

2015

# Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs

Andrew Kent

*Fordham University School of Law*, [akent@law.fordham.edu](mailto:akent@law.fordham.edu)

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Comparative and Foreign Law Commons](#), and the [National Security Law Commons](#)

---

## Recommended Citation

Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 Colum. L. Rev. 1029 (2015)

Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/617](http://ir.lawnet.fordham.edu/faculty_scholarship/617)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# ESSAY

## DISAPPEARING LEGAL BLACK HOLES AND CONVERGING DOMAINS: CHANGING INDIVIDUAL RIGHTS PROTECTION IN NATIONAL SECURITY AND FOREIGN AFFAIRS

*Andrew Kent\**

*This Essay attempts to describe what is distinctive about the way the protection of individual rights in the areas of national security and foreign affairs has been occurring in recent decades. Historically, the right to protection under the U.S. Constitution and courts has been sharply limited by categorical distinctions based on geography, war, and, to some extent, citizenship. These categorical rules carved out domains where the courts and Constitution provided protections and those where they did not. The institutional design and operating rules of the national security state tracked these formal, categorical rules about the boundaries of protection. There have been many “legal black holes” historically, domains where legal protections did not exist for certain people. Foreign affairs and national security have historically been areas defined by their legal black holes.*

*In recent years, legal black holes are disappearing, and previously distinct domains are converging. The importance of U.S. citizenship to protection under the Constitution and courts is decreasing, formal barriers to legal protection and judicial review based on geography and war are dissolving, and the dissolution of these categorical boundaries is changing the design and operation of the national security state. National security and foreign affairs law is being domesticated and normalized, as rights protections available in ordinary, domestic, peacetime contexts are extended into what were previously legal black holes. The jurisprudence of categorization and boundary-marking is fading away.*

*The core of this Essay identifies, names, and discusses these trends, seeking to give a vocabulary and conceptual and historical coherence to current discussions of individual rights protection in national security and foreign affairs contexts. Secondarily, this Essay suggests some factors that might be driving convergence and closing of legal black holes*

---

\* Professor, Fordham Law School; Faculty Adviser to the Center on National Security at Fordham Law. This Essay benefited from presentations at a faculty workshop at Fordham Law School and a symposium on the Future of National Security Law at Pepperdine Law School. Thanks to Corey Brettschneider, Karen J. Greenberg, Duncan B. Hollis, Robert Kaczorowski, Sonia Katyal, Joseph Landau, Thomas H. Lee, Ethan J. Leib, Martin Flaherty, Martha Rayner, and Benjamin C. Zipursky for helpful discussions and/or comments on earlier versions of this project.

*today. Because most of these potential causal drivers are still exerting their force on the shape of the law, this Essay concludes that the future of national security law will likely see more convergence and fewer black legal holes and then offers several specific predictions.*

## INTRODUCTION

It has been quite common in the last decade, when difficult legal questions were raised about individual rights and judicial review—the rights, for example, of noncitizen military detainees at Guantanamo, or of U.S. citizens targeted with drone strikes in Yemen or elsewhere—to hear lawyers assert that centuries-old understandings, precedents, and practices support their arguments. For instance, in the *Rasul*<sup>1</sup> and then the *Boumediene*<sup>2</sup> litigation, lawyers and law professors supporting the detainees confidently asserted that common law and constitutional principles and practices dating back to the eighteenth century and even earlier clearly mandated that the detainees had a right to habeas review, while lawyers and law professors on the other side just as confidently asserted the opposite.<sup>3</sup> Supporters of rights for detainees and others affected by post-9/11 security actions contended that the Bush Administration's claims that, under traditional understandings, the Constitution did not protect certain persons or places, were attempts to create "legal black holes,"<sup>4</sup> something which was said to be shocking and even un-American.<sup>5</sup>

---

1. *Rasul v. Bush*, 542 U.S. 466, 470–73 (2004) (concerning habeas corpus review of U.S. military detentions of suspected al Qaeda and Taliban supporters at military base in Guantanamo Bay, Cuba).

2. *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (same).

3. Compare Brief for Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae Supporting Petitioners at 5–25, *Boumediene*, 553 U.S. 723 (Nos. 06-1195), 2007 WL 2441580 (arguing historical case law and practice show persons such as detainees have long been protected by habeas corpus and Suspension Clause), with Brief for the Foundation for Defense of Democracies et al. as Amici Curiae Supporting Respondents at 5–12, *Boumediene*, 553 U.S. 723 (No. 06-1195), 2007 WL 2972242 (arguing there is no historical precedent of habeas corpus protection of persons such as detainees).

4. Kate Zernike, McCain and Obama Split on Justices' Guantanamo Ruling, *N.Y. Times* (June 13, 2008), <http://www.nytimes.com/2008/06/13/us/politics/13candidates.html> (on file with the *Columbia Law Review*) (quoting Senator Barack Obama). The term seems to have been coined by Johan Steyn. See Johan Steyn, Guantanamo Bay: The Legal Black Hole, 53 *Int'l & Comp. L.Q.* 1, 1 (2004) ("The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taliban in a legal black hole at the United States naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals.").

5. See Countdown with Keith Olbermann (MSNBC television broadcast June 22, 2007) (statement of Prof. Neal Katyal, Salim Hamdan's attorney), transcript available at [http://www.nbcnews.com/id/19415786/ns/msnbc-countdown\\_with\\_keith\\_olbermann/t/countdown-keith-olbermann-june/#.VNVdS1PF\\_IQ](http://www.nbcnews.com/id/19415786/ns/msnbc-countdown_with_keith_olbermann/t/countdown-keith-olbermann-june/#.VNVdS1PF_IQ) (on file with the *Columbia Law Review*) ("[T]he administration's argument is that Guantanamo is an [sic] legal black hole where

The effect of all this has been to suggest a kind of continuity in legal thought about how people are protected from overreaching by the U.S. government. But any suggestion of continuity is mistaken. Rather than continuity, there has been enormous change. Research about the Founding period,<sup>6</sup> the Civil War,<sup>7</sup> the age of imperialism at the turn of the twentieth century,<sup>8</sup> and the period spanning the two World Wars and early Cold War,<sup>9</sup> reveals that historical understandings about the protection of individual rights in national security and foreign affairs contexts<sup>10</sup> were profoundly different than modern understandings.

During these earlier eras, there was a stable and identifiable form or structure to the legal thought about individual rights and judicial review in foreign affairs.<sup>11</sup> In the last few decades, however, it has begun to

---

they can do whatever they want . . . . [T]hat is . . . fundamentally un-American to say, These people have no rights whatsoever.”).

6. See generally Philip Hamburger, *Beyond Protection*, 109 Colum. L. Rev. 1823, 1826 (2009) (showing in Founding era, persons who did not owe allegiance received no legal protection); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L.J. 463, 464–65 (2007) [hereinafter Kent, *Global Constitution*] (finding no evidence Founding generation thought U.S. Constitution provided extra-territorial protections but finding much evidence it did not).

7. See generally Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 Notre Dame L. Rev. 1839, 1845–52 (2010) [hereinafter Kent, *Civil War*] (showing during Civil War, persons resident in enemy territory and members of enemy’s armed forces lacked protection of Constitution and laws).

8. See generally Andrew Kent, *Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases*, 97 Iowa L. Rev. 101, 103, 112–13 (2011) [hereinafter Kent, *Insular Cases*] (showing *Insular Cases* held or assumed Constitution did not protect persons outside sovereign territory of United States, military enemies wherever located, and persons within newly-acquired sovereign territory in which congressional civil government had not yet been established); Andrew Kent, *Habeas Corpus, Protection, and Extraterritorial Constitutional Rights: A Reply to Stephen Vladeck’s “Insular Thinking About Habeas,”* 97 Iowa L. Rev. Bull. 34, 37–40 (2012) (showing in two little-known *Insular Cases*, Supreme Court apparently assumed noncitizens located in Panama Canal Zone and in newly-annexed Puerto Rico, which was still governed by U.S. military, were not protected by the Constitution’s Suspension Clause or other procedural rights).

9. See generally Andrew Kent, *Do Boumediene Rights Expire?*, 161 U. Pa. L. Rev. PENnumbra 20, 33–34 (2012) [hereinafter Kent, *Boumediene Rights*], available at [http://scholarship.law.upenn.edu/penn\\_law\\_review\\_online/vol161/iss1/6/](http://scholarship.law.upenn.edu/penn_law_review_online/vol161/iss1/6/) (on file with the *Columbia Law Review*) (contrasting approaches mid-nineteenth-century Court applied to court access for enemy aliens); Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 Vand. L. Rev. 153, 156–57 (2013) [hereinafter Kent, *Enemy Fighters*] (arguing until 1942 *Quirin* case, enemy fighters had never been thought to be entitled to access U.S. courts during wartime to claim protections from Constitution or other municipal laws).

10. This refers to contexts where the United States is involved in warfare, relations with foreign countries, or extraterritorial intelligence gathering, covert action, or law enforcement.

11. See *infra* Part I (discussing how entitlement to individual rights was understood to be delimited by territorial location, enemy status during wartime, and citizenship).

change, and this change has recently accelerated.<sup>12</sup> The longstanding form or structure of rights protection was based on categorical rules and boundary-drawing. The primary axes along which the protections of the Constitution and domestic laws and courts were delimited were territorial location, citizenship, and enemy status during wartime.<sup>13</sup> For instance, enemy aliens (citizens or subjects of a nation at war with the United States) were barred from accessing U.S. courts during wartime unless they resided in America and had refrained from taking hostile actions against the United States.<sup>14</sup> And all aliens who were outside the United States lacked any rights under the U.S. Constitution.<sup>15</sup> Even if present in the United States (say, as prisoners of war), enemy fighters lacked any right to access U.S. courts and any individual rights under the Constitution.<sup>16</sup> And even citizens could lose protection from the Constitution and courts during wartime when present at sites of actual battles.<sup>17</sup>

The domain of protection was therefore based on formal, categorical distinctions between U.S. territory and abroad, war and peace, resident and nonresident, citizen and noncitizen, enemy fighter and not, and zone of battle and elsewhere. Many legal black holes existed where persons, places, or contexts were on the wrong side of the categorical divide and were outside the protection of the law. This is not a claim that *inter arma enim silent leges*—in times of war, the laws are silent<sup>18</sup>—that is, that existing legal restraints tend to disappear in practice during wartime as government stretches the boundaries of the permissible. The claim is that the accepted boundaries of legal protection were limited by categorical distinctions as to place, person, and context.

---

12. See *infra* Part III (discussing recent changes to individual rights in foreign affairs and national security contexts).

13. See *infra* Part I (summarizing historical evidence that these categorical distinctions prevailed).

14. See *infra* notes 36–41 and accompanying text (discussing historical treatment of enemy aliens).

15. See *infra* notes 29–33 and accompanying text (discussing importance of geography in constitutional protection); see also Kent, *Global Constitution*, *supra* note 6, at 485–505 (identifying “background assumptions and conceptions” of legal status of aliens outside United States at Founding).

16. See *infra* Part I (summarizing historical evidence); see also Kent, *Enemy Fighters*, *supra* note 9, at 180–88, 193–96, 198–99, 202–05 (discussing treatment of enemy fighters in England and during early American wars and Civil War).

17. See *infra* Part I (summarizing historical evidence); see also Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 *S. Cal. L. Rev.* 1123, 1165 (2014) [hereinafter *Kent, Damages*] (summarizing rules of common law and law of nations).

18. The phrase dates back to Cicero and is frequently used today to describe, and criticize, the way courts are said to become much more deferential to political branches’ responses to emergencies than ordinary legal rules should allow. See Richard H. Pildes, *Law and the President*, 125 *Harv. L. Rev.* 1381, 1385 & n.19 (2012) (reviewing Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010)) (noting origin of phrase and modern usage).

Importantly, these categorical limitations on the domain of protection from the Constitution and courts in the national security area were instantiated by structural doctrines and institutional design choices by Constitution drafters, Congress, and the executive branch.<sup>19</sup> The sharp point of the spear of the national security state was aimed outside the United States. The U.S. military and, when they developed later in American history, foreign-intelligence organizations like the Central Intelligence Agency and National Security Agency, were generally deployed outward against noncitizens abroad, while internally it was law enforcement agencies like the Federal Bureau of Investigation that took the lead.<sup>20</sup>

In recent years, the older understandings and practices have started to break down. The distinctions between domestic and foreign, enemy and friend, peace and war, and citizen and noncitizen are breaking down, both in the real world and in the law determining the domain of rights and the right to access the courts. Formal barriers to legal protection and judicial review based on categorical distinctions about citizenship, geography, or war are dissolving, and the dissolution of these categorical boundaries is also reflected in changes to the design and operation of the national security state. I call this process “convergence”—previously distinct boundaries are softening and previously distinct spheres are becoming more alike. National security is becoming less an exceptional zone of limited or nonexistent legal protection and instead more like the domestic sphere where robust judicial review provides significant protections from government overreaching. Legal black holes are shrinking or closing entirely.

This Essay aims first to identify and describe these trends, seeking to give a vocabulary as well as a conceptual and historical coherence to current discussions of individual rights protection in national security and foreign affairs contexts. Second, as a kind of research agenda for further inquiry, it suggests some possible causal factors that might be driving these changes and, in light of this, makes some predictions about the future.

Legal black holes in contemporary law have been examined by other scholars. David Dyzenhaus, in advocating that a robust, substantive version of the rule of law should prevail even when government is responding to contemporary security emergencies, decries legal black holes as “lawless void[s]” where the executive can act without legal constraint, either because the substantive law does not cover the situation or judicial

---

19. See *infra* Part I (summarizing categorical distinctions established in Founding period).

20. See *infra* Part II.B (describing formation of modern national security system and division of responsibility).

review is unavailable.<sup>21</sup> Dyzenhaus, who focuses primarily on the United Kingdom, Canada, and Australia, sees evidence that courts are gradually closing legal black holes in those countries by “put[ting] a rule-of-law spine into the adjudication of national security.”<sup>22</sup> His account is thus broadly congruent with my description of the trend in U.S. law and practice.<sup>23</sup>

Other scholars writing about national security and foreign affairs have recently noted the blending and converging of previously distinct

---

21. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* 1–3 (2006).

22. *Id.* at 174.

23. Dyzenhaus also coined the term “legal grey holes” to describe “disguised black holes,” that is, situations where “there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases.” *Id.* at 3, 42. Adrian Vermeule has argued that contemporary U.S. administrative law is full of legal grey holes and even a few black holes, because of the standards for judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012). Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *Harv. L. Rev.* 1095, 1096–97 (2009). According to Vermeule, the large body of legal rules and practices that govern review of administrative agencies is pervasively founded upon “open-ended standards or adjustable parameters—for example, what counts as ‘arbitrary’ or ‘unreasonable’ . . .” *Id.* at 1097. Vermeule argues “that courts can and do adjust” these open-ended standards “during perceived emergencies to increase deference to administrative agencies,” often in practice being so deferential as to represent only “a sham” of legal constraint. *Id.* Unlike Dyzenhaus, Vermeule thinks that legal grey holes are inevitable and, it appears, often have benefits as well as drawbacks. *Id.* at 1033, 1136; cf. Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 *Nw. U. L. Rev.* 1271, *passim* (2010) (questioning Vermeule’s descriptive account); Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 *B.U. L. Rev.* 1917, 1974–77 (2012) (same).

With his co-author Eric Posner, Vermeule has also argued that the modern U.S. President is, in practice, “unbound” by law: The “law does little to constrain the modern executive.” Posner & Vermeule, *supra* note 18, at 15. In both ordinary domestic and national security contexts, and during both peacetime and emergencies, Posner and Vermeule suggest that legal constraints such as statutes and constitutional rules are typically vague enough, and courts are sufficiently deferential when law is invoked against executive action, that the executive in practice exists almost entirely in a legal grey hole. See, e.g., *id.* at 15, 52–58, 84–112. This Essay is not concerned with whether lax enforcement of legal constraints renders them merely nominal (legal grey holes); it focuses instead on well-accepted categorical rules and structures embodying those rules that, for much of American history, made certain persons, places, and contexts legal black holes. And, in any event, I join those critics who think that the suggestion that the modern U.S. executive operates in a pervasive legal grey hole is significantly overstated as an empirical matter. See, e.g., Jack Goldsmith, *Power and Constraint* (2012) (describing how national security actions of modern executive are restrained and made accountable by various mechanisms and institutions); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 *Colum. L. Rev.* 1097, 1149–52 (2013) (calling for additional empirical research on presidential legal constraints); Pildes, *supra* note 18, at 1392–403 (reviewing Posner & Vermeule and noting evidence that executive is restrained by law). This Essay suggests instead that the clear historical trend is toward greater legal constraint enforced by courts on the executive in the areas of foreign affairs and national security.

domains, akin to the processes I will describe. Robert Chesney has shown how the U.S. legal authorities and operating rules governing military versus intelligence operations have been converging.<sup>24</sup> Chesney and Jack Goldsmith have argued that the substantive and procedural law governing detention in military versus law enforcement contexts have been converging.<sup>25</sup> Joseph Landau has written about how the due process revolution in domestic law, primarily in the “new property” area, was assimilated into both immigration and national security law, helping spur greatly increased judicial protection for noncitizens in those areas.<sup>26</sup> And Richard Pildes and Samuel Issacharoff have shown how changes in law, political culture, and military technology are putting increasing pressure on the military to “individuate,” that is, to apply force in a surgical manner so that it only impacts individuals who have been deemed targetable or guilty in some fashion through fair procedures.<sup>27</sup> All of these insights provide context for the convergence in rights protection and the disappearance of legal black holes that I describe below.

Parts I–III are the core of this Essay. Part I sketches the historical structure of legal protections in national security and foreign affairs domains, characterized by categorization, boundary-drawing, and legal black holes. Part II shows how demarcations of the Constitution’s and courts’ domain for protecting individual rights based on geography, war, and citizenship were mirrored by the institutional design choices and operating rules at the heart of the national security state. Part III documents the convergence that has been taking place recently in rights protection and the closing of legal black holes. Part IV, the more speculative section, offers some thoughts about the reasons for convergence and closing of legal black holes, suggests areas for future research, and predicts that convergence is likely to continue if not accelerate.

## I. THE HISTORICAL DOMAIN OF THE CONSTITUTION AND RIGHT TO ACCESS THE COURTS

People can be protected from government overreaching in a number of ways. In the U.S. system, they may or may not have rights under

---

24. See Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. Nat’l Security L. & Pol’y 539, 544–83 (2012).

25. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079, 1100–20 (2008) (discussing convergence in era of post-9/11 military detention).

26. See Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 Conn. L. Rev. 879, 894–911 (2015) [hereinafter Landau, *Due Process*] (highlighting influence of *Matthews v. Eldridge* on due process in contexts of immigration and national security).

27. Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. Rev. 1521, 1596 (2013) [hereinafter Issacharoff & Pildes, *Targeted Warfare*] (arguing changes are part of “profound but partial transformation regarding the legitimate use of military force”).



the Constitution, international law, the common law, or statutory or regulatory law. They may be able to access U.S. courts to seek protection, or they may not. Government institutions may or may not be structured in ways that provide legal or practical protection. Historically, the traditional rules determining who had what kind of protections from the laws, courts, and other institutions in the national security domain have been based on a series of sharp, categorical distinctions.

This Part summarizes the traditional, categorical rules about protection from the laws and courts. I am generalizing a great deal here because the supporting research is presented in detail in other places<sup>28</sup> and, in any event, this Essay is focused on big themes that span historical epochs rather than doctrinal nuance at a given point in time.

Geography or territorial location has historically been a crucial determinant of protection from the Constitution and the courts. Generally speaking, both citizens and noncitizens within the United States were protected by the Constitution and could access the courts to claim protection.<sup>29</sup> But, before the twenty-first century, noncitizens outside the sovereign territory of the United States were held to lack any constitutional rights.<sup>30</sup> On the other hand, U.S. citizenship or lawful permanent residence in the United States did at times provide some extraterritorial rights protection. Most of the controversial and coercive national security activities of the U.S. government occur outside the United States, and hence the expansion and use of U.S. power around the globe in the late twentieth and early twenty-first centuries have generated recurring controversies about extraterritorial constitutional rights.<sup>31</sup>

---

28. See Hamburger, *supra* note 6, at 1834–44, 1955–73 (documenting relationship between allegiance and protection in colonial and Founding periods); Kent, Damages, *supra* note 17, at 1163–67 (analyzing historical and other reasons for Supreme Court’s reticence to extend *Bivens* to national security sphere); Kent, *Insular Cases*, *supra* note 8, at 103–18 (disputing that *Insular Cases* provide support for *Boumediene*’s extension of constitutional habeas corpus to alleged enemy fighters held outside United States); Andrew Kent, Citizenship and Protection, 82 *Fordham L. Rev.* 2115, 2118–23 (2014) [hereinafter Kent, Citizenship] (exploring role traditionally played by territorial location, domicile, enemy status, and citizenship in determining scope of constitutional protections); Kent, Civil War, *supra* note 7, at 1872–1911 (discussing reconceptualization of legal rights during Civil War era); Kent, *Boumediene* Rights, *supra* note 9, at 28–32 (assessing scope of enemy combatants’ rights under *Boumediene* and prior law); Kent, Enemy Fighters, *supra* note 9, at 169–213 (analyzing inability of enemy fighters to access courts via habeas corpus or otherwise); Kent, Global Constitution, *supra* note 6, at 485–505 (analyzing extraterritorial rights of noncitizens at time of Founding).

29. See Kent, Citizenship, *supra* note 28, at 2118–20.

30. See Kent, *Insular Cases*, *supra* note 8, at 123–32; Kent, Global Constitution, *supra* note 6, *passim*; see also *Boumediene v. Bush*, 553 U.S. 723, 770 (2008) (“It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.”).

31. See, e.g., *Boumediene*, 553 U.S. at 732–39 (concerning constitutional challenge to Congress’s stripping of habeas jurisdiction to review military detentions of non-U.S.

In earlier centuries, this general approach to determining the domain of rights was described as a reciprocal relationship between allegiance and protection. Those who owed and gave allegiance—all citizens and any noncitizens who were peacefully resident or traveling within the United States—were generally within the protection of the domestic laws, courts, and government of the United States.<sup>32</sup> In contrast, persons who owed no allegiance received no protection.<sup>33</sup>

Wartime also exposed a domestic–international law divide in protection. Both U.S. citizens and aliens on the home front remained protected by constitutional and other domestic law rights during war,<sup>34</sup> but all persons resident in an enemy nation, enrolled in an enemy’s armed forces (enemy fighters), or present at the site of actual combat were out of the protection of the Constitution.<sup>35</sup>

Wartime used to be understood as an exceptional state during which all ordinary civil intercourse between persons of warring nations was, in theory if not in practice, interdicted.<sup>36</sup> Since the first decade under the Constitution, Congress has empowered the President to detain or expel enemy aliens during declared wars or invasions of the United States.<sup>37</sup> In previous nation-to-nation wars, large numbers of civilian enemy aliens were excluded from the United States, detained in the United States, or

citizens at U.S. military enclave at Guantanamo Bay); *Hamdan v. Rumsfeld*, 548 U.S. 557, 566–69 (2006) (concerning constitutional and statutory challenges to military commission trial of non-U.S. citizen at Guantanamo Bay); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262–63 (1990) (concerning application of Fourth Amendment to search of Mexican residence conducted by U.S. and Mexican law enforcement while Mexican property owner was in custody of U.S. law enforcement); *In re Terrorist Bombings of U.S. Embassies in E. Afr.* (Fifth Amendment Challenges), 552 F.3d 93, 103–05, 108, 115 (2d Cir. 2008) (concerning application of Fifth Amendment to interrogation by U.S. law enforcement of foreign nationals held by Kenyan law enforcement).

32. See *Kent*, Civil War, *supra* note 7, at 1853–55 (discussing legal rights of and availability of judicial review to individuals present in and pledging their allegiance to United States).

33. See *Hamburger*, *supra* note 6, *passim*; *Kent*, Enemy Fighters, *supra* note 9, at 176–211; *Kent*, Global Constitution, *supra* note 6, at 503–05.

34. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118–31 (1866) (holding unconstitutional military trial of noncombatant in Union state not under martial law); *Kent*, Damages, *supra* note 17, at 1163–65 (summarizing relevant legal authorities).

35. See *Milligan*, 71 U.S. at 118, 123, 131 (suggesting persons in those contexts lacked protection from constitutional rules announced by Court); *Kent*, Civil War, *supra* note 7, *passim* (documenting nearly universal belief and practice persons in those categories lack protection from Constitution and laws); *Kent*, Enemy Fighters, *supra* note 9, at 176–211 (same).

36. See, e.g., *Matthews v. McStea*, 91 U.S. 7, 9–10 (1875) (“It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war and the effect of a state of war, even when not declared, that all commercial intercourse and dealing between . . . the contending powers is unlawful, and is interdicted.”).

37. See Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 21 (2012)) (giving President such power with respect to “all natives, citizens, or subjects of the hostile nations or government, being of the age of fourteen years and upward”).

repatriated.<sup>38</sup> Under both the common law and the law of nations, all commercial intercourse, including contracts, between civilian residents of warring nations was illegal during wartime.<sup>39</sup> And ancient rules allowed the military and, in some circumstances, even private citizens to seize the private property of enemy aliens during war.

Thus, according to Chancellor James Kent:

[W]hen the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other . . . . When hostilities have commenced, the first objects that naturally present themselves for detention and capture are the persons and property of the enemy, found within the territory at the breaking out of the war. According to strict authority, a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property, and detain the persons as prisoners of war.<sup>40</sup>

The Supreme Court colorfully summarized these traditional understandings:

In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat.<sup>41</sup>

Wartime was thus an exceptional state of greatly diminished or even nonexistent legal rights for residents and citizens of the enemy nation.

Prior to the twentieth century, the common law and international law were as or more frequently invoked than the U.S. Constitution to provide protections against the U.S. government.<sup>42</sup> Therefore, questions

---

38. See, e.g., Kent, *Enemy Fighters*, *supra* note 9, at 208–09 (noting during First World War, United States interned several thousand enemy civilians); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 *NYU L. Rev.* 1402, 1418 (1992) (enumerating enemy aliens interned and repatriated during and immediately after World War II).

39. See *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 535 (1867) (“[A]s soon as war is commenced all trading, negotiation, communication and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful.”).

40. James Kent, *Commentaries on American Law* 56 (1826).

41. *The Rapid*, 12 U.S. (8 Cranch) 155, 160–61 (1814). See generally Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 *Brit. Y.B. Int’l L.* 323, 325 (1951) (“The courts of the United States have been particularly prone to start from the premiss that all inhabitants of the enemy state and all persons adhering to it are enemies, notably in connexion with property rights, treasonable conduct, and commercial intercourse with the enemy at common law.”).

42. David Sloss, *Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation*, 71 *Wash. & Lee L. Rev.* 1757, 1760 (2014) (documenting “forgotten history of nineteenth century public law litigation” and noting “federal courts routinely applied a mix of international law, statutes, and common law to protect fundamental rights and restrain government action” rather than Constitution as done today); see also Kent, *Damages*, *supra* note 17, at 1163–67 (noting same effect).

of domain and how it has changed over time cannot only examine entitlement to *constitutional* protection. Because common law and international law often functioned as effective substitutes for constitutional protection,<sup>43</sup> it should not be surprising that the availability of those protections also depended on war, geography, and citizenship. Access to protection under common law or international law was controlled both procedurally and substantively—by both procedural and standing doctrines about who could access the courts to seek legal protection and substantive doctrines about the scope of rights.<sup>44</sup> Civilian enemy aliens (nationals of a country at war with the United States) domiciled abroad did not have the right to access U.S. courts during wartime.<sup>45</sup> Enemy fighters, no matter their nationality, domicile, or actual location, could not access U.S. courts during wartime.<sup>46</sup> Even U.S. citizens domiciled in an enemy nation during wartime lacked the right to access U.S. courts.<sup>47</sup> Moreover, it was generally held that “[I]east of all[] will the common law undertake to re-judge acts done *flagrante bello* in the face of the enemy.”<sup>48</sup>

International law was also a realm of categorical distinctions and legal black holes where no protection was available. Until the mid-twentieth century, international law provided very little and often no protection to a country’s own nationals, concerned as it was with state-to-state relations and treatment of foreign nationals.<sup>49</sup> In earlier eras, even within the domains where international law applied, there were categorical exclusions from protection. It was generally thought that international law bound only “civilized” nations in the mutual relations<sup>50</sup> and

---

43. See Kent, Damages, *supra* note 17, at 1163–67 (recounting historical use of common law tort suits instead of federal law or Constitution by U.S. citizens against government officials).

44. See *id.*

45. Kent, Enemy Fighters, *supra* note 9, at 188–93, 196–98, 207–09, 212.

46. *Id.* at 193–96, 198–99, 204, 206, 209.

47. See Kent, Civil War, *supra* note 7, at 1905–07.

48. *Tyler v. Pomeroy*, 90 Mass. (8 Allen) 480, 484–85 (Mass. 1864). And complying with the laws of war was a complete defense to a common law tort suit. See, e.g., *Terrill v. Rankin*, 65 Ky. (2 Bush) 453, 457 (Ky. Ct. App. 1867) (“Unless the order was authorized by the laws of war, it conferred on the appellee no legal authority and, consequently, his act was illegal.”).

49. See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law As Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 818 (1997) (“Historically, CIL [customary international law] primarily governed relations among nations, such as the treatment of diplomats and the rules of war. Today, however, CIL also regulates the relationship between a nation and its own citizens, particularly in the area of human rights.”).

50. See, e.g., Henry Wheaton, *Elements of International Law* 17–18 (Richard Henry Dana ed., 8th ed. 1866) (“Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or those of European origin.”).

that it did not apply, or at least did not have to be followed, when the civilized interacted with those considered savage or uncivilized.<sup>51</sup> During warfare against an uncivilized opponent, theorists of the law of nations and laws of war taught that law either did not apply or that it applied and allowed or even encouraged extreme violence, like summary execution of captured enemies or wholesale extermination of combatants and civilians.<sup>52</sup> It was commonly said that barbarians or other “savage” opponents could be treated like wild animals—that is, simply slaughtered.<sup>53</sup> According to Thomas Hutchinson, a historian who was also lieutenant governor and later governor of the Massachusetts Bay Colony, military enemies who “have no regard to the law of nations . . . therefore deserve no human respect.”<sup>54</sup> Western nations, including the United States, tended to act with extraordinary severity against foes deemed uncivilized or savage.<sup>55</sup>

The same general categorical rules and exemptions from legal obligation pertained to persons or groups that committed acts of violence and plunder unlawfully, such as banditti, marauders, pirates, and guerillas.<sup>56</sup> Even the theorist Emmerich de Vattel, an exponent of more civilized and peaceful norms of international conduct than generally prevailed in his day, taught that “[a] Nation that is attacked by enemies of

---

51. See S. James Anaya, *Indigenous Peoples in International Law* 26–27 (2d ed. 2004) (discussing view that international law only applied to European-recognized, “civilized” states).

52. See, e.g., 3 Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* § 34, at 246 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758) (noting “nations are justified in uniting together . . . with the object of punishing, and even of exterminating savage peoples” like “those barbarians . . . who make war from inclination and not from love of country”); see also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 27 (2005) (describing Vitoria’s views on lawfulness of violence against unbelievers or Indians who bear arms against Christians); Elbridge Colby, *How to Fight Savage Tribes*, 21 *Am. J. Int’l L.* 279, 279–80 (1927) (documenting widespread view that customary laws of war did not apply or applied much more loosely in conflicts with “savage” or “uncivilized” enemies).

53. See, e.g., Stephen C. Neff, *War and the Law of Nations* 30 (2005) (discussing Aristotle’s view that conflicts against “barbarians” were comparable to fights against wild beasts); Richard Tuck, *The Rights of War and Peace* 161–62 (1999) (discussing Samuel Pufendorf’s view that peoples like marauding Mongols and Turks could be hunted down like “Beasts of Prey”).

54. 2 Thomas Hutchinson, *The History of the Province of Massachusetts-Bay* 83 (2d ed., London, J. Smith 1768).

55. See generally Robert M. Utley, *Frontier Regulars: The United States Army and the Indian, 1866–1891* (Bison Books 1984) (1973) (detailing various atrocities committed by United States in American Indian Wars); Russell F. Weigley, *The American Way of War* 153–63 (1973) (same).

56. 2 William Winthrop, *Military Law* 11 (Washington, D.C., W.H. Morrison, Law Bookseller and Publisher 1886) (noting guerillas are “regarded as criminals and outlaws, not within the protection of the rights of war, or entitled . . . to be treated as prisoners of war, but liable to be shot, imprisoned, or banished, either summarily where their guilt is clear or upon trial and conviction by military commission”).

this sort is not under any obligation to observe towards them the rules belonging to formal war.”<sup>57</sup>

In sum, under traditional domain rules, noncitizens located outside the United States, military enemies (wherever located), and all persons at a site of active combat were outside the protection of the Constitution. The right to access U.S. courts to claim protection from the Constitution or other laws was denied to military enemies and to nonresident enemy aliens. The domain of protection from domestic laws and courts was therefore based on formal, categorical distinctions between domestic and foreign territory, war and peace, citizen and noncitizen, resident and nonresident, enemy fighter and enemy nonfighter, and zone of battle and elsewhere. Protections of international law also depended on categorical distinctions between citizen versus noncitizen and civilized versus uncivilized.

## II. INSTITUTIONAL DESIGN AND OPERATING RULES FOR THE NATIONAL SECURITY STATE

In their design and rules of the road, the national security institutions of the United States have observed and instantiated the categorical distinctions between foreign and domestic, enemy and friend, war and peace, and citizen (or noncitizen permanent resident) and noncitizen, and the like. These structures and internal operating rules therefore provide either legal or practical protection to persons who might be affected by national security or foreign affairs activities of the United States. Neither the statutory or regulatory operating rules for national security institutions that protect individual rights nor the institutional designs that provide structural protections to certain persons, places, and contexts were universally protective, however. Largely paralleling the situation with rules for individual rights protection discussed in Part I, the institutional structures and operating rules demarcated some persons, places, and contexts that were not protected. Often these substitutional operating rules and institutional design decisions have greater practical importance for protecting individual liberty and property interests than do primary rules regarding individual rights and court access found in constitutional law, international law, or the common law, and it is thus important to sketch their outlines in order to understand the historical baseline against which modern changes can be discerned. In describing these institutional design features and operating rules, it is helpful to distinguish between the post–World War II period, when the modern national security state developed, and earlier eras of U.S. history.

---

57. de Vattel, *supra* note 52, § 68, at 258.

### A. *Premodern Period*

For much of American history, a zone of liberty within the United States was preserved primarily by institutional design, intentional neglect and weakness, and ideological aversion to a strong domestic military, intelligence, or law enforcement presence. The common law also played an important role in limiting the role of the military or militarized law enforcement within the United States.

The national government that would wield the military force of the nation was designed by the Founding generation to be small and concerned primarily with external objects, in order to protect the liberties of the American people.<sup>58</sup> Thus, the level of government with more constant and encompassing control over the daily lives of Americans—the state governments and their subordinate, local bodies—would not be clothed with the awesome military and foreign affairs powers.<sup>59</sup>

The Constitution places the military firmly under civilian control by the U.S. government,<sup>60</sup> ensuring that its strength, while needed against external foes, will not be turned inward to threaten domestic liberties. The Constitution also specifies that federally controlled military force may be used internally only to the extent necessary to “execute the Laws of the Union,” “suppress Insurrections,”<sup>61</sup> or at the request of the state government affected, protect states “against domestic Violence.”<sup>62</sup>

The U.S. Army was generally tiny prior to the Civil War, and was garrisoned mostly on the frontiers, far away from the population centers.<sup>63</sup> The permanent defense establishment consisted primarily of

---

58. See, e.g., *The Federalist* No. 23, *supra*, at 142–43 (Alexander Hamilton) (“The principal purposes to be answered by Union are these—the common defence of the members; the preservation of the public peace as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse . . . with foreign countries.”); *The Federalist* No. 45, at 306 (James Madison) (Harvard Univ. Press ed. 2009) (“The powers delegated by the proposed Constitution to the federal government . . . will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce.”).

59. See U.S. Const. art. I, § 10, cl. 3 (“No state shall, without the consent of Congress, . . . keep troops . . . in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”).

60. See *id.* art. I, § 8, cls. 11–16 (establishing military powers of Congress); *id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”).

61. *Id.* art. I, § 8, cl. 15.

62. *Id.* art. IV, § 4.

63. See Andrew J. Birtle, *U.S. Army Counterinsurgency and Contingency Operations Doctrine, 1860–1941*, at 7 (1998) (describing pre-Civil War U.S. Army as “child of the frontier” and noting “antebellum Army spent the bulk of its time policing the nation’s ever-changing western boundary”).

coastal fortifications and a small Navy.<sup>64</sup> During the Civil War, the Army expanded hugely in size and massively increased its domestic powers over the civilian population,<sup>65</sup> but upon the surrender of Confederate forces, the extraordinary domestic powers were curtailed and the Army's size greatly reduced.<sup>66</sup> Within a few years, it was again a small frontier garrison force and remained that way until the 1898 war against Spain.<sup>67</sup> In 1890, the United States was the richest country in the world but had only the fourteenth-largest army—an army smaller than Bulgaria's.<sup>68</sup> At the end of Reconstruction, legislators from the former Confederate States of America helped enact the Posse Comitatus Act, which required a specific act of Congress before the military could be used for domestic law enforcement purposes.<sup>69</sup>

There was essentially no federal law enforcement apparatus until the Civil War, and it was tiny and ill-funded for decades afterward.<sup>70</sup> Although institutionalized military intelligence efforts began in the latter part of the nineteenth century, the efforts were wholly devoted to war planning and military analysis of potential external adversaries.<sup>71</sup> Before World War II, there was no foreign-intelligence and espionage agency.<sup>72</sup> Within

---

64. See Weigley, *supra* note 55, at 42–43 (describing U.S. defense strategy as based on fortresses to protect “vital parts of the American coast” and free-ranging Navy to ward off invading expeditions and protect waterborne commerce).

65. See, e.g., Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, at xii (1991) (noting Lincoln “suspended the writ of habeas corpus early in the [Civil War] and thereafter managed the home front, in part, by means of military arrests of civilians—thousands and thousands of them”).

66. The U.S. military continued to operate for some time in the former Confederate States, but the numbers involved were small. “During the 1870s the average size of the entire army was only 29,000, and only about 7,500 soldiers per year served in the South.” Joseph E. Dawson III, *Army Generals and Reconstruction: Louisiana, 1862–1877*, at 4 (1982).

67. See Graham A. Cosmas, *An Army for Empire: The United States Army in the Spanish-American War 1–14* (1994) (“[T]he Army in 1897 . . . had no permanent troop formations larger than regiments . . . and neither detailed war plans nor a staff for making them existed.”).

68. Fareed Zakaria, *From Wealth to Power: The Unusual Origins of America's World Role* 47 (1998).

69. See Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2012)) (“[I]t shall not be lawful to employ any part of the Army of the United States . . . for the purpose of executing the laws, except in such cases and under such circumstances as . . . may be expressly authorized by the Constitution or by act of Congress. . . .”).

70. There were, for example, some postal inspectors, revenue agents, U.S. marshals, and Secret Service agents assigned to investigate counterfeiting and the like, but their numbers were small and their jurisdiction limited. See generally David R. Johnson, *American Law Enforcement: A History* 73–86, 167 (1981).

71. See David R. Rudgers, *Creating the Secret State: The Origins of the Central Intelligence Agency* 5–6 (2000) (tracing evolution of American intelligence-gathering agencies).

72. See *id.*



the United States, the FBI—a relatively small law enforcement agency—was responsible for counterintelligence.<sup>73</sup> Unlike many other countries, the United States has never had a stand-alone domestic intelligence agency.<sup>74</sup> Housing domestic intelligence work within a law enforcement organization has been a conscious choice, designed to ensure that domestic rule-of-law norms govern intelligence work at home.

The judicially enforced common law helped protect the domestic zone of liberty in earlier eras. Habeas corpus and tort damages suits were available to ensure the military did not encroach on civilian life.<sup>75</sup> Until the Civil War, there was no standing authority for statutory indemnification of sued federal officers,<sup>76</sup> meaning that the prospect of a damages judgment could have significant deterrent effect on behavior. Prior to the Civil War, the common law and constitutional law of treason generally assumed that U.S. citizens could be traitors, prosecutable in civilian court and liable to be opposed by military force if they arrayed themselves militarily and in large numbers; they could not, however, be treated as full military enemies who were entirely outside the protection of the laws and courts.<sup>77</sup> Under the common law, deadly force could, of course, be used domestically, but only in order to prevent serious crime during its commission, apprehend fleeing felons, or put down rebellions and insurrections. When invasion or rebellion required the domestic use of military power, old common law rules—which the Supreme Court in 1866 held were incorporated into the Constitution's individual rights protections—required that martial law could only prevail where the courts and other institutions of civil justice could not in fact function.<sup>78</sup>

#### B. *Post–World War II Period*

The modern national security state created during and after World War II would be orders of magnitude larger and more powerful than

---

73. See generally Tim Weiner, *Enemies: A History of the FBI* (2012) (discussing FBI's evolution over time).

74. See Peter Chalk et al., *Considering the Creation of a Domestic Intelligence Agency in the United States: Lessons from the Experiences of Australia, Canada, France, Germany, and the United Kingdom* 8 (Brian A. Jackson, ed. 2009) (noting debate over “whether the United States needs a dedicated domestic intelligence agency”). In contrast, Australia, Canada, France, Germany, and the United Kingdom all have stand-alone domestic intelligence agencies. *Id.* at 9.

75. See Kent, *Damages*, *supra* note 17, at 1163–65 (detailing viable causes of action during Civil War period).

76. See generally James G. Randall, *The Indemnity Act of 1863: A Study in the War-Time Immunity of Governmental Officers*, 20 *Mich. L. Rev.* 589, 589 (1922) (discussing Civil War immunity statutes).

77. See Kent, *Civil War*, *supra* note 7, at 1860–61 (discussing treason and rebellion during Civil War period).

78. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121–22 (1866); see also Kent, *Civil War*, *supra* note 7, at 1927–29 (noting *Milligan* Court was signaling “it disapproved of military Reconstruction and the continued displacement of civil by military courts”).

what had existed previously, and hence more threatening to individual liberty at home. But its designers made a number of decisions that helped protect the zone of liberty within the United States and ensured military and other coercive force would be turned principally against the outside world. Especially since the reforms of the 1970s and 1980s, the national security state has reflected and instantiated the categorical distinctions demarcating zones, people, places, and contexts where protection was available and where it was not.

From the outset, the modern national security state was founded on a foreign–domestic divide, with the United States homeland and its people, institutions, and politics being shielded—for the most part—from the pointed end of the spear. For instance, the CIA’s organic act, dating from 1947, prohibits it from exercising “police, subpoena, law enforcement powers, or internal-security functions,”<sup>79</sup> in part because Congress did not want to create an American Gestapo.<sup>80</sup> The classified presidential directive that established the National Security Agency in 1952 stated that its primary purpose would be to “provide an effective, unified organization and control of the communications intelligence activities of the United States conducted against foreign governments.”<sup>81</sup> National security policy also placed great reliance on policing a citizen–noncitizen and domestic–foreign divide with measures relating to exclusion or deportation of foreign nationals who posed national security threats,<sup>82</sup> ideological bars to naturalization,<sup>83</sup> denials of passports to U.S. persons who were members of communist organizations,<sup>84</sup> and denationalization of persons who committed certain actions deemed sufficiently disloyal, such as taking an oath of allegiance to or serving in the armed forces or other government service of a foreign nation, or committing the crime of treason.<sup>85</sup>

But the full development of structural and rule-based protections for the people and territory of the United States did not develop until the 1970s and 1980s. After Watergate, the death of J. Edgar Hoover, and the

---

79. National Security Act of 1947, Pub. L. No. 80-523, § 102, 61 Stat. 495, 498 (codified as amended at 50 U.S.C. § 3036(d)(1) (2012)).

80. See Tim Weiner, *Legacy of Ashes: The History of the CIA 5–6* (2007) (describing early fears surrounding creation of intelligence agency).

81. Christopher J. Seline, *Eavesdropping on the Compromising Emanations of Electronic Equipment: The Laws of England and the United States*, 23 Case W. Res. J. Int’l L. 359, 390 (1991) (presenting reprint of document).

82. See, e.g., Internal Security Act of 1950, Pub. L. No. 81-831, §§ 22–23, 64 Stat. 987, 1006–12 (outlining circumstances under which aliens might be excluded or deported).

83. See, e.g., *id.* § 25, 64 Stat. at 1013–15 (amending Nationality Act of 1940).

84. See, e.g., *id.* § 6, 64 Stat. at 993 (authorizing passport denials).

85. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 349, 66 Stat. 163, 267–68 (reenacting as amended provisions of Nationality Act of 1940). The Supreme Court substantially limited the government’s ability to denationalize in *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (holding Congress lacks power to involuntarily divest person of U.S. citizenship).

revelation of embarrassing CIA covert operations abroad, a series of investigations by Congress and the press revealed that the CIA, the FBI, and military intelligence components had engaged in surveillance and subversion of many domestic groups and persons. These agencies monitored everything from Communists and other left wing individuals and political organizations to civil rights leaders, hippies, anti-Vietnam War activists, student groups, and many others that posed no real threat of any kind to the security of the United States and were plainly inappropriate targets of the national security state.<sup>86</sup>

Reforms by Congress and the executive branch followed these revelations, creating the modern national security architecture that endured through the first decade of the twenty-first century, when it started to change again in response to the pressures of the war against al Qaeda, globalization, and other forces.

The modern national security state reinforced a foreign–domestic divide, designed to protect the United States homeland and its people, institutions, and politics from the most coercive types of military and intelligence activities. Specific protections for the American people are rarely reserved for citizens only. Instead, most statutory and regulatory protections are for “United States person[s],” a term of art that includes citizens and lawful permanent residents.<sup>87</sup>

The overall structure of government, by limiting coercive activities that may occur within the United States, protects the liberty of everyone in the United States, including aliens who are not lawful permanent residents. For example, the military is hemmed in by strict legal rules that greatly reduce its authority to operate domestically and hence help preserve liberty at home. Building on rules enacted in earlier eras, Congress requires that military force only be used within the United States when ordinary criminal processes are insufficient,<sup>88</sup> and that Congress must

---

86. See, e.g., 2 Select Comm. to Study Gov’t Operations, Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities: Intelligence Activities and the Rights of Americans, S. Rep. No. 94-755, at 5–9 (2d Sess. 1976) (Church Committee Report) (summarizing results of intelligence study).

87. See, e.g., 50 U.S.C. § 1801(i) (2012) (defining “United States person” as “citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation . . . incorporated in the United States . . .”); Exec. Order No. 12333 § 3.5(k), reprinted as amended in Exec. Order No. 13,470, 73 Fed. Reg. 45,325 [hereinafter EO 12333] (defining “United States Person” to include citizens, aliens “known by the intelligence element concerned to be a permanent resident alien,” and the two types of corporations as described above).

88. 10 U.S.C. §§ 332–333 (2012) (authorizing military force when “President considers [it] . . . impracticable to enforce the laws of the United States . . . by . . . judicial proceedings” or “suppress . . . any insurrection, domestic violence, unlawful combination, or conspiracy, if it . . . hinders the execution of the laws of that State, and of the United States within the state”). Similar laws had been on the books since the first decade of the country’s existence. See Act of May 2, 1792, ch. 28, 1 Stat. 264 (authorizing President to

specifically authorize it before any U.S. citizen may be detained<sup>89</sup> or the U.S. military may directly participate “in a search, seizure, arrest, or other similar activity” by law enforcement.<sup>90</sup>

As noted, the CIA’s organic act prohibits it from exercising “police, subpoena, law enforcement powers or internal security functions.”<sup>91</sup> Law enforcement organizations, the DOJ and FBI, have primary responsibility for human-source foreign-intelligence collection within the United States, while the CIA has the responsibility for human-source collection abroad.<sup>92</sup> This choice was made because law enforcement organizations are structured and trained to follow legal commands that protect civil liberties, while foreign-intelligence organizations must habitually break the laws of countries where they operate. To take one basic example, law enforcement organizations seize and detain individuals within a web of constitutional and statutory commands that impose *ex ante* requirements before a detention can begin and require quick approval by an independent judicial officer in order to continue a detention.<sup>93</sup>

Executive Order 12333, a 1981 reform directive which today, as amended, still structures the intelligence community, requires that “[e]lements of the Intelligence Community shall use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad.”<sup>94</sup> Covert actions, often the most coercive form of national security action besides kinetic military force, are generally barred domestically, and both statute and Executive Order 12333 provide that “[n]o covert action may be conducted which is intended to influence United States political processes, public opinion,

---

use military force in face of “imminent danger of invasion” or “insurrection in any state”); Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 (same).

89. 18 U.S.C. § 4001(a) (2012) (added by Non-Detention Act, Pub. L. No. 92-128, 85 Stat. 347, 347–48 (1971)).

90. 10 U.S.C. § 375. This act is quite similar in intent and effect to the *Posse Comitatus Act* of 1878, now codified at 18 U.S.C. § 1385. See *supra* note 69 and accompanying text (discussing *Posse Comitatus Act*).

91. 50 U.S.C. § 3036(d)(1).

92. EO 12333, *supra* note 87, § 1.3(b)(20)(A)–(B); see also 50 U.S.C. § 3036(d)(3) (“The Director of the Central Intelligence Agency shall . . . provide overall direction for and coordination of the collection of national intelligence outside the United States through human sources by elements of the intelligence community authorized to undertake such collection . . .”). No intelligence community entity except the FBI is allowed to engage within the United States in “foreign intelligence collection . . . for the purpose of acquiring information concerning the domestic activities of United States persons.” EO 12333, *supra* note 87, § 2.3(b).

93. See, e.g., *Cnty of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding Constitution requires person arrested without judicially approved warrant must be brought before magistrate promptly, which generally means within forty-eight hours).

94. EO 12333, *supra* note 87, § 2.4.

policies, or media.”<sup>95</sup> The intelligence community is greatly restricted in its ability to secretly monitor or participate in domestic political groups.<sup>96</sup>

Entities other than the FBI are strictly limited in terms of the surveillance and searches they can perform within the United States, and somewhat limited regarding activities against U.S. persons abroad.<sup>97</sup> And the Foreign Intelligence Surveillance Act (FISA), enacted in 1978,<sup>98</sup> limits the surveillance and physical searches the FBI can conduct domestically for foreign-intelligence purposes and puts these functions under the oversight of Article III judges.<sup>99</sup> FISA is complex, but in its basic structure it requires both high-ranking executive and judicial approval for surveillance in the United States or against U.S. persons abroad,<sup>100</sup> and sets up a number of substantive protections to make sure that everyone’s domestic communications and worldwide communications of U.S. persons are only targeted to the extent they are themselves agents of foreign powers or are communicating with such agents.<sup>101</sup> Strict rules for the intelligence community governing the collection, retention, and dissemination of foreign-intelligence information generally only cover U.S. persons,<sup>102</sup> and the general Privacy Act also only protects U.S. persons.<sup>103</sup>

---

95. *Id.* § 2.13; see also 50 U.S.C. § 3093(e) (“As used in this subchapter, the term ‘covert action’ means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly . . .”); *id.* § 3093(f) (“No covert action may be conducted which is intended to influence United States political processes, public opinion, policies, or media.”).

96. See EO 12333, *supra* note 87, § 2.9 (barring undisclosed participation by intelligence community in domestic organizations except in certain circumstances). These restrictions can be eased according to procedures approved by the Attorney General and in cases where it is found “essential,” and barring attempts to influence domestic organizations unless “undertaken on behalf of the FBI in the course of a lawful investigation” or the domestic organization is largely composed of foreign nationals and “reasonably believed to be acting on behalf of a foreign power.” *Id.*

97. See *id.* § 2.4 (limiting “Intelligence Community” to “least intrusive collection techniques feasible” and enumerating restrictions to electronic surveillance and physical searches “in the United States”).

98. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1811 (2012)).

99. 50 U.S.C. §§ 1803–1806, 1812, 1823–1825.

100. See *id.* §§ 1801–1805 (defining “[e]lectronic surveillance,”— communications surveillance regulated by FISA).

101. See *id.* §§ 1801(a)–(b), 1802(a), 1805(a) (defining “[f]oreign power” and “[a]gent of foreign power” who can be targeted).

102. See *id.* §§ 1801 (h)(1), 1806(a) (delineating “[m]inimization procedures”); EO 12333, *supra* note 87, § 2.3 (restricting collection of information “concerning United States persons”).

103. See 5 U.S.C. § 552a(b) (2013) (limiting disclosure of “any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains”); see also *id.* § 552a(a)(2) (“[T]he term ‘individual’ means a citizen of the United States or an alien lawfully admitted for permanent residence . . .”); *id.* § 552a(a)(4) (“[T]he term ‘record’ means any item,

FISA loosens restrictions of foreign-intelligence surveillance and searches in the United States during periods of declared war.<sup>104</sup>

Thus, although there were deeply unfortunate incidents during the early- to mid-Cold War period in which military and foreign-intelligence organizations were deployed against U.S. citizens domestically, the architecture and operating rules of the modern national security state, especially those that emerged in the 1970s and after as part of the reform movement, respect and further the categorical divides between home and abroad, U.S. persons and foreign nationals, and war and peace.

### III. CONVERGENCE OF DOMAINS, DISAPPEARANCE OF LEGAL BLACK HOLES

Many aspects of the traditional protection framework described above were essentially unchallenged until the mid-twentieth century. The pace and extent of change has accelerated in the twenty-first century. A great convergence is underway. The distinctions between domestic and foreign, enemy and friend, peace and war, and citizen and noncitizen are breaking down, both in the real world, and in the constitutional and international law determining the domain of rights and the right to access the courts. The protections of the Constitution and the right to access the courts are expanding beyond the territorial borders of the United States to noncitizens abroad. Judicially enforceable constitutional protections are coming to cover military enemies. The battlefield is being constitutionalized to some extent. The institutional design and operating rules of the national security state are relaxing their traditional distinctions between foreign and domestic, enemy and friend, and U.S. person and non-U.S. person.

This Part offers evidence of convergence of domains and closing of legal black holes in a numbers of areas. First, the importance of citizenship and territorial location to determining rights is decreasing. Second, distinctions between wartime and peacetime are blurring. Third, the operating rules and institutional structures of the national security state are changing to reflect this convergence and softening of categorical distinctions. Fourth, the U.S. law governing foreign relations and national security is losing its distinctiveness, as it assimilates more and more norms from the domestic, peacetime legal regime. And finally, international law is changing in various important respects, most notably its broadening to protect a country's own citizens in domestic matters, rather than just foreigners in foreign relations contexts.

---

collection, or grouping of information about an individual that is maintained by an agency . . .").

104. See 50 U.S.C. § 1811 (lifting surveillance restrictions "following a declaration of war"); *id.* § 1829 (noting same for physical-search restrictions).

### A. *Citizenship and Territorial Location*

The importance of an individual's citizenship and territorial location to obtaining protection from the laws and courts has declined, and it is possible to imagine a future where they are largely irrelevant. But not all commentators see this kind of convergence. For example, since 9/11, it has been asserted that the U.S. government has targeted and oppressed noncitizens as never before.<sup>105</sup> There is certainly some truth to that. Trial by military commission, detention at Guantanamo Bay, extraordinary rendition to foreign countries, and imprisonment in CIA black sites overseas, where some of the worst interrogation abuses occurred, were all reserved for noncitizens.<sup>106</sup> And noncitizen residents of the United States from Arab or Muslim countries were rounded up and temporarily detained in large numbers after 9/11, primarily using immigration laws.<sup>107</sup> But I believe that the more important and more lasting trend in recent years has been toward convergence of the rights of citizens and noncitizens, as well as convergence in rights of people in the United States and abroad.

Even for U.S. citizens, location outside the sovereign territory of the United States often used to result in a lack of protection from the Constitution.<sup>108</sup> All that changed with a landmark decision in 1957, *Reid v. Covert*.<sup>109</sup> Since *Reid*, it has generally been assumed (though Supreme Court decisions have been very few) that U.S. citizens have the same

---

105. See, e.g., David Cole, *Enemy Aliens* 1–14 (2003) [hereinafter Cole, *Enemy Aliens*] (discussing treatment of noncitizens since 9/11).

106. See, e.g., 10 U.S.C. § 948b(a) (2012) (limiting military commission trials for “unprivileged enemy belligerents” to noncitizens); *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion) (noting Yaser Hamdi was transferred from custody at Guantanamo Bay to United States after U.S. officials learned he was U.S. citizen); Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 §§ 2–4 (Nov. 16, 2001) (limiting military detention and trial to noncitizens); David D. Cole, *Against Citizenship as a Predicate for Basic Rights*, 75 *Fordham L. Rev.* 2541, 2544 (2007) (noting post-9/11 immigration sweeps looking for terrorism suspects in United States and detention in Guantanamo Bay were both defended by administration on ground they were limited to noncitizens); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 *Case W. Res. J. Int'l L.* 309, 318 (2006) (noting Bush Administration did not claim right to use extraordinary rendition to foreign countries against U.S. citizens).

107. Cole, *Enemy Aliens*, supra note 105, at 5.

108. See *Neely v. Henkel*, 180 U.S. 109, 122–23 (1901) (holding U.S. citizen extradited from United States to Cuba for trial in local courts during U.S. military occupation not protected by “rights, privileges, and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States”); *In re Ross*, 140 U.S. 453, 464 (1891) (holding sailor of U.S.-flagged vessel tried in U.S. consular court in Japan could not “invoke protection of the provisions [of the Constitution] . . . until brought within the actual territorial boundaries of the United States”). But see Kent, *Citizenship*, supra note 28, at 2121 n.20 (discussing evidence of extraterritorial constitutional rights for U.S. citizens prior to mid-twentieth century).

109. 354 U.S. 1 (1957).

constitutional rights whether they are located in the United States or abroad.<sup>110</sup> This change was likely motivated, at least in part, by the large increase in the number of U.S. servicemen and their family members living abroad for extended periods of time in the aftermath of World War II. *Reid*, for example, involved civilian dependents of U.S. servicemen convicted of capital murder in military courts on U.S. military bases overseas.

*Reid* was explicit that it concerned only citizens, though,<sup>111</sup> and so noncitizens remained outside the protection of the Constitution when they were outside the United States. But in 2008 in *Boumediene v. Bush*, the Court for the first time held that noncitizens detained by the government in another country have rights under our Constitution,<sup>112</sup> and did so on behalf of detainees of the U.S. military charged with being enemy fighters in the armed conflict against al Qaeda and the Taliban.<sup>113</sup> Although some of the language in *Boumediene* suggests that decision is limited to a single unique location (Guantanamo Bay, leased by the U.S. government from Cuba) and a single procedural clause of the Constitution (the Habeas Suspension Clause), the decision is not actually so limited. As I have explained elsewhere, *Boumediene* and other recent cases suggest that noncitizens abroad can now make constitutional claims involving at least Due Process and separation of powers claims in addition to habeas.<sup>114</sup> And *Boumediene's* test for extension of the Constitution abroad is in no way limited to Guantanamo.<sup>115</sup> Eric Posner correctly identified a “cosmopolitan” impulse at the core of *Boumediene*, a non-instrumental concern for the liberties of noncitizens outside the United States.<sup>116</sup>

---

110. See Louis Henkin, *Foreign Affairs and the United States Constitution* 305–07 (2d ed. 1996) (“Outside the United States, constitutional protections for the individual against governmental action is enjoyed, we may continue to assume, by U.S. citizens . . .”).

111. See Kent, *Global Constitution*, supra note 6, at 474–75 (“[T]he Court is discussing the unique relationship between the U.S. government and its ‘citizens.’”).

112. *Boumediene v. Bush*, 553 U.S. 723, 770 (2008) (“It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution.” (emphasis omitted)).

113. Regarding enemy fighters, who had traditionally lacked constitutional rights or access to U.S. courts, the Supreme Court had earlier allowed detained enemy fighters who were present in the United States to use habeas corpus. Kent, *Enemy Fighters*, supra note 9, at 156–57. After 9/11, this right was extended tacitly to enemy fighters held at Guantanamo Bay in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (entertaining constitutional separation of powers objections to military commission trial of alleged enemy fighter). *Boumediene* was the first direct, express holding on this point.

114. Kent, *Enemy Fighters*, supra note 9, at 245–48.

115. See *id.* (“[T]he Court surely intended to leave itself the maximum flexibility as to where the Constitution applies extraterritorially . . .”).

116. Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 *Cato Sup. Ct. Rev.* 23, 32–34.



Noncitizens have seen their rights converge somewhat with those of citizens in immigration law as well. For at least a century, the so-called plenary power doctrine has meant significant judicial deference almost amounting to a lack of constitutional restraint on federal immigration statutes and also a view that “aliens lack the right to seek judicial review of the constitutionality of immigration policy.”<sup>117</sup> Because of its connections to foreign affairs and national security, and the fact that noncitizens were the primary subjects of its application, immigration law was conceived as a zone apart where ordinary constitutional restraints did not apply.<sup>118</sup> But in the twenty-first century, immigration law is becoming increasingly normalized, with more and more constitutional protections available and enforced by the courts.<sup>119</sup> As Landau explains, the Supreme Court’s doctrine in immigration law for analyzing claims of individual right used to be based on great deference to the political branches and “categorical, group-based analysis grounded in status, territoriality, and sovereignty that generally resulted in the denial of the claims of foreign nationals.”<sup>120</sup> But recently the Court has asserted “a more involved judicial role in assessing both the government’s claimed need for border control and national security and the foreign national’s unique liberty interests and overall circumstances,” with a concomitant greater protection of individual rights.<sup>121</sup> The stark, categorical view of the reach of constitutional protection is starting to break down.

---

117. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 *Calif. L. Rev.* 373, 375 (2004).

118. In one particularly stark formulation, the Court said that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

119. See Landau, *Due Process*, supra note 26, at 882 (arguing application of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to immigration has “produced surprisingly rights-affirming outcomes”); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 *Geo. Immigr. L.J.* 339, 339 (2002) (positing Supreme Court decisions from 2000 Term show expansion of “quantum of constitutionally mandated rights owed aliens in immigration proceedings”).

120. Landau, *Due Process*, supra note 26, at 884.

121. *Id.* at 885. For example, the Supreme Court recently “narrowly interpreted . . . statutes stripping . . . jurisdiction; imposed limits on the amount of time that foreign nationals can be detained; narrowed the meaning and scope of *Chevron* [*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] deference . . . or ignored *Chevron* altogether; and rejected or narrowed agency-created procedures that, with Congress’s blessing, limited or foreclosed procedural rights of foreign-nationals.” *Id.* at 885–86 (citing *Kucana v. Holder*, 558 U.S. 233, 233, 235 (2010); *Nken v. Holder*, 556 U.S. 418, 418 (2009); *Negusie v. Holder*, 555 U.S. 511, 522–23 (2009); *Boumediene v. Bush*, 553 U.S. 723, 724–25, 728 (2008); *Dada v. Mukasey*, 554 U.S. 1, 2 (2008); *Rasul v. Bush*, 542 U.S. 466, 466 (2004); *Zadydas v. Davis*, 533 U.S. 678, 679 (2001); *INS v. St. Cyr*, 533 U.S. 289, 309–10 (2001)).

### B. *Enemy Status in Wartime*

The way the law regards both citizen and noncitizen enemies in wartime has changed significantly over the centuries, with older, categorical distinctions fading in importance as judicial review and protection of the law expands to cover more and more people and contexts.

1. *Enemy Citizens*. — Although the rules were somewhat unsettled and disputed coming out of the Revolutionary War and its debates about how to treat American colonists who adhered to the Crown, it was generally accepted in the Founding and antebellum periods that a citizen could not be deemed outside the law's protection even when committing a serious breach of allegiance such as supporting military enemies or levying war against the United States.<sup>122</sup> The traditional rule was that such an individual was subject to criminal prosecution for treason or crimes but could not be subject to military detention or trial. "A citizen could be a 'traitor' but could not be an 'enemy,' that is, someone out of the protection of the law."<sup>123</sup>

These older understandings broke down during the early part of the Civil War. Congress, the executive, and the Supreme Court agreed that all residents of the Confederate States of America were liable to be treated as de facto enemy aliens who lacked protection of the laws.<sup>124</sup> Many residents of Union states were also so treated in practice, for example, Confederate-aligned guerrillas in loyal border states like Missouri and Kentucky. And although the Supreme Court in *Milligan* tried after the war ended to reimpose some of the older, categorical protection for U.S. citizenship,<sup>125</sup> the Court nevertheless acknowledged that U.S. citizens who were enemy fighters or residents of the Confederacy could be treated as military enemies lacking protection from the Constitution and laws.<sup>126</sup>

So it was that during World War II, the Supreme Court reiterated that U.S. citizens "who associate themselves with the military arm of the enemy government" and fight against the United States can be treated as "enemy belligerents" outside the protections of the Constitution and detained or tried by military commission just like noncitizen enemy

---

122. See Kent, *Civil War*, supra note 7, at 1860 (explaining far reach of protection of law in antebellum period).

123. *Id.* at 1860–61.

124. See *id.* at 1872–1911.

125. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

126. See supra note 35 and accompanying text (noting all persons resident in enemy nation, enrolled in enemy's armed forces (enemy fighters), or present at site of actual combat were out of protection of Constitution); see also Kent, *Civil War*, supra note 7, at 1842, 1927–29 (discussing differences among prisoners of war, persons residing in enemy territory, and persons residing in loyal U.S. territory).

fighters.<sup>127</sup> The infamous internment of U.S. citizens of Japanese ancestry during World War II in effect treated certain civilian U.S. citizens, resident in the United States, as de facto enemy aliens. This was broadened beyond Japanese Americans during the early Cold War. In the Emergency Detention Act of 1950 (Title II of the Internal Security Act), Congress authorized the President to detain any person in the United States, including U.S. citizen civilians, during a declared war, invasion, or insurrection in aid of a foreign enemy.<sup>128</sup>

When a U.S. citizen was detained after 9/11 during the war in Afghanistan and brought to the United States in military custody, Justice Scalia opined in a dissent that “the categorical procedural protection” of the Constitution for U.S. citizens barred his military detention.<sup>129</sup> But he was 150 years too late. The majority of the Court had no trouble concluding that “[t]here is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”<sup>130</sup> Scalia excoriated what he called the “judicious balancing” that replaced the older “categorical” protections.<sup>131</sup> I call it convergence.

2. *Court Access.* — Rights without a judicial remedy often provide little protection. Hence, the right and ability to access courts is a crucial part of being protected by the laws.

At common law and during the American Founding period, a very strict rule was applied barring all alien enemies—wherever domiciled, and no matter whether civilians or enemy fighters—from access to the courts during wartime. In the first decades of the nineteenth century, the rule softened so that civilian enemy aliens who were peacefully present in the United States could access the courts.<sup>132</sup> The categorical bar remained, however, for nonresident alien enemies and enemy fighters, no matter where located.<sup>133</sup>

In retrospect, a major moment in convergence occurred during World War II when, in the famous *Quirin* case, the Supreme Court reversed course and held that the German enemy fighters held for mili-

---

127. *Ex parte Quirin*, 317 U.S. 1, 37–38, 44 (1942).

128. Emergency Detention Act of 1950, Pub. L. No. 81-831, §§ 102–103, 64 Stat. 987, 1019–21 (noting “detention of persons who there is reasonable ground to believe” will commit espionage is “essential to the common defense . . . of the United States”).

129. *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting).

130. *Id.* at 519 (plurality opinion). Justice Thomas, the fifth vote against the detainee, would have gone even further in rejecting the U.S. citizen’s claims for protection from the courts. See *id.* at 585 (Thomas, J., dissenting) (“[T]he question whether Hamdi is actually an enemy combatant is of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . .” (internal quotation marks omitted)).

131. *Id.* at 575 (Scalia, J., dissenting).

132. Cf. *supra* note 29 and accompanying text (discussing ability of noncitizens to access the courts at the time).

133. See Kent, *Enemy Fighters*, *supra* note 9, at 188–95 (discussing court access for nonresident alien enemies and enemy fighters).

tary commission trial in the United States had a constitutional right to access the courts.<sup>134</sup> Since that time, it has been assumed that literally any person present in the United States may access the courts, at least via habeas corpus, to challenge executive detention. But even after *Quirin*, nonresident enemy fighters continued to be barred from the courts, a lingering remnant of the old categorical rule applicable to all enemy aliens.<sup>135</sup> *Boumediene* contributed to additional convergence when it held in 2008 that noncitizens held as alleged enemy fighters in territory under the control but not sovereignty of the United States had a constitutional right to access the courts via habeas to challenge their detentions. The constitutional right to access the courts is not yet fully universal—extraterritorially, the right might only apply to habeas corpus, and there might be some places or persons where it does not reach<sup>136</sup>—but it is getting there.

3. *The Legal Effects of War on Persons and Property*. — Wartime used to be understood as an exceptional state during which all ordinary civil intercourse between persons of warring nations was, in theory if not in practice, interdicted, and the persons and property of enemy aliens, even law-abiding civilians, liable to seizure.

Today, it is very unusual for the United States to go to war with a nation state.<sup>137</sup> Even when the United States fights a nation state, the old apparatus of detention of peaceful enemy alien civilians and private property confiscation is forgotten.<sup>138</sup> The stark distinctions between peacetime and wartime are dissolving. There are no “enemy aliens” in the long war against al Qaeda and related terrorist groups, because the United States is not fighting a nation state. Using terminology from a landmark Supreme Court case about how to understand the Civil War, we can say that war used to commonly be “territorial,” with people’s status determined not by their personal conduct but by their citizenship or geography (domicile), while today war is much more “personal,” with guilt and hence authority to use force against a person determined more by individual behavior.<sup>139</sup>

---

134. See *id.* at 165–69 (discussing *Quirin*’s holdings).

135. See *Johnson v. Eisentrager*, 339 U.S. 763, 769–71 (1950) (“It is war that exposes the relative vulnerability of the alien’s status.”).

136. *Maqaleh v. Hagel*, 738 F.3d 312, 317 (D.C. Cir. 2013) (declining to extend *Boumediene* to detainees at U.S. military base at Bagram, Afghanistan).

137. Eric Talbot Jensen, *Future War, Future Law*, 22 *Minn. J. Int’l L.* 282, 298 (2013) (“The vast majority of the armed conflicts in recent decades have not been between states, but between states and non-state actors or between two groups of non-state actors. Advancing technologies will make this phenomena even more pronounced.”).

138. See *Sidak*, *supra* note 38, at 1405 (noting Alien Enemy Act was not invoked during Korean War, Vietnam War, or Gulf War because those were not formally declared wars).

139. See *The Prize Cases*, 67 U.S. (2 Black) 635, 694–95 (1863) (Nelson, J., dissenting) (discussing transition from territorial war to personal war). See generally Issacharoff & Pildes, *Targeted Warfare*, *supra* note 27, at 1522–23 (“Whereas the

Prior to 9/11, threats from non-state groups like terrorists were largely handled as a matter of law enforcement and intelligence gathering. But it has been clear for about fourteen years that non-state groups' successful perpetration of mass-casualty attacks and the U.S. government's military response were blurring the lines between peacetime versus wartime, crime versus warfare, and law enforcement versus military responses.<sup>140</sup> It is frequently said that the old notion of a "battlefield" as distinct from areas where armed conflict is not occurring is fading away.<sup>141</sup> In this new era, convergence of domains has been rapidly occurring.

Extended, indefinite military detention became a leading way that the U.S. government responded to the threat from al Qaeda and affiliated groups. Even some suspected terrorists captured in the United States, including a U.S. citizen, were put initially into military detention instead of the Article III system.<sup>142</sup> Some suspected terrorists caught abroad were held in CIA or military detention and interrogated without *Miranda* warnings even though they were eventually sent to the United States to answer for ordinary criminal indictments.<sup>143</sup> Even when detention stayed within the civilian Article III system, the government's practices changed significantly, blurring the line between criminal and extraordinary, noncriminal detention.<sup>144</sup> The Supreme Court upheld (albeit not on the merits) the government's apparent practice of pretextually using the material-witness detention statute against both

---

traditional practices and laws of war defined 'the enemy' in terms of categorical, group-based judgments that turned on *status* . . . we are now moving to a world that . . . requires the *individuation of enemy responsibility* of specific enemy persons before the use of military force is considered justified . . .").

140. See, e.g., Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675, 677 (2004) ("[B]inary distinctions are no longer tenable.").

141. See, e.g., Frédéric Mégret, *War and the Vanishing Battlefield*, 9 Loy. U. Chi. Int'l L. Rev. 131, 141 (2011) ("The deconstruction of the battlefield is, in fact, well under way . . .").

142. See *al-Marri v. Wright*, 487 F.3d 160, 164 (4th Cir. 2007), rev'd sub nom. *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam), vacated sub nom. *al-Marri v. Spagone*, 555 U.S. 1220 (2009); *Padilla v. Hanft*, 423 F.3d 386, 388 (4th Cir. 2005).

143. See, e.g., Butch Bracknell & James Joyner, *Ahmed Abu Khattala and the Miranda-Rights Question*, Nat'l Int. (July 8, 2014), <http://nationalinterest.org/feature/ahmed-abu-khattala-the-miranda-rights-question-10828> (on file with the *Columbia Law Review*) (recounting initial un-Mirandized interrogation aboard Navy ship of captured Libyan jihadist and subsequent transfer to U.S. soil to appear before federal judge).

144. See Chesney & Goldsmith, *supra* note 25, at 1100–08 (arguing federal prosecutors in post-9/11 terrorism cases increasingly pursue membership-based liability, akin to traditional military detention).

U.S. citizens and noncitizens in the United States for counterterrorism purposes.<sup>145</sup>

On the same day as it decided *Boumediene*, the Court, in *Munaf v. Geren*,<sup>146</sup> heard habeas cases from dual U.S. citizens detained as security threats under the control of the U.S. military in Iraq during the insurgency. The Court implied that the substantive due process clause might provide limits on the treatment of these individuals—who were held by U.S. forces in a zone of active combat.<sup>147</sup> It is unclear at this point how far *Boumediene* and *Munaf* will extend habeas corpus and constitutional rights into war zones. But what is clear is that being a noncitizen or an enemy fighter in a foreign war zone is no longer a categorical bar to constitutional rights and judicial review.

The Anwar al-Awlaki drone strike also highlights these trends of extending rights abroad and to enemy fighters. Al-Awlaki was a U.S. citizen who became a high-ranking leader of al Qaeda in the Arabian Peninsula, helping to direct terrorist attacks against U.S. targets from hiding places in ungoverned regions of Yemen.<sup>148</sup> Because he was an enemy fighter in an armed conflict authorized by Congress, and was located outside the United States in a hostile area, older understandings would have treated al-Awlaki as beyond the protection of the Constitution. But in al-Awlaki's case, the U.S. executive branch now recognized that geography and war no longer served as impermeable barriers against constitutional protections, in particular because he was a U.S. citizen. An Office of Legal Counsel (OLC) opinion and a DOJ white paper prepared for public release opined that al-Awlaki had Fourth and Fifth Amendment rights that the executive had to respect.<sup>149</sup> The DOJ's

---

145. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080–83 (2011) (finding no constitutional violation in using material-witness arrest warrant to detain U.S. citizen, at least where there is no dispute individualized suspicion supported issuance of warrant).

146. 553 U.S. 674 (2008).

147. See *Kent, Insular Cases*, supra note 8, at 107 & n.22 (citing *Munaf*, 553 U.S. at 702) (noting Court disclaimed any intent to rule out potential due process claim arising from more extreme cases of detention, such as transferring detainee to foreign control if torture is likely).

148. See Charlie Savage & Peter Baker, Obama, in a Shift, to Limit Targets of Drone Strikes, *N.Y. Times* (May 22, 2013), <http://www.nytimes.com/2013/05/23/us/us-acknowledges-killing-4-americans-in-drone-strikes.html> (on file with the *Columbia Law Review*) (discussing drone strike against al-Awlaki and U.S. government's legal rationale for it).

149. See 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* 5–10, available at [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) (on file with the *Columbia Law Review*) (last visited Mar. 8, 2015) (considering whether and in what circumstances legal operation against U.S. citizen abroad violated Fourth and Fifth Amendment constitutional protections); DOJ Office of Legal Counsel, *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaki* 38–41 (2010), available at [https://www.aclu.org/sites/default/files/assets/2014-06-23\\_barron-memorandum.pdf](https://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf) (on file with the *Columbia Law Review*).

analysis revealed that the executive believes that the Constitution places important limitations on its ability to target U.S. citizens, even when they are enemy fighters in hostile or ungoverned territory. At the same time, the executive has suggested that it will follow with regard to noncitizen targets the same or similar procedural rules that it says the Constitution requires for U.S. citizens.<sup>150</sup>

Another example of this rights convergence and softening of categorical boundaries is the change in the rules regarding blocking and seizing the property for national security or foreign affairs purposes. Old rules allowed the U.S. government to detain the property of foreign nations, foreign nationals, and U.S. persons residing in enemy nations during wartime. But in recent years, the U.S. government has applied these rules to U.S. persons within the United States and has successfully argued to several lower federal courts that only the most minimal constitutional protections limit that seizure authority.<sup>151</sup>

### C. *Institutional Arrangements and Operating Rules*

As discussed above, there is an important kind of protection in addition to legal protections in the form of rights and judicial review: practical protections derived from the institutional structures or operating rules of national security institutions. Convergence of previously distinct domains is also occurring in that area. Individual rights and interests of groups previously excluded from protection—such as military enemies

---

(same); Charlie Savage, Justice Department Memo Approving Targeted Killing of Anwar Al-Awlaki, N.Y. Times (June 23, 2014), [http://www.nytimes.com/interactive/2014/06/23/us/23awlaki-memo.html?\\_r=0](http://www.nytimes.com/interactive/2014/06/23/us/23awlaki-memo.html?_r=0) (on file with the *Columbia Law Review*) (providing electronic version of OLC memo).

150. President Obama articulated this point during a speech at the National Defense University in 2013:

Beyond the Afghan theater, we only target al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute . . . [W]e act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.

President Barack Obama, Remarks by the President at National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (on file with the *Columbia Law Review*).

151. See *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 735–36 (D.C. Cir. 2007) (finding no constitutional violation in government decision to block Muslim organization's assets); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164–66 (D.C. Cir. 2003) (same). But see *Kindhearts for Charitable Humanitarian Dev. v. Geithner*, 647 F. Supp. 2d 857, 919 (N.D. Ohio 2009) (holding U.S.-based charity targeted by government blocking order for alleged terrorist ties had significant Fourth Amendment and Due Process rights that had been violated by government).

and noncitizens abroad—are increasingly being protected by structures and operating rules of national security institutions.

This can be seen in the area of intelligence collection. At least since the enactment of FISA, there has been a stark divide: Intelligence collection for national security purposes conducted outside the United States could proceed with little legal limit and essentially no judicial oversight (though U.S. citizens and lawful permanent residents received somewhat more protection), whereas within the United States, much stricter limits and judicial oversight applied. But convergence is occurring. As a result of recent legislation, the federal judiciary is now reviewing *ex ante* the legality of some surveillance requests directed at foreign targets overseas<sup>152</sup> while at the same time, as the recent revelations by Edward Snowden have shown, approving sweeping collection of telephony and internet metadata of U.S. citizens' domestic communications.<sup>153</sup> There is pressure for further convergence. The recent *Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies* recommended that non-U.S. persons be given significantly greater privacy protections from electronic surveillance than they currently possess under the Constitution and laws of the United States,<sup>154</sup> and the President responded affirmatively in the new Presidential Policy Directive (PPD-28) on Signals Intelligence Activities.<sup>155</sup> In a similar vein, even though the Privacy Act protects only U.S. persons with regard to government records, the Department of Homeland Security has administratively extended some protections to noncitizens.<sup>156</sup>

---

152. FISA Amendments Act of 2008, 50 U.S.C.A. § 1881a (West 2008).

153. See *ACLU v. Clapper*, 959 F. Supp. 2d 724, 730 (S.D.N.Y. 2013) (“Edward Snowden’s unauthorized disclosure of Foreign Intelligence Surveillance Court (‘FISC’) orders has provoked a public debate and this litigation. While robust discussions are underway across the nation, in Congress, and at the White House, the question for this Court is whether the Government’s bulk telephony metadata program is lawful.”).

154. *Liberty and Security in a Changing World: Report and Recommendations of the President’s Review Group on Intelligence and Communications Technologies* 29–30 (2013) (Recommendations 13–14), <http://www.lawfareblog.com/wp-content/uploads/2013/12/Final-Report-RG.pdf> (on file with the *Columbia Law Review*).

155. Presidential Policy Directive/PPD-28—Signals Intelligence Activities, pmb. (Jan. 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> (on file with the *Columbia Law Review*) (stating U.S. signals-intelligence practices must protect “legitimate privacy and civil liberties concerns of U.S. citizens and citizens of other nations”); *id.* § 4, 4(a) (“All persons . . . have legitimate privacy interests in the handling of their personal information. . . . To the maximum extent feasible consistent with the national security . . . policies and procedures are to be applied equally to the personal information of all persons, regardless of nationality.”).

156. See Memorandum from Hugo Teufel III, Chief Privacy Officer, U.S. Dep’t of Homeland Security, Privacy Policy Guidance Memorandum § III, (Jan. 7, 2009), [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_policyguide\\_2007-1.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_policyguide_2007-1.pdf) (on file with



Judicialization and greater rights protection through institutional change have been evident in the electronic surveillance area since at least 1978. Based on hints from the Supreme Court,<sup>157</sup> a number of courts of appeals affirmed the constitutionality of warrantless evidence gathering by the executive—either electronic surveillance or physical searches—for foreign-intelligence purposes, even when U.S. citizens were the target or the search occurred in the United States.<sup>158</sup> But Congress in 1978 imposed a regime of judicial oversight through the FISA statute.

Military targeting presents another area in which national security institutions are changing in ways that provide greater protection to previously vulnerable groups. Up through the end of the Vietnam War, American commanders did not seek or receive legal advice about battlefield matters such as targeting.<sup>159</sup> In the last several decades, there has been a “comprehensive integration of military lawyers into the targeting process”<sup>160</sup> and all other aspects of war-fighting.<sup>161</sup> One result has been the development of internal rules and processes that give great weight to minimizing anticipated harm to foreign civilians and foreign civilian infrastructure.<sup>162</sup>

A similar phenomenon exists in intelligence agencies. Before the mid-1970s, a small number of agency lawyers “were not consulted” during the planning of intelligence collection or covert actions.<sup>163</sup> As a result of the revelations of CIA scandals in the 1970s, everything changed. The Office of General Counsel at the CIA increased in size nearly tenfold

---

the *Columbia Law Review*) (extending some protections of Privacy Act of 1974 to non-U.S. citizens).

157. See *United States v. U.S. Dist. Court*, E.D. Mich., 407 U.S. 297, 321–22 (1972) (imposing limits on domestic surveillance but identifying surveillance regarding foreign entities as separate matter).

158. *United States v. Truong Dinh Hung*, 629 F.2d 908, 912–16 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 604–05 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425–27 (5th Cir. 1973).

159. Goldsmith, *supra* note 23, at 125.

160. Peter Margulies, *Valor’s Vices: Against a State Duty to Risk Forces in Armed Conflict*, 37 *Vt. L. Rev.* 271, 303 (2012) [hereinafter Margulies, *Valor’s Vices*].

161. See Goldsmith, *supra* note 23, at 125–35 (surveying growing role of lawyers in reviewing operational plans, giving advice on battlefield, and educating soldiers on legal issues).

162. See *id.* at 135–46 (summarizing role of lawyers in “elaborate, multi-layered, lawyer-vetted process” aimed at minimizing collateral damage); Margulies, *Valor’s Vices*, *supra* note 160, at 303–04 (arguing military lawyers are well-equipped to develop process-based approach to analyzing targeting decisions in light of collateral effects). For an overview of current targeting doctrines and practices, see generally Gregory S. McNeal, *New Approaches to Reducing and Mitigating Harm to Civilians*, in *Shaping a Global Framework For Counterinsurgency Law: New Directions In Asymmetric Warfare* 127 (William Banks ed., Oxford University Press 2013).

163. Goldsmith, *supra* note 23, at 87.

from late 1970s to the present.<sup>164</sup> Congress imposed restrictions on CIA covert actions that were meant to increase presidential accountability to Congress and therefore decrease excesses like the attempted assassination of foreign leaders.<sup>165</sup> All of the new lawyers enforced these and other restrictions. Based on interviews with participants, Goldsmith estimates that today over 100 government officials, including at least ten lawyers “and often more” review any proposed covert action.<sup>166</sup> All of this law, review, and oversight has the effect of providing practical protections to the foreign nationals who otherwise would have been impacted by covert actions, as either targets or collateral damage.

#### D. *Decline of Foreign Affairs Exceptionalism and Deference*

For at least a century,<sup>167</sup> if not more, foreign affairs law has been understood to be different than ordinary constitutional law in both rules about authority of government and rights of individuals. This “foreign affairs exceptionalism”<sup>168</sup> has manifested itself in many ways. There has been a generalized posture and rhetoric of deference by the courts.<sup>169</sup> Courts have given great deference to factual and predictive claims by the

---

164. *Id.*; see also John Rizzo, *Company Man* 48 (2014) (discussing expansion of Office of General Counsel from 1970s to turn of twenty-first century).

165. Goldsmith, *supra* note 23, at 87–95 (outlining accountability mechanisms imposed upon intelligence community by Congress following Iran–Contra scandal).

166. *Id.* at 89.

167. There is significant debate about how exceptional foreign affairs law was—how deferential courts were to the political branches in foreign affairs cases—during the Founding and antebellum periods. Recent scholarship suggests that courts actively entered the fray in cases raising significant foreign affairs questions and did not apply deference doctrines. See, e.g., David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 *N.Y.U. Ann. Surv. Am. L.* 497, 498–99 (2007) (examining treaty interpretation by Supreme Court in early Republic). Other scholars disagree.

168. See Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 *U. Colo. L. Rev.* 1089, 1096 (1999) (defining foreign affairs exceptionalism as “view that the federal government’s foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers”); see also Louis Henkin, *The Constitution for Its Third Century: Foreign Affairs*, 83 *Am. J. Int’l L.* 713, 716 (1989) (suggesting foreign affairs are likely to remain “constitutionally ‘special’” in U.S. law).

169. See, e.g., *Haig v. Agee*, 453 U.S. 280, 292 (1981) (reviewing suit for declaratory and injunctive relief concerning Secretary of State’s administrative revocation of passport and approaching task of statutory construction with view “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention”); *Hirsiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (rejecting constitutional challenge to deportation of former members of Communist Party and stating “contemporaneous policies in regard to the conduct of foreign relations [and] the war power . . . [are matters] so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference”).

executive branch.<sup>170</sup> The political question, standing, and related justiciability doctrines were often applied to dismiss suits raising national security and foreign affairs issues.<sup>171</sup> Courts often gave deference to the executive branch's interpretations of treaties.<sup>172</sup> Courts allowed the executive to decide on a case-by-case basis questions of immunity for foreign officials and, before enactment of FISA, foreign governments too.<sup>173</sup> Courts allowed the executive to unilaterally make domestically binding law in foreign affairs in ways that would be unthinkable under ordinary, domestic constitutional rules.<sup>174</sup> Courts applied much more expansive preemption doctrines in foreign affairs cases than they did in ordinary domestic cases.<sup>175</sup> When cases were heard on the merits raising questions about individual rights in wartime or other national security crises, the courts often upheld the government actions if they found endorsement by both Congress and the President, without fully grappling with the individual rights questions.<sup>176</sup> Many other examples could be given.

Foreign affairs exceptionalism buttressed and even exacerbated the categorical distinctions in individual rights protection that demarcated legal black holes. Justiciability doctrines and formalized or de facto deference to the political branches could provide an additional reason why no judicially enforceable individual rights protections were available to certain persons, places, or contexts, thereby reinforcing the categorical distinctions. And even for persons, places, or contexts that in theory were

---

170. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944) (deferring to Congress and military to determine exclusion order was necessary to prevent espionage and sabotage by U.S. residents of Japanese ancestry).

171. See, e.g., *Baker v. Carr*, 369 U.S. 186, 211–14 (1962) (listing foreign affairs issues found to be nonjusticiable political questions); Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 *Washburn L.J.* 275, 278–303 (1994) (describing how Supreme Court avoided ruling on merits of suits raising legal questions about U.S. participation in Vietnam War).

172. See, e.g., *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 & n.10 (1982) (noting “meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight”).

173. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284–85 (2010) (discussing history of these doctrines and practices).

174. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–27 (2003) (preempting state law because it interfered with presidential foreign policy initiative).

175. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”).

176. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *Theoretical Inquiries L.* 1, 5 (2004) (finding courts are reluctant to inquire into tradeoff between security and liberty when other two branches have acted together).

within the zone of protection, deference or justiciability doctrines could render protections unavailable.<sup>177</sup>

As Goldsmith, Ingrid Wuerth, Peter Spiro, and others have written, foreign affairs exceptionalism has been in decline since the 1990s, and the changes have seemed to accelerate recently. For instance, the Supreme Court has been gradually backing away from the political question doctrine, making it easier for courts to hear foreign affairs cases on the merits.<sup>178</sup> Courts are giving less deference to the government's fact-finding and predictive judgments about foreign affairs or security issues.<sup>179</sup> The Court is reining in executive lawmaking in foreign affairs.<sup>180</sup> In the post-9/11 era, Goldsmith and others have observed federal judges "discard[ing] their traditional reluctance to review presidential military decisions and thr[owing] themselves into questioning, invalidating, and supervising a variety of these decisions."<sup>181</sup> The Supreme Court is making it very difficult for Congress to remove federal court jurisdiction over habeas challenges to executive detentions in foreign affairs and national security settings.<sup>182</sup> Many other examples could be given of the decline of foreign affairs exceptionalism or domesticization of foreign affairs.<sup>183</sup>

---

177. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 220 (1944) (justifying detention of Japanese American U.S. citizens with idea that military's "power to protect [against foreign threats] must be commensurate with the threatened danger").

178. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (rejecting executive's argument that challenge to its refusal on Article II grounds to comply with congressional statute regarding U.S. passports and status of Jerusalem was nonjusticiable political question).

179. For example, in *Boumediene*, the Court independently determined that the government had presented "no credible arguments" or evidence to corroborate its claim "that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." *Boumediene v. Bush*, 553 U.S. 723, 769 (2008).

180. See *Medellin v. Texas*, 552 U.S. 491, 498–99 (2008) (holding President lacked authority to order state courts to reconsider criminal convictions that, according to International Court of Justice decision, violated defendants' treaty-based rights).

181. Goldsmith, *supra* note 23, at xi.

182. See *Boumediene*, 553 U.S. at 724–25, 728 (holding unconstitutional statute providing federal judiciary had no jurisdiction to hear habeas petitions from noncitizens detained at Guantanamo Bay); *Hamdan v. Rumsfeld*, 548 U.S. 557, 576–84 (2006) (applying exacting clear statement rule to hold Congress had not barred with sufficient clarity federal court jurisdiction over Guantanamo detainee's habeas corpus petition); *INS v. St. Cyr*, 533 U.S. 289, 309–10 (2001) (applying clear statement rule to narrowly interpret jurisdiction-limiting provisions of immigration statutes and permitting habeas petition by foreign nationals to proceed in habeas corpus).

183. As Goldsmith has pointed out, in some areas of foreign relations law, the Court has become more formalist, rejecting free-form balancing by courts of foreign relations interests in favor of more rule-like approaches. See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1424 (1999) (arguing "[s]ince the end of the Cold War, the Supreme Court and lower federal courts have begun to adopt a more formalistic approach" to foreign relations doctrines). One can see this in the act of state doctrine, dormant foreign affairs preemption, the political question doctrine, and doctrines about the extraterritorial reach of U.S. statutes. See *id.* at 1425–29

These developments support and extend the convergence of individual rights protection by making it more likely that judicial review will be available and, if it is, less likely that the courts will defer to the government's position.<sup>184</sup>

E. *International Law*

Convergence of previously distinct domains, closing of legal black holes, and greater protection of rights can be seen in international law as well. The development of international human rights law meant that international law now protected a country's citizens against their own government. International law became universal, no longer just the law of a club of "civilized" countries. The international laws of war developed greatly, bringing widely accepted, robust legal protections to previously at-risk groups, like civilians in occupied territory, prisoners of war, and the wounded. Other developments in the international laws of war and human rights law meant that it was no longer acceptable to treat guerrillas, pirates, and other practitioners of "uncivilized" warfare as outside of all legal protection. While this is a complex subject, it can fairly be said that the traditional, categorical distinctions between the laws of war and the law of human rights are dissolving,<sup>185</sup> as are the categorical divisions within the laws of war between the law governing international versus non-international armed conflicts.<sup>186</sup>

Like U.S. law, international human rights law is also gradually expanding its protections geographically. Important U.S. government actors, and many foreign governments, NGOs, and commentators have been arguing that treaties like the Convention Against Torture and the International Covenant on Civil and Political Rights do not only apply in U.S. territory but also wherever the government exercises effective

---

(discussing Court's adoption of rule-like approach in various foreign relations doctrines). Although this formalism reduces judicial subjectivity and freedom, the net effect is often to treat cases that were previously considered foreign affairs more like ordinary cases, and to resolve them under ordinary rules. See *id.* at 1437 (noting rule-like approach minimizes judicial foreign policy judgments).

184. Of course the Court has not wholly abandoned its practice of treating foreign affairs and national security cases as exceptional. See, e.g., Aziz Z. Huq, Structural Constitutionalism as Counterterrorism, 100 *Calif. L. Rev.* 887, 897–98 (2012) (criticizing Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), for deferring too much to government's factual claims and failing to apply ordinary, domestic First Amendment analysis to challenge to statute banning provision of material support to foreign terrorist organizations).

185. See Cordula Droege, Elective Affinities? Human Rights and Humanitarian Law, 90 *Int'l Rev. Red Cross* 501, 501–05 (2008) (“[T]here is today no question that human rights law comes to complement humanitarian law in situations of armed conflict.”); Hans-Joachim Heintze, On the Relationship Between Human Rights Law Protection and International Humanitarian Law, 86 *Int'l Rev. Red Cross* 789, 789–91 (2004) (noting human rights laws now apply to both war- and peacetime).

186. See Jensen, *supra* note 137, at 290–91 (arguing bifurcation between laws for international conflict and laws for non-international conflicts is “under fire”).

jurisdiction and control,<sup>187</sup> such as at detention facilities run by the U.S. government in foreign countries.

#### IV. WHAT MIGHT TODAY BE DRIVING THE CONVERGENCE OF DOMAINS AND THE CLOSING OF LEGAL BLACK HOLES?

This Essay has described convergence of domains and closing of legal black holes through changes in constitutional law, common law, international law, statutory law, judicial attitudes and practices, and executive-branch structures and operating rules. Though change has been most pronounced in recent decades, some of the legal, institutional, and attitudinal changes have taken place over centuries. Pinpointing causal factors would clearly be a difficult undertaking.

What might be more feasible, and more useful, would be to suggest some forces that, whether or not they have been responsible for pushing toward convergence and the closing of legal black holes in the past, today seem to be associated with and supportive of further movements in those directions.

##### A. *The Expansion of Rights, Jurisdiction, and Remedies*

When the Constitution had a fairly limited domain of protection, even in ordinary domestic settings, it would not have seemed strange or troubling that large areas of national security and foreign affairs were outside the Constitution's protective umbrella. And when the jurisdiction of the federal courts was fairly limited, doctrines that blocked access to the courts in foreign affairs and national security cases on the basis of citizenship, geography, or territorial location would also not have seemed strange or troubling either. But over the course of American history, both the substantive coverage of the Constitution and the jurisdiction of the courts has increased greatly.

For many decades, constitutional rights were interpreted narrowly and rarely, and the rights protected relatively few people. The Supreme Court's first holding on the Fifth Amendment Due Process Clause came in 1856.<sup>188</sup> The Court's first decision addressing the Sixth Amendment jury trial guarantee and Confrontation Clause came in 1878.<sup>189</sup> The

---

187. See, e.g., Peter Margulies, *Extraterritoriality and Human Rights: Time for a Change in the U.S. View?*, *Lawfare* (Mar. 8, 2014, 8:11 AM), <http://www.lawfareblog.com/2014/03/extraterritoriality-and-human-rights-time-for-a-change-in-the-u-s-view/> (on file with the *Columbia Law Review*) (arguing against U.S. position that treaties do not apply extraterritorially).

188. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280–81 (1856) (ruling statute allowing for property liens on debtor did not violate Fifth Amendment's Due Process Clause).

189. See *Reynolds v. United States*, 98 U.S. 145, 168 (1878) (ruling grand jury in polygamy case did not violate Sixth Amendment).

Court's first important Fourth Amendment case was decided in 1886.<sup>190</sup> The First Amendment had little bite until the 1940s.<sup>191</sup> Very little in the Constitution applied as rights-based limits to the activities of state and local governments until the Reconstruction Amendments. Either formally or practically, for many purposes, whole categories of people were outside the protection of the Constitution: slaves, African Americans including freed slaves, incarcerated convicts, and the institutionalized mentally ill. The federal courts' jurisdiction was also relatively narrow for many decades: It was not until 1875 that general federal question jurisdiction was given to the federal courts.<sup>192</sup> The most important judicial tools for remedying unconstitutional government actions also developed slowly. Throughout the nineteenth century, injunctions and mandamus were often unavailable.<sup>193</sup>

Starting gradually in the latter part of the nineteenth century, following on the heels of the extension of federal question jurisdiction, and increasing exponentially after World War II, there has been an expansion in the substantive coverage of constitutional rights. Today, it is a dense code that pervasively regulates many of the activities of all branches and levels of government. Previously excluded groups, mentioned above, have over time come within the protections of the Constitution, either by formal amendment or interpretation or both.<sup>194</sup> There has been a criminal procedure revolution that vastly expanded protections for suspects and defendants, primarily in the 1960s and 1970s, though its roots

---

190. See *Boyd v. United States*, 116 U.S. 616, 634–35 (1886) (holding “compulsory production of . . . private books” was “unreasonable search and seizure—within the meaning of the Fourth Amendment”).

191. See, e.g., *Abrams v. United States*, 250 U.S. 616, 624 (1919) (affirming conviction under Espionage Act for urging curtailment of production of war material with intent to hinder war effort).

192. See Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470. Congress did briefly establish general federal question jurisdiction in the Midnight Judges Act of 1801, see Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, but it was quickly repealed, see Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

Though over time the expansion of federal jurisdiction aided the expansion of individual constitutional rights, in 1875, the intent was more nearly the opposite. Both the jurisdiction and size of the federal judiciary were increased by a Republican Party that had largely abandoned the cause of black civil rights and wanted to entrench a nationalist economic vision. See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 *Am. Pol. Sci. Rev.* 511, 517–19 (2002) (attributing late nineteenth-century federal court jurisdiction expansion to Republican efforts to control national economy).

193. See Kent, *Damages*, *supra* note 17, at 1170–71 (explaining nineteenth-century judicial preference against equitable remedies like mandamus and injunctions).

194. Kent, *Citizenship*, *supra* note 28, at 2117; see also G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 *U. Colo. L. Rev.* 1109, 1117–18 (1999) (noting “unprecedented expansion in judicial protection for the civil and political rights of selected minorities . . . which characterized American constitutional jurisprudence for three decades after the close of the Second World War”).

appeared decades earlier.<sup>195</sup> At approximately the same time, constitutional law witnessed an enormous growth in the reach and bite of procedural due process.<sup>196</sup> Constitutional law and rights expanded in numerous other domains, from privacy and sexual liberty, to regulation of voting, and protections for speech, expression, and religious liberty.<sup>197</sup> And the courts have developed powerful remedial tools and doctrines with which to grant injunctive relief and restructure government to protect individual rights.<sup>198</sup> As these developments have proceeded, it has seemed more unusual and more normatively troubling to have any zones remain where rights are nonexistent or very limited and where courts decline to exercise jurisdiction or grant remedies.

At the same time, nineteenth-century formalism in legal doctrine and reasoning, characterized by a legal landscape divided into separate spheres or categories, has been declining. Formalist legal doctrine, which was often about drawing lines and deciding which side of the boundary line different phenomena fell on,<sup>199</sup> has been gradually supplanted by different styles of legal analysis. Modern constitutional doctrine is often based around rights and interest balancing, rather than categorical rules.<sup>200</sup> This shift in reasoning makes it less likely that legal analysis will find any person, place, or context to be categorically outside the protections of the Constitution.

These expansions in individual rights and remedial protections for them have, of course, not happened in a vacuum. Contemporary moral psychology and conceptions of equality seem also to be consistent with

---

195. See, e.g., Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 *Sup. Ct. Rev.* 65, 77–80 (describing “criminal procedure revolution” of 1960s and 1970s).

196. See, e.g., Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 *Colum. L. Rev.* 1973, 1974–80 (1996) (exploring background and combined effect of “five landmark opinions issued between 1970 and 1972” that drastically expanded due process protection).

197. See generally Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* 74–98 (1998) (discussing opinions from Warren era of Supreme Court expanding protection of rights such as decisions on voting regulation and police searches); Lucas A. Powe, Jr., *The Warren Court and American Politics* 209–335 (2000) (exploring history of Warren Court from 1962–1968 and discussing its rulings on freedom of expression and other personal rights).

198. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281, 1292–96 (1976) (discussing increasing availability of equitable remedies in twentieth century); Kent, *Damages*, *supra* note 17, at 1167–72 (describing shift in courts’ preferences toward equitable remedies in suits against government officials during latter part of twentieth century).

199. Morton J. Horwitz, *The Transformation of American Law 1870–1960*, at 17 (1992) (stating “[n]ineteenth-century legal thought was overwhelmingly dominated by categorical thinking” and “[l]ate-nineteenth-century legal reasoning brought categorical modes of thought to their highest fulfillment”).

200. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943, 948–63 (1987) (explaining emergence of “balancing” competing interests in modern constitutional jurisprudence).



and supportive of convergence and closing of legal black holes. When the United States was founded, the structure of social life, morality, and legal thought probably contributed to or buttressed the view that protection from the law and courts was very unevenly divided between distinct categories or spheres of persons, places, and contexts. As G. Edward White writes, Americans of the eighteenth and early nineteenth centuries were used to putting people into categories, often binary ones, that entailed social, economic, and sometimes legal differences in powers, privileges, and responsibilities.<sup>201</sup> Thus, there were important categorical differences in status between men and women, children and adults, squires and artisans, Indians and non-Indians, slaves and free persons, free whites and free people of color, property holders and those without property, aliens and citizens, and resident aliens and nonresident aliens.

Already in the early nineteenth century, the social and legal distinctions between different kinds of people were coming into some tension with what White calls “the equality principle.”<sup>202</sup> Since that time, one of the most important developments in U.S. history has been the expansion of “We the People” to include previously marginalized groups, especially during the huge expansions of civil rights and civil liberties protections from the 1940s onward.

Changes in the moral psychology of residents of the developed West might also be relevant to convergence. As psychologist Jonathan Haidt observes, all societies must confront the question of how to balance needs of the group and those of individuals, and there are two main ways that societies answer this question. According to Haidt, the West has been moving from a sociocentric moral approach to allocating power, rights, and resources—one that places the needs of groups and institutions first and subordinates the needs of individuals—to a more individualistic approach that places individuals at the center and makes society a servant of the individual.<sup>203</sup> Gradually increasing recognition of the dignity and rights of all individuals, in both U.S. constitutional law and international human rights law, has proceeded apace with this underlying change in moral psychology. At the same time, an older moral framework based on loyalty, authority, and sanctity has been breaking down. This framework, according to Haidt, valued “self-control over self-expression, duty over rights, and loyalty to one’s groups over concerns for out-

---

201. G. Edward White, *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–1835*, at 20 (1988).

202. *Id.* at 32.

203. Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* 14–15 (2012) (“The individualistic answer largely vanquished the sociocentric approach in the twentieth century as individual rights expanded rapidly, consumer culture spread, and the Western world reacted with horror to the evils perpetrated by the ultrasociocentric fascist and communist empires.”).

groups.”<sup>204</sup> Over time, persons on the liberal or left side of the ideological spectrum in the West, have come to value the former much more.

These underlying moral changes have proceeded apace with formal changes in constitutional law and remedies, helping create our present circumstances where it seems more and more “un-American”<sup>205</sup> to hold that any person, place, or context is categorically outside the protection of the Constitution and laws.

#### B. *Role and Self-Conception of the Supreme Court and Federal Judiciary*

Certain institutional changes within the U.S. government, notably the rise to prominence and power of the Supreme Court, seem conceptually and historically linked to convergence and closing of legal black holes. Today, the Court’s fairly aggressive vision of judicial supremacy, especially in the area of individual rights, is clearly supportive of further convergence and closing of legal black holes.

In *Marbury v. Madison*, the Court sketched a very limited role for judicial review. First, the Court emphasized that its duty and power to say what the law was could properly be exercised only in service of the court’s duty to provide a remedy for violations of an individual’s private right.<sup>206</sup> Second, the Court broadly described categories of “political” issues that could not be decided judicially but lay within the “constitutional or legal discretion” of another branch.<sup>207</sup> And, famously, the Court exercised the power of judicial review in service of limiting the Court’s power in the particular case before it and ducking confrontation with the President and Congress.

But in a gradual process spanning centuries, the modern imperial Court emerged from these humble beginnings. Only two acts of Congress were declared unconstitutional in the entire period prior to the Civil War (in *Marbury* and *Dred Scott*).<sup>208</sup> The pace quickened over the subsequent decades. As of 2002, a Government Printing Office publication had counted 157.<sup>209</sup> The Court barely maintains any longer the fiction that it decides constitutional issues only when it unavoidably must to protect an individual’s private rights. It is often very self-conscious and forthright about its modern role of declaring constitutional doctrines and rules that will operate prospectively as binding rules of law applica-

---

204. *Id.* at 192–93.

205. See Countdown with Keith Olbermann, *supra* note 5 (quoting Neal Katyal).

206. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 177–78 (1803).

207. *Id.* at 165–66.

208. See Jed Handelsman Shugerman, A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court, 37 Ga. L. Rev. 893, 907 (2003) (“The Court invalidated federal laws only twice before the Civil War (*Marbury v. Madison* and *Dred Scott*).”).

209. Gov’t Printing Office, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States (2002), <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-10.pdf> (on file with the *Columbia Law Review*).

ble to all government actors facing circumstances within the scope of those rules or doctrines.<sup>210</sup> The scope, density, and ambition of the modern Court's constitutional jurisprudence are astounding. It is difficult to think of any important area of social, political, economic, or educational life that entirely evades its reach.

The Court is less and less willing to see any zones of U.S. government activity as categorically immune to judicial review and oversight.<sup>211</sup> At the Supreme Court level, if not yet in the lower federal courts, the scope of things considered nonjusticiable political questions has shrunk. Out of quasi-departmentalist beginnings, the modern Court has decided that it "alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions."<sup>212</sup> The modern Court's supremacy is widely accepted. "Governments at all levels . . . have essentially acceded to the Supreme Court's demand in *Cooper v. Aaron* that the constitutional doctrines and rules announced by the Court in its decisions be treated as equivalent to the Constitution itself."<sup>213</sup>

For this enormously powerful and self-confident modern Court, it must seem increasingly quaint to hear the government argue in national security and foreign affairs cases that the judiciary lacks competence or authority to decide a given issue.<sup>214</sup>

As has been widely recognized, the Court has also shifted the focus and intensity of its judicial review over time. One salient change is the shift that became most obvious in the late 1930s and 1940s, and was noted by the Court itself in, among other places, the famous footnote in the *Carolene Products* decision.<sup>215</sup> As the Court moved toward a more deferential posture to legislative and executive action when reviewing law

---

210. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (discussing value of "promot[ing] the development of constitutional precedent" by issuing rulings on constitutionality of official conduct); *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (stressing importance of federal courts issuing written decisions on constitutionality of officers' conduct); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (same).

211. See *Kent, Damages*, *supra* note 17, at 1128–30 ("[T]he Supreme Court has arguably never been more assertive in adjudicating national security and foreign relations issues than it has in recent years.").

212. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *Colum. L. Rev.* 237, 241 (2002).

213. *Kent, Damages*, *supra* note 17, at 1158–59.

214. Even in national security cases involving core competencies of the Congress and executive, the modern Court often does not deign to even mention its doctrines that counsel deference to the political branches, much less apply them. See, e.g., *id.* at 1133 n.38 (discussing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

215. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (suggesting more searching inquiry might be appropriate when, among other things, rights of discrete and insular minorities are at stake).

in the economic and regulatory spheres, it has moved quite strongly to protect civil rights and civil liberties.

This is not to say that the Court entirely sets its own agenda or proceeds further and faster on behalf of individual rights than the national political order will tolerate. Courts are part of that political order, as Mark Tushnet and others emphasize, and when they exercise judicial review it is generally in collaboration with one part of the political order against another, understood either vertically (working with the federal government against state or local governments) or temporally (working with the current order against policies of a prior generation).<sup>216</sup>

Political coalitions can also amend the Constitution in ways that change individual rights protections directly<sup>217</sup> or allow Congress to enforce constitutional rights protections,<sup>218</sup> change the jurisdiction or structure of the federal judiciary in ways that promote the protection of individual constitutional rights,<sup>219</sup> or enact legislation that supports affirmative constitutional litigation and change,<sup>220</sup> declares the punishment of deprivations of constitutional rights,<sup>221</sup> tasks the bureaucracy with protecting and extending constitutional rights,<sup>222</sup> or promotes pre-

---

216. See Mark E. Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, in *The Supreme Court and American Political Development* 117–37 (Ronald Kahn & Ken I. Kersch eds., 2006) (examining Court’s role in shaping political order); see also Keith Whittington, *Political Foundations of Judicial Supremacy* 4 (2007) (arguing “political incentives facing elected politicians . . . often lead politicians to value judicial independence and seek to bolster, or at least refrain from undermining, judicial authority over constitutional meaning”).

217. See, e.g., U.S. Const. amends. XIII, § 1 (banning slavery and involuntary servitude), XIV, § 1 (defining and protecting national citizenship and barring states from abridging privileges or immunities of U.S. citizens or denying persons of due process of law or equal protection of laws), XV, § 1 (barring discrimination in voting on account of race or previous condition of servitude).

218. See *id.* amends. XIII, § 2, XIV, § 5, XV § 2 (giving Congress power to enforce amendments).

219. See, e.g., Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470 (granting general federal question jurisdiction of federal courts); Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (giving federal courts jurisdiction over actions challenging civil and criminal deprivations of civil rights).

220. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 3–6, 10, 79 Stat. 437 (authorizing Attorney General to initiate and federal courts to hear cases to protect voting rights); 42 U.S.C. § 1983, enacted as section 1 of the Enforcement Act or Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (creating private right of action for deprivation of constitutional rights by persons acting under color of state law).

221. See, e.g., Voting Rights Act of 1965 § 10 (declaring poll taxes violate Constitution and authorizing Attorney General to institute suits to ban them); Civil Rights Act of 1866 § 2 (making it crime for states and state actors to deprive persons of their civil rights or impose increased punishments on account of race).

222. See, e.g., Civil Rights Act of 1964, tit. IV–VI, Pub. L. No. 88-352, 78 Stat. 241 (granting authority to offer grants and technical assistance to promote desegregation of public schools; empowering investigations of racial discrimination in voting, education, housing, employment, use of public facilities, and administration of criminal justice; and

ferred values of constitutional dimension, and hence entrench those norms in the legal and political culture.<sup>223</sup>

Collaboration with other national political actors has marked the Court's push for greater protection of civil rights and civil liberties generally and, more recently, the moves toward convergence of domains and closing of legal black holes. Instances of sharp conflict between the federal courts and the George W. Bush Administration, and a more generalized but subtler difference in perspectives about the extent to which foreign affairs and national security should be legalized and judicialized, should not be allowed to obscure the role of Congress, the executive, and other parts of the national political order in supporting the judiciary in greater convergence and closing of legal black holes. During the Bush Administration, for example, Congress legislated to protect noncitizen detainees against torture in foreign locations<sup>224</sup> and to provide federal court review of detentions and military commission trials,<sup>225</sup> albeit not the full-blown habeas corpus that the Court later mandated in *Boumediene*. The earlier statutory protections were expanded by President Obama and a later Congress.<sup>226</sup> For decades Congress has been instrumental in introducing Article III judicial oversight of certain kinds of foreign-intelligence surveillance and searchers.<sup>227</sup>

### C. *International Relations and International Law*

There have been deep changes in the structure of the international system that seem connected with and supportive of convergence and the closing of legal black holes. At a very broad level, the increasing cross-border flows of people, information, money, goods, and services—in a word, globalization—has likely contributed to a softening of the distinctions between foreign and domestic affairs and between citizen and noncitizen. Sociologist Saskia Sassen describes “denationalization” driven by globalization, where “[t]erritory, law, economy, security, authority, and

---

directing federal agencies to ensure entities receiving funding do not practice racial discrimination).

223. See, e.g., *id.*, tit. VII (barring discrimination in employment on basis of race, color, sex, religion, or national origin).

224. See Detainee Treatment Act, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2680, 2739 (2005) (“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”).

225. See *id.* § 1005 (providing for federal-court review of military trials); see also Military Commissions Act of 2006, Pub. L. No. 109-366, § 950, 120 Stat. 2600 (same).

226. See Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (providing greater procedural protections, with Article III judicial review, of military commission trials); Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) (banning torture and mistreatment, including harsh interrogation tactics).

227. The original Foreign Intelligence Surveillance Act of 1978 has been extended numerous times by later Congresses.

membership” are no longer constructed solely as “national.”<sup>228</sup> But these phenomena operate at such a deep level that any causal role in changes in U.S. law and institutions relevant to this Essay is likely remote and highly mediated. I will instead look for more specific forces.

As I noted earlier in Part III.E, the structure of international law has changed dramatically. It is now universal, not limited in its coverage to civilized states and groups. It protects both noncitizens and citizens from their own governments. It used to have hugely different rules for peacetime and wartime, but those distinctions are collapsing somewhat.

In international law and international relations, there has been a centuries-long shift from diplomacy and coercion at the nation-state level toward a more individualized, judicialized view of how aliens are to be protected. Since at least the eighteenth century, it has been thought that international law has required that a host nation provide some minimum level of fair treatment to alien residents or visitors.<sup>229</sup> “Denial of justice” to aliens within the country—for instance, refusing or hindering access to domestic courts—was treated by international law as an injury to the alien’s home state for which the territorial state that had denied justice was responsible.<sup>230</sup> The offended home state could, if it chose to “espouse” the claim of its national, seek redress diplomatically.<sup>231</sup> Force could also be used if redress were refused; denial of justice was considered a justifiable cause of reprisal.<sup>232</sup> In more extreme circumstances such as riot or war, where justice was not so much denied as absent, customary international law allowed the state whose nationals were in peril

---

228. Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* 1–2 (2006).

229. See, e.g., de Vattel, *supra* note 52, §§ 104–114, at 145–48 (describing rights retained by foreigners abroad by virtue of membership in society and mankind); 3 G.F. Von Martens, *A Compendium of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* 88 (William Cobbett trans., Cobbett & Morgan 1802) (1795) (suggesting fair treatment of alien visitors was required by law of nations); 8 *id.* at 273. This norm was often embodied in bilateral treaties. See, e.g., Treaty of Amity, Commerce, and Navigation, U.S.–United Mexican States, arts. XIV–XV, Apr. 5, 1832, 8 Stat. 410 (offering governmental protection of civil rights and immunities to each nation’s citizens when in states of treaty signatories); Treaty of Friendship, Limits and Navigation, U.S.–Spain, art. XX, Oct. 27, 1795, 8 Stat. 138 (same); Treaty of Amity and Commerce, U.S.–Prussia, art. II, July 9–Sept. 10, 1785, 8 Stat. 84 (same); Treaty of Amity and Commerce, U.S.–Swed., art. XVII, Apr. 3, 1783, 8 Stat. 60 (same); Treaty of Amity and Commerce, U.S.–Neth., art. VIII, Oct. 8, 1782, 8 Stat. 32 (granting protections from arbitrary detention and capture of vessels by party signatories of each other).

230. See Francesco Francioni, *The Right of Access to Justice Under Customary International Law*, in *Access to Justice as a Human Right* 1, 9–13 (Francesco Francioni ed., 2007) (describing aliens’ access to justice).

231. *Id.* at 9.

232. See de Vattel, *supra* note 52, §§ 348–353, at 230–31 (noting instances where force is appropriate); *The Federalist* No. 80, *supra* note 58, at 522–23 (Alexander Hamilton) (noting denial of justice as just cause of war).

to intervene forcibly to protect lives or even property,<sup>233</sup> something the United States has done many times.<sup>234</sup>

Modern trends are away from force and more toward judicial remedies. Post-UN Charter, military force is only allowed to be used in self-defense or through authorized collective security processes. International human rights law is increasingly recognizing a right to court access—a right of anyone, citizen or alien, to access domestic courts in the state where they are located to seek redress for violations of domestic or international legal norms.<sup>235</sup>

More generally, as Samuel Moyn argues, the idea of rights was untethered from citizenship in the state, allowing the idea of universal human rights as against the state to be possible.<sup>236</sup> The enormous growth and success of the idea of international human rights in the post-World War II period means that it seems increasingly anachronistic and arbitrary to deny rights protection on the basis of citizenship. For example, the International Covenant on Civil and Political Rights, one of the most important modern human rights instruments to which 167 states are parties, provides that rights of personal security and access to the courts are available to all human beings without distinction.<sup>237</sup> The famous Third

233. See Lillich on the Forcible Protection of Nationals Abroad 41 (Thomas C. Wingfield & James E. Meyen eds., 2002) (discussing evidence showing state use of force to protect property and life).

234. See Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* 448 (1915) (“The army or navy has frequently been used for the protection of citizens or their property in foreign countries in cases of emergency where the local government has failed, through inability or unwillingness, to afford adequate protection to the persons or property of the foreigners in question.”).

235. See, e.g., International Covenant on Civil and Political Rights, art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171 (“Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy . . . (b) . . . that any person claiming such a remedy shall have his right thereto determined by competent judicial . . . authorities, or . . . any other competent authority . . .”); see also Universal Declaration of Human Rights, art. 8, G.A. Res. 217 (III) A, art. 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”); Charter of Fundamental Rights of the European Union, 364/01, art. 47, 2000 (“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.”); Organization of American States, American Convention on Human Rights, art. 8(1), Nov. 22, 1969, 1144 U.N.T.S. 143 (“Every person has the right to a hearing with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal . . . for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”); African Charter on Human and Peoples’ Rights, art. 7(1), June 27, 1981, 1520 U.N.T.S. 217 (“Every individual shall have the right to have his cause heard.”).

236. Samuel Moyn, *The Last Utopia: Human Rights in History* 44–85 (2010).

237. International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 (“Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized . . . without distinction of any kind, such as race, colour, sex, language, religion, political or

Geneva Convention bans the detaining power from making invidious distinctions between prisoners of war on the basis of “nationality” or “similar criteria.”<sup>238</sup> In light of these trends, protection under U.S. law that turns on categorical distinctions between different classes of persons is increasingly seen as a potential human rights violation.

D. *Changes in National Security and Foreign Affairs Activity of U.S. Government*

Concerted pressure for extending rights beyond the sovereign territory of the United States began when the U.S. government started projecting power abroad in sustained ways. When extraterritorial action by the U.S. government was irregular, brief, and primarily involved war-fighting or similar coercive activities, it seemed natural that constitutional rights developed for peacetime; domestic application would not be extended. But, as the twentieth century opened, the United States came to be involved in many extraterritorial activities that looked less like episodic coercion and more like governing, such as nation-building, ruling civilian populations of non-sovereign zones where military bases were located, or staffing and running U.S. courts in foreign countries like China. For example, an important case about whether constitutional rights applied outside the United States arose in Cuba during the time of temporary U.S. military government,<sup>239</sup> as part of this country’s first attempt at self-described humanitarian intervention. And the long-term occupations of Germany and Japan after World War II raised questions about whether constitutional rights limited U.S. government actions.<sup>240</sup>

At first these developments merely generated calls in some quarters for convergence and closing of black holes but did not actually change U.S. law in that direction. If anything, categorical distinctions were invigorated and new ones developed in order to give more flexibility to the government. The classic example is the so-called incorporation doctrine developed in the *Insular Cases* of 1901 and thereafter. The best

---

other opinion, national or social origin, property, birth or other status.”); id. art. 14(1) (“All persons shall be equal before the courts and tribunals.”); id. art. 9(1) (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”).

238. Geneva Convention Relative to the Treatment of Prisoners of War, art. 16, Aug. 12, 1949, 6 U.S.T. 3316.

239. *Neely v. Henkel*, 180 U.S. 109, 112 (1901) (extraditing U.S. citizen to Cuba, then governed by U.S. military, for criminal trial).

240. See, e.g., *Eisentrager v. Forrestal*, 174 F.2d 961, 963–65 & 963 n.9 (D.C. Cir. 1949) (holding Fifth Amendment Due Process and Habeas Suspension Clauses protect “any person,” anywhere in world, including admitted agents of German government convicted of war crimes by U.S. military commission in China and detained in U.S.-occupied Germany), rev’d sub nom. *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950) (holding German petitioners lacked constitutional rights, including right to access U.S. courts).



understanding of U.S. law and practices at the time was that during peacetime, full constitutional rights should be available to the people and entities present in territory that was de jure part of the United States.<sup>241</sup> But in response to pressures generated by the imperialism of 1898 and thereafter, the Supreme Court in the *Insular Cases* acceded to the government's wish to have fewer constitutional restrictions on its colonial governments, holding that not all constitutional restraints were applicable until Congress decided to fully "incorporate" a territory into the United States.<sup>242</sup>

But over time, the changing nature of U.S. foreign relations and national security activity has seemed to cause changes in U.S. law. In general, when a government is seen to wield great power, it leads to calls for more legal restraint. For example, once the breadth and intrusiveness of what the NSA has been doing in domestic and foreign surveillance became known as a result of the Snowden leaks, calls for the courts or Congress to rein it in have increased exponentially.

In recent conflicts with non-state actors like al Qaeda or insurgents in post-Saddam Hussein Iraq, U.S. government activities like long-term preventive detention, extensive interrogation for intelligence purposes, and counterinsurgency campaigns seem to many observers to be close enough to ordinary law enforcement and governance that norms of constitutional protection should be applicable.

There are other features of conflicts with non-state actors that create pressure for increased rights protection and judicialization. There are pervasive and factually complex disputes about whether a given individual detainee or military or intelligence target is, in fact, an enemy fighter. The likelihood of "false positives" is increased by the fact that citizenship cannot be used as an easy proxy for enemy status and that detainees who in fact are enemy fighters lack an incentive to self-identify as such because they will not receive prisoner-of-war protections but instead might be tried for unlawful belligerency or domestic crimes.<sup>243</sup> There is great indeterminacy about which international legal protections apply to detainees who are alleged terrorists. Skimpiness of those that do apply, like Common Article 3 of the Geneva Conventions of 1949, suggests to some observers that more robust and certain protections of domestic rights enforced by courts are needed. The indefinite and highly malleable scope and length of the conflict raises the discomfiting prospect of

---

241. See Kent, Citizenship, *supra* note 28, at 2127–28. There were minor exceptions based on territories' unique status as proto-states. For instance, federal courts in the territories were not staffed with Article III judges with life tenure—a kind of structural protection for individual rights—because territorial courts would be abolished once statehood was attained.

242. See *id.* (discussing outcome and impact of *Insular Cases*).

243. See generally Issacharoff & Pildes, Targeted Warfare, *supra* note 27, at 1545–46 (discussing pressures and incentives for military force to be used based on individual guilt rather than group status).

war without end or limits, and hence we see increasing calls to make armed conflict more like peacetime in terms of judicial involvement and rights protection. The fact that the home governments of many detainees are U.S. allies in the conflict against al Qaeda and the Taliban and therefore do not always advocate strongly for the detainees' interests also likely increases the calls for judicial oversight under robust domestic law norms.

On the other hand, the enormous destructive power that can be harnessed by non-state groups suggests to many that simple law enforcement methods are not sufficient, and that harder-edged military and intelligence assets and techniques must be deployed as well. Territorial location matters less as well. Whether through cyber attacks, dispersal of biological weapons, or the use of ordinary objects like commercial airplanes as weapons, destructive attacks can potentially be launched from anywhere and everywhere, putting pressure on the U.S. government to militarize the homeland. At the same time, changes in communications technologies mean that it is often difficult to determine the geographic location or identity of the parties to the communication, and hence traditional rules about electronic surveillance, based on a foreign-domestic distinction concerning citizenship and territorial location, are increasingly unworkable.

As Pildes and Issacharoff have argued, changes in military technology—such as the development and spread of precision munitions and drone technology—are putting increasing pressure on the military to “individuate,” to apply force in a surgical manner so that it only impacts individuals who have been deemed targetable or guilty in some fashion through fair procedures.<sup>244</sup>

As non-state threats rise in importance, the U.S. government and courts are less likely to confront a noncitizen as a representative of a foreign government. Spiro has noted that foreign affairs law often treated aliens for constitutional purposes “not as individuals but rather as components of other nations.”<sup>245</sup> This is seen, for example, in immigration cases giving great deference to the U.S. government because of concerns about the potential disloyalty of noncitizens to the United States. And courts often justified deference and fewer constitutional rights for noncitizens with the assumption “that their interests will be protected on the international plane by their country of nationality, so that even as they are deprived of individual constitutional rights, their rights will be protected through diplomatic channels.”<sup>246</sup> As non-state groups became

---

244. *Id.* at 1525–28 (“[T]he use of military force against terrorists *necessarily* must shift, and has shifted, away from traditional group-based membership attributions of responsibility to individuated judgments of responsibility.”).

245. Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 *Ohio St. L.J.* 649, 704 (2002) [hereinafter Spiro, *Globalization*].

246. *Id.* at 706.

more important to U.S. foreign policy, exceptional treatment of noncitizens seems less justifiable.<sup>247</sup>

And even though threats from non-state actors are serious, they pale in comparison to the threat of annihilation from superpower conflict. Today's reduced-threat environment has led some to argue that doctrines limiting judicial review and individual rights in foreign affairs and national security contexts have less justification today.<sup>248</sup>

Spiro correctly observes that much of the deference to the U.S. government from courts in foreign relations cases came from an asserted need to protect diplomatic secrecy and from concerns about provoking confrontation with another nation. The greatest deference to the government often came in cases that directly implicated the interests of third-party foreign countries.<sup>249</sup>

Thus, the very kinds of national security and foreign affairs activities that are most salient today tend to be ones that lead observers and, often, courts and other political actors to think that ordinary legal norms and perhaps even judicial review should govern.

E. *Trust in Government, Growth of New Media, and Relations Between the Government and the Press*

Paul Stephan has suggested that the attractiveness of judicial deference to the political branches in foreign relations waxes and wanes based on the legal elite's view of the competence and probity of the Executive and Congress.<sup>250</sup> Large portions of the American public have always been skeptical of the federal government, but it may be a distinctively modern phenomenon that large swaths of the legal and economic elites are today.

The Vietnam War and the Watergate scandals are commonly said to mark the beginning of a dramatic decline of trust and confidence in the federal government. For a brief period after 9/11, the shock of the attack and sense of crisis and national purpose may have rallied legal elites behind a posture of judicial deference to the political branches. But soon, the enormous credibility crisis of the Bush Administration surrounding WMDs in Iraq and revelations of behavior (e.g., intentional torture of captives) that many members of the legal elite found shocking and obviously illegal, among other things, led to the elite bar and, seemingly, even Justices of the Supreme Court to harbor distrust of the execu-

---

247. See *id.* at 707 (arguing historical justifications for distinguishing noncitizens for constitutional purposes “offer no support for its persistence”).

248. See *id.* (arguing prevalence of non-state threats erodes historical justifications for differential constitutional treatment of aliens).

249. See *id.* at 680 (noting “courts have shown a demonstrably greater willingness to entertain foreign relations matters that do not directly implicate other countries”).

250. See Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 *Va. J. Int'l L.* 33, 58–59 (2003).

tive branch.<sup>251</sup> Public approval of and trust in the executive has remained low during the Obama years.<sup>252</sup>

Congress's painfully obvious dysfunction and partisanship, which is reflected in very low public approval,<sup>253</sup> has not helped its standing with the elite bar and the courts. It seems likely that the Supreme Court's assertiveness vis-à-vis Congress, seen for example in the record number of congressional statutes declared unconstitutional in recent decades and in cases like *City of Boerne*, *Garrett*, and *Shelby County*,<sup>254</sup> results at least in part from a decline in respect for Congress by members of the Supreme Court.<sup>255</sup> In the title of her recent *Harvard Law Review* foreword, Pamela

---

251. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 765–69 (2008) (rejecting traditional bright-line rule that noncitizens outside United States lacked constitutional protections in part because such rule was “subject to manipulation” by President or Congress); *Hamdan v. Rumsfeld*, 548 US 557, 587–88 (2006) (stating process for review of military commission convictions that includes Secretary of Defense and ends with President “clearly lack[s] the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces,” hence Article III courts should not abstain from adjudicating legality of military commission proceedings); *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality opinion) (“[A]s critical as the Government’s interest may be in detaining those who . . . pose an immediate threat. . . , history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”).

252. See Gallup, *Trust in Government*, <http://www.gallup.com/poll/5392/trust-government.aspx> (on file with the *Columbia Law Review*) (last visited Mar. 7, 2015) (displaying poll results from 1972 through 2014 asking respondents about trust in federal executive branch, showing both George W. Bush and Barack Obama Administrations received high marks at beginning of their first terms but soon were trusted by less than half of respondents).

253. See Gallup, *Congress’ Approval Rating Remains Near Historical Lows* (Aug. 13, 2013), <http://www.gallup.com/poll/163964/congress-approval-rating-remains-near-historical-lows.aspx> (on file with the *Columbia Law Review*) (showing over eighty percent of Americans disapprove of job Congress is doing).

254. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2630–31 (2013) (invalidating key section of Voting Rights Act in part because Court disagreed with Congress’s fact-finding about extent of voting discrimination); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (invalidating part of Americans with Disabilities Act because Court determined Congress had failed to document in legislative record sufficient pattern of misconduct by states); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding limit on Congress’s authority to enforce Fourteenth Amendment where it assertedly encroached on Court’s prerogative of defining meaning of Constitution).

255. The Court has become more and more detached from Congress, and from high-level politics generally. The last Supreme Court Justice who served in Congress prior to joining the Court was Sherman Minton, who retired from the Court in 1956. The last former governor was Earl Warren, who retired in 1969. The last former Attorney General of the United States was Tom Clark, who retired from the Court in 1967. See Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 *Harv. L. Rev.* 1, 5 (2012) (“[T]he current Supreme Court is the first in U.S. history to lack even a single member who ever served in elected office.”).

Karlan suggests that the current Court has “disdain” for Congress and politics more generally.<sup>256</sup>

Even as trust in Congress and the executive branch have declined, a new media environment scrutinizes the activities of government like never before. As Goldsmith has argued, “[t]he growth of global television and the Internet” since the 1990s has given unprecedented publicity to the foreign affairs and national security activities of the United States and other governments, and by shining a light on them, has made their “perceived fairness” and compliance with law matters of public concern and debate.<sup>257</sup> The information and media revolution has gone hand-in-hand with decreased trust in government. Important segments of the American public and much of the press have, since Watergate and other scandals of the 1970s and the associated congressional hearings and press reporting that revealed abuses through the executive branch, become rather skeptical about U.S. government assertions that it should be trusted to do the right thing in secret. The transparency and checks and balances that come with judicial review therefore seemed more desirable. And, as Spiro argues, when the executive and Congress lose their monopoly over information about foreign affairs and national security, courts are less receptive to pleas for deference.<sup>258</sup> Recent decades have seen the rise of very active and sophisticated press and advocacy networks that ferret out and publicize unsavory government secrets.

The same information revolution that has changed the media landscape has also made it much easier for government insiders to leak large amounts of national security information to reporters or advocacy groups. And at the same time, many advocacy organizations have sprung up dedicated to using information about government misdeeds to expand constitutional and other legal protections for groups such as noncitizens abroad and military targets who would previously have been categorically unprotected.

#### CONCLUSION

The historical trajectory toward the closing of legal black holes and converging of domains is clear. Most of the forces I have suggested might be supportive of this change today seem unlikely to abate any time soon.

---

256. *Id.* at 12 (“The current Court, in contrast to the Warren Court, combines a very robust view of its interpretive supremacy with a strikingly restrictive view of Congress’s enumerated powers. The Roberts Court’s approach reflects a combination of institutional distrust . . . and substantive distrust . . .”); see also Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 *Wm. & Mary Bill Rts. J.* 127, 181 (2014) (“At times the Court seems to show a particular lack of respect for Congress as compared with state legislatures.”).

257. Goldsmith, *supra* note 23, at 125–35.

258. Spiro, *Globalization*, *supra* note 245, at 683 n.127.

Part of the reason is that many of the trends seem to reinforce each other. For example, the increase in the number and potency of individual constitutional rights and associated remedies gives authority and legitimacy to the role of federal courts restraining the political branches, and hence increases the self-confidence and assertiveness of the courts. In turn, greater assertiveness and self-confidence will lead the courts to elaborate and apply more rights and remedies. Moral psychology that increasingly values the autonomy and equality of individuals will tend to support increased individual constitutional rights and vice versa.

Many of these trends I have identified are probably also individually self-reinforcing. Take, for example, the increasing confidence of the U.S. judiciary about its right and capacity to adjudicate foreign affairs and national security cases. As the courts hear more such cases, they will likely gain both confidence in their ability to handle them and the confidence of outside observers. Courts create precedents when they decide cases, and a growing body of precedent will make it seem increasingly natural and accepted that courts are adjudicating these cases. The federal judiciary's involvement adjudicating applications for foreign-intelligence surveillance since 1978<sup>259</sup> has, for example, recently led to calls for a similar kind of judicial review of targeted killings.<sup>260</sup>

Because these trends toward the closing of legal black holes and converging of domains appear to be longstanding and mutually reinforcing as well as self-reinforcing, the future will probably bring more rather than less convergence in rights protection and the further closing of legal black holes. That does not mean that the trend lines will always be steady. A military or other catastrophe, such as the 9/11 attacks, can temporarily lead political actors, including the courts, to adopt and countenance fewer individual rights protections than they ordinarily would.<sup>261</sup> A major nation-to-nation war involving the United States, unlikely as that may seem today, would probably push the country further off the course of convergence and closing of legal black holes, and for a longer time.<sup>262</sup> But even that is unlikely to be permanent and almost certainly would not

---

259. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1789 (codified as amended at 50 U.S.C. §§ 1801–1885c (2012)).

260. See Scott Shane, *Debating a Court to Vet Drone Strikes*, N.Y. Times (Feb. 9, 2013), <http://www.nytimes.com/2013/02/09/world/a-court-to-vet-kill-lists.html> (on file with the *Columbia Law Review*).

261. See Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. Ill. L. Rev. 551, 551 (showing national security policies were less protective of individual rights during first Bush term immediately after 9/11 than during second term or Obama presidency).

262. See generally Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Comment. 261, 281 (2002) (discussing different reactions to Franklin D. Roosevelt versus George W. Bush's use of military tribunals and observing "[f]or better or for worse, solicitude for the interests of accused belligerents will diminish when the risks to the Nation seem most serious and tangible").

roll back the developments of the last several decades. As Goldsmith and Cass Sunstein argue, U.S. history shows a ratchet effect, where perceived abuses of individual rights in the name of security during wartime are criticized and rejected afterwards and thus develops a new, higher baseline for treatment of individuals going forward.<sup>263</sup>

The future of national security and foreign affairs is thus likely to see more and more aggressive judicial review and further application and extension of ordinary constitutional and other legal norms. The number of persons, places, or contexts that are legal black holes will continue to shrink, perhaps to zero. National security and foreign affairs will become less and less legally exceptional, as convergence continues apace.

Some more specific predictions might be ventured. Pildes and Issacharoff are surely right that there will be increased pressure, including by legal means, for the U.S. military to “individuate” by applying force in a surgical manner so that it only impacts individuals who have been deemed targetable or guilty in some fashion through fair procedures.<sup>264</sup> Calls for a “drone court” similar to the Foreign Intelligence Surveillance Court are an example of this phenomenon.<sup>265</sup>

Because the political actors driving convergence and closing of legal black holes tend to be more associated with the political left of center—for instance, it was the left of the Supreme Court plus Justice Kennedy that produced the narrow margins of victory for the detainees in *Rasul*, *Hamdan*, and *Boumediene*<sup>266</sup>—we will likely see more and faster convergence and closing of legal black holes on issues where the right can join in too. So, for example, issues involving property or other economic rights or First Amendment rights for commercial or other entities are ones to watch.

The Supreme Court, in an opinion by Chief Justice Roberts, recently held that the First Amendment rights of organizations that provided funding and assistance regarding HIV/AIDS in foreign countries were violated by the statutory requirement conditioning receipt of U.S. government grants on having “a policy explicitly opposing prostitu-

---

263. See *id.* at 284–85 (“During every serious war in our nation’s history, civil liberties have been curtailed. Following . . . each war, elites regret these restrictions . . . [as] unwarranted or extreme . . . . This dialectic produces a ratchet effect, over time, in favor of more expansive civil liberties during wartime.”).

264. See *supra* note 27 and accompanying text (describing Pildes and Isacharoff thesis on pressures on military to “individuate”).

265. See, e.g., Benjamin Wittes, *The New York Times Proposes Judicial Review of Nearly All Drone Strikes*, *Lawfare* (Feb. 15, 2013, 7:21 AM), <http://www.lawfareblog.com/2013/02/the-new-york-times-proposes-judicial-review-of-nearly-all-drone-strikes/> (on file with the *Columbia Law Review*) (discussing proposed “drone court”).

266. *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene v. Bush*, 553 U.S. 723 (2008), were 5-4 decisions, while *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), would have been 5-4 if Chief Justice Roberts had not recused himself after having voted for the government when the case was at the D.C. Circuit.

tion.”<sup>267</sup> The Court relied entirely on case law involving ordinary, domestic issues—such as restrictions on using federal funds to counsel women about abortions,<sup>268</sup> and evinced no awareness of the separation of powers concerns with constraining U.S. foreign policy activities in foreign countries with judicially imposed constitutional restrictions.

The recent D.C. Circuit decision concerning the Committee on Foreign Investment in the United States (CFIUS) is on point here. A statute empowers the President, through CFIUS, an executive branch committee chaired by the Secretary of Treasury and staffed by senior officials with national security and economic portfolios, to investigate and block “any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”<sup>269</sup> CFIUS reviews these transactions for effects on the national security of the United States.<sup>270</sup> The statute provides that presidential decisions are not subject to judicial review.<sup>271</sup> In a case where CFIUS blocked a transaction of a U.S. corporation owned by Chinese nationals on national security grounds, the D.C. Circuit first applied an exacting clear statement rule to find that the statute did not clearly enough bar a due process challenge to the decision of CFIUS; held that the political question doctrine did not apply; and, with only the barest hint of deference toward the national security equities, held that the corporation had been denied its property without due process because it was not given all unclassified evidence used in the review process or any opportunity to rebut that evidence.<sup>272</sup>

In the same vein, decisions that are only a little more than a decade old abruptly rejecting constitutional challenges to asset blocking orders for national security reasons by the Office of Foreign Assets Control<sup>273</sup> are almost certainly going to be superseded by precedent imposing more traditional constitutional restrictions on this national security activity.<sup>274</sup>

---

267. *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2326 (2013).

268. See *id.* at 2328 (citing *Rust v. Sullivan*, 500 U.S. 173, 195 & n.4 (1991)).

269. 50 U.S.C. app. § 2170(a)(3) (2012).

270. *Id.* § 2170(f).

271. *Id.* § 2170(e).

272. See *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 311, 314, 319 (D.C. Cir. 2014).

273. See, e.g., *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 163–66 (D.C. Cir. 2003) (upholding asset-blocking order against Muslim charitable foundation designated as terrorist organization); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (rejecting Global Relief Foundation’s constitutional arguments against seizing of its assets).

274. See, e.g., *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 988, 1001 (9th Cir. 2012) (holding OFAC violated foundation’s due process and First Amendment rights); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 919 (N.D. Ohio 2010) (holding OFAC violated corporation’s Fourth Amendment rights).



Whether these particular predictions prove correct or not, the tendency in our law, political institutions, and culture will be toward greater convergence and closing of legal black holes.