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Seeing reason or seeing costs? The United States, counterterrorism, and the human rights of foreigners

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Abstract

It is well known that in the wake of 9/11, the United States committed various extraterritorial human rights violations, that is, human rights violations against foreigners outside of its territory. What is less known is that the United States has gradually introduced safeguards that are, at least on paper, meant to prevent its counterterrorism policies from causing harm to foreigners abroad or, at least, to mitigate such harm. Based on three case studies on the development of safeguards related to torture, targeted killing, and mass surveillance, we show that two mechanisms, coercion and strategic learning, deployed either on their own or in combination, can account for the development of such safeguards. By contrast, we found no evidence of a third mechanism, moral persuasion, having any direct effect. In other words, US policymakers opt to introduce such safeguards either when they face pressure from other states, courts, or civil society that makes immediate action necessary or when they anticipate that not introducing them will, at a later date, result in prohibitively high costs. We did not find evidence of US policymakers establishing safeguards because they deemed them morally appropriate. From this we conclude that, although the emerging norm that states have extraterritorial (and not just domestic) human rights obligations may not have been internalized by key US policymakers, it nevertheless has a regulative effect on them insofar as the fact that relevant others believe in the norm restricts their leeway and influences their cost–benefit calculations.

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Introduction

The United States has committed extraterritorial human rights violations in its response to 9/11. Terrorist suspects have been tortured in Abu Ghraib, arbitrarily detained in Guantánamo Bay, or brought to black sites; terrorist suspects and civilians have lost their lives in targeted killing operations; citizens around the world have had their privacy rights infringed through mass surveillance programs; and refugees have faced ever larger obstacles to entering the United States. Nonetheless, the United States has also begun to introduce measures that are designed to prevent, or at least mitigate, the harmful effects of its policies on foreigners abroad. Government agencies and Congress have introduced safeguards that, among other things, prohibit torture and extraordinary rendition, allow Guantánamo inmates to challenge their detention, specify criteria for targeted killing operations, and ban intelligence agencies from indiscriminately spying on foreigners. Few of these safeguards effectively guarantee that extraterritorial human rights violations will not occur; some of them are almost certainly paper tigers. Yet they demonstrate that US policymakers recognize that they cannot treat foreigners beyond their borders simply as they like. The key question remains, however, why has the United States established such safeguards and imposed restrictions on itself?

Research on extraterritorial human rights obligations is primarily the domain of legal scholars, a number of whom have criticized a “paradox in international human rights law,” namely, that human rights were meant to be universal, while international human rights conventions have traditionally been perceived as primarily containing obligations toward a state’s own nationals or within its own territory (Gibney et al., 1999: 267). Since human rights are essentially protections against the unchecked exercise of power, however, the “territoriality paradigm” (Vandenhoe and Van Genugten, 2015: 1) of international human rights law no longer suits a world in which states increasingly interact with non-citizens beyond their borders, suggesting that states also have obligations toward the latter (King, 2009: 522). Legal scholars also interpret the jurisprudence emanating from national and international courts and United Nations (UN) treaty bodies and, although the matter is still contested, have identified a growing recognition in relevant case law that states have extraterritorial human rights obligations that arise in the contexts of territorial and factual control, though these are largely restricted to negative obligations (Gammeltoft-Hansen and Vedsted-Hansen, 2017; Skogly, 2006). This scholarship is undoubtedly of great value. Legal scholars, however, have not focused on gathering insights into why states introduce safeguards to minimize the harm their policies cause to foreigners abroad.

Political scientists, on the contrary, are very interested in why states commit to and comply with human rights standards. Some scholars have shown that shaming by transnational non-governmental organizations (NGOs) can improve states’ compliance (Murdie and Davis, 2012); some have argued that litigation is an important strategy for holding governments accountable (Simmons, 2009: 129–135); others have demonstrated

that states respond to material incentives (Hafner-Burton, 2005); finally, states may undergo a socialization process and be persuaded to believe in the value of human rights norms (Risse et al., 1999). How these or other mechanisms operate when extraterritorial human rights obligations are involved rather than domestic ones has not, however, been investigated. Moreover, scholars who have looked specifically into how US counterterrorism law has evolved since 9/11 only describe the changes (Setty, 2015, but see Abel, 2018); research that explains the emergence of US safeguards for foreigners abroad is based on single case studies (Sikkink, 2013).

In light of this gap, this article investigates why the United States has introduced protections for foreigners outside US territory against harm inflicted by its counterterrorism policies. We conceptualize three causal mechanisms—moral persuasion, strategic learning, and coercion—and examine which mechanism(s) account(s) for the emergence of safeguards. We do so on the basis of three case studies concerning the development of safeguards related to the right of detainees not to be tortured, the right to life in targeted killing operations, and the right to privacy in the context of foreign mass surveillance.

We have found two mechanisms, coercion and strategic learning, that are able, on their own or in combination, to explain why the United States has introduced safeguards. Although we did not find one mechanism that operated in all cases, our findings suggest that the introduction of safeguards follows a distinct pattern. Most importantly, our findings indicate that cost–benefit calculations by US policymakers were critical, whereas moral persuasion for the most part had no direct effect on them. This does not imply, however, that the norm that states have extraterritorial human rights obligations has not begun to diffuse internationally. Rather, it indicates that the norm primarily exerts a regulative effect. Key US policymakers may not have internalized the norm, but its existence has swayed their cost–benefit analyses in favor of introducing safeguards, suggesting that moral persuasion has an indirect effect.

This article consists of three sections. We first conceptualize our causal mechanisms and introduce the article's research design. Subsequently, we present and interpret the findings of the empirical analysis. The concluding section also outlines avenues for future research.

Theory

Mechanisms are chains of events that connect a starting point with an outcome. Following the logic of Coleman's (1986) macro–micro link in social action, we assume that events at the macro level (human rights violations) trigger action at the micro level (interventions by individuals/groups; input processing by policymakers), which, in turn, results in changes at the macro level (safeguards). Our mechanisms therefore all follow the same logic: Extraterritorial human rights violations evoke an intervention; policymakers process the intervention; as a result, they establish safeguards. Importantly, a mechanism can break down at any link in the chain if the conditions that facilitate the transition between its components are not given (Bennett and Checkel, 2015: 12).

We derive three mechanisms from existing theories on state commitment to and compliance with human rights norms. They are conceptualized as unique inasmuch as their individual components do not overlap (Goertz, 2017: 48). First, policymakers may

Table 1. Mechanisms.

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

become convinced of the inherent value of a norm and enact rules that reflect this conviction (moral persuasion). Second, policymakers may, after thorough reflection and in the absence of immediate pressure, realize that it is in their long-term strategic interest to prevent the potential negative consequences of rights violations by establishing safeguards (strategic learning). Third, policymakers may face immediate pressure in the form of material sanctions, shaming, or litigation, to which they feel forced to respond (coercion). Why actors decide to intervene with policymakers is not conceptualized as part of the mechanisms. Hence, when we assess whether a mechanism is present in a specific case, we only consider its direct effect (how it works on policymakers), not its indirect effect (how it works on actors who try to influence policymakers). We do, nonetheless, address such indirect effects when we discuss our findings. In the following section, we provide a short conceptualization of the mechanisms; Table 1 provides a summary; for a more detailed conceptualization, see sections 1.1 and 1.3 of the online appendix.

Moral persuasion

The moral persuasion mechanism, applied to our case, is, like any other, triggered by state actors committing human rights violations on foreign territory. Policymakers in the norm-violating state are then confronted with arguments by norm entrepreneurs as to why their behavior is morally wrong in order to convince them of the intrinsic value of the norm in question (Finnemore and Sikkink, 1998). Norm entrepreneurs may, for instance, argue that, given the universal nature of human rights, it is morally unjustifiable for states to violate the human rights of foreigners outside of their territory. Offending policymakers may, as a result, experience cognitive dissonance because they realize that their behavior is not in line with normative expectations (see Reinold and Zürn, 2014). In this process, they may become convinced of the norm's inherent value and conclude that their behavior has been morally wrong (Risse, 2000). In our case, key actors in government and/or Congress might become convinced that it is morally appropriate to insure that foreigners abroad are not harmed by US counterterrorism policies and, consequently,

take steps to comply with this norm by establishing new regulations or laws. While most violations may trigger criticism on moral grounds, the successful processing of moral arguments is key in determining whether moral persuasion was the causal mechanism behind a particular safeguard.

Strategic learning

In the strategic learning mechanism, policymakers in the norm-violating state are confronted with strategic (as opposed to moral) arguments as to why their norm-violating behavior is likely to undermine their own or their country's long-term interests (see Grobe, 2010). Crucially, this happens before immediate pressure to act builds up. Strategic arguments may be put forward by norm entrepreneurs who consider them more convincing than moral ones or by other stakeholders who perceive their own or their national interests to be in danger. Applied to our case, strategic arguments might be made that extraterritorial human rights violations could jeopardize key objectives in the fight against terrorism or undermine the United States's authority to demand compliance with human rights norms from other states. Having processed these arguments, policymakers in the perpetrator state might determine that continuing the norm-violating behavior is likely to undermine their strategic goals.¹ Rational actors are expected to weigh the anticipated costs of policy change against the perceived benefits. They will then be likely to conclude that the benefits associated with reforms will be greater than any losses such reforms might entail (Downs et al., 1996). For example, US policymakers might conclude that they would likely put off their allies in the future or provoke further terrorist violence by pressing ahead without safeguards. If these anticipated costs are deemed to exceed the perceived strategic benefits of their questionable policies, then policymakers will opt for reforms based on a logic of prevention, even if they are not being directly forced to alter their policies.

Coercion

In the coercion mechanism, the intervention that follows norm-violating behavior comes in the form of tangible, immediate pressure and not arguments (either moral arguments in the moral persuasion mechanism or instrumental arguments in the strategic learning one). Norm-violating policymakers face immediate negative consequences as a result of their behavior and therefore feel compelled to react. The critical difference from the strategic learning mechanism is that policymakers come to the conclusion that a response is necessary quickly and do not spend time carefully weighing the potential costs and benefits of introducing safeguards. Coercion can come in three variants—material sanctions, shaming, and litigation. They all follow the same basic logic but involve different intervention strategies applied by different actors.

In the material sanctions variant, norm-violating states face material punishment (Donno and Neureiter, 2018; Hafner-Burton, 2005) from other states whose nationals are harmed, international organizations (IOs), or private actors. The US government might, for example, introduce safeguards in response to key allies announcing that they will oust US troops from their territory unless safeguards for their nationals are introduced in

line with international human rights law. If policymakers in the target state see the sanctions as an immediate threat to their interests, they will perceive an urgent need to react. US policymakers might consider their allies' response to be prohibitively costly and feel compelled to provide safeguards to induce their allies to lift any sanctions or refrain from implementing them.

In the shaming variant, immediate pressure for policy change may again come from norm entrepreneurs with an honest interest in norm-compliant behavior. This time, however, instead of trying to influence norm-violators with convincing arguments, they tarnish their reputation (Krain, 2012; Murdie and Davis, 2012). Shaming can also be a strategy for actors who do not care about the violated norm but see an opportunity to publicly attribute blame to another actor. Policymakers in the target state perceive reputational damage as a result of a public attribution of blame. US policymakers, for example, might take note of any damage to the United States's reputation as a country that respects human rights and worry that this may have unwanted knock-on effects. Consequently, they introduce safeguards to restore the country's reputation.

In the litigation variant, immediate pressure comes from a court that issues a judgment that identifies a violation of international human rights law and demands safeguards (Duffy, 2018; Simmons, 2009). It might be a domestic court in the target state, a foreign court authorized to exercise universal jurisdiction, or an international court with jurisdiction over the respective state's extraterritorial human rights-related behavior. In order for the litigation mechanism to operate, policymakers must process the intervention and perceive an obligation to implement the court's decision and abide by its interpretation of applicable human rights law. As a direct response to an actual court judgment or to the imminent threat of one, US policymakers would therefore choose to introduce reforms to avoid the negative consequences of non-compliance with a court decision.

Research design

Our research design combines the strengths of process tracing with those of a design based on the analysis of several cases (Bennett and Checkel, 2015: 21). We use deductive process tracing to follow the selected causal mechanisms across three cases. Deductive process tracing requires the conceptualization of one or several hypothetical mechanisms before investigating whether empirical evidence for the operation of the mechanism(s) can be identified in any of the cases, working on the basis that a mechanism has explanatory value only if all of its components are present (Beach and Pedersen, 2019: 255, 260).

We do not expect that all cases in which the United States establishes safeguards for foreigners abroad will follow the same path. Instead, we are open to the possibility of equifinality and therefore in each case trace different mechanisms that might plausibly be expected to account for the establishment of any safeguards (Schimmelfennig, 2015: 106–107).² Similarly, we assume that a single mechanism may not always be able to do justice to the complexity of policy change. Hence, we are also open to the possibility that the interplay of multiple mechanisms may account for the outcome in a specific case (see sections 1.2 and 1.3 of the online appendix). Following a sequential pattern, one mechanism may trigger another; alternatively, following a cumulative logic, two mechanisms may operate simultaneously, together leading to the outcome (Beach and Rohlfing,

2018). However, to avoid overdetermined “kitchen sink arguments in which everything matters” (Checkel, 2006: 367), it is necessary to distinguish between genuinely causal and spurious relationships and to take into account the persuasiveness of the empirical evidence found for each mechanism (George and Bennett, 2005: 222). Finally, it should not be overlooked that when mechanisms interact, they do not necessarily reinforce each other but may crowd one another out instead if, for instance, their logics of influence are incompatible (Goodman and Jinks, 2013).

We examine the explanatory value of the selected mechanisms in three parallel case studies in which the United States, having committed extraterritorial human rights violations following 9/11, established what we call “extraterritorial human rights safeguards.” Specifically, we consider cases where the United States’s negative obligations not to violate the right to be free from torture (in the context of detainee treatment), the right to life (in targeted killing operations), and the right to privacy (in relation to foreign mass surveillance) were involved. Empirical evidence has been gathered from primary and secondary sources and from 43 interviews with US policymakers, their staff, bureaucrats, and experts conducted in 2017 and 2019.

Case selection was based on two considerations. First, in line with the logic of deductive process tracing, we chose cases in which both the mechanisms’ common starting point (extraterritorial human rights violations) and common endpoint (the introduction or enhancement of safeguards designed to prevent or mitigate harm to foreigners outside the United States) were given (Beach and Pedersen, 2019: 98–99, 258). We thus follow Goertz’s (2017: 59) advice to begin with cases in which hypothesized mechanisms can be explored in their entirety, before moving on to others that lack either the mechanisms’ starting point or their endpoint. Indicators that existing provisions are being enhanced are increases in the scope of the rights violations they cover, the degree of obligation they imply, their precision, the number of their beneficiaries, or the addition of complaint provisions to preventive measures (see Heupel and Hirschmann, 2017). Second, by conducting three case studies with the purpose of “accumulating systematically within-case causal inferences” (Goertz, 2017: 173), we take the expectation of equifinality seriously, because conducting several case studies enables us to detect different causal mechanisms (Hall, 2013: 28). Moreover, as our cases differ in important ways—for instance, with respect to the type of right violated or the actors who suffer rights violations—we can probe the mechanisms in different contexts and learn something about the conditions under which they occur.

To present the results of small-N process tracing in a journal article, one has to reconcile the contradictory demands of achieving internal and external validity. Given the space limits, it is impossible to give an account of all the important empirical information. Nonetheless, we have applied the following strategies to achieve a balance: The analysis that forms the basis of our brief case summaries has been as detail-oriented as process tracing demands, but the case summaries presented concentrate solely on key events and background conditions. At the same time, they mirror the structure provided in the way that the mechanisms are conceptualized, and we provide as many references as possible, again respecting the space limitations given. Finally, we concentrate on the mechanisms that operated as conceptualized (coercion and strategic learning) and restrict

Table 2. Results.

Human rights	Operational context	Casual mechanism(s)
Right not to be tortured	Detainee treatment	Coercion + strategic learning
Right to life	Targeted killing	Strategic learning
Right to privacy	Mass surveillance	Coercion

discussion of the role of moral persuasion to the “Interpretation” section of this article and section 2 of the online appendix.

Empirical analysis

Our empirical analysis confirms our expectation of equifinality. We found two mechanisms, coercion and strategic learning, that can, either on their own or in combination (with coercion preceding strategic learning), explain the emergence of safeguards that provide protections for foreigners outside the United States against harm caused by US counterterrorism policies (see Table 2). Moral persuasion did not have a direct effect on US policymakers but, as we will discuss in the next section and in section 2.2 of the online appendix, had important indirect effects. The remainder of this section provides short summaries of our three cases.

Coercion + strategic learning: detainee treatment and the right not to be tortured

The development of extraterritorial anti-torture safeguards arises out of a sequential combination of two mechanisms, an initial phase of coercion being followed by a phase of strategic learning. In the aftermath of 9/11, the perceived need for better intelligence opened the door to interrogation techniques for foreign terror suspects that even President Barack Obama, when commenting on practices endorsed by the Bush administration, later described as a violation of the right to be free from torture (The White House, 2014b). In 2002, the Office of Legal Counsel issued memoranda (later known as the “torture memos”) which introduced so-called Enhanced Interrogation Techniques (EITs). They also outlined why the protections of the Geneva Conventions were not applicable to Al-Qaida and how the Taliban could be denied prisoner-of-war status (Office of Legal Counsel, 2002b). According to these memos, the ten EITs, including waterboarding, walling, and sleep deprivation, would not result in long-lasting mental harm, nor did they constitute torture or cruel, inhuman, or degrading treatment (CIDT), because they were not “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” (Office of Legal Counsel, 2002a: 1). The actual application of the techniques, however, stood in stark contrast to the Counsel’s legal opinion. Official government reports confirm, for instance, that one detainee had been waterboarded 183 times within 14 days, while another died of hypothermia after he was held partially nude at low temperatures for at least 48 hours (CIA Inspector General, 2004: 74).

Alberto Mora, General Counsel of the Navy and a firm opponent of torture, tried, upon learning of the use of torture in the Guantánamo Bay detention facility in late 2002, to convince the Department of Defense to ban any form of torture, describing torture as a betrayal of American values (Department of the Navy, 2004). His efforts did not lead to any significant reforms, however (Mayer, 2006). Meanwhile, NGOs began to publicly denounce the US government's interrogation practices (American Civil Liberties Union, 2019). Due to the top-secret classification of the interrogation program, it was difficult to present evidence to back the accusations made, however, so that the topic's "campaign-ability" initially remained low.³ Similarly, early media reports alluded to abuses in US-run prisons in Iraq, but because they lacked photographic evidence, they were received with little interest by the public (Hanley, 2003).

This, however, changed with the Abu Ghraib leaks in spring 2004, when a series of very graphic photos depicting severe cases of torture and CIDT were broadcast nationwide on CBS News.⁴ Subsequent leaks of the "torture memos" and abusive detainee treatment in Guantánamo Bay further boosted the public uproar,⁵ allowing NGOs to initiate national and international shaming campaigns, that increasingly framed detainee abuse as a war crime (Amnesty International, 2004). At the same time, growing media coverage spread the story globally, putting policymakers under immediate pressure to act (Abel, 2018: 45–105; Hersh, 2004).

State Department officials quickly became aware of the reputational damage the scandal had produced.⁶ Moreover, Senator John McCain, a long-time opponent of torture, talked to key stakeholders in Congress, arguing that failure to restore the United States's reputation would put US military personnel into direct danger.⁷ Although McCain and others also made moral arguments, pointing to commitment to the torture ban being part of the US identity, such rhetoric had little impact.⁸ Finally, in autumn 2005, in direct response to the shaming campaign triggered by the Abu Ghraib leaks, the Senate passed the Detainee Treatment Act (DTA) as amendment 1977 to the Defense Appropriations Bill for 2005 by 90 votes to 9 (US Congress, 2005). The new law bound the military to the interrogation techniques listed in the Army Field Manual (AFM) (US Congress, 2005: Sec. 1002), making EITs an illegal practice for the Department of Defense. The DTA had its shortcomings, as it did not impose the same obligations on the Central Intelligence Agency (CIA) and introduced a good faith assumption for prior actions by US military personnel (US Congress, 2005: Sec. 1004). Nevertheless, it constituted an important reform as it prohibited, thenceforth, any use of torture and CIDT by the US military at all times and without geographical limitations, introducing a significant change to previous policy standards that had only applied such safeguards to detention facilities under officially recognized US jurisdiction.

NGOs, nevertheless, remained concerned about the absence of regulations for the CIA and criticized the lack of transparency surrounding the implementation of the new law.⁹ McCain, similarly, fiercely resented the loopholes in the legislation¹⁰ that enabled President Bush to declare that he would interpret the bill "in a manner consistent with the constitutional authority of the President" (The White House, 2005). The NGOs therefore decided to push for further reforms. Yet, with the US public growing increasingly indifferent to the issue, activists became aware of the declining potential of shaming. They felt forced to change their strategy and instead turned to feeding strategic arguments to

key policymakers about the anticipated negative consequences for the United States of using torture.¹¹ Human Rights First, one of the key NGOs working on the issue, began to cooperate with retired military and CIA interrogators to convince Congress and the 2008 presidential candidates of the need to abolish any form of torture for all agencies. The retired interrogators argued that torture was “ineffective, unlawful and counterproductive” and warned that its use “facilitates enemy recruitment, misdirects or wastes scarce resources, and deprives the United States of the standing to demand humane treatment of captured Americans” (Human Rights First, 2008). Presidential candidate Obama engaged actively in such debates, trying to sharpen his understanding of the problem and develop policy proposals with the experts.¹² Eventually, on his second day in office surrounded by the same retired generals and flag officers who had previously advised him about the expected costs of inactivity, President Obama signed Executive Order (EO) 13491 Ensuring Lawful Interrogations that referenced the Convention against Torture (CAT) and made compliance with the AFM mandatory for all government agencies, including the CIA (The White House, 2009).

EO 13491 did not have the authority of a law, however. After the release of the Senate Select Committee’s Study of the Central Intelligence Agency’s Detention and Interrogation Program in 2014, the issue was back on the agenda. Once more, experts and scholars publicly spoke out against torture, arguing that not only was it futile, it also constituted a looming threat to national security and the safety of members of the US military.¹³ Against this background, Senators McCain and Feinstein introduced an Amendment to the National Defense Authorization Act of 2016. In the subsequent debate, many Republicans opposed creating any sort of accountability for past actions, even though they generally opposed torture.¹⁴ In addition, concerns about reducing the CIA’s flexibility by binding it to the AFM coincided with open criticism of the AFM itself, which had originally been designed not as a general interrogation standard but as basic guidance for regular soldiers.¹⁵ Nonetheless, the new law would regulate governmental agencies’ conduct going forward and thus not only prevent future reputational damage, but also reduce national security risks deriving from unlawful interrogation techniques. In addition, writing EO 13491 into law would forestall arbitrary changes by future presidents (Senate Select Committee on Intelligence, 2014: vii). After having considered both its anticipated costs and benefits, Congress ultimately passed the amendment in December 2015. The new law made compliance with the AFM mandatory for all government agencies in any armed conflict, enshrining mandatory compliance with the Geneva Conventions and other core points of EO 13491. Likewise, the bill introduced a report on best practices and a regular review of the AFM to ensure the United States’s compliance with its international obligations (US Congress, 2015: Sec. 1045).

In summary, the development of extraterritorial anti-torture safeguards can be traced back to coercive pressure in the shape of shaming, followed by strategic learning about the potentially negative consequences of inaction. Although US policymakers were also confronted with moral arguments against torture and there were public officials who abhorred torture as a matter of principle, there is no evidence that safeguards would have been introduced without pressure and strategic considerations. The safeguards are strong in that they clearly outlaw torture for all government agencies and have survived the

Trump presidency despite President Trump's opposition to such limitations. Due to the secrecy surrounding CIA operations, however, hidden cases of torture or other forms of mistreatment in US detention facilities outside of US territory may still exist.

Strategic learning only: targeted killing and the right to life

The introduction of extraterritorial safeguards in the US targeted killing program can be traced back to strategic learning within the Obama administration. The use of lethal action¹⁶ rose exponentially from 50 strikes under the Bush administration to 586 strikes under Obama (New America, 2019), violating the right to life of many. Specifically, experts in the field claimed that the practice of targeting terrorist suspects in so-called signature strikes giving them no opportunity to defend themselves legally amounted to extrajudicial killing (Davis et al., 2016: 9), while the steady increase in civilian casualties was criticized as disproportionate and excessive (European Center for Constitutional and Human Rights, 2019). The drone program in non-active combat zones was especially controversial. Although the exact numbers of fatalities for which the program was responsible differ depending on the reporting source, the average estimate indicates a total between 3,400 and nearly 5,000 for the period January 2009 to January 2017 (The Bureau of Investigative Journalism, 2019).

These high fatality numbers and the initial absence of any formal rules regarding the determination of targets motivated various attempts at forcing the US government to consider a change of policy. These met with no success, however. Activists tried to develop a shaming campaign, using their own counts of civilian casualties (New America, 2019) and casting doubt on the United States's credibility as a defender of human rights (Center for Civilians in Conflict, 2013; Lawrence, 2013). Yet they failed to change domestic public opinion. By 2013, support for drone strikes abroad among Americans was still at 65 percent; only 28 percent opposed them strictly (Brown and Newport, 2013). Similarly, as the US government was able to refer to the principle of self-defense (The White House, 2013b), no litigation made it before a US court, while attempts by the Pakistani and Afghan governments to sanction the US government proved futile because of their inconsistency.¹⁷

In the end, however, though coercive pressure did not succeed in triggering policy change, strategic argumentation did. Executive staffers began to worry that the president's quasi-unlimited discretionary power in targeted killing operations could have long-term negative consequences.¹⁸ Likewise, arguments that terrorists might use the US drone program for propaganda or that the United States should not miss an opportunity to set standards for other countries that also acquired drone technology played an important role in the strategic debate.¹⁹ Moral arguments against targeted killing with drones were brought forward, too, particularly by civil society actors and UN human rights bodies (e.g. UN Human Rights Council, 2010). Yet, there is little evidence that they had a decisive impact on the decision in favor of safeguards.²⁰

High-ranking White House staffers and the government's Counterterrorism Working Group engaged with the strategic arguments and ultimately acknowledged that the potential benefits of introducing safeguards would outweigh the anticipated costs associated with them.²¹ Although additional bureaucratic procedures would require resources and

slow down operational decisions, a public guideline could terminate legal debates and address concerns regarding the absence of rules.²² A new cross-checking provision for targeting procedures that would involve additional agencies could likewise diminish Pakistan's and Afghanistan's resentment by relying on more intelligence so as to increase strike accuracy and limit future civilian casualties (The White House, 2013b). While the latter would also offset the worries of NGOs, further provisions such as a requirement of a high certainty of minimum civilian casualties would additionally reduce the risk of future shaming campaigns and their negative consequences.²³

As a result, and in the absence of immediate pressure, Obama signed Presidential Policy Guidance (PPG)—Procedures for Approving Direct Action against Terrorist Targets Located outside the United States and Areas of Active Hostilities (The White House, 2013a) in May 2013, establishing the first official guideline on targeted killing. The document remained rather weak, as it did not restrict the drone program to combat zones, nor significantly improve the policy's transparency. However, it signaled that, "the United States prioritizes, as a matter of policy, the capture of terrorists as a preferred option over lethal action," and that "lethal action should not be proposed or pursued as [a] punitive step or as a substitute for prosecuting a terrorist" (The White House, 2013a: preamble). In addition, the PPG created, at least on paper, a rigorous framework for target nomination, interagency review, and authorization procedures. Accordingly, any operational plan had to be approved by the operating agency's general counsel(s), the National Security Staff, and the Deputies and Principals Committees of the National Security Council (NSC), before being handed to the President for the final decision (The White House, 2013a: Sec. 1B). Moreover, the PPG introduced a mandatory requirement of near certainty of no civilian harm, and made an assessment of the compliance of each strike with international law as well as after-action reports and Congressional notifications obligatory (The White House, 2013a: Sec. 6). So, the PPG attempted to offer a response to almost all concerns brought forward in the previous debate, testifying to the processing of the strategic arguments presented by internal stakeholders.

Nonetheless, after the enactment of the PPG, the continued elevated use of lethal action remained a matter of concern, particularly as the number of civilian casualties remained high (Greenfield and Hausheer, 2014: 1). State Department officials insistently cautioned that civilian casualties were a looming threat to national security: the high death toll could facilitate terrorist propaganda, creating more radicalized enemies than the strikes were actually eliminating.²⁴ In addition, advisors within the White House and the Counterterrorism Working Group grew worried that a continuing lack of transparency and accountability could further increase the risk of reputational damage both domestically and internationally.²⁵ Moreover, human rights watchdogs continued to voice moral concerns about civilian casualties (Human Rights Watch, 2013).

In response, the Counterterrorism Working Group, the NSC, and Department of State officials resumed their discussions, again focusing primarily on strategic arguments. They exchanged views on concerns that reports detailing civilian casualties could reveal secret operations, while creating additional expense. On the contrary, a new policy on civilian casualty mitigation could increase the program's effectiveness tactically and strategically, given that safeguards would improve target accuracy while decreasing the risk of creating new enemies.²⁶ Likewise, official government reports on civilian

casualties could create a greater sense of accountability, which would bolster the United States's credibility as a human rights defender.²⁷ Moral considerations, however, even though they were shared by a number of internal stakeholders, did not take center stage in the debates.²⁸ Despite some internal opposition, in July 2016 President Obama eventually signed EO 13732—United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in US Operations Involving the Use of Force, which, despite lacking precision throughout, clearly went beyond the PPG. The EO established enhanced training programs for civilian protection, mandatory periodic performance consultations with the NSC, and regular exchanges on best practice with international partners. It also provided for the development of more precise weapon systems and field intelligence so as to further decrease the number of civilian casualties, while the agencies involved were instructed to take responsibility for any deaths and to publish them, in cooperation with NGOs, in annual reports (The White House, 2016).

In summary, the case is an example of safeguards being introduced as the result of strategic learning. Both the PPG and EO 13732 were promulgated in response to strategic arguments brought forward, in this case, mostly by actors from the executive branch. Both safeguards were written in vague language and, given their nature as executive directives, could be easily altered by future administrations—a feature exploited by President Trump when he revoked parts of the directives in 2019 (The White House, 2019). Nonetheless, the safeguards constitute a small but important step toward the development of safeguards for foreigners in the US targeted killing program.

Coercion only: foreign mass surveillance and the right to privacy

In the case of the violation of privacy rights in foreign mass surveillance, safeguards emerged via two iterations of the coercion mechanism.²⁹ In the aftermath of 9/11, the US government used its existing legal competences (The White House, 1981) and competences newly acquired from Congress (US Congress, 2001, 2008) to expand its capacity for indiscriminate digital surveillance of foreigners. Although the National Security Agency (NSA) receives some of its data on foreigners from foreign governments, its direct access to data on foreign users via US companies is key to its surveillance efforts. It has supposedly hacked the servers of US technology and telecommunications companies and relied on the Foreign Intelligence Surveillance Court to order technology companies like Facebook and Google to turn over user data. Moreover, it has remunerated telecommunication companies for tapping emails that transit their Internet cables (Greenwald, 2014). The US government thus treated private companies as “tools of national intelligence” (Farrell and Newman, 2016: 131), benefiting from their collection of huge amounts of data from their foreign customers for its own purposes.

In mid-2013, Edward Snowden, an NSA contractor turned whistleblower, exposed the extent and indiscriminateness of US surveillance practices, feeding confidential information on the doings of the NSA to the *Guardian* and the *Washington Post*. The issue of domestic surveillance briefly dominated the news media in the United States, and human rights NGOs and UN agencies publicly blamed the US government for indiscriminate mass surveillance (Amnesty International, 2013; UN Human Rights Committee, 2014). Nonetheless, a public campaign on privacy rights violations of foreigners outside of the

United States never gained momentum. Not only was the issue overshadowed by the focus on domestic transgressions, it was also inherently difficult to visualize. Consequently, the government did not suffer the kind of reputational harm that would have necessitated immediate action. Moreover, moral arguments as to why safeguards for foreign citizens were appropriate (e.g. Roth, 2013) did not motivate policymakers to establish them (see Bignami and Resta, 2018: 364, 378) and, while foreign governments did express public criticism, they were not very vocal as they depended on the United States for intelligence sharing (Abel, 2018: 395–473).

Although the US government was not vulnerable to shaming, US technology companies were (Farrell and Newman, 2016: 125, 128). Companies like Facebook and Google depend on the trust of their users. This weak spot was exploited by actors who believed they could use the companies as an instrument to make themselves heard.³⁰ Accordingly, journalists zoomed in on the supporting role of US technology companies in US foreign surveillance (Greenwald and MacAskill, 2013). Importantly, these accusations not only entailed reputational damage to technology companies but also financial losses when foreign customers began to turn to the services of non-US competitors. Moreover, there was a general assumption that there would be greater losses of market share in the future (Donohue, 2015).

Unwilling to bear the costs of NSA foreign surveillance, technology companies lobbied the US government for privacy safeguards. They made clear that it was extremely important for them that the government sent out a public signal to the effect that it took the issue of privacy safeguards for foreigners abroad seriously (Levy, 2014; Schneider, 2015: 122). They also communicated unequivocally that they were ready to penalize the US government immediately if it did not act. Specifically, they threatened to invest in stronger encryption and to store foreign user data abroad. Technology companies even began to strengthen their encryption capacities as a direct response to the Snowden leaks (Timberg, 2013).

The US government wanted continued access to the tech companies' data from foreign users, but was concerned about the proliferation of data encryption initiatives and believed that the companies would follow through with at least some of their threats. The Obama administration therefore decided quite quickly to send out the public signal the tech companies wanted, and in early 2014 released Presidential Policy Directive 28—Signals Intelligence Activities (PPD-28), which announced that the “United States will . . . impose new limits on its use of signal intelligence in bulk . . . intended to protect the privacy and civil liberties of all persons, whatever their nationality and regardless of where they might reside” (The White House, 2014a: Sec. 2). Although PPD-28 contains rather vague language, it still constitutes an act of “unprecedented self-limitation”³¹ as it marks the first time that the United States recognized that foreigners living outside its borders are entitled to privacy protections. It is also striking that the limits on the purposes for which foreigners' data could be used were more precise than those set out in comparable documents issued by most countries of the European Union (EU) (Brown et al., 2015: 3, 19). PPD-28 was also a response to requests by other governments.³² Nonetheless, it was the intervention of US technology companies, especially the pressure and threat of sanctions from them, that was decisive (see Rascoff, 2016: 662, 669,

688–689), as the US government heavily depended on access to their data specifically and good relations with them more generally (see Donohue, 2015: 35–36).

PPD-28 did not, however, end the pressure on tech companies that collected data from foreign customers and stored it on servers in the United States. As public attention abated, new pressure came from the Court of Justice of the European Union (CJEU), which had to decide whether the data from foreign users that Facebook's Irish subsidiary transferred to the United States were sufficiently protected against government surveillance. In October 2015, the CJEU issued a landmark judgment that invalidated the Safe Harbor Agreement between the European Commission and the US government that had been used by about 4,500 US companies to transfer EU citizens' personal data to the United States. Specifically, the court argued that these data were insufficiently protected against NSA access, which made their transfer to the United States unacceptable (Court of Justice of the EU, 2015). The affected companies were alarmed and demanded more far-reaching privacy safeguards against foreign surveillance from the US government to satisfy the CJEU and, hence, the EU.³³ The US government feared, again, that inaction would prompt the companies to complicate government access to their data.

Finally, less than four months after the CJEU's judgment, the US Department of Commerce issued the Privacy Shield Framework Principles, a self-certification regime for US companies that transfer data from EU citizens to the United States (US Department of Commerce, 2016). The European Commission accepted the Principles as providing adequate protection and allowed the transfer of EU data to the United States by companies that self-certified under the new regime. On paper, the Privacy Shield went beyond the Safe Harbor Agreement, as it contained transparency requirements and provided for an Ombudsperson in the State Department to handle complaints by EU citizens. Critics cast doubt on the effectiveness of the Privacy Shield Principles, however, pointing to the hurdles built into the complaints process and the unreproducible assurances by the US government that the agreement was based on.³⁴ In the end, the CJEU, in a further landmark judgment of July 2020, invalidated the decision attesting that the Privacy Shield provided adequate protection (Court of Justice of the EU, 2020), once again prompting talks between United States and EU regulators on how to establish safeguards that would satisfy the court.

In summary, the small steps the US government has thus far taken to introduce privacy safeguards for its foreign surveillance operations can be traced back to coercion. There is no evidence that policymakers would have been persuaded of the inherent value of the right to privacy as it applies to foreigners residing outside of the United States or that they would have carefully weighed the potential future costs and benefits of introducing privacy safeguards for foreigners.³⁵ Rather, safeguards were introduced as an immediate response to sanctions, or the threat of them, by US technology companies.

Interpretation

Based on our analysis, there appears to be a discernible pattern: Coercion and strategic learning can be sufficient on their own, and occur in our cases in iterations. Alternatively,

they can operate in combination, in which case strategic learning follows coercion. We did not find evidence of US policymakers introducing safeguard because they believed they had a moral obligation to do so. What do these findings tell us?

Coercion

Coercion does not seem to be a blunt sword when it comes to holding powerful states to account for extraterritorial human rights violations. In two of our cases, coercion was either the sole mechanism (mass surveillance) or one of two mechanisms (torture) that led to safeguards.

Material sanctions are not as powerless as one might have expected. Generally speaking, it is economically weak states that face sanctions if they do not adhere to the human rights clauses of preferential trade agreements (Hafner-Burton, 2005). Similarly, only weaker states can be threatened with a possible refusal of their bid to join an IO if they do not fulfill the IO's human rights standards (Schimmelfennig and Sedelmeier, 2004). Nevertheless, as our case study on mass surveillance has shown, under certain conditions, even powerful states like the United States are vulnerable to human rights-related sanctions. One such condition is that the actor imposing sanctions has the ability to inflict significant harm on the target actor (Bapat et al., 2013): In the surveillance case, the US government depended on access to the data of foreign citizens stored by US technology companies, which meant that ignoring their demands would have been prohibitively costly.

Shaming can also work under certain conditions. Shaming certainly faces challenges when it comes to pressurizing powerful states into compliance with extraterritorial human rights obligations. For one thing, it is generally easier to mobilize the domestic public if the rights of nationals rather than those of foreigners are violated. Powerful states also generally depend less on their reputation, as they have hard power resources at their disposal. However, as we have shown in the torture case, shaming can still be effective. Specifically, it was possible to build a powerful campaign, even though it was foreigners' rights that were violated, because the violations involved physical harm that could be easily visualized and because of torture's status as a taboo—qualities that are believed to make rights violations particularly suitable for a public campaign (Barnes, 2017; Keck and Sikkink, 1998: 205).

In our cases, litigation did not prove to be an effective mechanism for holding powerful states accountable for extraterritorial human rights violations. Notwithstanding emerging case law that ascribes extraterritorial human rights obligations to states, domestic courts are frequently reluctant to issue judgments on foreign policy issues and, moreover, tend to have limited access to classified information (Setty, 2017). Furthermore, because the extraterritorial application of human rights conventions is still contested, judges have a certain margin to deny jurisdiction (Andresen, 2016). In the case of the United States, it is mostly in exceptional cases where rights violations take place on territory with a complex legal status that courts are inclined to claim jurisdiction and issue judgments that demand safeguards for foreigners—as was the case with safeguards against arbitrary detention for terrorist suspects detained in Guantánamo Bay (US Supreme Court, 2006). Foreign courts can technically invoke universal jurisdiction, but they rarely do so for political reasons. Nonetheless, our analysis suggests

that litigation can have indirect effects. As the surveillance case has shown, “complicit” third parties may sometimes be vulnerable to litigation and may forward the pressure to the target state.

Strategic learning

Strategic learning also seems to be an important mechanism for prompting powerful states to introduce safeguards to ensure extraterritorial protection of human rights. In two cases, it was either the only mechanism (targeted killing) or one of two mechanisms acting together (torture) that proved effective. US policymakers processed causal arguments, weighed the anticipated future costs and benefits of safeguards, and took decisions based on those considerations (see also Abel, 2018). The establishment of safeguards cannot therefore be solely explained as a response to coercive pressure. In the cases in which we found strategic learning, we can confirm the expectation that the credibility of the messenger and the perceived risk that negative consequences will materialize in the event of inaction influence political actors’ readiness to engage with strategic arguments and act upon them (Bapat et al., 2013: 89–90; Haas, 2004). In both the targeted killing and the torture case, we observed that it made a difference that the predictions of the actors who put forward strategic arguments were credible. Moreover, it was important that the arguments in favor of safeguards came not only from NGOs but also from actors within the establishment who were well respected by progressives and conservatives alike.

Beyond that, there seems to be an interesting dynamic between strategic learning and coercion. In the torture case, coercion (in the form of shaming) triggered the first reform but also paved the way for strategic learning by providing an external shock that reverberated even after public attention faded. In this sense, initial coercion sensitized policymakers to the possibility that potential future coercive action might jeopardize their long-term strategic goals.

Moral persuasion

One of the most interesting findings of our analysis is that the moral persuasion mechanism did not operate as expected (see also section 2.1 of the online appendix). In all cases, safeguards were introduced as the result of a rational cost–benefit analysis—either in direct response to urgent pressure or in anticipation of potential future negative consequences. This is to some extent surprising, given that being a country that values human rights is clearly part of the US identity. Moreover, all safeguards activated by the executive branch were issued by the Obama administration, which was, at least rhetorically, strongly committed to the protection of human rights.³⁶ So why then did we not find evidence of US policymakers introducing extraterritorial human rights safeguards because they believed that this was the right thing to do?

One explanation could be that US policymakers have only partially internalized the human rights norm and believe that it has to recede behind the security norm if the two are in conflict (Sikkink, 2013). Another explanation could be that US policymakers have internalized the idea that they have human rights obligations toward their own citizens,

but are less inclined to extend them to foreigners outside of US territory. Moral persuasion may also have been crowded out by the other mechanisms. In all cases, policymakers faced strategic arguments or immediate pressure to act, in addition to moral arguments. The latter did not prove decisive, but policymakers were swayed by strategic arguments or bowed to pressure—which is in line with findings that the impact of norms can be undercut by extrinsic motivation (Terechshenko et al., 2019).

That moral considerations were not the driver behind the introduction of safeguards may also help explain why in two out of three cases, the safeguards enacted were not far-reaching. Those against torture are the most advanced, because they unequivocally ban all forms of it. Safeguards against indiscriminate targeted killing remained vague and were partially rolled back by the Trump administration, while many critics question the effectiveness of the safeguards against foreign mass surveillance. What is more, if the United States establishes safeguards, it does not consistently use human rights language, so as not to legally or rhetorically entrap itself. Nevertheless, the safeguards are still important, both in their own right and because they are evidence of US policymakers rhetorically recognizing obligations toward foreigners abroad. Yet, had there been a deep conviction among US policymakers that extraterritorial human rights violations are generally wrong and that it is morally appropriate to prevent their occurrence, we should have seen more far-reaching safeguards and more explicit references to human rights obligations.

This does not imply, however, that the emerging norm that states have extraterritorial human rights obligations did not play a role in the process leading up to the establishment of safeguards. What we have been able to show is that the norm did not have a constitutive effect, in the sense that norm entrepreneurs failed to convince US policymakers of the inherent value of that norm and the need to act in accordance with it. Even though individuals in the inner circle, like Senator McCain in the torture case, may have honestly believed that certain violations were inherently wrong, it was generally strategic, not moral, arguments that resonated with policymakers most. Nonetheless, the norm that states have human rights obligations also vis-à-vis foreigners beyond their borders had an important regulative effect in that it influenced US policymakers' cost-benefit calculations. The fact that other relevant actors believed in the norm mattered because it constrained the range of justifiable policy options. Only because relevant others believed in the norm was it possible to, for instance, shame the US government for its norm-violating behavior.³⁷

Last but not least, moral considerations provided motivation for actors to develop intervention strategies in the first place. In the case of torture, many actors who were instrumental in organizing a powerful shaming campaign truly believed that the ban on torture also applied to interactions with non-citizens beyond a state's borders. In the case of targeted killing, human rights groups were equally motivated by a commitment to a truly universal notion of human rights, but uttered mostly strategic arguments, as they believed that the latter resonated with policymakers. In the case of surveillance, finally, privacy activists were driven by the belief that it was wrong for the United States to disregard the privacy rights of foreign citizens beyond their borders in foreign surveillance operations (see section 2.2 of the online appendix).

Conclusion

In this article, we have investigated why the United States has introduced safeguards designed to prevent or at least attenuate the harm to foreigners abroad caused by their counterterrorism measures. We have searched for evidence of three mechanisms—moral persuasion, strategic learning, and coercion—but found that only the latter two have had a direct effect on US policymakers. Hence, although some US policymakers had moral concerns about the harm afflicted to foreign citizens, cost–benefit calculations were key, either as a response to direct pressure or in anticipation of potential future pressure. This finding may be sobering for those who believe that the best way to make states commit to and comply with human rights norms is to change the normative convictions of policymakers. Nonetheless, our findings suggest that the norm that states should respect the human rights of foreigners beyond their borders not only provided motivation for actors to intervene with policymakers but is sufficiently strong to affect policymakers’ cost–benefit analysis.

We see three avenues for future research. First, we should learn more about the conditions under which the mechanisms selected for this study operate, but also search for alternative mechanisms. Future research should therefore compare cases in which the United States has introduced safeguards with cases in which it has not. One could also consider deviant cases (Seawright, 2016) and consider cases in which the United States did not commit rights violations but nevertheless established safeguards to ascertain whether emulation has been at play.

Second, future research should investigate whether our findings are generalizable beyond the United States. The United States displays certain traits of a hard case. It is one of few established democracies that, save for limited exceptions, dismisses the idea of extraterritorial human rights obligations; moreover, it is generally powerful enough to be able to fend off pressure from other actors. Whether our findings really tell us anything about the behavior of other established democracies needs to be systematically investigated, though. One could therefore consider cases in which the mechanisms’ starting and endpoints are also present, but that differ from the United States regarding theoretically relevant criteria such as power, domestic institutions, or political culture—the United Kingdom’s anti-torture safeguards or Israel’s guidelines for targeted killing operations, for example. China’s guidelines for foreign investments or Saudi Arabia’s complaint mechanism for civilian victims of its operation in Yemen might also be looked into to explore to what extent the findings might apply to autocracies.

Third, we have concentrated on the rules themselves and not on their implementation. Although the emergence of safeguards is important in itself, it is, especially from a victim’s perspective, also necessary to examine whether the rules are actually implemented or whether they are paper tigers intended to fend off calls for more extensive reforms. Future research should therefore look into whether and on what conditions the rules that have emerged have been implemented and how implementation can be strengthened.

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Supplemental material

Supplemental material for this article is available online.

Notes

1. Strategic learning thus comes close to Argyris and Schön's (1978) single-loop learning, because policymakers do not alter their normative convictions but merely adjust their behavior to increase policy effectiveness.
2. On equifinality, generally see Beach and Pedersen (2019: 6).
3. Interview with Elizabeth Grimm Arsenault, Georgetown University, Washington, DC, 19 March 2019.
4. Interview with Elizabeth Grimm Arsenault.
5. Interview with Benjamin Wittes, Senior Fellow, Brookings Institution, Washington, DC, 19 March 2019.
6. Interview with Philip Zelikow, Executive Director of the National Commission on Terrorist Attacks upon the United States (9/11 Commission), Washington, DC, 8 April 2019.
7. Interview with Mark Fallon, former Chair of the US Government's High Value Detainee Interrogation Group Research Committee, via Skype, 3 May 2019.
8. Interview with Benjamin Wittes.
9. Interview with Elisa Massimino, former President and CEO of Human Rights First, Washington, DC, 28 March 2019.
10. Interview with John Bellinger, Senior Associate Counsel to President Bush and Legal Advisor to the National Security Council, Washington, DC, 9 April 2019.
11. Interview with Elisa Massimino.
12. Interview with Michael Posner, former Assistant Secretary of State for the Bureau of Democracy, Human Rights and Labor, via Skype, 1 July 2019.
13. Interview with Mark Fallon.
14. Interview with Elisa Massimino.
15. Interview with Colonel Steven Kleinman, Military Intelligence Officer, Washington, DC, 2 April 2019.
16. "Lethal action" is the technical term for targeted killing, often featured in Obama administration documents.
17. Interview with Patricia Stottlemeyer, Impact Litigation Attorney at Human Rights First, Washington, DC, 26 March 2019.

18. Interview with Kenneth Anderson, American University, Washington, DC, 21 March 2019.
19. Interview with Larry Lewis, former Senior Advisor to the Department of State's Assistant Secretary for Democracy, Human Rights, and Labor, Washington, DC, 3 April 2019.
20. Interview with Luke Hartig, former Senior Director for Counterterrorism at the National Security Council, via Skype, 2 July 2019.
21. Interview with Larry Lewis.
22. Interview with Kenneth Anderson.
23. Interview with Sarah Holewinski, Executive Director, Center for Civilians in Conflict, Washington, DC, 22 March 2019.
24. Interview with Larry Lewis.
25. Interview with Luke Hartig.
26. Interview with Larry Lewis.
27. Interview with Kenneth Anderson.
28. Interview with Larry Lewis.
29. This section draws on Heupel (2020).
30. Interview with Amie Stepanovich, US Policy Manager, Access Now, Washington, DC, 28 February 2017.
31. Interview with Greg Nojeim, Senior Counsel, Center for Democracy & Technology, Washington, DC, 28 February 2017.
32. Interview with Robert Litt, former General Counsel to the Office of the Director of National Intelligence, Washington, DC, 14 March 2019.
33. Interview with a US Senate staffer, Washington, DC, 27 February 2017.
34. Interview with Neema Guliani, Senior Legislative Counsel, American Civil Liberties Union, Washington, DC, 13 March 2019.
35. Following the Snowden revelations, President Obama appointed a Review Group on Intelligence and Communications Technologies. It is unlikely, however, that the recommendations provided by this group would have been followed had there not been pressure from the tech industry.
36. The two laws that we cover in the torture case study were enacted by Congresses with Republican majorities.
37. On the distinction between the constitutive and regulative effect of norms, see Klotz (1995).

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