA). The PCLOB was critical of the program under Section 215, but it confirmed that the program under Section 702 helped to identify terrorists and thwart planned attacks. The board nevertheless made a number of proposals to improve compliance and increase transparency. It recommended making FISA Court decisions, minimization procedures, and statistics on data collection public. For the most part, the suggestions were taken up.⁶⁸ Since the PCLOB’s mandate relates to the anti-terrorist aspects of the programs, it only touched marginally on the impact of Section 702 on law enforcement.

With the 2014 Presidential Policy Directive, Obama recognized for the first time that foreign citizens also have a right to privacy.

Two policy changes would have been inconceivable without the Snowden revelations. On January 17, 2014, President Obama issued Presidential Policy Directive 28 (PPD-28), which establishes further guidelines on espionage and the surveillance of foreign targets. The directive refers to measures taken under Executive Order 12333, that is, in accordance with the inherent authority of the executive for foreign intelligence. Although PPD-28 largely codified existing practice, it was recognized for the first time that foreign citizens also have a right to privacy, which can only be infringed upon in special circumstances. Similar to US citizens, minimization rules are introduced to help protect the privacy of innocent people. In addition, espionage is limited to six purposes. It is authorized to detect: foreign espionage; terrorist threats; proliferation of weapons of mass destruction; threats to cyber security; threats to the US and its allies; and

⁶⁸ Privacy and Civil Liberties Oversight Board, “Recommendations Assessment Report”, 5 February 2016, https://www.pclob.gov/library/Recommendations_Assessment_Report_20160205.pdf.

threats from transnational crime.⁶⁹ Economic motives are excluded, unless national security issues are concerned, such as the monitoring of sanctions regimes. However, as this is a purely executive measure, it is not certain that this policy will be maintained under President Trump.

The Freedom Act brought perhaps the most significant restrictions on surveillance to date. The law that was passed in June 2015 reformed the telephone metadata program. The data is no longer transferred to and stored on government servers; instead, the data remains with the telephone companies and is kept for 180 days. Data is only transferred to the security authorities on the basis of a FISA Court warrant. Such warrants, unlike before, must be based on a specific and sufficiently narrow selection criterion to avoid collection in bulk.⁷⁰ When the FISA Court decides on surveillance measures, a “Special Advocate” representing the privacy interests of citizens is heard in addition to the agency making the request. In addition, the requirements for the publication of FISA Court rulings are being expanded. The reform was only possible because the existing legislation had a sunset clause leading to its expiration on June 1, 2015. Without new legislation, there would have been no legal basis to continue the surveillance program; therefore, critics in Congress of the existing practices were able to use their power to block the reauthorization to force reforms.

However, in January 2018, Section 702 of the FAA, which also contained a sunset clause and had to be renewed, was reauthorized without any significant changes, although the statute has been subject to ongoing criticisms since the Snowden revelations. The section allows the FBI to search the data of US persons collected “incidentally” in the surveillance of foreign intelligence targets in a virtually unrestricted manner and to pass it on to local police departments. These far-reaching implications did not prevent a bipartisan

⁶⁹ The White House, “Presidential Policy Directive/PPD-28, Subject: Signals Intelligence Activities”, 17 January 2014. See also Benjamin Wittes, “The President’s Speech and PPD-28: A Guide for the Perplexed”, *Lawfare*, 20 January 2014, <https://www.lawfareblog.com/presidents-speech-and-ppd-28-guide-perplexed>; Savage, *Power Wars* (see note 18), 605.

⁷⁰ See e.g. Florian Gawehns and Johannes Thimm, *Ein bisschen Freiheit. Was die Verabschiedung des Freedom Act durch den US-Kongress bedeutet*, SWP-Aktuell 56/2015 (Berlin: Stiftung Wissenschaft und Politik, June 2015).

majority in Congress from extending the law in its existing form for another six years.⁷¹

In conclusion, with respect to surveillance, the overall patterns are the same as with the detention and interrogation program: The Bush administration, at first, tried to circumvent the law in secret. After some of the clandestine surveillance activities became public knowledge, a legal basis was created for them. Essentially, the existing practice was legalized without major restrictions. Although the Obama administration put the existing programs on a more solid and formal legal basis, it initially expanded the government's powers. Only when the extent of the surveillance became public through the Snowden leaks were there some course corrections. The bottom line, however, is that the possibilities available to government agencies – in collecting and storing communications data as well as use by different agencies – go far beyond what was allowed before 9/11.

Targeted killing

The clearest evidence that the term “war on terrorism” is not a metaphor is the policy of targeted killings. The use of lethal force in the fight against terrorism is not limited to areas or time periods in which the US is obviously involved in hostilities. In addition to the well-known theaters of war in Afghanistan, Iraq, and Syria, where the US is engaged in ongoing military operations on the basis of international law for armed conflict (which, under certain circumstances, permits lethal force against enemy combatants), targeted killings have taken place in Libya, Pakistan, Somalia, and Yemen since 9/11. The legal justification for them has also been the 2001 authorization of military force.

The lethal use of drones stands paradigmatically for the normalization of extraordinary methods.

To eliminate suspected terrorists, both special forces as well as air strikes from manned and unmanned aircraft are employed. Both the military and the CIA use drones, as unmanned aerial vehicles (UAVs) are commonly known. The number of drone

missions over the past 17 years shows no clear trends. They vary from country to country and within countries over time.⁷² One thing is clear: The increasing number of armed drones available was initially accompanied by a dramatic increase in air strikes, with a temporary peak in 2010.

The lethal use of drones stands paradigmatically for the normalization of extraordinary methods in the war on terror. Initially, the CIA conducted drone operations under strict secrecy as covert operations. The US government long maintained its policy of not officially acknowledging such operations, even though they had long been an open secret, reported by the media, and sometimes confirmed anonymously by government officials.⁷³ By refusing to acknowledge the attacks, the government avoided taking responsibility for mistakes and the killing of innocent people. More recently, the government has officially admitted to the use of drones for targeted killings. In 2010, it began to acknowledge the policy in general, and since 2016, it has also provided official information on individual strikes.⁷⁴ This did not result in any significant public criticism to such operations.

Most recently, President Trump announced that he would relax the guidelines for drone strikes. Regarding the government's assessment of the fundamental legitimacy and necessity of targeted killings, the continuity between the various incumbents prevails. The

⁷² Three organizations attempting to systematically keep track of armed drone attacks by the US are the Federation for the Defense of Democracies, which runs the *Long War Journal*, <https://www.longwarjournal.org/us-airstrikes-in-the-long-war>; the New America Foundation, <http://securitydata.newamerica.net/>; and the Bureau of Investigative Journalism, <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data>. For an overview, see Micah Zenko, *Questioning Obama's Drone Deaths Data* (New York, NY, and Washington, D.C.: Council on Foreign Relations, 1 July 2016), <https://www.cfr.org/blog/questioning-obamas-drone-deaths-data>. In 2016, the Obama administration first published official numbers about drone attacks and their victims; however, independent experts consider these numbers as too low: Director of National Intelligence, *Summary of Information Regarding U.S. Counterterrorism Strikes outside Areas of Active Hostilities* (June 2016), <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF>.

⁷³ See Cora Currier, “How the Gov't Talks about a Drone Program It Won't Acknowledge Exists”, *ProPublica*, 13 September 2012, <https://www.propublica.org/article/how-the-govt-talks-about-a-drone-program-it-wont-acknowledge>.

⁷⁴ *Ibid.*

⁷¹ Charlie Savage, “Congress Approves Six-Year Extension of Surveillance Law”, *New York Times*, 18 January 2018, <https://nyti.ms/2DjAcYl>.

legal and administrative basis for targeted killings has been repeatedly modified. But beyond questions of style, decisions on targeted killings seem to have been shaped above all by tactical considerations and technical possibilities, regardless of who is in charge.

Origins and evolution of the practice of targeted killing

Already under President Bill Clinton, the elimination of terrorists – and the immediate threat they posed to the United States – was considered self-defense and did not fall under the prohibition of political assassinations that had been in force since Gerald Ford’s time in office.⁷⁵ According to Richard Clark – at the time the White House’s anti-terrorism czar – Clinton used the instrument very rarely.⁷⁶ Potential targets for killing had to undergo a strict review process within the CIA as well as the executive branch, and each operation had to be personally approved by the president. After 9/11, George W. Bush delegated the authority to hunt down and kill alleged terrorists to the head of the CIA’s Counterterrorism Center. Targeted killings have become a central part of the battle against Al-Qaeda.⁷⁷ In 2004, Defense Secretary Rumsfeld also authorized the military’s special forces to

carry out clandestine operations, including targeted killings.⁷⁸

Technological progress led to a growing reliance on unmanned aerial vehicles.⁷⁹ UAVs allow for the surveillance of potential targets from the air. This helped to compensate for the lack of human intelligence on Al-Qaeda. Drones are equipped with laser-guided missiles, allowing them to carry out relatively precise air strikes. They are controlled remotely from military bases within the US, so there is no risk of US troop losses.⁸⁰ They also made it possible to carry out operations on short notice in territories without any US personnel on the ground. As more and more drones became available, the number of such attacks rose sharply. It remains controversial as to whether the increasing difficulty in arresting and detaining terror suspects without due process – because of public criticism and resistance from Congress and the courts – also contributed to the rising number of drone strikes.⁸¹

In armed conflicts that – based on international humanitarian law – allow for the use of deadly force against the enemy, armed drones are just another in-

75 When investigations by Congress in the 1970s uncovered numerous assassination attempts by the CIA – including on foreign heads of government – President Ford issued Executive Order (E.O.) 11905 on 19 February 1976. Section 5(g) bans political assassinations. Subsequent administrations continued the prohibition, even as they repeatedly violated it in specific cases. E.O. 12036 Sec. 2-305 from 26 January 1978 (issued under President Jimmy Carter) outlawed “assassinations” in general. In E.O. 12333, Sec. 2.11, from 4 December 1981, President Ronald Reagan confirmed this policy, which is still valid with only slight modifications to this day. See Elizabeth B. Bazan, *Assassination Ban and E.O. 12333: A Brief Summary*, CRS Report for Congress RS 21037 (Washington, D.C.: CRS, 4 January 2002), <https://fas.org/irp/crs/RS21037.pdf>.

76 Scahill, *Dirty Wars* (see note 15), 5f.

77 One anonymous official put it this way: “Lethal Operations that were unthinkable pre-September 11 are now underway.” See Bob Woodward, “CIA Told to Do ‘Whatever Necessary’ to Kill Bin Laden”, *Washington Post*, 21 October 2001, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/18/AR2007111800655pf.html>.

78 According to the journalist Mark Mazzetti, Rumsfeld issued a secret order, authorizing the Joint Special Operations Command to carry out secret operations of espionage, capture, and killing in more than 12 countries, from North Africa to the Philippines. See Mark Mazzetti, *The Way of the Knife. The CIA, a Secret Army, and a War at the Ends of the Earth* (New York, NY: Penguin Press, 2013), 128.

79 See Micah Zenko, *Reforming U.S. Drone Strike Policies*, Council Special Report no. 65 (New York, NY, and Washington, D.C.: Council on Foreign Relations, January 2013).

80 The use of Predator drones was first tested shortly before 9/11. The first air strike with a drone took place on 4 February 2002 in Afghanistan, the first use outside a conflict zone on 4 November 2002 in Yemen. See John Sifton, “A Brief History of Drones”, *The Nation*, 7 February 2012, <https://www.thenation.com/article/brief-history-drones>.

81 President Obama declared in 2013: “America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute.” The White House, “Remarks by the President at the National Defense University”, 23 May 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>. Mark Mazzetti, however, writes (Mazzetti, *The Way of the Knife* [see note 78], 126) that internal deliberations within the CIA tilted more towards kill missions with every setback of the detention and interrogation program.

strument of warfare.⁸² This has been the case with the military intervention in Afghanistan.⁸³ But as with targeted killings in general, drone attacks are not limited to areas of active hostilities. The Bush administration interpreted the authorization of military force passed by Congress to mandate the hunt of Al-Qaeda members and their allies everywhere.

The number of drone strikes reached a temporary peak in 2010.

Drone strikes frequently took place in Pakistan, whose border region with Afghanistan serves as a retreat for fighters of Al-Qaeda and the Taliban. Yemen, used by Al-Qaeda in the Arabian Peninsula (AQAP) as a base of operations because of its weak government, was also a frequent target. According to *Long War Journal* data, the number of annual drone attacks in Pakistan was in the single digits up to and including 2007, before rising to 35 in 2008, the last year of Bush's second term.⁸⁴ This trajectory continued under Obama until the number of strikes reached its peak in 2010, with 117 attacks. Since then, the number has declined steadily, mainly due to Al-Qaeda's weakened position in Pakistan; in 2016 and 2017 it was back in the single digits.⁸⁵ However, President Trump has declared that he will renew the focus of the war on terror on Pakistan. In Yemen, drone attacks numbered in the double digits for the first time in 2011; since 2012 there have been between 20 and 40 of them per year. According to the *Long War Journal*, more than 100 air strikes took place

in Yemen in 2017.⁸⁶ For a long time, the US leadership did not officially acknowledge the drone program, not least because the operations were quietly condoned by the governments of Yemen and Pakistan. Therefore, Washington did not have to publicly defend its policy or take responsibility for civilian victims.⁸⁷ In addition to the air strikes, targeted killings by special forces continued; the best-known case is the elimination of Osama Bin Laden in his hiding place in Abbottabad, Pakistan.⁸⁸ This occasion also showed that the US government was willing to selectively acknowledge killing missions when it suited its political interests.

Greater transparency and more killings

Under Obama, the number of drone strikes initially continued to increase.⁸⁹ He also continued the controversial practice of signature strikes, in which targets are selected on the basis of patterns of suspicious behavior without actually knowing the identity of the targeted persons.⁹⁰ At the same time, the Obama

⁸² For an assessment of the international law implications, see Peter Rudolf and Christian Schaller, "Targeted Killing". *Zur völkerrechtlichen, ethischen und strategischen Problematik gezielter Tötens in der Terrorismus- und Aufstandsbekämpfung*, SWP-Studie 1/2012 (Berlin: Stiftung Wissenschaft und Politik, January 2012).

⁸³ Yet, there is evidence that special forces systematically violated the laws of war in their pursuit of terrorists in Afghanistan. See Matthew Cole, "The Crimes of Seal Team 6", *The Intercept*, 10 January 2017; Scahill, *Dirty Wars* (see note 15).

⁸⁴ "US Airstrikes in the Long War", *FDD's Long War Journal*, no date, <https://www.longwarjournal.org/us-airstrikes-in-the-long-war>.

⁸⁵ Greg Miller, "Why CIA Drone Strikes Have Plummeted", *Washington Post*, 16 June 2016, <http://wapo.st/23e4a60>. Obama's decision to transfer the responsibility for drone operations from the CIA to the armed forces contributed to the drop. Another possible reason is the shift in focus to fighting the Islamic State after 2014.

⁸⁶ See "US Airstrikes in the Long War" (see note 84).

⁸⁷ Estimates of civilian victims differ widely. According to US government figures, between 64 and 116 non-combatants were killed "outside of areas of active hostilities" between early 2009 and the end of 2015 (before that no official figures are available). The three non-governmental organizations keeping track of drone strikes put the number for the same time period between 184 and 570 killed civilians. See Zenko, *Questioning Obama's Drone Deaths Data* (see note 72). For the time period since 2001, the three organizations estimate on average 474 killed civilians. Examples of civilians killed by mistake can be found, for example, in Open Society Justice Initiative, "Death by Drone. Civilian Harm Caused by U.S. Targeted Killings in Yemen", *Open Society Foundations*, April 2015, <https://www.opensocietyfoundations.org/reports/death-drone>.

⁸⁸ Depending on the area of operation, missions take place with or without the consent of the host government. The concept of safe harbors is central to the legal analysis. On the evolution of the legal literature on this type of intrusion on state sovereignty, see Theresa Reinold, "State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11", *American Journal of International Law* 105, no. 2 (2011): 244–86.

⁸⁹ On this point and the following, see Peter Rudolf, *Präsident Obamas Drogenkrieg*, SWP-Aktuell 37/2013 (Berlin: Stiftung Wissenschaft und Politik, June 2013).

⁹⁰ See also Micah Zenko, *Targeted Killings and Signature Strikes* (New York, NY, and Washington, D.C.: Council on

administration gradually took steps to make its policy of targeted killings more transparent and to provide a more precise legal justification for the policy. In March 2010, State Department legal adviser Harold Koh publicly laid out the government's view for the first time that the practice of targeted killings by drones was in line with the law.⁹¹ In the following years, members of the administration continued to go on record to elaborate on the legal framework.⁹² As their statements showed, from a US government perspective, there were not just the traditional categories of combatants — members of an enemy force and individuals actively involved in hostilities — who could legally be targeted with lethal force. Relying on the right of self-defense under Article 51 of the UN Charter, the US claimed the right to also kill persons that constitute a “continuing, imminent threat.” In contrast to the plain meaning of the word “imminent,” the term is interpreted broadly and does not require any evidence that a specific attack is underway.⁹³ Such persons may also be targeted outside areas of active hostilities. It is this category that is particularly controversial because, in doing so, the US government is claiming the right to kill terror suspects wherever it determines that the host government itself is unwilling or unable to act against alleged terrorists.⁹⁴

Foreign Relations, 16 July 2012), <https://www.cfr.org/blog/targeted-killings-and-signature-strikes>.

91 For a critical analysis of this legal position, see Christian Schaller, “Using Force Against Terrorists ‘Outside Areas of Active Hostilities’.” *The Obama Approach and the Bin Laden Raid Revisited*, *Journal of Conflict & Security Law* 20, no. 2 (2015): 195–227.

92 See Schmitt, “U.S. Commando Killed in Yemen” (see note 3); The White House, “Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations”, December 2016, 44–48 (Appendix), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf.

93 White House, “Report on the Legal and Policy Frameworks” (see note 92), 9; Rudolf, *Präsident Obamas Drohnenkrieg* (see note 89), 3.

94 White House, “Report on the Legal and Policy Frameworks” (see note 92), 10. On page 20, the report further contains the tautological statement: “using targeted lethal force against an enemy consistent with the law of armed conflict does not constitute an ‘assassination.’ Assassinations are unlawful killings and are prohibited by Executive Order.” For a critical assessment, see Elliot Ackerman, “Assassination and the American Language”, *New Yorker*, 20 November 2014,

In 2013, Obama restricted the conditions for such operations in presidential policy guidance. In addition to their being an immediate threat, capturing the target must be considered impossible; there must be “near certainty” that no civilians will be injured or killed; and the host government should prove to be not able or willing to take effective action against the threat. At the same time, Obama reduced the CIA’s role in conducting drone strikes and transferred the responsibility to the military.⁹⁵ The details of the legal justifications and the decision-making processes to authorize targeted killings kept changing.⁹⁶ Since 2013, Obama has changed the status of certain regions in Libya several times. At times he declared them areas of active combat (and thus relaxed the standard for the use of drones); at other times he lifted this designation again.⁹⁷ In its last public statement, the Obama administration stated that the wording used in the AUMF — “forces associated with Al-Qaeda” — which applies to targets outside of areas of active hostilities, includes, in its view, the following groups: Al-Qaeda and the Taliban and certain allied groups in Afghanistan; Al-Qaeda in the Arabian Peninsula (especially in Yemen); Al-Shabab in Somalia; members of Al-Qaeda in Libya; Al-Qaeda in Syria; the so-called Islamic State.⁹⁸ Who falls within the definition laid down in the AUMF has never been definitively resolved, so the executive’s interpretation of the authorization stands. By failing to intervene, the legislature and the judiciary de facto gave the president the opportunity to add more and more groups to the list of associated forces.⁹⁹

<https://www.newyorker.com/news/news-desk/assassination-american-language>.

95 Charlie Savage and Peter Baker, “Obama, in a Shift, to Limit Targets of Drone Strikes”, *New York Times*, 22 May 2013, <https://nyti.ms/2nGjKfn>.

96 See Savage, *Power Wars* (see note 18), 245–49, 254–57.

97 White House, “Report on the Legal and Policy Frameworks” (see note 92), 25; Charlie Savage, “U.S. Removes Libya from List of Zones with Looser Rules for Drone Strikes”, *New York Times*, 20 January 2017, <https://nyti.ms/2ka2hqJ>.

98 White House, “Report on the Legal and Policy Frameworks” (see note 92), 5.

99 A bipartisan bill introduced in the Senate in 2018 to replace the old authorization of military force with a new one, adopts this list and adds the Haqqani network and Al-Qaeda in the Islamic Maghreb to it. See Jon Schwarz, “Cure Worse Than Disease: Bill to Restrict Trump’s War Powers Would Actually ‘Endorse a Worldwide War on Ter-

Overall, Obama's policy of targeted killings confirms the thesis of journalist Charlie Savage: that Obama was more interested in establishing formal justifications for this policy under the rule of law than in substantially strengthening civil and human rights. The bottom line is that, despite a more restrictive interpretation of the legal situation, Obama still found a legalistic way to justify any desired policy – including the order to use lethal force against anyone he considered a threat.¹⁰⁰

First trends under Trump

According to press reports, President Trump has relaxed the rules of engagement. He is said to have declared regions in Yemen and Somalia as areas of active hostilities, where the lower standards of international humanitarian law apply and where the military is allowed to carry out operations independently.¹⁰¹ In addition, in a document entitled “Principles, Standards, Procedures,” it is said that Trump has expanded the scope of possible targets for killings outside of active combat zones. The preconditions to determine the existence of a “continuous, immediate threat” is said to have been loosened so that lower-ranking members of terrorist organizations can be killed. Operations also no longer need to be approved by high-ranking members of the US government.¹⁰² Obama's efforts since 2013 to reduce the CIA's role in drone operations also appear to have been reversed

ror”, *The Intercept*, 21 April 2018, <https://theintercept.com/2018/04/21/donald-trump-war-powers/>.

100 Thomas Gregory points out that in the US debate about targeted killings, the legal contributions do not have a moderating effect on the use of force. The legal debate depoliticizes the controversy about the appropriate use of force and delegitimizes the opposition. Thomas Gregory, “Drones, Targeted Killings, and the Limitations of International Law”, *International Political Sociology* 9, no. 3 (2015): 197–212.

101 Eric Schmitt, “U.S. Air Campaign in Yemen Killed Guantánamo Ex-Prisoner”, *New York Times*, 6 March 2017, <https://nyti.ms/2n8dhXs>; Charlie Savage and Eric Schmitt, “Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules”, *New York Times*, 12 March 2017, <https://nyti.ms/2mzNhoH>; Charlie Savage and Eric Schmitt, “Trump Eases Combat Rules in Somalia Intended to Protect Civilians”, *New York Times*, 30 March 2017, <https://nyti.ms/2oCu6ds>.

102 Charlie Savage and Eric Schmitt, “Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids”, *New York Times*, 21 September 2017, <https://nyti.ms/2jRoPSa>.

by Trump. He is thinking about allowing the CIA to carry out drone missions once again, even in areas of active hostilities.¹⁰³

These changes have not yet been officially confirmed, and little is known about their practical impacts. If the reports are correct, the measures will probably lead to an overall increase in air strikes and, inevitably, to more civilian casualties.¹⁰⁴ However, they would not represent a fundamental departure from the rules currently in force. Trump is now using the flexible legal framework that the executive branch initially claimed under Bush for a more aggressive policy. That even the observers who were close to the Obama administration do not consider this to be very dramatic is another indication of the progressive normalization of this endless war.¹⁰⁵ It is also remarkable how little resistance the program has generated in the American public to date. Only human rights organizations such as Amnesty International, Human Rights

103 Gordon Lubold and Shane Harris, “Trump Broadens CIA Powers, Allows Deadly Drone Strikes”, *Wall Street Journal*, 13 March 2017, <http://on.wsj.com/2mlgyS9>; Eric Schmitt and Matthew Rosenberg, “C.I.A. Wants Authority to Conduct Drone Strikes in Afghanistan for the First Time”, *New York Times*, 15 September 2017, <https://nyti.ms/2y2BALJ>.

104 Whereas US Central Command in February 2017 estimated the number of accidentally killed civilians in the fight against IS in Iraq and Syria (areas of active hostilities) to be 199, in January of 2018, the estimate had already jumped to 831. US Central Command, “CJTF-OIR Monthly Civilian Casualty Report”, 25 January 2018, <http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1423091/cjtf-oir-monthly-civilian-casualty-report>; see also US Central Command, “CJTF-OIR Monthly Civilian Casualty Report”, 2 February 2017, <http://www.inherentresolve.mil/News/Article/1068517/cjtf-oir-monthly-civilian-casualty-report/>. According to these figures, almost three-quarters of the civilian casualties acknowledged by the military fall into Trump's term. It should be noted, however, that the largest offensives against IS – the liberation of Raqqa and Mosul – happened during this period. The actual numbers are much higher. See Azmat Khan and Anand Gopal, “The Uncounted”, *New York Times Magazine*, 16 November 2017, <https://nyti.ms/2juNRXb>; Samuel Oakford, “The U.S. Is in Denial about the Civilians It's Killing in Syria”, *Foreign Policy*, 31 August 2017, <http://foreignpolicy.com/2017/08/31/the-u-s-is-in-denial-about-the-civilians-its-killing-in-syria/>. For recent numbers, see <https://airwars.org/>.

105 Luke Hartig, “New Drone Rules Ignore Trump Crazy Talk on Terrorism”, *Newsweek*, 22 September 2017, <http://www.newsweek.com/new-drone-rules-ignore-trump-crazy-talk-terrorism-669516>.

Watch, and the Open Society Institute have issued critical statements. Public opinion supports the drone program, and although experts question specific aspects of the program, such as signature strikes, they do not question the basic policy of targeted killings outside of combat areas.¹⁰⁶

106 On public opinion, see Alyssa Brown and Frank Newport, “In U.S., 65% Support Drone Attacks on Terrorists Abroad”, *Gallup*, 25 March 2013, <http://www.gallup.com/poll/161474/support-drone-attacks-terrorists-abroad.aspx>; “Public Continues to Back U.S. Drone Attacks”, *Pew Research Center*, 28 May 2015, <http://www.people-press.org/2015/05/28/public-continues-to-back-u-s-drone-attacks/>. On reform proposals, see Luke Hartig, *The Drone Playbook* (New York, NY: New America, August 2016), https://na-production.s3.amazonaws.com/documents/Drone_Playbook_Essay_8.16.pdf; Zenko, *Reforming U.S. Drone Strike Policies* (see note 79).

The National Security State and the Power of the Executive

The experiences during 16 years of global war against terrorism show that the American system of “checks and balances” is not without flaws. In domestic politics, Congress and the courts keep the executive branch in check, and this system of “separated institutions sharing powers” (Richard Neustadt) often creates gridlock. On foreign policy, however, the executive branch enjoys a great level of autonomy, especially on matters of national security. When there is a strong feeling of insecurity, the legislative and judicial branches are reluctant to limit executive power.

In line with the saying “inter arma silent leges” (“when the weapons speak, the law falls silent”), US presidents have usually interpreted their powers expansively in times of war. Examples are the suspension of the right of *habeas corpus* by Abraham Lincoln during the American Civil War and the internment of US citizens of Japanese descent in camps during World War Two. In most cases, such extreme measures were ended when the wars did and – with some historical distance – were also considered to be morally wrong. However, the war on terror has no such clear end.

When the Soviet Union became a major threat at the beginning of the Cold War, the US reacted by building up a national security state that shifted power among the branches of government to the executive. With the exception of the State Department, all major institutions of the national security bureaucracy go back to the National Security Act of 1947.¹⁰⁷ The various services of the armed forces were integrated under the Defense Department, which succeeded the War Department. The establishment of the National Security Council led to the prioritization of security considerations in the executive decision-making process. Moreover, in turning the Office of

Strategic Services (OSS) into the CIA, intelligence capabilities initially created to conduct wartime reconnaissance of enemy forces were permanently institutionalized. Industry and science were also recruited to contribute to the effort to strengthen America’s defense capabilities. The executive branch, whose powers are enumerated only after Congress in the Constitution, was elevated in status and became the guardian of national security in charge of a newly established apparatus.¹⁰⁸

Expansion of the national security state after 9/11

When the new dimension of terrorism became apparent after 9/11, it led to a similar dynamic as during the rise of the Cold War in the late 1940s. Terrorism was perceived as an existential threat, which led to an unprecedented expansion of the security bureaucracy.

Since the 17 agencies¹⁰⁹ that make up the intelligence community are financed from various budget lines, most of which are classified, exact figures on the cost are not available. In recent years, the baselines for the Military Intelligence Budget and the National Intelligence Budget, which covers the civilian agencies (first among them the CIA), have been published. For the 2018 fiscal year, the request for the National Intelligence Budget was \$57.7 billion and \$20.7 billion for the Military Intelligence Budget; together, they exceed the amount approved for the previous year by around \$5 billion, which is close to

108 See Daniel Yergin, *Shattered Peace. The Origins of the Cold War and the National Security State* (Harmondsworth: Penguin Books, 1977), 6.

109 Depending on whether the Office of the Director of National Intelligence is included in the count, there are references to 16 or 17 organizational units.

107 See Douglas T. Stuart, *Creating the National Security State. A History of the Law That Transformed America* (Princeton, NJ: Princeton University Press, 2008).

the 2010 record of \$80.1 billion. Between 1997 and 2010, the combined intelligence budget more than tripled from the original \$26.6 billion.¹¹⁰ Within the CIA, the Counterterrorism Center grew from 300 to 2,000 employees in the first 10 years after 9/11; it now accounts for 10 percent of the workforce. Of the CIA analysts, 20 percent work as “targeters” who look for key individuals in terrorist networks who can either be recruited or are designated for capture or killing.¹¹¹ The Defense Intelligence Agency has grown from 7,500 employees in 2002 to 16,500 in 2010, and in the FBI, the number of persons dealing with terrorism has tripled.¹¹²

In addition to the state bureaucracy, numerous private companies are involved. In addition to the traditional defense industry, which has adapted to the newly emerging business of fighting terrorism, a number of new private contractors, particularly in the IT sector, provide services and profit financially from the war on terror. According to journalists Dana Priest and William Arkin, some 1,000 government agencies and 2,000 private companies are involved in the fight against terrorism at the federal level alone.¹¹³ They estimate that 854,000 people have a “top secret” security clearance.¹¹⁴

The resulting web of organizations and agencies raises questions of coordination and control. The system of compartmentalized secrecy and access to sensitive information on a need-to-know basis makes effective supervision difficult and permits for mis-

conduct.¹¹⁵ In 2004, the position of Director of National Intelligence was created to better coordinate the various agencies. But the DNI has only a small staff, does not directly command the different agencies, and has no control over their personnel policy. Only the CIA director reports directly to the DNI, and only the civilian part of the budget is under the DNI’s supervision. Beyond that, the various organizations each report to their respective departments.

State of exception

Following the traumatic experience of 9/11, not only did the security state grow, but the existing oversight system was also suspended. Although the US Constitution was never formally suspended after the attacks in New York and Washington, there is much to suggest that the situation in the first years after 9/11 resembled a state of exception. In his book of the same name, the philosopher Giorgio Agamben describes the state of exception as “no man’s land between public law and political fact, and between the juridical order and life.”¹¹⁶ He refers to a military order issued by the president on November 13, 2001, which created the basis for the unlimited detention of foreign terror suspects and their trial by military commissions. In it, Bush decreed: “I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.”¹¹⁷

110 The combined intelligence budget of 1997 became public through court records. With \$26.6 billion it was at a historic low, after years of cuts in the wake of the so-called peace dividend after the end of the Cold War. Most likely, even before 9/11, the budget began to increase again. The baseline budgets of the National Intelligence Program and the Military Intelligence Program are published; they include most — but not all — of the money spent. See Federation of American Scientists, “Intelligence Budget Data”, *FAS Intelligence Resource Program*, <https://fas.org/irp/budget/>; Anne Daugherty Miles, *Intelligence Community Spending: Trends and Issues*, CRS Report for Congress R44381 (Washington, D.C.: CRS, 8 November 2016).

111 Greg Miller and Julie Tate, “CIA Shifts Focus to Killing Targets”, *Washington Post*, 1 September 2011, https://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html.

112 Priest and Arkin, *Top Secret America* (see note 14), 37.

113 Priest and Arkin, *Top Secret America* (see note 14), 86–87.

114 Priest and Arkin, *Top Secret America* (see note 14), 158.

115 Priest and Arkin (*Top Secret America* [see note 14]) give many examples of waste, problems with the chain-of-command, and the duplication of tasks. For example, persons involved in the so-called Special Access Programs in the Defense Department have to keep some information secret — even from their superiors — and the exchange of information between different units is restricted. During the Cold War, such “hyper-compartmentalization” sometimes had the effect that some within intelligence agencies came to believe the propaganda and disinformation their colleagues had produced for the public. See Timothy Melley, *The Covert Sphere. Secrecy, Fiction, and the National Security State* (Ithaca, NY: Cornell University Press, 2012), 61.

116 Giorgio Agamben, *State of Exception* (Chicago, IL: University of Chicago Press 2005), 1.

117 Military Order of November 13, 2001 issued by George W. Bush, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”, reprinted in *The Torture Papers*, ed. Greenberg and Dratel (see note 11), 25–28.

By declaring suspects unlawful combatants, they are denied basic human rights.

The fact that the rule of law has effectively been suspended supports the argument that this situation constituted a state of exception.¹¹⁸ The situation made it possible to give orders, introduce rules, and establish procedures that are incompatible with fundamental principles of the rule of law, the US Constitution, and international law. The “black sites” and the detention center in Guantánamo created areas outside the law that were beyond the reach of the courts. In Guantánamo, to this day there are limits on the application of US law. By declaring suspects unlawful combatants, they are denied basic human rights. Moreover, by circumventing regular decision-making processes and operating in secret, checks both within the executive branch and between the branches are rendered ineffective.¹¹⁹

Since this state of exception has never been officially declared, there is also no clear marker for ending it. Civil society (press, NGOs, lawyers), government officials, the courts, and Congress have gradually exposed the problematic methods and forced the discontinuation of some of the most extreme practices through their resistance. At the same time, however, methods such as unlimited imprisonment and targeted killing have been normalized and cemented in practice, despite political resistance. Other measures,

118 See Agamben, *State of Exception* (see note 116), 1: “if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds [...], then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have a legal form.”

119 Building on Agamben, Mark Danner identifies the state of exception based on eight policies: (1) declaring the war on terror; (2) defining this new war as unbounded in space and time; (3) redefining terrorists as unlawful combatants, thus depriving them of the protections of the laws of war; (4) imposing in both law enforcement and national security the so-called preventive paradigm; (5) grounding the legitimacy of much of the state of exception on the president’s “inherent powers”; (6) making use, in multifarious and creative ways, of the power of secrecy; (7) improvising solutions, often ignoring expertise with amateurish results; (8) embedding the rhetoric of the war on terror in political struggle for partisan gains. See Mark Danner, *Spiral. Trapped in the Forever War* (New York, NY: Simon & Schuster, 2016), 21–23.

such as mass surveillance, were even legally sanctioned once they were discovered. As described above, the Obama administration had put those measures it wanted to continue on a more solid legal footing. This was accomplished either by providing new, more sophisticated interpretations of the law, or by convincing Congress or the courts to support the policy. One contributing factor was that many critics of the Bush administration joined the Obama administration and thus ceased their criticism.¹²⁰ Moreover, the Democrats in Congress, as well as some critical judges, trusted Obama – the constitutional lawyer and former Bush critic – more in this field.

Despite all course corrections and new regulations, essential elements of the original state of emergency have gradually been institutionalized and become part of the new normal. This applies in particular to the war paradigm, the claim to executive power, and the excessive use of secrecy.

Secrecy

The excessive use of secrecy has not only given rise to inefficiencies in the bureaucracy of the national security state, but it also raises more fundamental problems. The clear violations of the law in the era immediately after 9/11 under the cover of secrecy have given way to a practice of exploiting legal gray areas.

In principle, the separation of powers also applies in the fight against terrorism, and since the reforms of the 1970s, Congress has had relatively far-reaching oversight powers. Since 1980, the intelligence agencies have been required by law to inform the Senate and House Intelligence Committees – newly created following the recommendations of the Church Committee – of all their activities, including covert operations.¹²¹ In practice, however, the members of

120 Examples include Marty Lederman David Barron, who joined the Department of Justice, as well as Harold Koh, who as State Department Legal Advisor, defended Obama’s counter-terrorism policies.

121 *Intelligence Authorization Act for Fiscal Year 1981*, Pub. L. 96-450, 14 October 1980. See also McCormick, *American Foreign Policy and Process* (see note 13), 416–24. McCormick (*ibid.*, 418) points to the following as contributing factors in the growing interest of Congress in intelligence oversight: the fiasco of the Bay of Pigs invasion; the increase of covert operations during the Vietnam War; the CIA’s involvement in the destabilization of the Allende government in Chile;

the Committee are overwhelmed with holding in check a bureaucracy of tens of thousands of staff, a budget in the tens of billions, and hundreds of individual programs and activities.¹²² In addition to a lack of time and resources — membership on the Intelligence Committee is only one of many issue areas the lawmakers have to deal with — the classification rules represent a structural problem to effective oversight. Committee members may not share the information they receive during classified hearings with outsiders, sometimes including their own staff. Therefore, it is hardly possible to independently verify the claims made by the intelligence agencies. Even if there are indications of misconduct, for example if intelligence agencies do not tell the truth, members of Congress cannot simply go public.¹²³

The far-reaching authorization of the CIA in the wake of 9/11 to go after terrorists reduced to a minimum the oversight within the executive branch as well as the sharing of information with Congress. With the blanket authorization of November 17, 2001, the formal legal requirement for approval by the president and notification of Congress was ful-

the atmosphere after the Watergate affair with Congress emboldened to challenge the executive.

122 Even some unclassified military anti-terror measures are apparently lost in the daily business. When four US troops were killed in Niger on 4 October 2017, several Senators, including Armed Services Committee member Lindsay Graham, admitted to not being aware of the extent of the US mission in Niger. Daniella Diaz, “Key Senators Say They Didn’t Know the US Had Troops in Niger”, *CNN*, 23 October 2017, <http://edition.cnn.com/2017/10/23/politics/niger-troops-lawmakers/index.html>. For more background, see Alexis Arieff et al., *Niger: Frequently Asked Questions about the October 2017 Attack on U.S. Soldiers*, CRS Report for Congress R44995 (Washington, D.C.: CRS, 27 October 2017).

123 One example was the testimony of NSA Director James Clapper at a Senate Intelligence Committee hearing on 12 March 2013. Asked by Senator Ron Wyden whether the NSA collected data on millions of Americans, Clapper denied this. Even though Wyden knew this to be false from confidential briefings he received as a member of the Judiciary Committee, he could not do much about it. In a letter, he asked Clapper to correct his statement. This was ignored by Clapper until the Snowden leaks revealed the truth. Janet Reitman, “Q&A: Senator Ron Wyden on NSA Surveillance and Government Transparency”, *Rolling Stone*, 15 August 2013, <http://www.rollingstone.com/politics/news/q-a-senator-ron-wyden-on-nsa-surveillance-and-government-transparency-20130815>.

filled — without having to report individual operations to the relevant Committees.¹²⁴

Increasingly, the line between intelligence and military operations, which each take place under different statutory authorities, has been blurred; this trend continues to this day, posing special challenges.¹²⁵ When clandestine activities take place in connection with ongoing hostilities, the military is not subject to the same requirements of presidential approval and notification of Congress as the CIA. Outside the obvious areas of conflict of Afghanistan, Iraq, and Syria, however, such a connection is not always clear. On the other hand, the CIA seems to have laxer rules on covert operations that violate the sovereignty of other states. Cooperation between the (formally civilian) CIA and the military units of the Joint Special Operations Command, which are authorized to carry out operations in secret, has increased to such an extent that it is sometimes unclear to outsiders whether certain operations are carried out under the mandate for the intelligence services or that for military operations and what rules apply. Both CIA drones and military drones were apparently involved in the mission to kill US citizen Anwar Al-Awlaki in Yemen, but the operation was carried out according to CIA rules.¹²⁶ The mission to kill Osama Bin Laden in Pakistan was carried out by Navy Seal Team Six (part of JSOC), which was placed under CIA command for the operation, probably because it violated Pakistan’s sovereignty.¹²⁷ Overall, the creative combination of the various rules and regulations allows for maximum flexibility and minimum reporting obligations.

124 The CIA lawyer responsible for approving covert operations within the organization stated: “I had never in my experience been part of or ever seen a presidential authorization as far-reaching or as aggressive in scope. It was simply extraordinary.” Sarah Moughty, “John Rizzo: The Lawyer Who Approved CIA’s Most Controversial Programs”, *PBS Frontline*, 6 September 2011, <https://www.pbs.org/wgbh/frontline/article/john-rizzo-the-lawyer-who-approved-cias-most-controversial-programs/>; see also Priest and Arkin, *Top Secret America* (see note 14), 12.

125 See Chesney, “Military-Intelligence Convergence” (see note 13).

126 *Ibid.*, 617.

127 *Ibid.*, 539.

The battle between the Senate and the CIA over the torture report

On March 5, 2009, the Senate Select Committee on Intelligence decided in a bipartisan vote to conduct a review of the CIA’s detention and interrogation program. Both the processes and the results of this review have since become the subject of a fierce dispute between the Committee and the CIA. About six months after the decision, the Republicans on the Committee withdrew their support, allegedly because the attorney general’s investigation into the same matter made the Senate inquiry superfluous. After lengthy negotiations, the CIA granted Committee representatives access to 6.2 million pages of internal CIA documents by setting up a special computer system at a secure facility in Virginia. After years of work, the Committee produced a 6,000-page report – classified to this day – that called into question many of the CIA’s claims about the program.

In the course of their research, Committee staff came across an internal CIA report – often referred to as the “Panetta Review,” named after the director at the time – whose conclusions contradicted the official CIA account that the brutal interrogations had contributed significant intelligence to the struggle against terrorism. The CIA maintained that it had not granted the Committee access to the Panetta Review. At least twice in 2010, it also deleted other documents that it had previously made available to the Committee from the file system. CIA staff also searched the computer drives on which Committee staff kept their own work results. When this came to the attention of the Committee chair on January 15, 2014, CIA Director John Brennan first denied the allegations, before admitting a few months later that the searches had taken place. The CIA, in turn, reported Committee staff to the FBI, accusing it of illegally accessing documents and removing them from the facility.

On March 11, 2014, Senator Dianne Feinstein went public with serious allegations against the CIA.^a Feinstein was the ranking member of the Committee and, in her former

position as Committee chair, had been a reliable supporter of the intelligence agencies. In a speech on the Senate floor, she now alleged that, in trying to obstruct the investigation, the CIA had violated the principle of the separation of powers and the prohibition on conducting domestic surveillance. Attorney General Eric Holder did not take sides in the conflict and announced in July 2014 that he would not take action against either the CIA or the Committee staff. CIA Inspector General David Buckley, after his own investigation, sided with the Senate. When a specially created Committee decided not to hold anyone in the CIA accountable for the events, Buckley resigned in protest.

From December 2012 to December 2014, the Intelligence Committee, the CIA, and the White House haggled over what results of the final report should be published. The Committee succeeded in publishing a 600-page, only slightly redacted summary of the report. It described in detail the origins and the cruelties of the interrogation program. Moreover, the report concluded: (1) the brutal interrogation methods were not effective in gathering information; (2) the CIA did not correctly inform decision-makers and the public about the program; (3) there were serious failures in the management of the program; (4) the program was much more brutal than the CIA had admitted to decision-makers and the public. Even taking into account the Senators’ interests in playing down their own responsibility for the interrogation program, the impression remains that the CIA used every means at its disposal to prevent a highly critical, if not devastating, report about the CIA from seeing the light of day.

^a “Transcript: Sen. Dianne Feinstein Says CIA Searched Intelligence Committee Computers”, *The Washington Post*, 11 March 2014, <http://wapo.st/NWtFsa>; Savage, *Power Wars* (see note 18), 512–15.

A congressional investigation accuses the CIA of misleading those elected to provide oversight.

The Senate Intelligence Committee’s investigation into the CIA’s detention and interrogation program provides particular insight into the difficult relationship between the legislative and executive branches – both in terms of the process of the investigation and its results. The Intelligence Committee’s comprehensive report not only examines the CIA’s actions,

but it also accuses it of deliberately misleading those who are elected to conduct oversight. According to the report, even executive decision-makers were not kept fully in the loop.¹²⁸ The brutality of the interrogation methods was systematically played down to the administration and Congress, while at the same time the method’s usefulness in

¹²⁸ For a critical assessment of the report, particularly on this point, see Robert Jervis, “The Torture Blame Game”, *Foreign Affairs*, May/June 2015, <https://www.foreignaffairs.com/reviews/2015-04-20/torture-blame-game>.

obtaining information was exaggerated. It is also part of the truth that the democratically elected leaders did not ask enough questions, presumably because they did not really want to know all the dirty details.¹²⁹ But regardless of the report's conclusions, the CIA's attempt to influence those conclusions is very telling of how it sees its own role and exposes the methods it is willing to employ against US lawmakers.

To protect its secrets, the government increasingly took action against those who passed information to the press. While in the past the Justice Department had not put much effort into investigating leaks, in 2006 a task force of 12 prosecutors and 25 FBI employees was set up to prosecute those leaking classified information.¹³⁰ During Obama's presidency, the Department of Justice brought a total of nine cases for the publication of classified information – more than among all previous presidents put together. While some cases were taken over from the Bush administration and others newly initiated, many of the leakers were charged under the Espionage Act of 1917, which provides for particularly draconian punishments. The law was initially intended for enemy spies (as the name implies), but due to its imprecise wording, it can also be applied in cases where the publication of classified information may end up allowing enemies to benefit from that information. The *New York Times* journalist James Risen was threatened with imprisonment under Obama for years for refusing to name his sources. In this context, a court ruled that journalists enjoy no special privileges to protect their sources under the First Amendment, which guarantees the right to freedom of speech. Charlie Savage noted that, as a result, the willingness of government sources to disclose classified information has declined significantly. He

129 Senators and CIA officials give conflicting accounts on how much Congress knew. The CIA claims to have repeatedly briefed members of Congress on the use of enhanced interrogation techniques. See Scott Shane and Carl Hulse, "List Says Top Democrats Were Briefed on Interrogations", *New York Times*, 8 May 2009, <https://nyti.ms/2Krb4RT>; Marc Ambinder, "What Pelosi Knew", *The Atlantic*, 8 May 2009, <https://www.theatlantic.com/politics/archive/2009/05/what-pelosi-knew/17309/>.

130 On this and the following, see James Risen, "The Biggest Secret. My Life As a New York Times Reporter in the Shadow of the War on Terror", *The Intercept*, 3 January 2018, <https://interc.pt/2Cx81Zx>; Savage, *Power Wars* (see note 18), 350–414.

partly attributes to this development the fact that NSA surveillance was not uncovered before the Snowden leaks. In the first such case during the Trump administration, NSA contractor Reality Winner was recently sentenced to 63 months in prison for passing on a classified document to a media outlet. Again, she was charged under the Espionage Act, even though the leaked information was redacted before publication.¹³¹ Overall, there has been a significant change since 9/11. Whereas prosecutors were previously very reluctant to force reporters to disclose their sources – and virtually no one was ever convicted of publishing classified information – both are now firmly established practices.

Impunity

The normalization of controversial methods has also been helped by the fact that no one has been held accountable for violations of the law that have occurred. Those responsible for the use of torture acted with impunity – a persistent breach of the UN Convention against Torture, which Washington has ratified, obliging states to prosecute violations of the provision on the prohibition of torture.¹³² Not only were there no criminal charges, but also no disciplinary measures. Those responsible were able to continue their careers.¹³³ After Obama's election, the

131 Trevor Timm, "The Government's Argument That Reality Winner Harmed National Security Doesn't Hold Up", *The Intercept*, 23 August 2018, <https://interc.pt/2N87X3w>.

132 The fact that no serious attempt was made to establish accountability prompted the prosecutor of the International Criminal Court to ask for an investigation on possible crimes committed by US personnel in Afghanistan, a move that, in turn, has provoked harsh criticism and threats against the court by the Trump administration. See John Bolton, "Protecting American Constitutionalism and Sovereignty from International Threats", remarks delivered to the Federalist Society, 10 September 2018, available at <http://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society>.

133 This is true on almost all levels. Jay Bybee, who in the Justice Department was responsible for the greenlighting of torture, was appointed as a federal judge for life in 2003 (before the torture memos became public). John Yoo, who authored many of the torture memos, remains professor of law at the University of California at Berkeley. Dick Cheney's legal counsel David Addington became vice president for research at the Heritage Foundation; Gina Haspel, who led a black site in Thailand, where prisoners were tortured, was

Justice Department started investigations, which were soon closed again without any charges being filed. The likely reason was that the Obama administration did not want to antagonize the intelligence community. Conflicts with advocates of “enhanced interrogation techniques” in Congress, the Republican Party, and the security establishment could have derailed the entire agenda of the newly elected president.

Nevertheless, foregoing any accountability has caused permanent damage to the norm outlawing torture, even after the problematic practices were ended. The advocacy of torture remains an acceptable position in mainstream discourse. Not only did Donald Trump speak approvingly of the use of torture, presidential candidate Mitt Romney in the 2012 election campaign also spoke out in favor of advanced interrogation techniques. During the 2016 election campaign, the majority of Republican candidates advocated reintroducing them. Without any sign of regret, ex-Vice President Cheney criticizes the renunciation of torture at every opportunity, and Bruce Jessen, the psychologist mainly responsible for the development of interrogation techniques, aggressively defends his actions. In film and on television, scenes in which American intelligence agents engage in torture now belong to the standard repertoire of screenwriters.¹³⁴

appointed to the position of CIA Director by Donald Trump. Even CIA employees whose failures caused the torture of innocents and even to deaths among detainees did not face disciplinary consequences. One notable exception are the 11 low-ranking soldiers who were convicted, some to prison terms, for their involvement in the Abu Ghraib scandal. See Adam Goldman and Matt Apuzzo, “CIA Officers Make Grave Mistakes, Get Promoted”, *NBC News*, 9 February 2011, http://www.nbcnews.com/id/41484983/ns/us_news-security/t/cia-officers-make-grave-mistakes-get-promoted/.

134 See e.g. Robert Cochran and Joel Surnow, *24* (Los Angeles: 20th Century Fox, 2001–2010); Pierre Morel, *Taken* (Los Angeles: 20th Century Fox, 2008); Gregor Jordan, *Unthinkable* (Culver City: Sony Pictures Home Entertainment, 2010); Daniél Espinosa, *Safe House* (New York, NY: Universal Pictures, 2012).

Conclusion: The Cost of the Forever-War

In the Trump era, the US war on terrorism does not seem to be the most pressing issue on the transatlantic agenda. However, it is a phenomenon that is not limited to one president or one party. If Europeans take Trump's presidency as an opportunity to reflect more generally on their strong dependence on the United States, they should also include the issue of how to deal with terrorism in their considerations. The question is to what extent European states, and in particular Germany, are prepared to continue to support the controversial approach of the US in fighting terrorism.

The immediate and existential threat following the attacks of 9/11 has passed, and yet terrorism continues to hold a central place in the American perception of its security environment. The limited successes in this war so far have been primarily tactical. No cost has been spared, and many compromises of principles and ideals have been accepted in order to prevent terrorist attacks, even if the danger is not very concrete, and despite the fact that – in terms of statistics – the security risk that jihadist terrorism poses to Western societies is relatively low. Despite all the differences between Trump's administration and the Bush and Obama administrations, in the war on terror, continuity prevails. Following Obama's time in the White House, many controversial methods are now more firmly institutionalized than ever before. Policies introduced for exceptional situations have become the standard.

That there is no end in sight to this war is also due to the fact that Congress has allowed the executive to extend its methods to ever-new groups and territories. Right after 9/11, Congress refused to issue the president *carte blanche*. The original White House draft resolution for the AUMF requested legal authorization for the president "to deter and pre-empt any future acts of terrorism or aggression against the

United States."¹³⁵ Congress denied this general authorization and limited the authorization to those responsible for 9/11 and associated forces. Since then, there have been debates as to whether a new legal basis is necessary because the situation has evolved. Paradoxically, some of the drafts now under discussion, which seek to adapt and renew the authorization of military force, are even broader in scope. For example, a bipartisan bill introduced in the Senate would codify the executive's interpretation of who is an "associated force," and thus a legitimate target of military force. The draft not only mentions numerous groups that only emerged after 9/11, but also leaves it to the president to designate further groups.¹³⁶

In discourse about national security, the terrorist threat is now being overshadowed by new challenges. Due to Russia's aggressive policy and China's assertive stance, the return of rivalries among the great powers is being discussed more and more.¹³⁷ In the sense that terrorism dominates the strategic debate, the post-9/11 era is coming to an end. However, this does not mean the end of the war against terrorism, which to some degree has always taken place in the shadows. New challenges will certainly lead to adjustments. The US military's procurement policy is already changing – away from hardware for counter-insurgency operations and toward the requirements for interstate conflicts. Such a reorientation is more difficult to detect in the intelligence services because of the secrecy of their use of resources. However, it can be assumed

¹³⁵ See Grimmet, *Authorization for Use of Military Force in Response to the 9/11 Attacks* (see note 6).

¹³⁶ Schwarz, "Cure Worse Than Disease" (see note 99).

¹³⁷ According to the National Defense Strategy of 2018, "Inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security". Department of Defense, "Summary of the 2018 National Defense Strategy of the United States of America", 1, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

that more personnel will also be deployed in the future to analyze developments in China and Russia, especially since Moscow's interference in the US election campaign in 2016 caught the intelligence services largely unprepared — despite the surveillance powers created over the previous 15 years.¹³⁸

Western democracies have undermined their credibility in the competition with authoritarian systems.

However, the new type of anti-terrorism fight can be conducted with fewer resources, partly because armed drones are a comparatively cheap instrument. A new drone base is currently being completed in Niger for \$110 million, which will enable the US to reach large parts of West and North Africa in the future. The number of US troops active in Niger has grown from 40 soldiers in 2013 to around 800 at present. American special forces, such as the Army's Green Berets, operate largely outside the public eye in ever-new places, from the Nigerian-Malian to the Saudi-Yemeni borders. The activities of the US special forces in training security forces in states such as Burkina Faso and Cameroon, which currently have a budget of around \$100 million, are also continuing.¹³⁹

With regard to future geopolitical conflicts with China and Russia, Western democracies have done themselves no favors by normalizing behavior that violates long-standing norms. In the competition between democracies and authoritarian systems, which also takes place with respect to value systems and soft power, the weakening of norms has undermined the West's credibility. The idea of integrating other states — and in particular emerging powers — into existing norms and legal systems suffers when one can be charged with hypocrisy. There are plenty

of examples of this dynamic. After Snowden revealed the extent of NSA surveillance, it became much more difficult to call out China's hacking in its attempt to acquire industrial secrets. Criticism of the "little green men" Moscow has sent to Ukraine and Syria is also more convincing if one does not send one's own special forces to hunt down terrorists in faraway places — while sometimes also not wearing uniforms with clearly identifiable insignia or having the government not accept responsibility for their operations.

Of course, the global commitment to human rights and the rule of law suffers the most. Governments of all kinds have quickly learned to put their own struggles against political opponents under the banner of "fighting terrorism." Russia once "fought terrorists" in Chechnya and is now doing so in Syria; China uses the same rhetoric when it persecutes Uighurs.¹⁴⁰ Turkish President Recep Tayyip Erdoğan now routinely accuses unpopular journalists of "supporting terrorism" in order to justify their imprisonment.

Although even under the best circumstances any outsider's ability to influence dictators such as Abdel Fattah al-Sisi in Egypt or Bashar al-Assad in Syria is in doubt, the struggle against torture is more difficult, since their secret services have previously tortured on behalf of the US. The events of 2003 in the Iraqi prison of Abu Ghraib, which was already notorious for torture at the time of Saddam Hussein, represents perhaps the greatest missed opportunity to establish a new awareness of human rights after the regime change in Iraq. The European Union's policy of enabling the security forces of various North African countries to curb migration to Europe through training and equipment is problematic in any case, due to the lack of the rule of law in many partner states. Convincing these countries to treat migrants humanely is not made easier by the Western approach to the issue of terrorism.

President Trump has repeatedly stated publicly that human rights are no longer a priority for US foreign policy. He has thus adjusted his declaratory policy to more closely resemble the actual practice. We can only hope that the United States, under a new administration, will return to promoting a strong commitment to human rights. However, the war on

¹³⁸ Dana Priest, "Russia's Election Meddling Is Another American Intelligence Failure", *The New Yorker*, 13 November 2017, <https://www.newyorker.com/news/news-desk/russias-election-meddling-is-another-american-intelligence-failure>.

¹³⁹ Eric Schmitt, "A Shadowy War's Newest Front: A Drone Base Rising from Saharan Dust", *New York Times*, 22 April 2018, <https://nyti.ms/2HjKxhB>; Joe Penny, "Africa, Latest Theater in America's Endless War", *New York Review of Books Daily*, 12 March 2018, <http://www.nybooks.com/daily/2018/03/12/africa-latest-theater-in-americas-endless-war/>; Helene Cooper et al., "Army Special Forces Secretly Help Saudis Combat Threat from Yemen Rebels", *New York Times*, 3 May 2018, <https://nyti.ms/2HI2f9Q>.

¹⁴⁰ Mehdi Hasan, "One Million Muslim Uighurs Have Been Detained by China, the U.N. Says. Where's the Global Outrage?", *The Intercept*, 13 August 2018, <https://interc.pt/2MIBNo6>.

terror, conducted outside of the traditional normative framework, would be a major obstacle.

If European governments wish to maintain human rights advocacy as a foreign policy goal, they should not be silent in the face of violations. In the early years of the global war on terror, US methods were strongly criticized by Europe's governments. This has now largely ceased. It is not clear whether this is due to the fact that Europeans are now increasingly experiencing terrorist attacks of their own, whether they became less critical out of understanding or sympathy for the Obama administration, or whether they have simply become accustomed. In any case, little of what prompted the initial criticism has changed. To tolerate — or even adopt — such problematic methods is not only contrary to Europe's claim of being a guardian of the rule of law and human rights. It also carries the risk of a return to even worse episodes in the war on terrorism. Trump's election illustrates how shortsighted it is to trust in the judgment of the man occupying the White House — as the Europeans did with Obama. Even in the best hands, too much power creates potential for abuse. Only strong laws, institutions, and norms can prevent this.

Abbreviations

AUMF	Authorization for Use of Military Force
CIA	Central Intelligence Agency
CRS	Congressional Research Service
DNI	Director of National Intelligence
FAA	FISA Amendments Act
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act
G-SAVE	Global Struggle Against Violent Extremism
GWAT	Global War On Terror
ICRC	International Committee of the Red Cross
JSOC	Joint Special Operations Command
MCA	Military Commissions Act
NSA	National Security Agency
OLC	Office of Legal Counsel (US Justice Department)
PCLOB	Privacy and Civil Liberties Oversight Board
SERE	Survival, Evasion, Resistance and Escape
UAV	Unmanned Aerial Vehicle
US	United States

