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A Problem of Standards?: Another Perspective on Secret Law

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A PROBLEM OF STANDARDS?: ANOTHER PERSPECTIVE ON
SECRET LAW

JONATHAN HAFETZ*

ABSTRACT

This Article provides a new perspective on the growth of secret law in the United States. It is widely assumed that the U.S. government's exercise of national security powers suffers from excessive secrecy. Although secrecy presents significant challenges, it does not alone explain the lack of clarity surrounding the government's legal justifications for using military force, conducting surveillance, or exercising other national security powers. The Article argues that what is often labeled "secret law" may also be understood as a consequence of how legal standards are used in this context.

The Article draws on the larger rules versus standards literature to help unpack the debate over secret law. This literature suggests that standards should become clearer and more predictable over time as a body of law accrues. The Article demonstrates, however, that in the national security context, standards tend to expand, becoming more fluid and indeterminate. Though secrecy may impact the inflationary trajectory of national security standards, it does not alone explain it. The Article urges greater attention to how these standards are formulated and applied to produce a body of law that is more determinate and predictable and less prone to expansion. The Article also cautions against viewing national security as a form of

* Associate Professor of Law, Seton Hall University School of Law. I would like to thank Joel Brenner, Jenny-Brooke Condon, Paul Gowder, Aziz Huq, Brett Max Kaufman, Deborah Pearlstein, Kim Lane Scheppelle, and Hina Shamsi for their comments and suggestions, and the team at the *William & Mary Law Review* for their editorial assistance. This Article benefited from presentations at the Law and Public Affairs Program at Princeton University (LAPA) and the International Society of Public Law (ICON·S) 2015 Conference held at New York University School of Law.

legal exceptionalism and instead notes its connections to administrative law more generally.

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INTRODUCTION

It is commonly—and correctly—assumed that U.S. national security policy suffers from excessive secrecy. The focus is typically on how the executive branch conceals the legal authority and legal justifications for its actions, triggering complaints about secret law.¹ The phenomenon of secret law has been associated with various high-profile counterterrorism measures, from drone strikes to surveillance programs. Commentators have described the threat that secret law poses to the separation of powers, democratic accountability, and other tenets of the modern liberal state.² But national security secrecy also helps mask—and is sometimes confused with—a lack of determinacy in the law itself.

In some instances, the debate over secret law has less to do with transparency than with executive branch efforts to treat congressional delegations as invitations to develop broad and malleable standards that provide sufficient elasticity to respond to heterogeneous, often rapidly developing events.³ A similar impulse helps explain attempts by executive branch officials to strip rules of their ordinary meaning, causing their *sub rosa* transformation into standards.⁴ In both instances, focusing narrowly on secrecy can obscure underlying tensions over how the law is given—or not given—content.

Although transparency remains important, this Article suggests secrecy's limits as an explanation for what are, in part, concerns about the content of the underlying legal authority itself, including the degree to which it constrains government officials and provides notice to regulated actors. Secrecy may be more acute in matters affecting national security. However, this Article cautions against viewing national security as an isolated outpost of legal exceptionalism. By examining secret law against the larger rules versus

1. See *infra* Part I.

2. See, e.g., Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81, 82, 97 (2011/2012) (concluding that the Constitution provides only limited protection against “undue government secrecy” and describing the incompatibility of secrecy, separation of powers, and democratic accountability).

3. See *infra* Part III.A.1 (exploring the Bush Administration’s use of the Authorization for Use of Military Force’s elastic “detention authority”).

4. See *infra* Part III.B.

standards literature, the Article builds on an existing, but underdeveloped, body of scholarship that situates national security within the broader framework of administrative law.⁵

This Article thus seeks to reframe the debate about national security secrecy as a debate, at least partly, about standards. It cautions against focusing exclusively on transparency without regard to how the underlying legal authority is designed and implemented. The Article suggests that increasing avenues by which standards can gain content through their application to specific cases, such as through judicial review, can help counteract the indeterminacy that is often associated with and sometimes mistaken for secret law. Such review, moreover, can also mitigate the inflation of legal authority through standards, although the degree to which courts will impose constraints remains uncertain.⁶

A principal goal of the rule of law is to ensure obedience to rules and avoid arbitrariness.⁷ As Lon Fuller explained, secret law undermines the internal morality of law itself, undercutting the obligation to obey the law's command.⁸ Secrecy can threaten the rule of law not only by masking the legal authority by which power is exercised but

5. See, e.g., Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 887-88 (2014) (examining the process of national security rule making); Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1723-25, 1758-59 (2014) (applying administrative law principles to "panvasive surveillance" that is not considered a search or seizure, such as NSA bulk metadata collection); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2663-64 (2005) (arguing for application of administrative law principles to the 2001 Authorization for Use of Military Force and noting, in particular, that "the logic of *Chevron* applies to the exercise of executive authority in the midst of war"); see also Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 2D 379, 383-84, 387-88 (2003) (describing the value of applying an administrative law perspective to military commissions established at Guantanamo to try unlawful combatants); David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1361 (2007) (examining how the civil administrative state has been mobilized in the war on terrorism).

6. See generally Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 889 (2012) (explaining that, as an empirical matter, courts do not necessarily lean to the libertarian left of the executive).

7. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 198 (6th ed. 1902) (explaining that the rule of law "means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative ... on the part of government").

8. LON L. FULLER, THE MORALITY OF LAW 39 (1964) ("Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that ... is kept secret from him.").

also by concealing the fluidity and indeterminacy of that authority itself. Although such indeterminacy can give public officials greater latitude to respond to diverse and unforeseen challenges, it can also enable authoritarian models of governance. Secrecy, moreover, can undermine the principle of equality by enabling authorities to treat the law's subjects in a discriminate manner.⁹

Part I describes the growing concerns about secret law in the United States and theories advanced to explain it. Part II surveys the literature on rules and standards. It emphasizes the features of standards that are particularly relevant to understanding their operation in the national security context: their provision of broad ex ante guidelines that enable government authorities to respond to diverse situations; their lower cost to promulgate relative to rules; and the expectation that they will be sharpened over time through their application to individual cases by courts and agencies.

Part III applies these insights to national security secrecy. It focuses on two commonly cited instances of secret law: (1) the use of military detention and lethal force against terrorist groups under the Authorization for Use of Military Force, and (2) new, more expansive government surveillance programs, such as those that rely on bulk data collection. It explains how what is often diagnosed as legal secrecy may also be understood as a function of how legal standards are employed in these areas. Part IV then discusses several implications of reframing the question of legal secrecy as one of standards in the national security context. Although it recognizes that public officials require some degree of both flexibility and secrecy, this Article suggests the need to strengthen the mechanisms by which standards can be developed through their application to individual cases.

I. THE GROWTH OF SECRET LAW

Commentators have highlighted the growth of legal secrecy in recent years. Building on pioneering work by Kim Lane Scheppele,¹⁰

9. See Paul Gowder, *The Rule of Law and Equality*, 32 *LAW & PHIL.* 565, 565-66 (2013) (explaining how the rule of law, which is required to treat individuals as equals, is achieved only when states practice regularity, publicity, and generality).

10. See KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON*

David Pozen has applied the distinction between deep and shallow secrecy to the control of national security information.¹¹ Professor Pozen explains that a secret is deep when a small group of similarly situated individuals keeps the secret's existence from the public.¹² By contrast, "a secret is shallow if ordinary citizens understand they are being denied relevant information and have some ability to estimate its content."¹³ The former includes not only the operational details of a particular counterterrorism initiative but also the legal authority to engage in it. Heidi Kitrosser has drawn a similar distinction between what she terms "macro-transparency" and "micro-secrecy."¹⁴ Professor Kitrosser argues that a law's "execution must be traceable to publicly created and publicly known laws [macro-transparency], even if those laws allow their execution to occur in secret [micro-secrecy]."¹⁵ Secret law is a failure of macro-transparency. Bruce Ackerman has similarly emphasized the distinction between secret and acknowledged programs.¹⁶ These scholars all share the view that the greatest threat to democratic accountability and separation of powers comes when a particular program—and the legal rationale for it—remains hidden from the public.¹⁷

Others have resisted distinctions between deep or macro-secrecy, on the one hand, and shallow or micro-secrecy on the other, instead emphasizing the connection between secrecy and illegality. Jenny-Brooke Condon, for example, has cautioned against focusing too heavily on secrecy per se.¹⁸ She argues that the focus should instead

LAW 21 (1988) (introducing the concept of the deep secret).

11. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 275 (2010).

12. *Id.* at 274.

13. *Id.*

14. See Heidi Kitrosser, "Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163, 1165, 1174 (2007).

15. *Id.* at 1165.

16. See Bruce Ackerman, *The Secrets They Keep*, SLATE (Dec. 20, 2005, 1:41 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/12/the_secrets_they_keep.html [<https://perma.cc/Z9PG-GSW8>]; see also Christopher Kutz, *Secret Law and the Value of Publicity*, 22 RATIO JURIS. 197, 201 (2009) (distinguishing between "mere secrecy" and "meta-secrecy").

17. See, e.g., Kutz, *supra* note 16, at 200 (explaining that secret law "undermines democratic accountability, raising the possibility that we do not know what our government does in our name, and so cannot demand a change").

18. Jenny-Brooke Condon, *Illegal Secrets*, 91 WASH. U. L. REV. 1099, 1104, 1106 (2014).

be on illegal secrecy, observing that “shallow secrets’ can ... be no less problematic than deep secrets when they insulate the government’s illegal conduct from judicial and public review.”¹⁹ In a similar vein, Jameel Jaffer has concentrated on the relationship between secrecy and government accountability.²⁰ He argues that “known unknowns,” or information that is secret only formally and officially, but which the public knows about, can “sever the connection between transparency and accountability” for government misconduct.²¹

U.S. counterterrorism policy after 9/11 provides fruitful ground for the study of legal secrecy. Secrecy has permeated the detention and interrogation of terrorism suspects, the use of lethal force through drone strikes, and the creation of new surveillance programs relying on bulk data collection. Sometimes, the program itself is secret (“deep” secrecy);²² other times, it is public, but its details remain hidden (“shallow” secrecy).²³ In both instances, the public authority justification for the particular government activity may be obscured or provided at a high level of generality through mere references to a statute or to the President’s constitutional authority as Commander in Chief.²⁴ Such abstracted descriptions of the government’s legal authority, without further elaboration, have contributed to the perception of secret law.

As information becomes public—whether through leaks, litigation, public pressure, or a combination of factors—it stokes debate over the proper limits on secrecy and the corresponding role of transparency in a democratic society facing threats to its security. Yet the secrecy-transparency discourse may also be understood as a debate about the underlying form and content of the law itself. That debate—which encompasses questions of how specific the law should be and when (and how) its content should be articulated—would benefit from increased attention to the rich literature on

19. *Id.* at 1105-06.

20. Jameel Jaffer, *Known Unknowns*, 48 HARV. C.R.-C.L. L. REV. 457, 459-60 (2013) (describing how government secrecy, though illusory, may keep the government from having to answer questions from the public or the courts).

21. *Id.* at 471.

22. *See supra* note 12 and accompanying text.

23. *See supra* note 13 and accompanying text.

24. *See* Pozen, *supra* note 11, at 297.

rules and standards. The next Part surveys that literature and explains how it can shed light on the phenomenon of secret law.

II. RULES, STANDARDS, AND NATIONAL SECURITY

A substantial body of literature addresses the question of rules versus standards as a legal form. This subject has been approached from diverse perspectives, including political choice theory, judicial behavior, and economic analysis,²⁵ and it has provided insights into various fields, including property,²⁶ constitutional,²⁷ and administrative law.²⁸ This Article explains how the rules versus standards discussion also offers valuable insights into the question of secret law.

Rules and standards elude precise definition because the two denote ends of a continuum rather than fixed and self-contained points.²⁹ However, the following example conveys the basic distinction.³⁰ Assume a law prohibits driving too fast. A rule might prohibit any person who travels on a residential street from going thirty miles per hour, which the rule defines as speeding. The test for determining whether a person has committed the offense of speeding is straightforward: did the defendant drive a car on a residential street, and if so, did her speed exceed the limit? By contrast, a

25. See, e.g., Adam H. Morse, *Rules, Standards, and Fractured Courts*, 35 OKLA. CITY U. L. REV. 559, 563 (2010); see also R. Polk Wagner, *Reconsidering Estoppel: Patent Administration and the Failure of Festo*, 151 U. PA. L. REV. 159, 235 n.275 (2002) (summarizing the diversity of the rules versus standards literature).

26. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592-93 (1988) (explaining the divergent purposes of rules versus standards and arguing that, rather than adopting one of these positions, property law is governed by both).

27. See, e.g., Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992) (placing rules and standards on a “continuum of discretion”).

28. See, e.g., Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 66-67 (1983) (evaluating the precision of administrative rules by their transparency, accessibility, and congruency).

29. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561 & n.6 (1992); Morse, *supra* note 25, at 562; Sullivan, *supra* note 27, at 57 (explaining that legal directives can be situated as rules or standards “to signify where they fall on the continuum of discretion”).

30. This example was originally provided by Russell Korobkin. See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23 (2000). A version of the example also appears in Morse, *supra* note 25, at 562-63.

standard might prohibit driving unreasonably fast on a residential street, taking into account road conditions, traffic patterns, and other factors relevant to the safety of residents. When applying this standard, a judge must resolve factual questions and determine the reasonableness of the driver's speed under the circumstances.³¹

This example illustrates some basic attributes of rules and standards. Rules require more mechanical determinations (for example, did the speed exceed thirty miles per hour?). As Kathleen Sullivan has explained, a rule "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts."³² Because they reduce a decision maker's discretion, rules are relatively predictable.³³ Their certainty, moreover, can help produce compliance among the citizenry, which knows in advance the grounds for official intervention.³⁴ Rules, however, tend to be over- or underinclusive³⁵: a thirty mile-per-hour speed limit would exclude a careless driver who was nevertheless traveling under the limit, but include a cautious driver who was traveling modestly above the limit. Rules, therefore, may in some cases appear arbitrary, irrational, and in tension with the background principle or policy they seek to capture.³⁶

Conversely, standards give greater latitude to the decision maker, who is empowered to apply the background principle or policy to a particular set of facts.³⁷ For example, a court would have to resolve multiple issues to determine whether a person was speeding.³⁸ Because standards permit greater case-by-case adjustment and consideration of the totality of the circumstances, they are both

31. Morse, *supra* note 25, at 563; *see also* Korobkin, *supra* note 30, at 23.

32. Sullivan, *supra* note 27, at 58; *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-88 (1976) ("The extreme of formal realizability [or 'ruleness'] is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.").

33. Kennedy, *supra* note 32, at 1688 (describing "restraint of official arbitrariness and certainty" as key features of rules).

34. *Id.* at 1688-89.

35. Sullivan, *supra* note 27, at 58.

36. *Id.* at 58-59; *see also* Kennedy, *supra* note 32, at 1689 (explaining how a rule's rigidity can involve "the sacrifice of precision in the achievement of the objectives lying behind the rule[']").

37. Sullivan, *supra* note 27, at 58.

38. *See supra* notes 30-31 and accompanying text.

less predictable and less prone to over- and underinclusiveness.³⁹ Standards are also relatively flexible and thus more capable of responding to changing conditions and behavior than rules, whose specificity makes them vulnerable to becoming obsolete.⁴⁰

Louis Kaplow has described the relative advantages of using standards or rules based on the nature of the regulated activity.⁴¹ The choice between rules and standards, he explains, depends principally on the relative desirability of *ex ante* versus *ex post* creation of the law.⁴² That, in turn, involves a determination of whether information should be gathered and processed before or after individuals act.⁴³ Professor Kaplow notes that “[r]ules are more costly to promulgate than standards because rules involve advance determinations of the law’s content, whereas standards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law’s content.”⁴⁴ Rules thus tend to be attractive to address frequently recurring fact scenarios, as with many traffic laws, health and safety regulations, and provisions of the federal income tax code.⁴⁵ Standards, by contrast, tend to be preferable when the law governs more heterogeneous behavior in which each type of relevant act may be rare, such as the law of negligence, which applies to diverse and often complex accident scenarios.⁴⁶

The choice between rules and standards implicates the allocation of responsibility among the respective branches of government: legislators typically determine rules *ex ante*, whereas courts interpret standards through *ex post* application.⁴⁷ As standards are enforced over time, they tend to become more rule-like through the development of precedent.⁴⁸ If enough decisions interpret a speeding standard based on particular facts—such as road conditions and traffic patterns—the standard begins to take on the specificity of a

39. Sullivan, *supra* note 27, at 58-59.

40. *Id.* at 66.

41. See Kaplow, *supra* note 29, at 584.

42. See *id.* at 562.

43. See *id.* at 585.

44. *Id.* at 562-63.

45. See *id.* at 563-64.

46. See *id.* at 563-64, 600.

47. *Id.* at 608.

48. *Id.* at 577.

rule.⁴⁹ The standard's principles, as Judge Richard Posner explains, become "particulariz[ed]" through application.⁵⁰ As the standard becomes more rule-like, its predictability increases and its elasticity decreases. Conversely, rules can become more standard-like over time through the creation of exceptions and qualifications.⁵¹

The choice between rules and standards has normative implications. Scholars have explained how rules promote fairness by protecting individuals against arbitrary and discriminatory government conduct, "requir[ing] decisionmakers to act consistently, treating like cases alike."⁵² Rules have been associated with the protection of individual liberty for similar reasons: they bind the exercise of authority to fixed, *ex ante* constraints.⁵³ Yet, these same attributes can make rules seem arbitrary and inequitable, suppressing relevant similarities and differences through their formal rigidity.⁵⁴

Standards, on the other hand, can promote fairness by reducing arbitrariness and irrationality.⁵⁵ They give decision makers the latitude to treat alike cases that are formally distinct, but substantively similar.⁵⁶ By making determinations based on the specific facts of an individual case, standards can help achieve—or avoid frustrating—the legal directive's underlying policy or purpose. Standards, however, remain vulnerable to arbitrariness and unpredictability for the same reason: they give greater discretion to decision makers in determining the law's content through their application.⁵⁷

In the administrative law context, Colin Diver has examined the question of precision in rule making to develop a "standard for standards."⁵⁸ The goal of achieving what he describes as optimal

49. *See id.*

50. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 20.4, at 424-25 (2d ed. 1977); *see also* Rose, *supra* note 26, at 592-93 (describing the interaction of and tradeoffs between standards and rules in the property law context).

51. *See* Sullivan, *supra* note 27, at 61.

52. *Id.* at 62.

53. *See id.* at 63-64.

54. *See id.* at 63.

55. *Id.* at 66.

56. *Id.*

57. *See id.* at 65-66.

58. Diver, *supra* note 28, at 66. In framing the question, Professor Diver paraphrases

precision—thus avoiding the twin extremes of underprecision and excessive regulatory rigidity—depends on the interplay of three factors: transparency, accessibility, and congruency.⁵⁹ Transparent rules “use words with well-defined and universally accepted meanings within the relevant community”; accessible rules are “applicable to concrete situations without excessive difficulty or effort”; and congruent rules “produce[] the desired behavior” through the “content of the message communicated.”⁶⁰ Tradeoffs typically occur among the three. For example, a transparent rule, such as no person can drive without a high school diploma, “may assure similar treatment of categorically similar cases, but it may also fail to provide defensible applications.”⁶¹ Calibration is achieved through a feedback loop when policymakers adjust to information about social costs to reduce error and achieve the desired outcome. Although they may be limited by distorting influences (incomplete knowledge, imperfect vision, and selfish desires), policymakers can achieve a degree of “bounded rationality”⁶² by moving towards an “optimally precise formulation” for the particular regulatory context.⁶³ Adjudication by judges and agencies plays an important role by providing a means by which standards and rules are developed through application to concrete situations.

This literature on the relationship of standards and rules provides a useful perspective on legal secrecy in the context of national security.⁶⁴ National security law spans disparate fields, including criminal law enforcement, noncriminal sanctions mechanisms, noncustodial restrictions on liberty, intelligence gathering and other forms of surveillance, and the law of armed conflict. Each, however,

Judge Skelly Wright, who described the need to develop standards for determining “when we should require standards.” *Id.* at 66 & n.6 (quoting J. Skelly Wright, *Beyond Discretionary Justice*, 81 *YALE L.J.* 575, 587 (1972) (reviewing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969))).

59. *Id.* at 67.

60. *Id.*

61. *Id.* at 72.

62. *Id.* at 98 (quoting James G. March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, 9 *BELL J. ECON.* 587, 590-91 (1978)).

63. *Id.*

64. *Cf.* Zaring & Baylis, *supra* note 5, at 1367 (“In the scholarship on the administration of the war on terror ... most observers have been thinking about divided government control of the war-fighting executive rather than about the capabilities of the various independent and executive branch agencies in helping to fight that war.”).

may be said to face a similar regulatory challenge as various areas of administrative law: achieving the optimal degree of precision that gives form to legal directives to achieve the desired goal without unnecessarily or impermissibly infringing upon individual liberty, equality, privacy, and other competing interests. Limits on or barriers to adjudication can hinder an important mechanism by which standards are distilled and rules are calibrated.

In the national security context, secrecy is commonly justified by the need to avoid tipping off regulated actors, protect sources and methods, and manage sensitive diplomatic or intelligence concerns. However, secrecy in the design and application of counterterrorism measures is in tension with the notion of law as public. Secrecy also weakens due process principles, such as the requirement of notice, because individuals remain unaware of the consequences of their actions. Both sides of the secrecy debate tend to treat the law as fixed and instead dispute whether (as well as when and to what degree) it should be revealed to the public.⁶⁵

Yet there is more at work than an acoustic separation between decision and conduct rules under Meir Dan-Cohen's classic framing.⁶⁶ Professor Dan-Cohen posits a distinction between decision rules directed at officials and conduct rules directed at the general public, which shape their perception and behavior.⁶⁷ On various national security issues, the legal framework itself resists particularization. It is not simply that government officials and the public are hearing different rules because the law is saying different things to different audiences. The law itself remains fluid, often deliberately so.

Viewed from this perspective, the growth of secret law in the United States reflects more than a lack of transparency about decision rules applied by officials to regulated actors. It also points to ambiguities in the law that result partly from the combined effect of two factors: (1) the expression of the law through standards designed to give public officials greater flexibility, and (2) limitations

65. *See supra* Part I.

66. *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

67. *See id.* at 630.

on judicial review, which is the traditional means by which standards are liquidated into rules.

III. SECRECY AND STANDARDS: THE USE OF MILITARY FORCE AND SURVEILLANCE

Both the use of military force against al Qaeda and other terrorist groups as well as government surveillance programs engaging in bulk data collection have served as focal points for accusations about secret law. Yet such accusations also reflect concerns about a lack of particularity in the law itself that results from unliquidated standards. This Part describes how the debate about secrecy in these areas may also be understood as one about the inflationary potential and enabling effect of standards. It also describes how the indeterminacy of the legal standard—and, thus, the perception of secret law—tends to be greater where barriers to judicial review are more pervasive.

A. *The Use of Military Force*

Enacted days after the 9/11 attacks, the 2001 Authorization for Use of Military Force (AUMF) authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons” responsible for the attacks as well as those who harbored attackers.⁶⁸ The AUMF has served as the framework statute for much of the war on terrorism, including the detention and interrogation of and the use of lethal force against suspected terrorists.⁶⁹ Secrecy has surrounded much of the AUMF’s interpretation and application, fueling a perception of secret law.⁷⁰ This

68. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001).

69. For example, interpretation of the AUMF was central in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion), in which the Supreme Court concluded that the AUMF permitted the detention of enemy combatants.

70. For one commentator’s characterization of the connection between secrecy and the interpretation and application of the AUMF, see Gregory D. Johnsen, *60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BUZZFEED (Jan. 16, 2014, 11:52 PM), <http://www.buzzfeed.com/gregoryjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most> [https://perma.cc/2ZTN-Y9P2]. See also Robert Bejesky, *Cognitive Foreign Policy: Linking Al-Qaeda and Iran*, 56 HOW. L.J. 1, 8-16 (2012); Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT’L SEC. J. 115, 124-25

perception, however, may be due as much to the expression of the AUMF through standards as to a lack of transparency in the law itself.

The exercise of war powers under the AUMF highlights two salient features of standards: their *ex post* rather than *ex ante* delineation of legal authority, and their potential flexibility, which allows for their application to discrete—and often diverse—situations. The AUMF suggests how standards governing the exercise of national security powers can resist liquidation into more rule-like form and instead expand over time. The absence of transparency surrounding the AUMF can thus obscure and, in some instances, be mistaken for an underlying indeterminacy in the law itself. The following discussion examines two related exercises of AUMF authority—detention and targeting—from this perspective.

1. *Detention*

In approving the use of military force against persons and entities responsible for the 9/11 attacks and those who harbored them, the AUMF effectively identified al Qaeda and the Taliban as its targets.⁷¹ Beyond that, the AUMF provided little guidance as to its scope. The Bush Administration nevertheless relied on the AUMF in conjunction with the President's Article II powers as Commander in Chief to detain individuals in a wide variety of circumstances and locations as an incident to the use of military force.⁷² It did not initially elaborate on the legal basis for the detentions, nor did it delineate the scope of the president's detention authority with respect to al Qaeda, the Taliban, or other organizations.⁷³ The Bush

(2014).

71. See *Hamdi*, 542 U.S. at 518 (plurality opinion) (“There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”).

72. *Id.* at 516-17.

73. The Bush Administration also concealed the existence of executive authorization for the Central Intelligence Agency (CIA) to engage in detention operations. See S. SELECT COMM. ON INTELLIGENCE, 113TH CONG., COMM. STUDY OF THE CIA'S DETENTION AND INTERROGATION PROGRAM, EXEC. SUMMARY 11 (Comm. Print 2014), http://www.intelligence.senate.gov/sites/default/files/press/executive-summary_0.pdf [<https://perma.cc/PVS7-69X2>] (noting that the President signed a covert action memo authorizing the CIA director to “undertake operations

Administration, in short, originally kept hidden the most basic facts surrounding detentions, including the identity of individuals in U.S. custody, the methods of their interrogation, and, in the case of CIA-run black sites, the existence of the detention facilities themselves.⁷⁴ The Administration also refused to disclose its interpretation of the President's detention authority, which was set forth in secret memoranda by the Justice Department's Office of Legal Counsel (OLC).⁷⁵ This lack of transparency over the AUMF's meaning triggered perceptions of a secret law being developed within the executive branch. One might, however, also view the Bush Administration's initial claims of broad AUMF detention authority as evidence of the enabling effect of standards.

This detention authority's elasticity was perhaps best illustrated by the shifting conceptions of "enemy combatant."⁷⁶ In some instances, the Bush Administration opted for a narrow definition,⁷⁷ describing AUMF detention as "classic wartime detention."⁷⁸ In other instances, it advanced a definition that seemed to defy limits, suggesting at one point that the President could detain "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities."⁷⁹ The Supreme Court provided only

designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities"). The full text of that authorization—contained in a September 17, 2001, presidential covert action memorandum of notification—still remains classified.

74. See JONATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM* 2, 58, 150 (2011).

75. See *id.* at 151.

76. Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 *NW. U. L. REV.* 1683, 1732 (2009).

77. See *Hamdi*, 542 U.S. at 516 (plurality opinion) ("[T]he Government has never provided any court with the full criteria that it uses in classifying individuals as [enemy combatants, but] for purposes of this case [has defined an enemy combatant as] an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." (quoting Brief for Respondents at 3, *Hamdi*, 542 U.S. 507 (No. 03-6696))).

78. See Brief for Respondents at 20-21, 27, *Hamdi*, 542 U.S. 507 (No. 03-6696).

79. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (quoting Transcript of Oral Argument at 25, *Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (Nos. CIV.A. 02-CV-0299CKK, CIV.A. 02-CV-0828CKK, CIV.A. 02-CV-1130CKK, CIV.A. 04-CV-1135ESH, CIV.A. 04-CV-1136JDB, CIV.A. 04-CV-1137RMV, CIV.A. 04-CV-1144RWR, CIV.A. 04-CV-1164RBW, CIV.A. 04-CV-1194HHK, CIV.A. 04-CV-1227RWB, CIV.A. 04-CV-1254HHK)).

limited guidance, ruling in *Hamdi v. Rumsfeld* that the AUMF authorized holding enemy fighters for the duration of the armed conflict as “a fundamental incident of waging war.”⁸⁰ *Hamdi* did not, however, address the scope of detention authority beyond those captured fighting against U.S. or allied forces in a combat zone.

Over time, the AUMF’s detention standard gained greater clarity through the process of adjudication. In early 2009, the Obama Administration sought to articulate a single standard for presidential detention authority in response to the federal courts’ exercise of habeas corpus jurisdiction in the Guantanamo detainee litigation. The Administration explained that the AUMF authorized the President to detain individuals who were “part of” or who “substantially supported” al Qaeda, the Taliban, or associated enemy forces for the duration of the armed conflict with those groups.⁸¹ The Administration did not define these terms with precision but instead sought flexibility. It drew loosely on “[p]rinciples derived from law-of-war rules” and resisted *ex ante* specificity.⁸² “It is neither possible nor advisable,” the Justice Department explained, “to attempt to identify, in the abstract, the precise nature and degree of ‘substantial support,’ or the precise characteristics of ‘associated forces,’ that are or would be sufficient to bring persons and organizations within the foregoing framework.”⁸³ Justice further stated:

Evidence relevant to a determination that an individual joined with or became part of al-Qaida or Taliban forces might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaida (as reflected in some cases by staying at al-Qaida or Taliban safe-houses that are regularly used to house militant recruits) or taking positions with enemy forces.⁸⁴

80. 542 U.S. at 519.

81. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 1-2, *In re Guantanamo Bay Detainee Litigation*, 2008 U.S. Dist. LEXIS 109949 (D.D.C. 2005) (Misc. No. 08-442 (TFH)).

82. *Id.* at 1.

83. *Id.* at 2.

84. *Id.* at 6-7.

The assumption was that this standard would be developed and articulated through its application to individual cases.⁸⁵

Lower courts largely adopted the Obama Administration's interpretation of the President's detention authority under the AUMF⁸⁶ and applied a "totality of the evidence" test to determine whether a particular prisoner fell within its ambit.⁸⁷ Courts resisted any "settled criteria" for determining who was "part of" a covered enemy force.⁸⁸ Instead, they relied on a variety of factors, such as a person's travel patterns or associations.⁸⁹ They then applied these factors in individual cases, further clarifying the definition. In 2012, Congress adopted the Obama Administration's interpretation of the President's detention authority.⁹⁰

Secrecy remains an issue that limits public knowledge about the facts that underlie the government's asserted basis for the Guantanamo detentions, as well as the conduct of the litigation itself, including attorneys' ability to share relevant information with their clients. Yet the Guantanamo habeas cases illustrate how secrecy can obscure related but ultimately distinct concerns triggered by the elasticity of standards and how those standards can become—or fail to become—more particularized through adjudication.

The features of AUMF detention authority that have resisted judicial examination, such as the duration of detention, tend to remain more ambiguous. The international law of armed conflict (LOAC) requires the prompt repatriation of prisoners upon the cessation of hostilities,⁹¹ even when no peace treaty has been

85. *See id.* at 2.

86. *See, e.g.,* Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) (upholding the President's authority to detain under the AUMF individuals that were "part of" or who "materially supported" al Qaeda, the Taliban, or associated forces (quoting Military Commissions Act of 2006, Pub. L. No. 109-366, § 948a(1)(A)(i), 120 Stat. 2600, 2601)).

87. *See, e.g.,* Khan v. Obama, 741 F. Supp. 2d 1, 5 (D.D.C. 2010) (citing Naji al Warafi v. Obama, 704 F. Supp. 2d 32, 37-39 (D.D.C. 2010)). *See generally* BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING (2012), http://www.brookings.edu/~media/research/files/reports/2011/5/guantanamo-wittes/05_guantanamo_wittes.pdf [<https://perma.cc/BDG2-76DF>].

88. *Khan*, 741 F. Supp. 2d at 5 (citing Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010); Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009)).

89. *See* Uthman v. Obama, 637 F.3d 400, 403-07 (D.C. Cir. 2011).

90. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011).

91. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

signed.⁹² Relying on this background LOAC norm, the United States maintains that it can hold prisoners for the duration of the armed conflict with al Qaeda and other AUMF-covered forces.⁹³ The 2012 National Defense Authorization Act validated this interpretation, clarifying that the AUMF authorizes continued detention “under the law of war ... until the end of the hostilities.”⁹⁴ President Obama, to be sure, has described the need to bring the war with al Qaeda to a close and repeal the AUMF,⁹⁵ and former senior administration officials have similarly cautioned against a “forever war.”⁹⁶ Yet officials have never specified criteria for determining the end of hostilities against al Qaeda and associated forces.⁹⁷ For years, courts accepted the LOAC principle that detainees can be held under the AUMF for the duration of the conflict, but declined to provide specific criteria for determining when hostilities have ceased.⁹⁸ Recently, a district court ruled that detention authority continued as long as fighting is ongoing, thus rejecting one detainee’s claim that he

92. See Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1180 (2011) (noting that Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War “sought specifically to eliminate pretexts to delay repatriation used in earlier conflicts, such as the absence of a formal peace treaty or the ‘non-termination of the armed conflict by or against a co-belligerent’” (quoting ROBERT KOLB & RICHARD HYDE, *AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS* 217 (2008))); David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT’L L. 801, 919 (1996) (“State practice established by cease-fire agreements supports a broad norm of repatriation.”).

93. See Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143, 189 (2014).

94. National Defense Authorization Act for Fiscal Year 2012 § 1021(c)(1).

95. See President Barack Obama, Remarks at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [https://perma.cc/7WAT-HVXA] (“[T]his war, like all wars, must end.”).

96. Harold Hongju Koh, Sterling Professor of Int’l Law, Yale Law Sch., *How to End the Forever War?*, Remarks at the Oxford Union (May 7, 2013), <http://graphics8.nytimes.com/packages/pdf/world/2013/KOHSPEECH.pdf> [https://perma.cc/GSE7-E6LL].

97. See Jeh Charles Johnson, Gen. Counsel, U.S. Dep’t of Def., *The Conflict Against Al Qaeda and its Affiliates: How Will it End?*, Remarks at the Oxford Union 8-9 (Nov. 30, 2012), <http://www.state.gov/documents/organization/211954.pdf> [https://perma.cc/HE7V-Y8C4] (noting that there would come “a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured” that the organization with which the United States is at war “has been effectively destroyed,” but declining to provide specifics on when that tipping point might come).

98. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (explaining that the continued detention of an enemy combatant was authorized because “[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan,” but declining to provide more specific criteria for determining the cessation of hostilities).

should be released because of statements by the President that the U.S. combat mission in Afghanistan was over.⁹⁹ Apart from such limited guidance, the law governing the end of hostilities for purposes of AUMF detentions has not been secret so much as defined at a high level of abstraction.

Such generality is attractive to executive branch officials for several reasons. It not only helps them respond quickly to new threats but also provides flexibility to address enduring and seemingly intractable problems, such as the Guantanamo detentions. For example, defining the temporal bounds of the conflict at a high level of generality helps enable the administration to continue holding detainees whom it is unwilling to transfer to other countries, whether because of restrictions imposed by Congress or security considerations.¹⁰⁰ Loosely defining the conflict itself, meanwhile, leaves open the option to engage in detention operations in emerging military theaters, such as Syria, should that be deemed desirable, without seeking new legal authority from Congress.¹⁰¹

Detentions under the AUMF have unquestionably suffered from gaps in transparency. But continued uncertainty surrounding various aspects of the President's detention authority is less a function of secret law than the product of standards that have resisted particularization. Secrecy, to be sure, helps perpetuate legal

99. See *Al Warafi v. Obama*, No. 09-2368, 2015 WL 4600420, at *7 (D.D.C. July 30, 2015) (rejecting the petitioner's claim that he should be released because the President had declared an end to the U.S. combat mission in Afghanistan).

100. See generally David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179, 206 (2012) (discussing obstacles to transferring detainees from Guantanamo). The lack of clarity surrounding the AUMF's duration has prompted proposals to enact a sunset provision. See, e.g., Ryan Goodman, *Senate Foreign Relations Committee Approves ISIL AUMF and Sunset of 2001 AUMF*, JUST SECURITY (Dec. 11, 2014, 2:18 PM), <https://www.justsecurity.org/18319/forever-war-watch-senate-foreign-relations-committee-approves-isil-aumf-sunset-sept-2001-aumf/> [<https://perma.cc/WV3H-SJ3Q>] (describing Senate Foreign Relations Committee approval of draft authorization for use of force against ISIL that would sunset the 2001 AUMF within three years).

101. The Obama Administration, for example, has reportedly detained Umm Sayyaf, the wife of a senior ISIL leader in Syria. Her husband, Abu Sayyaf, was killed after engaging U.S. forces. However, the United States has avoided specifying how the AUMF authorizes her detention, leaving the legal theory to educated speculation. See Nathalie Weizmann & Rebecca Ingber, *Whatever Happened to Umm Sayyaf?*, LAWFARE (June 11, 2015, 8:10 AM), <https://www.lawfareblog.com/whatever-happened-umm-sayyaf/> [<https://perma.cc/8B9A-C33Z>] (describing the possible legal basis for detention under the AUMF).

indeterminacy by concealing important facts and providing a rationale for denying judicial review, thus foreclosing an avenue by which standards can be particularized. But secrecy alone does not explain the underlying fluidity in the law itself.

2. Targeting and the Use of Force

The AUMF has also provided the statutory foundation for lethal drone strikes against al Qaeda and other terrorist groups in Afghanistan, Pakistan, Yemen, Somalia, and, most recently, Syria.¹⁰² Drone strikes have been shrouded by even greater secrecy than detentions, and have generated accusations that the United States is waging a shadow war across the globe.¹⁰³ They have also been criticized for misidentifying targets and harming innocent civilians.¹⁰⁴ In one high-profile example, the United States acknowledged that a drone strike in Pakistan mistakenly killed two western hostages held by al Qaeda.¹⁰⁵ Human rights groups have continued to document civilian casualties notwithstanding that the administration introduced reforms designed to minimize such casualties.¹⁰⁶

Critical gaps remain in the factual record surrounding drone strikes, such as the identity of intended and actual targets; the number, dates, and status of people killed; and the location of each

102. See Leila Nadya Sadal, *America's Drone Wars*, 45 CASE W. RES. J. INT'L L. 215, 215, 224-31 (2012).

103. See, e.g., MICHAEL J. GLENNON, *THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW* 195 (2010); MARK MAZZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH* 218 (2013); JEREMY SCAHILL, *DIRTY WARS: THE WORLD IS A BATTLEFIELD* 358 (2013); Mary Ellen O'Connell, *The Questions Brennan Can't Dodge*, N.Y. TIMES (Feb. 6, 2013), http://www.nytimes.com/2013/02/07/opinion/the-questions-brennan-cant-dodge.html?_r=0 [<https://perma.cc/6MNS-3A2W>].

104. See PETER BERGEN & KATHERINE TIEDEMANN, NEW AM. FOUND., *THE YEAR OF THE DRONE: AN ANALYSIS OF U.S. DRONE STRIKES IN PAKISTAN, 2004-2010*, at 1 (2010), http://vcnv.org/files/NAF_YearOfTheDrone.pdf [<https://perma.cc/C5AZ-627E>]; Sadal, *supra* note 102, at 228.

105. See Peter Baker, *Obama Apologizes After Drone Kills American and Italian Held By Al Qaeda*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/24/world/asia/2-qaeda-hostages-were-accidentally-killed-in-us-raid-white-house-says.html> [<https://perma.cc/N8MM-WD5W>].

106. See AMRIT SINGH, OPEN SOC'Y JUSTICE INITIATIVE, *DEATH BY DRONE: CIVILIAN HARM CAUSED BY TARGETED KILLINGS IN YEMEN* 1, 6 (2015), <https://www.opensocietyfoundations.org/sites/default/files/death-drones-report-eng-20150413.pdf> [<https://perma.cc/4QB8-TFL6>].

drone strike as well as the particular agency involved.¹⁰⁷ The broad legal justification for using lethal force, by contrast, has become clearer over time. The continuing gap between a general targeting standard on the one hand, and the standard's application to particular situations on the other, yields an indeterminacy in the law governing the use of force. The Obama Administration has been able to apply this standard with greater flexibility than the standard's purported stringency suggests. Although often cited as an example of legal secrecy, the law governing the use of force may be better described as a case of legal fluidity.

U.S. officials initially refused to provide information about drone strikes, including the legal basis for conducting them.¹⁰⁸ But mounting criticism of their use, particularly outside Afghanistan, increased pressure on officials to respond.¹⁰⁹ In May 2010, Harold H. Koh, then Legal Adviser to the State Department, provided the first public explanation of the legal basis for drone strikes at the annual meeting of the American Society of International Law.¹¹⁰ Professor Koh defended the use of drone strikes in the armed conflict against al Qaeda and associated forces, explaining that they were authorized domestically under the AUMF and complied with all applicable international law.¹¹¹ Although Professor Koh did not engage in detailed legal analysis, he identified the two bases under international law for drone strikes: the LOAC and the law of self-defense.¹¹² In public speeches over the next two years, other senior U.S. officials

107. See Jameel Jaffer, *The Erosion of a Secret*, JUST SECURITY (Sept. 12, 2014, 11:56 AM), <https://www.justsecurity.org/14908/erosion-secret/> [<https://perma.cc/DW5H-TFDF>]; see also Koh, *supra* note 96, at 14-15 (urging the Obama administration to be more transparent regarding the factual record surrounding drone strikes including the Administration's "method of counting civilian casualties" and the threat posed by particular targets).

108. Former CIA Director Leon Panetta provided an early, if indirect, acknowledgment of remote drone strikes in Pakistan in May 2009, noting that they were "the only game in town in terms of confronting or trying to disrupt the al-Qaeda leadership." *U.S. Airstrikes in Pakistan Called 'Very Effective'*, CNN (May 18, 2009, 6:48 PM), <http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/> [<https://perma.cc/VCS8-XBSJ>].

109. See Jane Mayer, *The Predator War*, NEW YORKER (Oct. 26, 2009), <http://www.newyorker.com/magazine/2009/10/26/the-predator-war> [<https://perma.cc/3384-AT2N>].

110. See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm> [<https://perma.cc/6H7P-G3AP>].

111. *Id.*

112. *Id.*

elaborated on the legal grounds for drone strikes.¹¹³ Although the speeches did not provide a granular discussion of legal authorities, they did offer a road map to the legal architecture of the Obama Administration's targeted killing program.¹¹⁴

The speeches maintained that: (1) the United States remains engaged in a transnational, noninternational armed conflict (NIAC) with al Qaeda and associated enemy forces; (2) the AUMF authorizes the President to use military force against those enemy forces; (3) the President has additional authority as Commander in Chief under Article II of the Constitution to protect the nation from an imminent threat of attack; (4) the President's authority to use lethal force is not limited to "hot," or active, battlefields; (5) the President may use such force against nonstate actors in another country if that country either consents to its use or is unwilling or unable to contain the threat those actors pose; and (6) all uses of force must conform to the LOAC, including the principles of necessity, distinction, and proportionality.¹¹⁵

Administration officials stressed that this legal framework provided the outer limit for the use of force and suggested that the United States often used force in a more restrictive manner as a

113. John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to our Values and Laws (Sept. 16, 2011) [hereinafter Brennan, Strengthening Our Security], <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> [<https://perma.cc/35B7-AUNW>]; John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Prepared Remarks at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012) [hereinafter Brennan, Ethics and Efficacy], <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100> [<https://perma.cc/NGT8-Q5WV>]; Eric Holder, Attorney Gen., Prepared Address at Northwestern University School of Law (Mar. 5, 2012), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> [<https://perma.cc/D585-MRQS>]; Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., Dean's Lecture at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), <https://www.lawfareblog.com/jeh-johnson-speech-yale-law-school> [<https://perma.cc/TM43-Y9F6>].

114. See Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decision-making*, 38 YALE J. INT'L L. 359, 398-401 (2013) (describing how speechmaking by Obama administration officials not only provided to the public the preexisting rationale for executive programs but also helped drive the executive "to crystallize and finally bind itself to a position").

115. See Holder, *supra* note 113 ("Our legal authority is not limited to the battlefields in Afghanistan.").

matter of policy.¹¹⁶ Thus, before launching a drone strike, U.S. officials asked whether the target posed “a significant threat to U.S. interests.”¹¹⁷ Officials, in turn, defined a significant threat as a person who; (1) is an operational leader of al Qaeda or an associated force; (2) is himself an operative in the midst of training for or planning to carry out attacks against the United States or its interests; or (3) possesses unique operational skills that are being leveraged in a planned attack.¹¹⁸ Officials noted that the United States would use lethal force only if capturing the individual was not feasible.¹¹⁹

In response to media reports that the United States had placed on a “kill list” Anwar al-Aulaqi, a U.S. citizen suspected of being a senior operational leader for Al Qaeda in the Arabian Peninsula (AQAP) in Yemen, high-level officials described the additional legal justifications for using force against a U.S. citizen. Then Attorney General Eric Holder, for example, identified the following criteria: (1) the U.S. citizen must “pose an imminent threat of violent attack against the United States;” (2) capture must not be feasible; (3) and the operation must be conducted in a manner consistent with the LOAC.¹²⁰ Holder further emphasized that no lethal strike against a U.S. citizen could go forward without a “thorough and careful review” by U.S. officials.¹²¹

Further details were provided in an unsigned and undated Justice Department “White Paper,” obtained by NBC News and made public in February 2013.¹²² The White Paper described the U.S. government’s legal position on the use of force against a U.S. citizen who “is an operational leader” of al Qaeda “located outside the United States” and who is “continually planning attacks against U.S.

116. See Brennan, Ethics and Efficacy, *supra* note 113.

117. *Id.*

118. *Id.*

119. *Id.*

120. Holder, *supra* note 113.

121. *Id.*

122. U.S. DEPT OF JUSTICE [DOJ], LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 1 (2013) [hereinafter DOJ WHITE PAPER], http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [<https://perma.cc/3DAN-4R49>]; Michael Isikoff, *Justice Department Memo Reveals Legal Case for Strikes on Americans*, NBC NEWS (Feb. 4, 2013, 5:57 PM), http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans [<https://perma.cc/MPF6-GGHZ>].

persons and interests.”¹²³ It summarized a more complete legal analysis contained in a July 16, 2010 OLC Memo,¹²⁴ which was subsequently made public in June 2014 as a result of FOIA litigation brought by the ACLU and *New York Times*.¹²⁵ The memo, which was heavily redacted, was written in response to the possible targeting of al-Aulaqi. The United States subsequently killed al-Aulaqi in a drone strike in Yemen in September 2011, along with another U.S. citizen, Samir Khan.¹²⁶

Both the White Paper and the July 16, 2010, OLC Memo discussed the legality of targeted killing. The White Paper, for example, addressed the concept of “imminence,” explaining that the United States “does not require ... clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”¹²⁷ Such a narrow conception of imminence, the White Paper explained, would force the “United States to refrain from action until preparations for an attack [were] concluded” and, therefore, “would not allow the United States sufficient time to defend itself.”¹²⁸ Instead, at least with respect to al Qaeda leaders who are continually planning attacks, the United States could strike within any “limited window of opportunity” that presented itself.¹²⁹ The White Paper and OLC Memo also defended the legality of strikes against American citizens abroad, notwithstanding the U.S. Constitution,¹³⁰ the War Crimes Act,¹³¹ and a federal criminal statute

123. DOJ WHITE PAPER, *supra* note 122, at 6.

124. See Memorandum on the Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, DOJ, for the Attorney Gen. (July 16, 2010), [hereinafter July 16, 2010 OLC Memo] https://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf [<https://perma.cc/Y6M8-QKLM>].

125. See *N.Y. Times Co. v. DOJ*, 752 F.3d 123, 126 (2d Cir. 2014); Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. TIMES (June 23, 2014), <http://www.nytimes.com/2012/07/19/world/middleeast/us-officials-sued-over-citizens-killed-in-yemen.html> [<https://perma.cc/R9CN-RYQW>].

126. See Charlie Savage, *Relatives Sue Officials Over U.S. Citizens Killed by Drone Strikes in Yemen*, N.Y. TIMES (July 18, 2012), <http://www.nytimes.com/2012/07/19/world/middleeast/us-officials-sued-over-citizens-killed-in-yemen.html> [<https://perma.cc/X7EG-ST76>]. A third U.S. citizen, Anwar al-Aulaqi's 16-year-old son, Abdulrahman al-Aulaqi, was inadvertently killed in a U.S. drone strike the following month. See *id.*

127. DOJ WHITE PAPER, *supra* note 122, at 7.

128. *Id.*

129. *Id.*

130. *Id.* at 5 (examining the legality of targeted killing under the Fourth and Fifth

prohibiting the U.S. government from killing U.S. nationals abroad.¹³² The White Paper and OLC Memo's explanations of the legal basis for strikes tracked those provided in speeches by senior administration officials and helped flesh out the legal justification for the Administration's targeted killing program.

In May 2013, President Obama delivered an address regarding drone strikes at the National Defense University.¹³³ In connection with the speech, Obama issued a Presidential Policy Guidance (PPG) outlining standards and procedures for lethal strikes that either were already in place or that would be implemented over time.¹³⁴ The PPG described drone strikes as a last resort, stating that lethal force would be used "only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively."¹³⁵ The PPG stated that lethal force would be used outside areas of active hostilities under specified criteria.¹³⁶ It further noted that targeting decisions were made "at the most senior levels of the U.S. government" and that "an additional legal analysis" is conducted if the target is a U.S. citizen.¹³⁷

The Obama Administration has thus far disclosed only one of the legal memoranda it has relied on to kill suspected terrorists; others reportedly exist.¹³⁸ But the Administration has nevertheless provided a reasonably clear outline of its legal authority to engage in

Amendments); July 16, 2010 OLC Memo, *supra* note 124, at 38 (same).

131. DOJ WHITE PAPER, *supra* note 122, at 15-16; July 16, 2010 OLC Memo, *supra* note 124, at 37.

132. DOJ WHITE PAPER, *supra* note 122, at 10 (addressing 18 U.S.C. § 1119(b)); July 16, 2010 OLC Memo, *supra* note 124, at 12 (same).

133. *See* Obama, *supra* note 95.

134. *See* Press Release, Office of the Press Sec'y, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 22, 2013) [hereinafter PPG], <https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> [https://perma.cc/C7VP-438X].

135. *Id.*

136. *Id.* (listing criteria).

137. *Id.*

138. Eleven memos reportedly exist. *See* Andrew Rosenthal, *Telling Secrets*, N.Y. TIMES: TAKING NOTE (Mar. 3, 2013, 2:15 PM), http://takingnote.blogs.nytimes.com/2013/03/05/telling-secrets/?_r=0 [https://perma.cc/HF2Y-6FDW]. At least one of those memos is another OLC memo referenced in the July 16, 2010 Memo discussed above. *See* July 16, 2010 OLC Memo, *supra* note 124, at 40.

drone strikes. Indeed, the crux of the plaintiffs' argument in FOIA litigation seeking disclosure of documents discussing the legal basis for the targeted killing of al-Aulaqi—which the Second Circuit adopted in ordering disclosure of the July 16, 2010, OLC Memo—was that the Administration's legal justifications were not secret but had already been made public through various speeches and statements by administration officials.¹³⁹

Two factors help explain the continuing perception of secret law despite the disclosure of the government's asserted authority to conduct drone strikes. First, the Administration continues to conceal critical facts surrounding drone strikes even after they have occurred. Second, and relatedly, this authority still takes the form of a general standard that has resisted liquidation through its application to specific cases, partly because of barriers to judicial review.

Take, for example, the use of "imminence." The current standard defines imminence only in the negative: it tells us more about what imminence is not—a particular attack in the immediate future—than what imminence is.¹⁴⁰ The "no other reasonable alternatives" standard evinces a similar level of generality, borne of a desire for flexibility.¹⁴¹ The current standard describes capture as the preferred approach but provides no meaningful guidance as to when it would permit targeting as an alternative to capture.

Most significantly, a broadly articulated targeting standard has helped perpetuate ambiguity regarding precisely where, with whom, and on what theory the United States is engaged in armed conflict. This uncertainty has facilitated the use of force under the AUMF against AQAP in Yemen, al Qaeda in the Islamic Maghreb (AQIM) in Somalia, and most recently, the Islamic State of Iraq and the Levant (ISIL) in Iraq and Syria.¹⁴² The list of forces covered by the

139. See *N.Y. Times Co. v. DOJ*, 752 F.3d 123, 141 (2d Cir. 2014) (finding that prior disclosures and acknowledgments through various speeches by administration officials and the DOJ White Paper waived any claim the government had to preventing release of the legal analysis contained in the OLC opinion at issue).

140. See *supra* text accompanying notes 127-29.

141. See *supra* text accompanying note 135.

142. See John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 190 (2011) (describing the government's position), <https://www.pennlawreview.com/online/159-U-Pa-L-Rev-PENnumbra-175.pdf> [<https://perma.cc/634G-9CQ8>]; Charlie Savage, *Obama Adviser Discusses Using Military on Terrorists*, N.Y. TIMES (Sept. 16, 2011), <http://www.nytimes.com/2011/09/17/us/john-o-brennan-on-use-of-military-force-against-al-qaeda.html> [<https://perma.cc/8HKN-QBPJ>] (discussing the Obama

AUMF has expanded significantly over time.¹⁴³ The United States, moreover, has often resisted specifying whether a particular group, such as AQAP, falls within the AUMF because it is part of al Qaeda or because it is a successor force.¹⁴⁴ The standard governing the use of force has thus demonstrated considerable elasticity, such as when the United States claimed it could use force against ISIL as a successor force to al Qaeda despite the various differences and tensions between the two groups.¹⁴⁵ The United States has also avoided providing a precise definition of associated forces, relying instead on generalized criteria, such as whether the new group is a “cobelligerent” of an AUMF-covered force (al Qaeda or the Taliban).¹⁴⁶ Although the Department of Defense recently provided a list of associated forces against whom the United States is presently using force,¹⁴⁷ that list does not include other groups the United States believes the AUMF covers but against whom the United States has not yet chosen to use force. The list, moreover, may expand to include additional groups in the future.

In these respects, the AUMF more closely resembles an expansive delegation of authority to confront emerging threats by extremist groups than an authorization to use force against a specific enemy. As one commentator put it, an authorization malleable enough to engage in future combat against an amorphous collection of al

Administration’s perspective on the AUMF’s application to AQAP and Al-Shabaab). The Obama Administration also relied on a separate 2002 authorization to use force against ISIL in Iraq. See Karen DeYoung & Ed O’Keefe, *Obama to Seek Congressional Authorization to Fight Islamic State*, WASH. POST (Feb. 11, 2015), https://www.washingtonpost.com/world/national-security/obama-to-seek-congressional-authorization-to-fight-islamic-state/2015/02/10/c150d2d2-b160-11e4-854b-a38d13486ba1_story.html [<https://perma.cc/J5DF-JSGK>].

143. See John Reed, *Rethinking How We Wage the Forever War*, JUST SECURITY (Apr. 20, 2015, 1:03 PM), <https://www.justsecurity.org/22220/rethinking-wage-war/> [<https://perma.cc/JN22-QWYS>].

144. See, e.g., Peter M. Shane, *The Obama Administration and the Prospects for a Democratic Presidency in a Post-9/11 World*, 56 N.Y.L. SCH. L. REV. 27, 36 (2011/2012) (quoting the government’s position regarding AQAP in Yemen).

145. See Deborah Pearlstein, *On the Theory that ISIL Is Al Qaeda*, OPINIO JURIS (Sept. 11, 2014, 4:59 PM), <http://opiniojuris.org/2014/09/11/theory-isil-al-qaeda/> [<https://perma.cc/FVR6-3QLM>].

146. Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 691-92 (2014).

147. See Marty Lederman, *Highlights from DOD General Counsel Stephen Preston’s ASIL Speech*, JUST SECURITY (Apr. 10, 2015, 5:45 PM), <https://www.justsecurity.org/21928/preston-asil-speech/> [<https://perma.cc/Z735-FXMF>].

Qaeda-affiliated persons risks opening the door to an “endless game of global whack-a-mole.”¹⁴⁸ This malleability helps illuminate the phenomenon of secret law. Rather than waging war across the globe based on a body of secret law,¹⁴⁹ the United States may thus better be understood as selectively using force under standards that provide a basic template of legal authority but that resist the type of concretization and specification that ordinarily occurs when standards are liquidated through their application to particular cases.

This approach has given the United States greater latitude to address evolving security threats and helped it navigate changes in the nature of armed conflict that have altered traditional understandings of terms such as “battlefield” and “combatant.”¹⁵⁰ But it has also loosened constraints on the use of force.

The U.N. Charter prohibits the use of force by one state against another,¹⁵¹ except when authorized by the Security Council to maintain or restore peace or security,¹⁵² or in self-defense in response to an armed attack.¹⁵³ Maintaining that the armed conflict against al Qaeda and associated groups is not territorially restricted has alleviated the need for the United States to engage in a self-defense analysis under the U.N. Charter each time it uses force by placing the use of force within the framework of armed conflict.¹⁵⁴ An elastic concept of imminence¹⁵⁵ offers additional latitude to respond with force to perceived threats before those threats have ripened. The use

148. Reed, *supra* note 143.

149. See THE STIMSON CTR., RECOMMENDATIONS AND REPORT OF THE TASK FORCE ON US DRONE POLICY 9 (2d ed. 2015), http://www.stimson.org/images/uploads/recommendations_and_report_of_the_task_force_on_us_drone_policy_second_edition.pdf [<https://perma.cc/DJ74-L69A>] (describing the perception of war waged based on secret law).

150. *Id.* at 12.

151. U.N. Charter art. 2, ¶ 4 (prohibiting the threat or use of force against the territorial integrity or political independence of any state).

152. *Id.* arts. 39, 41-42.

153. *Id.* art. 51 (authorizing the use of force in self-defense against an armed attack). Whether, and to what extent, the U.N. Charter authorizes the use force in anticipation of an armed attack remains unsettled. See Jane E. Stromseth, *New Paradigms for the Jus Ad Bellum?*, 38 GEO. WASH. INT'L L. REV. 561, 564-65 (2006). The use of force in self-defense, including against an anticipated armed attack, is also recognized under customary international law. See James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT'L & COMP. L. 429, 431, 466-69 (2006).

154. Brennan, *Strengthening Our Security*, *supra* note 113.

155. See *supra* text accompanying notes 127-29.

of signature strikes provides further flexibility, allowing the United States to launch drone strikes based on suspicious patterns of activity even if it does not know the identities of those who would be killed.¹⁵⁶

To help alleviate concerns that the current framework has weakened restraints on the use of force, Obama's PPG offers more rule-like formulations. The PPG, for example, states that there must be "[n]ear certainty that the terrorist target is present" and "[n]ear certainty that non-combatants will not be injured or killed" when lethal force is used "outside areas of active hostilities."¹⁵⁷ In fact, neither "certainty" is required under the LOAC. The PPG's insistence on "near certainty" instead reflects a concern about the implications—political, strategic, and ethical—of waging a boundaryless conflict against nonstate actors.¹⁵⁸ When applied, the PPG could provide constraints on the executive and limit operational flexibility. But it is not binding and can be dispensed with, as it reportedly has been in the recent campaign against ISIL.¹⁵⁹ Additionally, although the PPG offers a more rigorous interpretation of *jus in bello* principles that regulate the use of force *within* armed conflict, such as distinction and proportionality, it does not affect the *jus ad bellum* determination of *whether* force may be

156. See Peter Margulies, *Constraining Targeting in Noninternational Armed Conflicts: Safe Conduct for Combatants Conducting Informal Dispute Resolution*, 46 VAND. J. TRANSNAT'L L. 1041, 1074-75 (2013).

157. PPG, *supra* note 134 (footnote omitted).

158. Naz Modirzadeh, *A Reply to Marty Lederman*, LAWFARE (Oct. 3, 2014, 7:34 AM), <https://www.lawfareblog.com/reply-marty-lederman> [<https://perma.cc/MF2X-SBR5>] ("The sophistication of the PPG is that by referencing so many international law-sounding principles, it gives the appearance of a unilateral decision by the [United States government] to bind itself to a higher standard than it must, when it chooses, as a matter of policy."). Professor Modirzadeh argues that the United States has cherry-picked concepts from the (formerly) distinct legal frameworks of the LOAC and international human rights law to create a new type of "folk international law," which creates amorphous legal standards and avoids accountability. See Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SECURITY J. 225, 228-29 (2014).

159. See Michael Isikoff, *White House Exempts Syria Airstrikes from Tight Standards on Civilian Deaths*, YAHOO! NEWS (Sept. 30, 2014, 3:30 PM), <http://news.yahoo.com/white-house-exempts-syria-airstrikes-from-tight-standards-on-civilian-deaths-183724795.html> [<https://perma.cc/9N8S-B5AD>] (noting the Administration's explanation that the "near certainty" standard was meant to apply only when the United States takes direct action "outside areas of active hostilities," which "simply does not fit what we are seeing on the ground in Iraq and Syria right now").

used in the first instance.¹⁶⁰ President Obama has instead described limiting the use of force in aspirational terms, explaining his wish to decrease reliance on drone strikes,¹⁶¹ avoid a perpetual war against al Qaeda and other terrorist groups,¹⁶² and increase reliance on soft power mechanisms to address terrorist threats.¹⁶³

Criticisms about secret law made by human rights groups and other nongovernment organizations in the context of drone strikes reflect as much a concern with the current framework's fluidity as with its lack of transparency.¹⁶⁴ Law is not simply hidden; it is indeterminate. The main transparency problem remains factual, with gaps in information surrounding details such as the number of strikes, the circumstances under which they occur, and a description of those killed, including the collateral damage. A recent report, for example, provides evidence that U.S. drone strikes have continued to kill numerous civilians in Yemen despite President Obama's imposition of the "near certainty" requirement—evidence that has been hidden from the public by the secrecy that surrounds such strikes.¹⁶⁵ This informational gap does not merely make it more difficult to determine whether the law is being followed. It also raises questions about what the law actually is, because when a legal directive takes the form of a standard, it typically depends on its application to specific situations for elaboration.¹⁶⁶

That process of elaboration often occurs through adjudication.¹⁶⁷ But in the case of targeting, justiciability doctrines have thus far barred review of targeted killings, whether *ex ante* through the

160. *See supra* text accompanying notes 150-53.

161. *See* Obama, *supra* note 95 ("We cannot use force everywhere that a radical ideology takes root; and in the absence of a strategy that reduces the wellspring of extremism, a perpetual war—through drones or Special Forces or troop deployments—will prove self-defeating, and alter our country in troubling ways.").

162. *See id.* ("The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States.").

163. *See id.*

164. *See, e.g.*, Letter from Am. Civil Liberties Union [ACLU] et al. to President Barack Obama (Apr. 11, 2013), https://www.hrw.org/sites/default/files/related_material/4-11-13_US_LetterToPresidentObamaOnTargetedKillings.pdf [<https://perma.cc/A5LX-6K49>] (calling on the government to be more transparent "by demonstrating the legal bases for targeted killing policies and practices").

165. SINGH, *supra* note 106, at 40.

166. *See supra* notes 49-50 and accompanying text.

167. Kaplow, *supra* note 29, at 585.

provision of injunctive or declaratory relief or *ex post* through a damages action. When, for example, Anwar al-Aulaqi's father brought suit to challenge his son's placement on a kill list, the court dismissed the suit because it raised a nonjusticiable political question.¹⁶⁸ The district court thus declined to address the legality of the standard under which the United States can select individuals for targeted killing or its application to al-Aulaqi. By dismissing the suit, the court avoided clarifying whether a particular group (in this case, AQAP) fell within the AUMF, the required nexus of a targeted individual to that force, what particular activities make an individual an imminent threat such that they may be lawfully killed, and what alternatives to lethal force the United States would first need to employ.¹⁶⁹ Another suit was brought after the United States killed not only Anwar al-Aulaqi but also his son, Abdulrahman al-Aulaqi, whose death was the unintended result of a separate drone strike.¹⁷⁰ That *ex post* damages suit was also dismissed on justiciability grounds.¹⁷¹ The court concluded that judicial review "would impermissibly draw [it] ... into the heart of executive and military planning and deliberation" and require it to address "fundamental questions regarding the conduct of armed conflict," which, it said, should be left to the political branches.¹⁷²

The absence of an adjudicatory process to address targeted killings helps prevent any means by which legal norms, defined at a high level of generality, gain content through their application to individual cases. To borrow from Raymond Carver,¹⁷³ what we talk about when we talk about secret law is, at least partly, standards that resist particularization.

B. Surveillance and Bulk Data Collection

Secrecy has pervaded the design and implementation of bulk data collection and other surveillance programs. Those programs have together led to the collection and storage of the content and

168. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 46 (D.D.C. 2010).

169. *See id.*

170. *See* Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 58-59 (D.D.C. 2014).

171. *See id.* at 80.

172. *Id.* at 79.

173. *See* RAYMOND CARVER, WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE 137 (1981).

metadata of e-mails and telephone calls of millions of individuals.¹⁷⁴ After 9/11, President Bush authorized the NSA to collect telephony and Internet metadata and telephone and Internet content without review by the Foreign Intelligence Surveillance Court (FISC) pursuant to the President's Surveillance Program (PSP), also known by its code name, STELLARWIND.¹⁷⁵ Both the contours and legal justifications for activities conducted under the PSP have shifted over time.¹⁷⁶ After the *New York Times* revealed in December 2005 that the National Security Agency (NSA) was collecting telephone content between the United States and overseas—one component of the PSP—the Bush Administration provided its first legal explanation of the program to the public.¹⁷⁷ Initially, the Administration grounded the PSP on the President's Article II Commander in Chief authority, the War Powers Resolution, and the AUMF, which the Administration said overrode FISA's prohibition on warrantless electronic surveillance.¹⁷⁸ Continuing concerns about the PSP's legal foundations prompted the Administration to bring it within the FISA umbrella. In July 2004, the FISC approved the Administration's request to bring the Internet metadata program under FISA's pen register and trap and trace provisions,¹⁷⁹ and in May 2006, it

174. See James Bamford, *They Know Much More Than You Think*, N.Y. REV. BOOKS (Aug. 15, 2013), <http://www.nybooks.com/articles/archives/2013/aug/15/nsa-they-know-much-more-you-think/> [<https://perma.cc/ZVD8-FP3G>] (describing the collection of metadata of telephone communications); Barton Gellman, *U.S. Surveillance Architecture Includes Collection of Revealing Internet, Phone Metadata*, WASH. POST (June 15, 2013), http://www.washingtonpost.com/investigations/us-surveillance-architecture-includes-collection-of-revealing-internet-phone-metadata/2013/06/15/e9bf004a-d511-11e2-b05f-3ea3f0e7bb5a_story.html [<https://perma.cc/LB3H-R2TR>] (describing the collection of the content of Internet and telephone communications).

175. See Ryan Lizza, *State of Deception*, NEW YORKER (Dec. 16, 2013), <http://www.newyorker.com/magazine/2013/12/16/state-of-deception> [<https://perma.cc/KT6H-AD8A>].

176. See Laura K. Donohue, *FISA Reform*, 10 I/S: J. L. & POL'Y FOR INFO. SOC'Y 599, 600 (2014).

177. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?_r=0 [<https://perma.cc/45F8-5273>].

178. DOJ, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB178/surv39.pdf> [<https://perma.cc/VAY3-EV5B>].

179. Opinion and Order, No. PR/TT [Redacted], at 2-3 (FISA Ct. July 14, 2004), <http://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf> [<https://perma.cc/6VDN-JSYH>]. Although those provisions refer to “a pen register or trap and trace device,” Judge Colleen Kollar-Kotelly, the then-presiding judge of the FISC, nevertheless sanctioned the bulk

approved the Administration's request to bring the bulk collection of telephony metadata within FISA's business records provision.¹⁸⁰ The other PSP collection programs—those aimed at international telephone and Internet content—were subsequently shifted to FISA through the passage of the Protect America Act (PAA) in 2007 and the FISA Amendments Act of 2008 (FAA), which made the temporary changes of PAA permanent.

Even when the executive publicly invoked statutory authority for the PSP—whether under the AUMF, section 215 of the USA PATRIOT Act, section 702 of the FAA, or other provisions of FISA—it resisted providing the underlying legal rationale contained in still-secret OLC memoranda and FISC opinions.¹⁸¹ In addition to approving and reauthorizing bulk data collection programs, the FISC opinions found in several instances that the programs exceeded existing authority, violated prior court orders, and impermissibly captured the domestic communications of tens of thousands of Americans.¹⁸² The public were not the only ones kept in the dark. Congress was informed selectively and incompletely about these surveillance programs and the legal basis for them.¹⁸³ While its opinions had almost always remained secret before,¹⁸⁴ the FISC had

acquisition of metadata—allowing the real time and ongoing collection of the metadata of potentially tens of millions of customers—under a single FISC order covering multiple devices. *Id.* See generally Orin Kerr, *Problems with the FISC's Newly-Declassified Opinion on Bulk Collection of Internet Metadata*, LAWFARE (Nov. 19, 2013, 2:35 AM), <https://www.lawfareblog.com/problems-fiscs-newly-declassified-opinion-bulk-collection-internet-metadata> [<https://perma.cc/4N5U-P4NS>].

180. See *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Prod. of Tangible Things from [Redacted], No. BR 06-05, at 2 (FISA Ct. May 24, 2006), <http://www.documentcloud.org/documents/785206-pub-may-24-2006-order-from-fisc.html> [<https://perma.cc/NJ2K-ZAD5>].

181. See *id.*

182. See *In re* Prod. of Tangible Things from [Redacted], No. BR 08-13, at 1-2 (FISA Ct. Jan. 28, 2009), https://www.eff.org/files/filenode/br_08-13_alert_list_order_1-28-09_final_redacted1.ex_-_ocr_0.pdf [<https://perma.cc/8YM5-GQ6L>] (order regarding notice of compliance incident dated January 15, 2009); Memorandum Opinion, No. [Redacted], at 2 (FISA Ct. Oct. 3, 2011), <http://www.dni.gov/files/documents/0716/October-2011-Bates-Opinion-and%20Order-20140716.pdf> [<https://perma.cc/C98E-MCXV>] (order finding components of NSA's bulk collection under section 702 “deficient on statutory and constitutional grounds”).

183. See Letter from Sens. Ron Wyden & Mark Udall to Eric Holder, Attorney Gen. (Sept. 21, 2011), <http://www.wyden.senate.gov/download/?id=a3670ed3-9f65-4740-b72e-061c7de83f75&download=1> [<https://perma.cc/J46H-VCDV>] (“[T]he decision to classify the government's interpretations of the law itself makes informed debate on [domestic surveillance] impossible.”).

184. See Bryce Clayton Newell, *The Massive Metadata Machine: Liberty, Power, and Secret*

typically engaged in the routine application of law to facts—determining whether a warrant should issue in a particular case—rather than engaging in judicial lawmaking by interpreting the scope and legality of new surveillance programs.¹⁸⁵

The U.S. government's bulk data collection programs have served as a focal point for concerns about secret law. Prior to the revelations by former NSA contractor Edward Snowden, some lawmakers had correctly predicted that Americans would be "stunned" when they learned about secret government interpretations of statutes, such as section 215 of the USA PATRIOT Act.¹⁸⁶ Since the revelations, advocacy groups have attacked "a hidden body of law that defines the government's power to collect information about millions of Americans" and pressed for increased disclosure and transparency.¹⁸⁷

Surveillance depends on a degree of secrecy.¹⁸⁸ The government cannot conduct effective surveillance of a target that knows it is being watched. Secrecy is thus necessarily more pervasive in surveillance than in kinetic activities, such as detention and targeting, that have a visible impact and, in turn, increase pressure on public officials to justify their actions. Yet as with detention and targeting, secrecy alone does not capture the controversy over hidden interpretations of the government's legal authority. That controversy also stems from the use of elastic standards and a resistance to rules that might more sharply constrain government conduct.

Prior to FISA, foreign intelligence collection was largely unregulated by statute and unsupervised by courts. Congress enacted FISA in 1978 following the Church Committee's report documenting

Mass Surveillance in the U.S. and Europe, 10 *IS: J.L. & POL'Y FOR INFO. SOC'Y* 481, 506 (2014) ("[D]uring the first 24 years of its existence, from its inception until 2002, the FISC only ever publicly released one single opinion (which did not relate to electronic surveillance).").

185. *See id.* at 505-06.

186. 157 *CONG. REC.* S3386 (daily ed. May 26, 2011) (statement of Sen. Wyden); 157 *CONG. REC.* S3389 (daily ed. May 26, 2011) (statement of Sen. Udall).

187. Plaintiff's Memorandum of Law in Support of Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 4, *ACLU v. FBI*, 59 F. Supp. 3d 584 (S.D.N.Y. 2014) (No. 11 Civ. 7562 (WHP)); *see also id.* at 13 (describing how "pivotal interpretations of our public laws" are hidden from the public view).

188. *See* Samuel J. Rascoff, *Domesticating Intelligence*, 83 *S. CAL. L. REV.* 575, 632 (2010) (noting that "[a]t first blush, transparency seems like an odd fit with an intelligence community that inevitably carries out much of its work in secret," but also suggesting areas in which greater transparency is warranted).

decades of warrantless surveillance of U.S. citizens, including for political purposes,¹⁸⁹ and the Supreme Court's decision in *Keith* suggesting that a special, less restrictive framework for foreign intelligence surveillance might be constitutionally permissible.¹⁹⁰ FISA, as Laura Donohue has observed, "became the instrument designed to limit the NSA's collection of information on U.S. citizens."¹⁹¹ It subjected all domestic foreign intelligence surveillance, and some surveillance abroad, to a specific warrant procedure modeled on, but ultimately distinct from, the warrant procedure for criminal cases. Warrants were issued by the newly created FISC, which meets in secret and imposes a less onerous showing than for ordinary criminal wiretaps.¹⁹² FISA also required minimization procedures that are "reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information."¹⁹³ Congress subsequently amended FISA to authorize other forms of intelligence gathering.¹⁹⁴ In general, however, FISA retained its basic structure, demanding a particularized showing in relation to the target prior to the collection of information, an individualized court order, and heightened protections for U.S. persons.¹⁹⁵

The bulk collection of domestic telephony metadata, which circumvented this basic framework, is a commonly cited example of secret lawmaking. After 9/11, the Bush Administration began

189. See FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, bk. 2, at 36-40 (2D SESS. 1976), http://www.intelligence.senate.gov/sites/default/files/94755_II.pdf [<https://perma.cc/BFT6-8QKA>]. See generally FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 50-54 (2007).

190. See *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 322-23 (1972); see also *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013) (describing *Keith*).

191. Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 773 (2014).

192. See 50 U.S.C. § 1803(a) (2012).

193. 50 U.S.C. § 1801(h)(1); see also *In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002).

194. See 50 U.S.C. §§ 1821-1829 (physical searches); *id.* §§ 1841-1846 (2012) (pen registers and trap and trace devices).

195. Donohue, *supra* note 191, at 797.

collecting domestic telephone call and Internet records without judicial authority.¹⁹⁶ In May 2006, the FISC approved the bulk collection of records under section 215 of the USA PATRIOT Act; over the next seven years, fifteen different FISC judges issued thirty-five orders reauthorizing the collection.¹⁹⁷ The FISC orders did not become public until June 2013, when *The Guardian* first published documents obtained by Snowden.¹⁹⁸

The bulk telephony metadata program, however, demonstrates more than legal secrecy; it also highlights the inflationary potential of standards in the national security context. The precursor of the section 215 program was added to FISA in 1988.¹⁹⁹ It originally allowed the government to obtain an order compelling the production of business records in foreign intelligence or international terrorism investigations from common carriers, public accommodation facilities, storage facilities, and vehicle rental facilities.²⁰⁰ To obtain an order authorizing the production of records under this provision, the government had to provide the FISC with “specific and articulable facts giving reason to believe that the person to whom the records pertain[ed was] a foreign power or an agent of a foreign power.”²⁰¹ After 9/11, Congress modified this provision through section 215 of the USA PATRIOT Act and subsequent legislation. Section 215 provided for the production of “any tangible things (including books, records, papers, documents, and other items).”²⁰² It further required the government to provide the FISC with “a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) ... to obtain foreign intelligence information not concerning a United States person or to protect

196. Risen & Lichtblau, *supra* note 177.

197. Erin E. Connare, Note, *ACLU v. Clapper: The Fourth Amendment in the Digital Age*, 63 *BUFF. L. REV.* 395, 398 (2015).

198. See *Verizon Forced to Hand Over Telephone Data—Full Court Ruling*, *GUARDIAN* (June 5, 2013), <http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order> [<https://perma.cc/756M-9HLS>].

199. See 50 U.S.C. §§ 1861-1862.

200. *Id.* § 1862.

201. *Id.*

202. The only limitation on the types of records that may be obtained with a section 215 order is that the types must be obtainable with a grand jury subpoena. *Id.* § 1861(c)(2)(D).

against international terrorism or clandestine intelligence activities.”²⁰³

Section 215 thus broadened the type of records that may be obtained, replaced the requirement of “specific articulable facts” with a more generalized concept of “relevance,” and eliminated the requirement that the target be a “foreign power or an agent of a foreign power” and instead required only that the items be obtained in the course of an investigation to obtain “foreign intelligence information” to “protect against international terrorism or clandestine intelligence activities.”²⁰⁴ Although Congress still insisted on a connection between the records sought and the target of the investigation,²⁰⁵ these changes reduced the degree of specificity required of the government to obtain information. The USA PATRIOT Act made changes to other FISA provisions that similarly enhanced the government’s ability to obtain and search electronic files.²⁰⁶

Section 215’s treatment of “relevance” illustrates how standards can reduce constraints on the government’s ability to conduct surveillance. Under the section 215 program, bulk telephony metadata collection is considered relevant to counterterrorism investigations because it provides the necessary “historical repository of metadata” that may later be accessed through a more particularized query.²⁰⁷ Without that historical repository, government officials have explained, it might not be feasible to identify and examine chains of communications between a terrorist suspect and his own contacts

203. *Id.* § 1861(b)(2)(A).

204. *Id.* § 1861(b)(2)(A)(i)-(iii). The USA PATRIOT Act eliminated the “specific and articulable facts” requirement, but in 2005, Congress reintroduced a requirement that the government provide a statement of facts establishing “reasonable ground to believe that the tangible things” to be obtained were “relevant to an authorized investigation (other than a threat assessment).” USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 106(b), 120 Stat. 192, 196 (2006).

205. Donohue, *supra* note 191, at 799; *see also id.* at 804 (discussing that Congress designed FISA to be used in “*specific cases* of foreign intelligence gathering” as a means of protecting U.S. citizens’ privacy).

206. *See* USA PATRIOT Act § 216 (codified at 18 U.S.C. § 3127(3)) (increasing the availability of pen register devices to include the interception of Internet metadata); *id.* § 214 (codified at 50 U.S.C. § 1842(c)) (reducing the standard for obtaining Internet metadata so that the FBI need only certify to the FISC that the information likely to be obtained is “relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities”).

207. Brief for Defendants-Appellees at 50, *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (No. 14-42).

across different time periods and communications networks.²⁰⁸ As one district judge found in upholding the program, bulk telephony metadata collection is relevant to counterterrorism investigations because “it allows the querying technique to be comprehensive” and enables the government to “draw connections it might otherwise never be able to find.”²⁰⁹ But as the Privacy and Civil Liberties Oversight Board (PCLOB) cautioned: “[I]f the government develops an effective means of searching through *everything* in order to find *something*, then *everything* becomes relevant to its investigations,” and relevance “becomes limited only by the government’s technological capacity to ingest information.”²¹⁰

In response to the controversy over Snowden’s revelations about the section 215 program, President Obama announced several reforms, including submitting requests to query the database to the FISC, which would have to find reasonable articulable suspicion that the number to be queried was connected to a suspected terrorist (rather than allowing the executive to decide that question on its own), and limiting queries to within two “hops” of the original contact number queried (as opposed to the three hops previously permitted).²¹¹ In May 2015, the U.S. Court of Appeals for the Second Circuit declared in *ACLU v. Clapper* that the bulk metadata collection program exceeded the authority granted by Congress.²¹² The court thus rejected the government’s expansive interpretation of section 215’s relevance standard, upon which it relied to create a historical repository of information unconnected to any specific

208. *See id.*

209. *ACLU v. Clapper*, 959 F. Supp. 2d 724, 748 (S.D.N.Y. 2013), *rev’d*, 785 F.3d 787 (2d Cir. 2015). Orin Kerr has called this new approach “a collect-it-all-and-query-with-suspicion model.” Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1528 (2014).

210. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD. [PCLOB], REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 62 (2014), https://www.eff.org/files/2014/01/23/final_report_1-23-14.pdf [<https://perma.cc/73LM-2XZH>]. The PCLOB is an independent agency within the executive branch.

211. *See* President Barack Obama, Remarks on Review of Signals Intelligence (Jan. 17, 2014 11:15 AM), <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intellig> [<https://perma.cc/D629-V4W2>]; Charlie Savage, *Obama to Call for End to N.S.A.’s Bulk Data Collection* N.Y. TIMES (Mar. 24, 2014), http://www.nytimes.com/2014/03/25/us/obama-to-see-nsa-curb-on-call-data.html?_r=0 [<https://perma.cc/5XMN-JR54>].

212. *See* 785 F.3d 787, 812 (2d Cir. 2015).

investigation. On June 2, 2015, just one day after section 215 had expired under a sunset provision in the statute, Congress enacted the USA FREEDOM Act, ending the bulk domestic metadata collection program.²¹³ Among other changes, the Act prohibits the government from collecting telephony metadata, which must instead remain with private companies, and requires the government to obtain a warrant from the FISC to access such metadata.²¹⁴ Both the Second Circuit's ruling in *Clapper* and the enactment of the USA FREEDOM Act thus pushed back against one component of expanded surveillance powers that had developed in secret through the articulation of broad standards.

FISA section 702 has also relaxed constraints on government surveillance. After 9/11, President Bush authorized the NSA to conduct warrantless wiretapping of telephone and e-mail communications in which "one party to a communication was located outside the United States and a participant in 'the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization.'"²¹⁵ Passage of the FAA in 2008 brought this surveillance activity under FISA.²¹⁶ The FAA dispensed with several traditional FISA requirements. Under the FAA, the government no longer has to show probable cause that the target of the electronic surveillance is a foreign power or an agent of a foreign power; it also no longer has to specify the nature and location of each of the particular facilities or places where that surveillance occurs. Instead, the FAA permits the targeting of persons "reasonably believed to be outside the United States" when a "significant purpose" of the surveillance is to acquire "foreign intelligence information."²¹⁷ Additionally, the statute diminishes the FISC's authority to demand, and eliminates its authority to supervise, privacy-intrusion minimization procedures that are instance-specific.²¹⁸ These changes

213. See *Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring (USA FREEDOM) Act of 2015*, Pub. L. No. 114-23, 129 Stat. 268, 282. The Act provides for a six-month transition period, after which bulk collection is prohibited. *Id.*

214. See *id.*

215. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143-44 (2013) (quoting Appendix to Petition for Certiorari at 403a, *Clapper*, 133 S. Ct. 1138 (No. 11-1025)).

216. *Id.* at 1144.

217. 50 U.S.C. § 1881a(a), 1881a(g)(2)(A)(v) (2012).

218. *Id.* § 1881a(e).

deprive targeting of its ordinary meaning: in place of a rule requiring specific information about an individual “target,” the FAA permits programmatic surveillance by substituting a broad standard of “foreign intelligence information” and severing any nexus to particular individuals.²¹⁹ While the FAA nominally limits the targets of surveillance to foreign nationals, it enables the surveillance of U.S. citizens whose communications are collected “incidentally” in the process,²²⁰ a result FISA was originally intended to prevent.²²¹

Word play has facilitated the *sub rosa* transformation of intelligence rules into permissive standards. As Jennifer Granick has explained, the NSA has repeatedly “warp[ed] language in order to make rules mean something very different from what ordinary people would take them to mean.”²²² For example, when Senator Ron Wyden (D-OR) asked Director of National Intelligence James Clapper whether the NSA collects any information on millions or hundreds of millions of Americans,²²³ Clapper responded “[n]o ... [n]ot wittingly.”²²⁴ In fact, the NSA was collecting such information,

219. *Id.* § 1881a(g)(2)(A)(v).

220. Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html [<https://perma.cc/H3XK-9N3N>] (describing secret rules instructing NSA analysts to enter search terms “that are designed to produce at least 51 percent confidence in a target’s ‘foreignness’”); Faiza Patel, *Extending Privacy Protections to Foreigners Will Benefit Americans*, JUST SECURITY (Nov. 6, 2014, 3:04 PM), <https://www.justsecurity.org/17170/extending-privacy-protections-foreigners-benefit-americans/> [<https://perma.cc/28VK-7SMN>] (describing the risks of incidental collection of U.S. citizen communications).

221. Donohue, *supra* note 191, at 771-73 (describing the incidental collection of information about U.S. persons prior to FISA).

222. See Jennifer Granick, *The Surveillance State’s Legalism Isn’t About Morals, It’s About Manipulating the Rules*, JUST SECURITY (Nov. 13, 2014, 10:00 AM), <https://www.justsecurity.org/17393/ics-legalism-morals-manipulating-rules/> [<https://perma.cc/GD48-XML9>]. Granick notes that “[a] Defense Intelligence Agency ‘intelligence law handbook’ explains that a [Defense Department] document regulating NSA conduct has special definitions of commonly used words, so that analysts should ‘adjust their vocabulary’ lest they be led astray by relying on commonly understood definitions.” *Id.* But see Margo Schlanger, *Intelligence Legalism and the National Security Agency’s Civil Liberties Gap*, 6 HARV. NAT’L SECURITY J. 112, 117-18 (2015) (describing the rise of “intelligence legalism,” which prefers rules and rights over policy-based solutions that could more effectively protect civil liberties).

223. *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 113th Cong. 66 (2013) (statement of Sen. Ron Wyden, Member, S. Select Comm. on Intelligence).

224. *Id.* (testimony of James R. Clapper, Director of National Intelligence).

as Clapper knew at the time.²²⁵ However, Clapper later defended his answer, which he called the “most truthful, or least most untruthful” statement he could make, by distinguishing between “collect” and “gather.”²²⁶

Surveillance standards, moreover, have resisted narrowing despite evidence of noncompliance. In 2009, FISC Judge Reggie Walton expressed concern about the government’s use of identifiers to query the database of telephony metadata collected under section 215 that did not meet the “reasonable, articulable suspicion” standard prescribed by the FISC.²²⁷ Such misuse of these identifiers, Judge Walton explained, would amount to a “flagrant violation” of FISC orders.²²⁸ He later stated that the NSA’s explanation for its noncompliance with FISC courts “strains credulity.”²²⁹ Judge Walton nevertheless allowed the telephony metadata collection program to continue with reforms,²³⁰ which were subsequently lifted.²³¹

Former FISC Chief Judge John Bates identified significant compliance problems with bulk data collection under section 702 of the

225. See Granick, *supra* note 222.

226. Interview by Andrea Mitchell, NBC News Chief Foreign Affairs Correspondent, with James R. Clapper, Dir. of Nat’l Intelligence, in Tysons Corner, Va. (June 8, 2013), <http://www.dni.gov/index.php/newsroom/speeches-and-interviews/195-speeches-interviews-2013/874-director-james-r-clapper-interview-with-andrea-mitchell> [<https://perma.cc/X2U7-2NMU>]. Clapper maintained that the NSA merely gathered—as opposed to collected—information about specific targets, later analogizing collection to “taking the book[] off the shelf, opening it up and reading it.” *Id.*

227. Order Regarding Preliminary Notice of Compliance Incident Dated Jan. 15, 2009 at 1-2, *In re* Prod. of Tangible Things from [Redacted], No. BR 08-13 (FISA Ct. Jan. 28, 2009), http://www.dni.gov/files/documents/section/pub_Jan%2028%202009%20Order%20Regarding%20Prelim%20Notice%20of%20Compliance.pdf [<https://perma.cc/EH68-HBLF>].

228. *Id.* at 4.

229. Order at 5, 11, *In re* Prod. of Tangible Things from [Redacted], No. BR 08-13 (FISA Ct. Mar. 2, 2009), http://www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from%20FISC.pdf [<https://perma.cc/PH6M-A6G5>] (complaining that the minimization procedures had been “so frequently and systemically violated that it can fairly be said that this critical element of the overall [section 215 program] has never functioned effectively”).

230. Susan Freiwald, *Nothing to Fear or Nowhere to Hide: Competing Visions of the NSA’s 215 Program*, 12 J. ON TELECOMM. & HIGH TECH. L. 309, 328-29 (2014).

231. Specifically, the FISC lifted its requirements that the NSA query the database with prior FISC approval (or, in an emergency, to query the database on its own but then notify the FISC by close of the next business day) and that the NSA file a weekly report listing each time over the preceding seven-day period it had shared any information derived from bulk metadata collections with anyone outside the NSA. See Donohue, *supra* note 191, at 819-20.

FAA.²³² The NSA relied on that provision to collect data not only directly from Internet companies under the PRISM program, but also from upstream communications (containing both metadata and content) passing through undersea fiber optic cables and sweeping up the protected domestic communications of U.S. persons in the process.²³³ Judge Bates nevertheless found that the procedures met the required standard for collection because they were

“reasonably designed” to: 1) “ensure that any acquisition authorized under [the certifications] is limited to targeting persons reasonably believed to be located outside the United States”; and 2) “prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.”²³⁴

He reached this conclusion by interpreting the “reasonableness” standard to accommodate technological limitations: because the NSA lacked the means to filter out wholly domestic communications,²³⁵ its failure to do so was not unreasonable.²³⁶ Judge Bates did conclude, however, that the minimization standards were not “reasonably designed” to minimize the retention of that information.²³⁷

As Orin Kerr has observed, the FISC’s interpretation of surveillance laws suffers from the lack of an effective feedback mechanism.²³⁸ Although ordinary criminal warrants are also issued *ex parte*, they can provide for *ex post* review after a warrant is issued. Once evidence has been seized and criminal charges filed, a defendant can seek to suppress the evidence.²³⁹ This *ex post* review has produced an extensive body of jurisprudence under the Fourth Amendment

232. See Memorandum Opinion, No. [redacted], at 7 (FISA Ct. Oct. 3, 2011), https://www.eff.org/files/filenode/fisc_opinion_-_unconstitutional_surveillance_0.pdf [<https://perma.cc/AU3E-BC7E>].

233. *Id.* at 5.

234. *Id.* at 41-42 (alteration in original) (quoting 50 U.S.C. § 1881a(d)(1), 188a(d)(1)(2)(B) (2006)).

235. *Id.* at 30 (“[D]ue to the technological challenges associated with acquiring Internet transactions, NSA is unable to exclude certain Internet transactions from its upstream collection.”); see also *id.* at 44-45.

236. *Id.* at 48, 58.

237. *Id.* at 62-63. Instead, those standards maximized the retention of that information. *Id.* at 78.

238. Kerr, *supra* note 209, at 1519-20.

239. *Id.*

exclusionary rule, liquidating constitutional standards—such as whether a warrant issued on probable cause and, therefore, was reasonable—by means of their application to particular facts.²⁴⁰ The result has been the creation of a thicket of rules regulating law enforcement conduct²⁴¹ through case-by-case adjudication.²⁴²

Surveillance laws, as drafted, seek to balance privacy and security.²⁴³ But unlike in the case of ordinary criminal warrants, there is typically no review of the judge's *ex parte* decision to grant a FISA order. One consequence is that surveillance standards, by remaining indeterminate, tend to augment executive authority, rather than being distilled into rules that help constrain it. Secrecy exacerbates this effect by preventing public debate and hindering legal challenges by preventing those subject to surveillance from establishing standing to bring suit.²⁴⁴

Other factors are at work as well, including the desire to preserve flexibility in the face of rapid technological change.²⁴⁵ New surveillance programs are partly a response to developments that have made it more difficult to apply a legal framework premised on a strict division between domestic and international communications.

240. See, e.g., *Samson v. California*, 547 U.S. 843, 848 (2006) (explaining that “reasonableness” is to be determined by examining the “totality of circumstances” in a particular case to “assess[, on the one hand, the degree to which [government conduct] intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests” (quoting *United States v. Knights*, 534 U.S. 112, 118-19 (2001))); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (describing reasonableness as “the ultimate touchstone of the Fourth Amendment”).

241. See *New York v. Belton*, 453 U.S. 454, 458 (1981) (“Fourth Amendment doctrine ... is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.” (quoting Wayne R. LaFare, “*Case-by-Case Adjudication*” versus “*Standardized Procedures*”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141)); Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 536 (2005) (“[T]he modern Supreme Court has used the text of the Fourth Amendment to craft a comprehensive set of rules regulating law enforcement.”).

242. See *California v. Carey*, 471 U.S. 386, 400-01 (1985) (Stevens, J., dissenting) (“The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication.”).

243. Kerr, *supra* note 209, at 1517.

244. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (dismissing suit challenging the FAA on the ground that plaintiffs could not establish with sufficient certainty that they had been the target of surveillance).

245. See Kerr, *supra* note 209, at 1522-23 (explaining that “the Internet and technological surveillance tools are constantly morphing and relentlessly dynamic”).

Today, for example, many foreign-to-foreign communications, which would otherwise remain outside FISA,²⁴⁶ now touch a U.S. wire, thus triggering the requirement of a court order under the FISA framework. In a world in which it is increasingly difficult to know which communications to intercept, government officials are prone to favor standards over rules. Secret law, as it is commonly described, thus encompasses more than a lack of transparency in the underlying legal authority; it also suggests concerns about the fluidity of a legal standard that gives government officials greater latitude to act in a changing technological environment at the expense of more rule-like constraints.

IV. SECRET LAW AS A PROBLEM OF STANDARDS: SOME IMPLICATIONS

Perceptions of legal secrecy derive not only from an absence of transparency but also from indeterminacy in the law itself due to the expression of legal directives through standards. Standards are particularly attractive in the national security context because of the flexibility they give officials to adapt existing legal authorities to new and rapidly changing situations. Viewing secret law as a problem of standards has several implications. Most obviously, it suggests that the common framing—as a conflict between legal secrecy and transparency—is too simple. Secrecy exacerbates the tendency of standards towards expansion and contributes to their ambiguity. But increased transparency alone will not halt reliance on national security standards, cabin their inflationary trajectory, or cure the problem misdiagnosed as secret law.

Reframing the problem of secret law as one of standards thus raises the threshold question of whether greater determinacy is possible in this area. Adrian Vermeule has argued that U.S. administrative law is essentially Schmittian.²⁴⁷ He divides administrative law into a series of legal “black holes” and “grey holes.”²⁴⁸ “Black

246. Such foreign-to-foreign communications instead fall under Executive Order No. 12,333, 46 Fed. Reg. 59,941, 59,948 (Dec. 4, 1981).

247. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1103-04 (2009).

248. *Id.* at 1096; see also DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 3 (2006).

holes,” a term coined by Law Lord Johan Steyn,²⁴⁹ “either explicitly exempt[] the executive from the requirements of the rule of law or explicitly exclude judicial review of executive action.”²⁵⁰ “Grey holes,” as described by David Dyzenhaus,²⁵¹ exist when “there are some legal constraints on executive action ... but the constraints are so insubstantial that they pretty well permit government to do as it pleases.”²⁵² Standards operate within the latter space, serving as what Professor Vermeule describes as “adjustable parameters” to provide a rule-of-law facade to executive action.²⁵³

Professor Vermeule thus finds in standards evidence of the need to afford the executive sufficient latitude to respond to the exigencies of national security. He explains that “[e]mergencies cannot realistically be governed by ex ante, highly specified rules, but at most by vague ex post standards; it is beyond the institutional capacity of lawmakers to specify and allocate emergency powers in all future contingencies.”²⁵⁴ Instead, Professor Vermeule argues that the absence of constraints in the legal regime regulating emergency power, whether or not normatively desirable, is inevitable.²⁵⁵ Standards intended to govern national security powers will remain adjustable parameters, whether or not they are secret, and the legal directives they implement will resist liquidation into rules. If such indeterminacy is inevitable, then trying to give content to the grey holes of standards is hopeless.

However, others have challenged Professor Vermeule’s assessment of the inevitability of black and grey holes. Evan Criddle has explained not only how Congress might cabin national security exceptions in the Administrative Procedure Act (APA) that provide for legal black holes,²⁵⁶ but also why federal courts are not “institutionally

249. See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 1 (2004).

250. Vermeule, *supra* note 247, at 1096 (quoting DYZENHAUS, *supra* note 248, at 3).

251. DYZENHAUS, *supra* note 248, at 3.

252. *Id.* at 42.

253. Vermeule, *supra* note 247, at 1097.

254. *Id.* at 1101.

255. *Id.* at 1133.

256. See Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. COLLOQUY 309, 311-12 (2010), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1197&context=nulr_online [<https://perma.cc/ZXA9-G9SN>] (describing steps Congress could take, including designing malleable procedural requirements to accommodate agencies’ legitimate concerns for speed and efficiency without abandoning procedural

predestined to convert the APA's flexible standards into grey holes."²⁵⁷ Professor Criddle distinguishes between reasoned deference and de facto abstention, arguing that even after 9/11, federal courts engaged in the latter not the former.²⁵⁸ While flexible legal standards may increase the opportunities for judicial abstention, he maintains that judicial review can still give content to national security standards.²⁵⁹

Others have focused on the traditional separation of national security rule making from ordinary domestic rule making.²⁶⁰ The APA has a "foreign or military affairs function" exception to its usual notice-and-comment requirements,²⁶¹ which Robert Knowles has proposed cabining through comprehensive rule-making reform.²⁶² Professor Knowles argues that greater use of notice-and-comment rulemaking would not only increase public participation but would also promote a regulatory approach that is more effective and protective of individual rights,²⁶³ at least if coupled with judicial review

restraints during national crises or requiring agencies to develop their own ad hoc administrative procedures for emergencies); *see also* David Dyzenhaus, *Schmitt v. Dickey: Are States of Emergency Inside or Outside the Legal Order?*, 27 *CARDOZO L. REV.* 2005, 2026-28 (2006) (describing possible legal models to respond to emergencies).

257. Criddle, *supra* note 256, at 312.

258. *Id.* ("[L]ower courts in the post-9/11 cases Vermeule identifies undertook a robust review of agency actions, identifying substantial evidence supporting the agency's position and articulating a detailed explanation for upholding the agency's decision.").

259. *Id.* at 313 ("[T]he public need not necessarily resign itself to the inevitability of executive and judicial lawlessness during national crises.").

260. Knowles, *supra* note 5, at 889-90.

261. *See* 5 U.S.C. § 553(a)(1) (2012) (stating that notice-and-comment requirements apply "except to the extent that there is involved ... a military or foreign affairs function of the United States"). Professor Knowles describes the exception as "an expression of, if not the foundation of, the national security administrative state." Knowles, *supra* note 5, at 904. The APA also contains an exception from notice-and-comment requirements for when there is "good cause" because such requirements would be "impracticable, unnecessary, or contrary to the public interest." *See* 5 U.S.C. § 553(b)(3)(B).

262. Knowles, *supra* note 5, at 933-34 (proposing, for example, issuance of an executive order requiring additional procedural requirements for rule making by nonindependent federal agencies).

263. *Id.* at 938-43 (advocating more frequent use of notice-and-comment rule making, enforced by courts through greater scrutiny of an agency's decision to forego such rule making). For example, Professor Knowles explains how use of notice-and-comment rule making could have avoided, or at least minimized, the problems associated with a program implemented after 9/11—and widely regarded as a failure—that required noncitizens of specifically designated countries—almost exclusively Muslim nations—to specially register with the Justice Department. *Id.* at 892-94.

that scrutinizes the rationales employed during the agency's decision-making process.²⁶⁴ Under a *Chenery*-based model of judicial review, for example, a court would uphold an agency rule only on the grounds specified by the particular agency when the rule was developed, thus limiting agency power to create policy outside independent scrutiny.²⁶⁵

The evolution of detention authority under the AUMF suggests that grey holes are not inevitable. As described above, the Guantanamo habeas litigation provided an important catalyst in the gradual liquidation of a detention standard under the AUMF.²⁶⁶ To be sure, that standard retains considerable flexibility and remains vulnerable to deferential review in individual cases. But judicial scrutiny did force the executive to articulate legal positions and prompted decisions on the AUMF's content. It not only had an information-forcing effect but also helped define the AUMF's outer reach.²⁶⁷ Notably, the law has become more particularized on issues with which courts have engaged, such as the category of individuals covered by the AUMF, while remaining more uncertain on questions courts have tended to avoid, such as the scope and duration of the armed conflict itself.²⁶⁸

In short, courts have the potential to mitigate the inflationary potential of standards. Conversely, barriers to justiciability eliminate an important mechanism for liquidating national security standards, as has been the case in challenges to targeted killing, which have thus far been dismissed on justiciability grounds.²⁶⁹ In

264. *Id.* at 903.

265. *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) (holding that discretionary administrative action will be upheld only on grounds specified by the agency in the record).

266. *See supra* text accompanying notes 81-89.

267. Rebecca Ingber has observed that an unintended consequence of federal habeas litigation was to force the Obama Administration Justice Department into a reactive posture and cause it to adopt a more expansive view of presidential detention power than it might otherwise have taken if it had been relieved of litigation pressures and given greater space to deliberate. *See* Ingber, *supra* note 114, at 375-76. Whether the absence of such pressures would have led the new administration to adopt a more moderate position is uncertain. Litigation did, however, provide the primary means by which the AUMF's broadly worded directive on the use of military force became more defined. *See id.*

268. Jonathan Hafetz, *Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. REV. 326, 348-49, 386-87 (2014) (describing failure of habeas corpus review to address questions surrounding the length of AUMF detention).

269. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (dismissing suit

these areas in particular, perceptions about secret law persist. These perceptions point not only to continuing gaps in transparency but also to how the relevant legal authority continues to take the form of a generalized standard that resists liquidation.

Proposals designed to address barriers to judicial review can increase the opportunity for standards to gain content through their application to particular cases. One way would be through reform of the state secrets privilege,²⁷⁰ which has barred adjudication of unlawful detention and treatment of detainees.²⁷¹ Another way would be legislation that expressly authorizes damages actions, thus eliminating an obstacle to suits challenging targeted killing and other contested government conduct.²⁷² The suits might still result in dismissal, but litigation would provide a means for a fuller and more refined articulation of the standard at issue.

Surveillance poses particularly difficult challenges because the need for secrecy—which necessarily excludes notifying the target or allowing for his participation—is in tension with the central features of the adversarial process, which are notice and an opportunity to be heard. As the pre-Snowden FISC opinions show, the absence of this process limited the potential of court review to impose limits on the growth of standards.²⁷³ One reform that could

challenging the President's authority under the AUMF to engage in the targeted killing of a U.S. citizen in Yemen for lack of standing and on political question grounds). Efforts to define the scope of the President's authority to engage in lethal force have thus drawn by analogy on decisions in habeas cases interpreting the scope of the President's detention authority under the AUMF. See Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 773-74 (2011).

270. See, e.g., State Secrets Protection Act, S. 2533, 110th Cong. (2008) (as introduced in Senate, Jan. 22, 2008).

271. See John Ames, Note, *Secrets and Lies: Reynolds' Partial Bar to Discovery and the Future of States Secret Privilege*, 39 N.C. J. INT'L L. & COM. REG. 1067, 1078-79, 1089 (2014).

272. See Stephen I. Vladeck, Response, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11, 23-24 (2014), http://www.gwlr.org/wp-content/uploads/2014/02/Vladeck_SME2.pdf [<https://perma.cc/MX7C-37RU>] (advocating congressional creation of an express cause of action providing for judicial review of targeted killings after the fact).

273. See *supra* text accompanying notes 182-98. While recipients themselves may challenge orders issued under section 215 or section 702 before the FISC, no recipient has utilized the adversarial process provided under the statute. See Letter from the Hon. Reggie B. Walton, Presiding Judge, U.S. Foreign Intelligence Surveillance Court, to the Hon. Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate 8-9 (July 29, 2013), <http://www.leahy.senate.gov/imo/media/doc/Honorable%20Patrick%20J%20Leahy.pdf> [<https://perma.cc/3Y9P-SSAZ>]. As a result, the mass suspicionless surveillance programs implemented pursuant to these provisions were approved “almost entirely through *ex parte*, *in camera* judicial

lead to a greater elaboration of legal standards under FISA without compromising the need for secrecy in surveillance is the appointment of a special advocate before the FISC.²⁷⁴ Several former FISC judges²⁷⁵ and scholars²⁷⁶ have supported the appointment of a special advocate, which could reduce the risk that the FISC would uphold expansive interpretations of surveillance authority based on *ex parte* submissions. Unlike other *ex parte* proceedings, FISC review of applications requires extensive analysis and creates precedent for future cases.²⁷⁷ But the adjudicatory process tends to suffer when judges do not hear both sides of an argument or do not receive the type of in-depth briefing warranted by complex, fact-based Fourth Amendment issues and the technical details of surveillance programs.²⁷⁸ As the President's Review Group explained in proposing the creation of a Public Interest Advocate, "judges are in a better position to find the right answer on questions of law and fact when they hear competing views."²⁷⁹

In response to these proposals, Congress included a provision in the USA FREEDOM Act that authorizes the FISC to appoint an individual to serve as *amicus curiae* to participate in cases that present "a novel or significant interpretation of the law."²⁸⁰ Whether

proceedings." See, e.g., Stephen I. Vladeck, *The Case for a FISA "Special Advocate"*, 2 TEX. A&M L. REV. (forthcoming 2016) (manuscript at 6), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546388 [<https://perma.cc/973T-WWGB>].

274. See Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(a)(1) (1st Sess. 2013) (proposing the creation of a standing pool of private "public interest advocates" appointed by the PCLOB, but not residing within any branch of the government).

275. See James G. Carr, Opinion, *A Better Secret Court*, N.Y. TIMES (July 23, 2013), http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html?_r=0 [<https://perma.cc/YNH7-3DPX>]; Charlie Savage, *Nation Will Gain by Discussing Surveillance, Expert Tells Privacy Board*, N.Y. TIMES (July 9, 2013), <http://www.nytimes.com/2013/07/10/us/nation-will-gain-by-discussing-surveillance-expert-tells-privacy-board.html> [<https://perma.cc/D6UQ-ETTT>] (noting the views of former FISC Judge James Robertson).

276. See, e.g., Vladeck, *supra* note 273 (manuscript at 23).

277. Alan Butler, *Standing Up to Clapper: How to Increase Transparency and Oversight of FISA Surveillance*, 48 NEW ENG. L. REV. 55, 88 (2013).

278. *Id.* at 88-89.

279. RICHARD A. CLARKE ET AL., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 203 (2013), http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf [<https://perma.cc/L8JK-FB93>].

280. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring (USA FREEDOM) Act of 2015, Pub. L. No. 114-23, § 401, 129 Stat. 268, 279.

this measure, which leaves the appointment in the FISC's discretion, will succeed in providing more balanced presentations on important issues remains to be seen. But it offers a potential check against the inflationary potential of standards.

Another way to facilitate the liquidation of surveillance standards would be to provide greater disclosure to criminal defendants where the government has obtained evidence through FISA, thus creating an opportunity for a defendant to contest the warrant. While individuals whose communications are monitored under FISA normally do not receive notice of the government's surveillance, the government is statutorily required to notify them if it intends to rely on evidence "obtained or derived" from FISA or the FAA in a criminal prosecution.²⁸¹ If, in response to a defendant's motion for disclosure, the Attorney General files an affidavit asserting the national security risks of disclosure, the court must conduct an *ex parte*, in camera review to determine if the surveillance was lawful.²⁸² The statute further contemplates that the court may order disclosure if in camera and *ex parte* review will not suffice to determine the lawfulness of the surveillance.²⁸³ This mechanism for disclosure and adversarial process not only provides a layer of protection to defendants, but also affords a means by which surveillance standards can be concretized through application to individual cases. But this mechanism has been underutilized. The government has often failed to disclose when evidence has been obtained or derived from FISA or the FAA²⁸⁴ or to disclose the specific authorities it used to obtain the evidence cited in its FISA applications.²⁸⁵ Courts have also typically declined to provide an adversarial process, despite their authority to do so.²⁸⁶ In the one instance in which a court did order

281. 50 U.S.C. §§ 1806(c), 1825(d), 1881(e) (2012).

282. *Id.* § 1806(f).

283. *See id.* (stating that a court may disclose FISA materials to the defendant under appropriate security procedures and protective orders "where such disclosure is necessary to make an accurate determination of the legality of the surveillance").

284. *See* Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16, 2013), <http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html> [<https://perma.cc/TYGK-WNPQ>] (describing the government's narrow construction of the "derived from" requirement).

285. *See* *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 (2013) (describing the various ways the government gains intelligence through surveillance).

286. *See* Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants, & the Right to Notice*, 54 SANTA CLARA L. REV. 843, 865-69, 874-75

an evidentiary hearing to determine if FISA-derived evidence was lawfully obtained,²⁸⁷ an appeals court reversed the ruling.²⁸⁸

While review by courts or agencies is the most common means for liquidating standards, other mechanisms might be considered. For example, Allen Buchanan and Robert O. Keohane have proposed adoption of an international Drone Accountability Regime to address continuing gaps in transparency and accountability surrounding the use of this technology.²⁸⁹ Although the proposed regime would be based on an informal agreement among states, it would require public justifications for specific strikes after they occur, which would be evaluated by an independent Ombudsperson.²⁹⁰ This review process could help concretize norms of use by states through a nonjudicial process that examines the application of ex ante standards to specific drone strikes.

Pressure from civil society can serve as a catalyst for liquidating national security standards. For example, increased public attention on drone strikes against suspected terrorists helped force the Obama administration to articulate limitations on drone use.²⁹¹ These limitations were outlined initially in a series of speeches and eventually in the PPG, which provided further nonbinding constraints on drone strikes conducted outside “hot” battlefields.²⁹²

Yet uncertainty and controversy continue to surround the use of drone strikes.²⁹³ The main obstacle to increased clarity is not a lack of transparency about the legal standards for targeting, but rather an absence of information about how those standards are applied in individual cases. LOAC principles such as necessity, proportionality, and distinction—all of which are incorporated into official U.S. targeting standards—gain content through their application to

(2014) (describing the failure to provide defendants notice of the use of FISA-derived evidence and the implications for the development of Fourth Amendment jurisprudence).

287. See *United States v. Daoud*, No. 12 cr 723, 2014 WL 321384, at *3 (N.D. Ill. Jan. 29, 2014).

288. See *United States v. Daoud*, 755 F.3d 479, 485 (7th Cir.), supplemented by 761 F.3d 678 (7th Cir. 2014).

289. See generally Allen Buchanan & Robert O. Keohane, *Toward a Drone Accountability Regime*, 29 *ETHICS & INT'L AFF.* 15 (2015).

290. *Id.* at 16-17.

291. See *supra* text accompanying notes 108-32.

292. See *supra* text accompanying notes 133-37.

293. See, e.g., Buchanan & Keohane, *supra* note 289, at 18-20 (describing the attractions and risks of drone use).

concrete situations.²⁹⁴ Increased precision and certainty in the law will come with increased knowledge of how those standards are employed in individual cases. Creating more opportunities for courts to review the application of standards to specific facts could help achieve this result.

CONCLUSION

The current legal landscape surrounding the exercise of national security powers, from the use of military force to bulk data collection, exhibits a deficient, if sometimes deeply flawed, combination of rules and standards. The former may be resisted—or violated outright, as in the case of some surveillance programs—because of concerns about imposing *ex ante* restrictions on the executive's ability to respond to new threats and adapt to rapid technological change. Lawmakers ordinarily seek clarity to induce compliance and avoid socially harmful conduct,²⁹⁵ but much national security law making—particularly surrounding surveillance—is not primarily concerned with inducing compliance. Rather, national security law making is often concerned with gathering information about possible future noncompliance without notifying potentially noncompliant actors. Standards provide enhanced flexibility but can expand over time and evade liquidation into more rule-like constraints. The different forms and distribution of judicial review impede the tailoring that ordinarily results from applying standards to the facts of individual cases.

In some instances, no review occurs because of threshold justiciability doctrines, such as the state secrets privilege or political question doctrine. In other instances, review is *ex parte* and not subject to correction. And in other instances, the political economy of litigation—which favors risk-averse decision making and judicial deference to the executive—limits oversight and stunts clarification of the law. Meanwhile, institutional incentives and political pressures encourage the executive to pursue a legal framework that maximizes its flexibility to respond to emerging security threats.

294. See Koh, *supra* note 96.

295. Diver, *supra* note 28, at 73.

The problem of inflationary standards is often misidentified as secret law. To be sure, secrecy remains an important issue, as it can obscure the indeterminacy in the underlying legal authority on which executive officials are relying, shield critical facts from public view, and justify barriers to litigation for fear of disclosing sensitive security information. Yet the conception of secret law as a fixed body of legal authority hidden from the public that needs only to be uncovered fails to capture how the law itself continues to take the form of generalized and elastic standards. Increased precision in the law requires not only more transparency, which facilitates public discussion and debate, but also more opportunities for national security standards to be liquidated through their application to particular cases.

