
ESSAY

RULE OF LAW TROPES IN NATIONAL SECURITY

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In seeking to insulate national security conduct from external review, executive officials often publicize self-imposed rules that appear to subject their authority to familiar, well-established legal standards from constitutional or international law. But executive officials sometimes invoke such standards in public while deviating from prevalent interpretations of those constraints in secret. The effect is to mislead courts, policymakers, and the public about the extent to which national security actions threaten individual rights and democratic values. “Rule of law tropes” lead observers to draw false equivalences across legal contexts, obscuring hard questions surrounding liberty and security, and ultimately undermine the rule of law. This Essay critiques the national security executive’s deployment of rule of law tropes, with a primary focus on one striking but barely noticed example: the Executive’s invocation of, and secret departures from, a “reasonable suspicion” standard for placing individuals on the terrorist watchlist.

INTRODUCTION

In December 2013, a challenge to terrorist watchlists improbably went to trial in a San Francisco federal courtroom. Dr. Rahinah Ibrahim, a Malaysian architecture professor barred from air travel and stripped of her U.S. visa nearly a decade earlier, had contested her inclusion on watchlists as a violation of due process, equal protection, and the First Amendment.¹ After two dismissals by the district court and two reinstatements on appeal, protracted battles over access to information, and a final attempt by the government to quash the case based on state secrets, the case reached trial.² Months later, the district court issued a public opinion with two stunning revelations. The first drew greater attention: human error had led to the placement of Dr. Ibrahim, then a Stanford University doctoral student, on the “No Fly List” in 2004.³ An FBI agent investigating her had mistakenly checked the wrong box on a form — a mistake the court called the

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¹ *Ibrahim v. Dep’t of Homeland Sec.*, 62 F. Supp. 3d 909, 911, 914, 926 (N.D. Cal. 2014). In the interest of full disclosure, I testified at trial as an expert witness for the plaintiff.

² *Id.* at 911–14.

³ *Id.* at 916, 927.

“bureaucratic analogy to a surgeon amputating the wrong digit.”⁴ The government conceded at trial that Dr. Ibrahim did not present a threat to national security and never had.⁵ Noting that “derogatory information” in a watchlist database could propagate “like a bad credit report that will never go away,” the court ordered the government to cleanse all of its databases of information resulting from that initial, mistaken designation.⁶

But the court made a second revelation of wider significance: although Dr. Ibrahim had been removed from the No Fly List, she remained on the government’s broader terrorist watchlist *despite* the fact that she presented no security threat.⁷ The government had routinely stated that it placed individuals on the watchlist where it had “reasonable suspicion” of a connection to terrorist activities.⁸ How could Dr. Ibrahim both meet that standard and present no threat to national security? It turned out, the court disclosed, that she was on the list “pursuant to a classified and secret exception to the reasonable suspicion standard.”⁹ The nature of that exception and the reasons that Dr. Ibrahim fell within it, the court noted, remained “state secrets.”¹⁰

For years, national security officials had promoted the existence of a “reasonable suspicion” threshold for watchlisting as a key safeguard against arbitrary or unjustified inclusion.¹¹ Adopted in the wake of civil libertarian critiques of watchlists, the standard evoked the familiar *Terry v. Ohio*¹² Fourth Amendment standard for police questioning of individuals on city streets. In the latter context, the Supreme Court had held that law enforcement officers could briefly stop a person for questioning only where they had individual suspicion that she was committing, or was about to commit, a crime.¹³ Noting the close similarity in language between the watchlisting standard and *Terry*, members of Congress and courts alike equated the two.¹⁴ And the government relied on that equation: Justice Department lawyers told courts that its reasonable suspicion standard could not be unconstitutionally vague because it was “widely recognized, widely used, generally understood, and deeply rooted in constitutional jurisprudence.”¹⁵

⁴ *Id.* at 928.

⁵ *Id.* at 915–16.

⁶ *Id.* at 928.

⁷ *Id.* at 923.

⁸ *See infra* section II.A, pp. 1583–86.

⁹ *Ibrahim*, 62 F. Supp. 3d at 926.

¹⁰ *Id.* at 923.

¹¹ *See infra* section II.A, pp. 1583–86.

¹² 392 U.S. 1 (1968).

¹³ *Id.* at 27.

¹⁴ *See infra* section II.C, pp. 1590–1600.

¹⁵ Defendants’ Memorandum in Support of Motion to Dismiss Plaintiff’s Second Amended Complaint at 29, *Fikre v. FBI*, 23 F. Supp. 3d 1268 (D. Or. 2014) (No. 3:13-CV-00899).

Yet Dr. Ibrahim's case revealed the existence of at least one explicit and secret departure from that frequently invoked standard. Eight months later, a leaked document made clear that the government's interpretation of the standard deviated still further from common understandings of the Fourth Amendment analog.¹⁶ The intelligence community's Watchlisting Guidance, long withheld in litigation under a claim of state secrets, contained both interpretive guidelines and explicit exceptions that essentially swallowed the rule.¹⁷ As an initial matter, unlike the *Terry* standard, the watchlisting standard required no suspicion of a crime — only suspicion of an undefined relationship to terrorism.¹⁸ That much had been known, if largely unappreciated. But the Guidance went further. It presumed that individuals named by certain foreign governments or through certain agency processes qualified, without requiring individual determinations that they satisfied reasonable suspicion.¹⁹ And it carved out gaping exceptions to the reasonable suspicion requirement: one set of exceptions, including the one that snared Dr. Ibrahim, authorized the listing of noncitizens for visa and border screening purposes based on family relationships, associational ties, or vague allegations of extremism.²⁰ Another exception permitted the government to watchlist entire categories of individuals, including U.S. citizens, without reasonable suspicion in exigent circumstances. Indeed, security officials had already done so at least once, adding groups of U.S. citizens to the lists based on their ties to particular countries.²¹

Why call this “reasonable suspicion” at all? The longstanding invocation of the familiar standard functioned as a *rule of law trope* — a legal term of art borrowed from constitutional law to persuade law-conscious audiences that the Executive was sufficiently constrained. The Executive had largely written the rules on watchlisting; Congress had barely legislated on the subject, and courts had spared watchlisting from constitutional review on the merits for nearly a decade.²² By gesturing to a well-known constitutional standard, national security officials sought to leverage the credibility of constitutional values to insulate their decisionmaking from external review.

¹⁶ See *infra* section II.C.2, pp. 1592–97.

¹⁷ See *infra* section II.C.2, pp. 1592–97. See generally U.S. NAT'L COUNTERTERRORISM CTR., WATCHLISTING GUIDANCE (2013) [hereinafter WATCHLISTING GUIDANCE], <https://firstlook.org/theintercept/document/2014/07/23/march-2013-watchlisting-guidance> [http://perma.cc/3DFA-FW64].

¹⁸ See *infra* section II.C.2, pp. 1592–97.

¹⁹ See *infra* note 184 and accompanying text.

²⁰ See *infra*, pp. 1593–94.

²¹ See *infra*, pp. 1594–95.

²² See *infra* section II.C.1, pp. 1590–92.

The use and misuse of “reasonable suspicion” in terrorist watchlisting is perhaps the most striking example of a more general problem. In drafting internal guidelines for national security conduct implicating individual rights, executive officials sometimes borrow familiar legal standards from constitutional law, international law, or other sources of legal authority perceived as legitimate — but then depart from prevailing understandings of those standards in secret. By publicly promoting a known standard but concealing its actual interpretation, the national security executive hinders meaningful evaluation of the extent to which its actions comport with individual rights, democratic values, and the law itself. Such tropes lead observers to draw false equivalences across legal contexts, thus obscuring hard questions surrounding national security constraints, and mask the lack of oversight over executive national security practices.

This Essay describes and critiques the national security executive’s deployment of rule of law tropes. Part I illustrates the dynamics of national security rulemaking that create the problem. Congress and courts frequently defer to the Executive on matters of national security; where they do, national security agencies write their own rules in the absence of binding, external law. These rules are designed both to provide a measure of internal constraint and to deflect pressure for external oversight. The voluntary incorporation of exogenous legal standards in these internal guidelines can, at its best, constrain national security activities in the gaps of the law, reinforce rule of law values, and raise the costs of departing from even voluntary constraints. But in national security law, selective secrecy is omnipresent. When security agencies depart from prevailing understandings of a constitutional or international law standard in the dark, they leave the public misinformed about the extent to which internal rules constrain power and protect rights.

Part II homes in on the Essay’s chief example, describing how government officials came to adopt, publicize, and secretly depart from the “reasonable suspicion” standard for terrorist watchlisting. Part III shows the more general nature of the problem through additional examples of rule of law tropes in national security. Part IV elaborates on the costs of rule of law tropes and examines whether bad faith or more innocent bureaucratic explanations account for the Executive’s use of them. It also addresses a likely objection to the Essay’s core argument. The Essay concludes by connecting tropes to legal theorist David Dyzenhaus’s conception of “grey holes” in the law: grey holes

offer the appearance of legal constraint, potentially doing more damage than the “black holes” asserted to be beyond law’s reach.²³

I. RULE OF LAW TROPES IN EXECUTIVE NATIONAL SECURITY LAWMAKING

Executive dominance and endemic secrecy in national security lawmaking set the stage for the deployment of rule of law tropes and the secret departures from the standards invoked.²⁴ This Part describes that dominance and defines the elements of the rule of law tropes that emerge: legal terms of art that are drawn from constitutional or international law but that deviate, at least partly in secret, from prevalent understandings of those terms.

A. *Executive Dominance*

In national security lawmaking, the institutions of government that create the law elsewhere are often sidelined. A combination of secrecy, institutional norms, political incentives, and legal doctrine restrict the involvement of Congress and the courts in overseeing national security conduct. These dynamics are well trod in legal scholarship and require only the barest of restatement. When Congress chooses to legislate in the counterterrorism context, it does so reactively²⁵ — and often under political circumstances that favor granting broad authority to the Executive.²⁶ Members of Congress often lack the information or electoral incentives to oversee national security agencies, especially where the rights at stake are those of noncitizens or members of marginalized communities.²⁷ Judges, whether because they believe they must or should, often defer to the executive branch on matters of national security. Employing a litany of constitutional and procedural doctrines, some courts limit their involvement where national security concerns are asserted.²⁸ The state secrets privilege alone, which can

²³ See David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 *CARDOZO L. REV.* 2005, 2026, 2038 (2006).

²⁴ In using the term “national security lawmaking,” I refer to the making of law and policy across a range of substantive contexts that the Executive *asserts* relate to the protection of U.S. national security. I do not imply that U.S. security is, in fact, at stake in any particular context, nor that the term “national security” has a stable or normatively uncontested meaning.

²⁵ Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 *CALIF. L. REV.* 887, 918–21 (2012).

²⁶ Laura K. Donohue, *The Perilous Dialogue*, 97 *CALIF. L. REV.* 357, 370–73 (2009).

²⁷ See Huq, *supra* note 25, at 921–27; see also AMY B. ZEGART, *EYES ON SPIES* 9–11 (2011) (arguing that Congress expends insufficient effort overseeing intelligence operations compared to other policy areas as a result of electoral incentives, limited expertise, and other reasons).

²⁸ See Donohue, *supra* note 26, at 385–89. For a classic debate on the extent to which courts should defer to the Executive, see generally ERIC A. POSNER & ADRIAN VERMEULE, *TERROR*

lead to the dismissal of entire cases, has been asserted in litigation over a hundred times between 2002 and 2013 and has been upheld on two-thirds of those occasions.²⁹ Furthermore, many administrative law mechanisms designed to keep the burgeoning Executive accountable in other areas only lightly touch national security.³⁰

As an empirical matter, the *extent* to which other branches defer to the Executive is unsettled.³¹ Indeed, in several contexts, courts have recently scrutinized executive claims more skeptically than in the past — perhaps because of perceptions that the post-9/11 emergency is retreating or because of growing fears of a surveillance state.³² Moreover, executive dominance is not limited to the national security context: changes in trans-substantive doctrines, from standing to damage remedies, and the rise of “unorthodox” agency rulemaking practices have insulated executive decisionmaking from public input and judicial review more generally.³³ Executive dominance in the national security realm is therefore neither absolute nor entirely unique. Even so, few would question that the Executive retains extraordinary power over the terms of law that govern security activities.

Therefore, where rules are set regulating national security conduct, it is often through the work of executive officials themselves, issuing legal opinions, policy guidelines, and other “rules” of various kinds.³⁴ These rules are not necessarily toothless merely by dint of their executive issuance. For instance, a legal opinion issued by the Justice Department Office of Legal Counsel (OLC) may effectively “bind” agencies or the President because norms developed over a period of time treat such opinions as binding, even if these expectations are

IN THE BALANCE (2007); and David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329 (2008) (reviewing former).

²⁹ Daniel R. Cassman, Note, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 STAN. L. REV. 1173, 1188 (2015).

³⁰ See, e.g., 5 U.S.C. § 553(a)(1) (2012) (exempting rules involving a “military or foreign affairs function” from the Administrative Procedure Act notice-and-comment requirement).

³¹ See, e.g., Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015); Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225; Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005).

³² See, e.g., *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015) (reinstating damages claims against high-level government officials in claims arising out of post-9/11 immigration detentions); *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (holding that NSA collection of bulk phone records lacked statutory authorization); see also Shirin Sinnar, *Towards a Fairer Terrorist Watchlist*, ADMIN. & REG. L. NEWS, Winter 2015, at 4 (describing recent decisions in favor of plaintiffs in procedural due process challenges to terrorist watchlists).

³³ See, e.g., Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

³⁴ See Margo Schlanger, *Intelligence Legalism and the National Security Agency’s Civil Liberties Gap*, 6 HARV. NAT’L SECURITY J. 112, 123 (2015).

occasionally flouted.³⁵ Rules agreed to in an interagency process may “bind” those agencies because they have committed to following them. Where sufficiently independent internal compliance mechanisms exist, they may also render rules more effective than their internal origin might suggest.³⁶

Nonetheless, even where enforced, the content of rules adopted wholly by executive agencies will often preserve broad executive discretion and set a low bar for constitutional protections.³⁷ National security agencies that will be held accountable for security failures often prioritize their dominant mandate to protect security over secondary concerns, like preserving rights.³⁸ And internal rules are simply not equivalent to public law of other kinds: they do not purport to create justiciable legal rights for individuals; they are easier to change than legislation, judicial precedent, or formal regulations; there are few formal procedural requirements for adopting them; and there may be no public notice of the rules, whether before or after their adoption.

Moreover, as Professors Eric Posner and Adrian Vermeule have argued, internal “self-binding” mechanisms paradoxically empower the Executive.³⁹ The Executive gives up some power by issuing rules that constrain its own conduct, but it acquires power by signaling to the public that it is an Executive worthy of trust — worthy, even, of being granted sweeping discretion, particularly on matters of national security.⁴⁰ As much as they are designed to restrain, executive guidelines are often issued for the purpose of persuading external audiences — Congress, the courts, or the general public — that the Executive can responsibly police itself. For instance, the Attorney General issued guidelines for the FBI’s domestic operations in the 1970s to fend off congressional attempts to rein in the agency following revelations of widespread abuse.⁴¹ These guidelines remain one of the few con-

³⁵ Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1722–23 (2011) (book review).

³⁶ See generally Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289 (2015) [hereinafter Sinnar, *Institutionalizing Rights*]; Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

³⁷ For a critique of the growing machinery of internal rights protection, see generally Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005), which argues that executive lawyers will recognize constitutional limits only to the extent that courts have already declared them; and Sinnar, *Institutionalizing Rights*, *supra* note 36.

³⁸ See Sinnar, *Institutionalizing Rights*, *supra* note 36, at 331–32.

³⁹ See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 912–13 (2007).

⁴⁰ See *id.* (supporting the use of self-binding mechanisms to signal that the Executive is well motivated, but noting the potential downfall of strategic signaling to garner more power).

⁴¹ Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3, 13–14 (2014).

straints on the FBI's intelligence gathering and continue to serve as a "justification for the lack of a statutory charter governing the FBI's activities" — despite the fact that they have been repeatedly loosened since their inception.⁴²

Similarly, amid growing concern over the Obama Administration's targeted killing of U.S. citizens,⁴³ senior Administration officials announced an internal legal framework governing these strikes.⁴⁴ In one prominent speech publicizing that framework, Attorney General Eric Holder argued that "due process" did not require "judicial process" and implied that "robust oversight" already existed over the targeting of suspected terrorists.⁴⁵ The due process Holder cited, of course, consisted of a purely executive deliberative process based on executive-made rules. With courts and Congress unwilling to decide the permissibility of targeted killings, the only rules are those the Executive has chosen for itself.

B. *Defining Rule of Law Tropes*

The Executive's dominance over national security lawmaking both enables and incentivizes its deployment of "rule of law tropes." As this Essay defines them, rule of law tropes have four elements: (1) executive use of a recognizable term from constitutional or international law in an internal rule; (2) public promotion of that term to persuade audiences that rights are sufficiently protected and that the Executive is sufficiently constrained; (3) executive interpretation of the term in a way that departs from prevalent understandings; and (4) secrecy that hides from the public the full extent of that departure.

1. *Executive Use of a Constitutional or International Law Term.* — National security officials often incorporate easily recognizable legal terms or standards from constitutional or international law into internal rules: terms like "reasonable suspicion," "least intrusive method," or "imminence."⁴⁶ Such terms may not be familiar to the public at large but are familiar to many lawyers and at least some segments of law-conscious elites.

Frequently, the incorporation of particular constitutional or international law standards occurs in contexts where executive officials do

⁴² *Id.* at 14.

⁴³ See Scott Shane, *Judging a Long, Deadly Reach*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/american-strike-on-american-target-revives-contentious-constitutional-issue.html>.

⁴⁴ See *N.Y. Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 524–29 (S.D.N.Y. 2013), *aff'd in part, rev'd in part*, 756 F.3d 100 (2d Cir. 2014).

⁴⁵ Eric Holder, Att'y Gen., U.S. Dep't of Justice, Speech at Northwestern University School of Law (Mar. 5, 2012), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> [<http://perma.cc/472C-LJ28>].

⁴⁶ See *infra* Parts II and III, pp. 1581–609.

not necessarily believe that external decisional rules require those standards. Congress and the courts may not have spoken to the specific issue in question — a common occurrence where novel issues are presented or where judges and lawmakers are reluctant to intervene in matters of security. In fact, the standards adopted may actually derive from an area of legal doctrine that is not generally viewed as applicable to the issue in question. In such cases, the agencies may be submitting to a standard that would not necessarily be imposed by a court, were it to adjudicate the question.

For instance, in the context of terrorist watchlists, the Executive voluntarily adopted a “reasonable suspicion” standard from Fourth Amendment law. Congress had not legislated a standard, nor had courts reached the question of what standard, if any, the Constitution might require for inclusion of a person on the watchlist.⁴⁷ Moreover, under existing interpretations of the Fourth Amendment, the placement of a person on a watchlist would not constitute a search or seizure giving rise to Fourth Amendment protection.⁴⁸ Thus, the invocation of a constitutional standard took place for reasons other than conforming agency conduct to binding law.

Within and across legal systems, the voluntary incorporation of rules from other legal domains is pervasive. Judges and legal advocates regularly transfer doctrines, rationales, and ideas from one area of constitutional law to another for persuasive purposes.⁴⁹ In drafting legislation or regulations, government lawyers regularly look to models in other jurisdictions for approaches that have been tried elsewhere.⁵⁰ At the international level, legal systems frequently adopt — and adapt — constitutional concepts from foreign jurisdictions.⁵¹ Comparative law scholars have richly analyzed this movement of ideas across countries using the metaphors of “legal transplants,”⁵² “constitutional borrowing,”⁵³ and, most recently, the “migration of constitutional ideas.”⁵⁴

Indeed, the literature on transnational legal transplants offers an unexpected set of insights relevant to national security officials’ adop-

⁴⁷ See *infra* Part II, 1581–600.

⁴⁸ For leading cases on the scope of a search or seizure under the Fourth Amendment, see *United States v. Jones*, 132 S. Ct. 945 (2012); and *Katz v. United States*, 389 U.S. 347 (1967).

⁴⁹ See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461 (2010).

⁵⁰ See, e.g., Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 884 (2003).

⁵¹ Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1, 13 (Sujit Choudhry ed., 2011).

⁵² ALAN WATSON, *LEGAL TRANSPLANTS* (2d ed. 1993).

⁵³ See, e.g., Choudhry, *supra* note 51, at 20–21 (documenting and critiquing the “borrowing” metaphor).

⁵⁴ *Id.*

tion of legal standards from constitutional and international law. Comparative law scholar Jonathan Miller distinguishes among four forms of legal transplants based on the motivations for adopting them: (1) the cost-saving transplant; (2) the externally dictated transplant; (3) the entrepreneurial transplant; and (4) the legitimacy-generating transplant.⁵⁵ The first motivation is simplest: using an existing legal concept or approach can save time and avoid the need for “costly experimentation,” because a drafter “confronted with a new problem [can] pull[] a solution from elsewhere off the shelf of the library to save having to think up an original solution.”⁵⁶ The second motivation reflects the need, especially on the part of developing countries, to adopt foreign legal models “as a condition for doing business or for allowing the dominated country a measure of political autonomy.”⁵⁷ The third form of transplant arises from the self-interest — whether political, economic, or ideological — of individuals and groups who stand to benefit from local adoption of a model in which they have invested energy and developed expertise, such as lawyers who have mastered a foreign law through study abroad.⁵⁸ Miller’s fourth form tracks “[o]ne of the most frequently offered explanations as to why transplants occur”⁵⁹: the prestige of the foreign model and its potential to provide an additional source of authority to induce compliance.⁶⁰ Drawing on Weber’s sociology of law, Miller argues that, in contexts where other sources of political authority are lacking, borrowing a foreign law respected by elites may offer the state “instant legitimacy.”⁶¹

Each of these motivations may partially explain national security officials’ adoption of existing legal standards. Begin with the notion of a cost-saving transplant: for executive lawyers drafting internal rules, established legal standards offer easy, off-the-shelf resources that appear to avoid the uncertainties of novel language. It is unsurprising that U.S.-trained lawyers, immersed in the language, metaphors, and conventions of U.S. (and sometimes international) law, would reach for standards familiar to them from other contexts. In addition, as Miller’s third type suggests, the recourse to constitutional or international law concepts may elevate the profile of certain agencies or professions within a bureaucratic context. The adoption of internal guidelines regulating intelligence has historically empowered executive lawyers who are in charge of writing and overseeing them, enhancing the role

⁵⁵ Miller, *supra* note 50, at 842.

⁵⁶ *Id.* at 845.

⁵⁷ *Id.* at 847.

⁵⁸ *Id.* at 850.

⁵⁹ *Id.* at 854.

⁶⁰ *Id.* at 854–57.

⁶¹ *Id.* at 857.

of agency counsel and the Department of Justice.⁶² The adoption of legal standards from *particular* areas of law — criminal procedure or international law, for instance — can further empower individuals and institutions that have developed expertise in those fields (former prosecutors, perhaps, or the State Department Office of the Legal Adviser).

Alongside these explanations, Miller's fourth explanation seems especially applicable here, and indeed converges with his second: transplants allow the Executive to benefit from the legitimacy that exogenous legal standards provide, in turn reinforcing the Executive's ability to sustain autonomy from external branches of government. The next section turns to this legitimacy-generating function of executive borrowing.

2. *Public Promotion for Persuasive Ends.* — National security officials publicize legal standards adopted from constitutional or international law within their internal rules to persuade law-conscious audiences that rights are protected and that the Executive is accountable. Legal standards that are well established elsewhere may give internal rules greater legitimacy, especially where executive officials are drafting guidelines in novel and controversial factual and legal terrain — when, for instance, creating an unprecedented system of terrorist watchlisting or deploying the fantastically lethal technology of drones. That legitimacy, in turn, supports the efforts of national security agencies to preserve their autonomy from encroachment by the legislative and judicial branches.

Linguists and philosophers have long noted the rhetorical value of appealing to familiar terms with rich emotive meaning for particular audiences. In an essay on “persuasive definitions,” for instance, philosopher Charles Leslie Stevenson argued that speakers sometimes seek to change people's values by giving “a new conceptual meaning to a familiar word without substantially changing its emotive meaning.”⁶³ Because the chosen word has favorable associations, Stevenson theorized, assigning it a new definition more in line with the speaker's interests capitalizes on those associations while subtly moving audiences toward the speaker's preferred position.⁶⁴

Both constitutional and international law enjoy a fair amount of legitimacy among elites concerned about individual rights and executive accountability, perhaps especially so in the national security con-

⁶² Schlanger, *supra* note 34, at 122–24.

⁶³ Charles Leslie Stevenson, *Persuasive Definitions*, 47 MIND 331, 331 (1938). I thank David Schraub for bringing Stevenson's essay to my attention.

⁶⁴ For instance, Stevenson suggested that while the word “cultured” originally signified a person who was “widely read and acquainted with the arts,” *id.* (emphasis omitted), a speaker might redefine the term to mean someone who possessed “imaginative sensitivity,” thereby leveraging the emotive resonance of the original word in service of a value the speaker preferred, *id.* at 332.

text. Because the Bush Administration was seen as denigrating the applicability of both constitutional rights and international law to post-9/11 counterterrorism policies, executive policies that appear to acknowledge the relevance of these sources of law may attract support from such elites. The Bush Administration had famously declared that core constitutional protections, such as the writ of habeas corpus, did not protect foreigners detained at Guantanamo; it had announced that the Geneva Conventions did not apply to terrorism suspects in U.S. military custody.⁶⁵ Civil libertarians accused the Administration of seeking to create a “law-free zone,”⁶⁶ and advocated for the continuing applicability of constitutional and international law.⁶⁷ Against such a backdrop, executive invocations of constitutional or international law might already seem like a victory for liberty and the rule of law.

Professor Rebecca Ingber observes that, for certain audiences, international law arguments legitimize executive policies because they signal the normative validity of executive action, the presence of international institutional checks, and the acquiescence of other countries.⁶⁸ She argues that this legitimizing effect is often undeserved, and that international law arguments sometimes *empower* the Executive by displacing statutory or constitutional constraints on executive power.⁶⁹ But the widespread assumption that international law constrains, Ingber contends, lulls critics into accepting arguments they would otherwise resist.⁷⁰ A similar point could be made with regard to constitutional law. In many contexts, constitutional law, at least as interpreted by courts, does not robustly protect individual liberty or equality. But constitutional veneration is deeply rooted and may lead some to assume that standards drawn from constitutional law offer appropriate protection for rights.⁷¹ Even rights proponents more skeptical of the extent of constitutional protection in other contexts may respond dif-

⁶⁵ See Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 557–58; see also Charles Babington & Michael Abramowitz, *U.S. Shifts Policy on Geneva Conventions*, WASH. POST (July 12, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071100094.html> [<http://perma.cc/6W29-8WB6>] (reporting the Bush Administration’s announcement that it would change its policy and apply the Geneva Conventions to all terrorism suspects in U.S. custody).

⁶⁶ Alexander, *supra* note 65, at 553.

⁶⁷ See *id.* at 553–55.

⁶⁸ Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT’L L.J. (forthcoming 2016) (manuscript at 51–52) (on file with the Harvard Law School Library).

⁶⁹ See *id.* (manuscript at 8–9).

⁷⁰ See *id.* (manuscript at 57–58) (describing ACLU litigation position on detention of enemy combatants).

⁷¹ See Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335, 337–39 (2015) (describing constitutional veneration in both public discourse and legal scholarship on national security).

ferently to constitutional arguments where security is alleged to be at issue; the fact that law's relevance in counterterrorism is still debated may make executive gestures toward constitutional and international law reassuring for rights proponents.⁷²

3. *Divergent Interpretations.* — On its own, the incorporation of exogenous legal standards into internal executive guidelines is not problematic. Indeed, it promises benefits: at its best, such incorporation not only affirms the relevance of constitutional and international law, but also supplies constraints that external legal institutions might never impose. Given the low floor of legal “rights” in many national security contexts, internal rules may provide a sorely needed form of minimal protection. And a standard adopted for the purpose of conferring legitimacy may be particularly difficult to displace later, thus becoming a durable constraint on executive action. Indeed, Professors Nelson Tebbe and Robert Tsai see this dynamic as an important accountability benefit of the more general borrowing of constitutional ideas: “Once a mechanism has become widespread and institutionally entrenched, a failure or refusal to adopt it becomes more visible. In other words, the migration of a stable repertoire of moves over several domains will make a subsequent refusal to adopt that repertoire — or the introduction of a new technique — appear anomalous rather than innocuous.”⁷³

The problem, in this context, is that legal standards are sometimes interpreted by the Executive in ways that depart from prevalent understandings of the original legal term — and, as the next section suggests, in circumstances where transparency is limited. Few legal terms have a single or fixed interpretation in existing law, and interpretations often exist along a spectrum. But the Executive's interpretation might drift beyond the conventional range of interpretations given to the original legal standard in authoritative sources such as judicial decisions. Or it might conflict with common *understandings* of the original term's meaning, where those understandings assume a more particular and stable meaning than the original term arguably has in existing doctrine. Either way, the effect of the term's deployment is to suggest a meaning to particular audiences that is at odds with the Executive's actual interpretation.

⁷² Even today, a popular debate continues over whether the Constitution should apply to suspected terrorists. Compare, e.g., Ben Kinchlow, *No Constitutional Rights for Terrorists*, WND (Apr. 28, 2013, 2:42 PM), <http://www.wnd.com/2013/04/no-constitutional-rights-for-terrorists> [<http://perma.cc/LAE2-YQ9B>], with, e.g., Rachel Goodman, *There Is No 'Suspected Terrorist Activity' Exception to the Constitution*, MSNBC (Apr. 21, 2015, 7:59 PM), <http://www.msnbc.com/msnbc/there-no-suspected-terrorist-activity-exception-the-constitution> [<http://perma.cc/E5UG-AEAM>].

⁷³ Tebbe & Tsai, *supra* note 49, at 491.

To be clear, where executive officials are borrowing legal standards from other domains in the *gaps* of binding law, they are not required to adhere to conventional interpretations of those standards because the standards themselves are not binding. The problem, therefore, is *not* a failure to follow the law but rather the mismatch between the expectations that result from the invocation of familiar standards and the actual rules.⁷⁴

4. *Secrecy's Role.* — The final characteristic of rule of law tropes is that secrecy occludes the extent of divergence in meaning between the original term and the Executive's adaptation. That secrecy frequently exists at two levels. It applies not only to the facts surrounding the application of a legal standard in concrete cases, such as the application of executive rules on targeted assassinations to specific individuals. It also applies to the Executive's interpretive materials — legal opinions, agency manuals, and so forth — that formally elaborate on the legal standard announced to the public. Even where there is some public indication that the Executive's interpretation departs in some respect from the conventional one, the full scope of that departure is not apparent. The effect is to mislead audiences about the extent to which the internal rules protect rights or constrain power.

To some extent, rule of law tropes represent a particular version of the greater problem of excessive secrecy in national security decisionmaking. Critiques of state secrecy are well known: the Executive's dominance over information, its sweeping authority to classify records, legal doctrines protecting national security information from exposure, and institutional cultures devaluing oversight all shield executive conduct from public review and accountability.⁷⁵ Many have especially lamented the turn to "secret law": the reliance by the Executive on internal legal opinions and even court decisions that are hidden from public view.⁷⁶

But the problem of rule of law tropes is also distinct from more general critiques of state secrecy. First, the use of tropes highlights a particular concern over secrecy that has elicited less attention than it

⁷⁴ Following the presentations of the three core examples, Part IV returns to this question of whether bad faith, or more ordinary bureaucratic dynamics, explains interpretive departures.

⁷⁵ The Senate Intelligence Committee's recent report on the CIA's torture program illustrates many of these dynamics. See generally S. SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288 (2014).

⁷⁶ See, e.g., Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES (July 6, 2013), <http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html> (discussing over a dozen classified rulings that expand NSA power); Dan Roberts, *Senators Accuse Government of Using 'Secret Law' to Collect Americans' Data*, THE GUARDIAN (June 28, 2013, 12:39 PM), <http://www.theguardian.com/world/2013/jun/28/senators-james-clapper-nsa-data-collection> [<http://perma.cc/7K2Y-YCYF>] (discussing concerns about secret interpretations of the USA PATRIOT Act).

deserves: the problem of selective, rather than pervasive, secrecy over a government program. “Deep secrets” are sometimes seen as the key challenge to accountability; in such situations, the public does not even know that it is being denied information, as opposed to cases where the public has some awareness that information is being withheld.⁷⁷ But where secrets are “shallow,” accountability is threatened differently. Even if the public knows that some information is being withheld, the government’s capacity to decide which information to provide enables it to shape public perceptions of executive power and constraint. Human rights advocates have frequently decried the exploitation of secrecy in this fashion.⁷⁸ More recently, political scientists and legal scholars have begun pairing secrets and leaks as two dimensions of the same problem.⁷⁹ As such critiques recognize, where the rules that apply in a given area of national security policy are internally adopted, the Executive’s ability to disclose some rules but conceal others gives it a powerful opportunity to shape and manage public opinion.⁸⁰

Second, rule of law tropes also differ from other manifestations of selective secrecy, in that they unite secrecy’s flaws with the little-noticed power of persuasive associations. Tropes rely on the natural tendency of individuals — perhaps especially legally trained individuals — to analogize, consciously or subconsciously, to what is (or appears to be) familiar from other contexts. Where standards are drawn from constitutional or international law — commonly seen as legitimate, rights-protecting, and a bulwark against national security state tyranny — the effect may be to provide false comfort regarding protections for individuals or limits on state power. Thus, the hindrance to public understanding of the rules stems from both the legitimizing ef-

⁷⁷ For the leading account, see David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

⁷⁸ See, e.g., *Pub. Citizen v. Dep’t of State*, 11 F.3d 198, 203–04 (D.C. Cir. 1993) (describing but rejecting public interest group’s argument against selective release of classified information in a FOIA context); see also Editorial, *Employing Selective Secrecy*, CHI. TRIB. (Feb. 13, 2007), http://articles.chicagotribune.com/2007-02-13/news/0702130243_1_cia-operative-valerie-plame-ambassador-joseph-wilson-lewis-scooter-libby [<http://perma.cc/F3T3-DDNY>]; Jameel Jaffer, *National Security: When Secrecy Is a Weapon*, L.A. TIMES (Apr. 6, 2011), <http://articles.latimes.com/2011/apr/06/opinion/la-oe-jaffer-nationalsecurity-20110406> [<https://perma.cc/ZEK3-X3FF>]; Jameel Jaffer & Brett Max Kaufman, *The CIA Can’t Keep Its Drone Propaganda Straight*, JUST SECURITY (June 20, 2015, 8:30 AM), <https://www.justsecurity.org/24061/cia-cant-drone-propaganda-straight/> [<http://perma.cc/WEZ7-QASV>].

⁷⁹ See, e.g., David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 559–62 (2013). See generally RAHUL SAGAR, SECRETS AND LEAKS (2013).

⁸⁰ Once again, selective secrecy of this kind is not limited to the national security context. But the effect of the classification regime may limit disclosure to a greater extent than in nonsecurity contexts. This may be even more true after the Supreme Court’s narrowing of a Freedom of Information Act exemption for internal agency records in *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1261–62 (2011).

fect of persuasive invocations and the secrecy that surrounds the actual rules.

Indeed, the effects of legitimizing associations may persist even where there is relatively little executive concealment or where secrecy recedes over time. Time-constrained observers will often lack full information from which to form judgments, even if that information is publicly available somewhere. In areas of law — such as international law — where legitimacy is presumed but deep knowledge of the law is scant, even among lawyers, the tendency of tropes to reassure without reason may be especially great.

* * *

Arising in a context of extraordinary executive power over national security affairs, rule of law tropes invite legitimacy for internal executive rules, whether or not the rules, as actually interpreted, deserve that legitimacy. Where security agencies say they use a “reasonable suspicion” standard for watchlisting or require the “least intrusive method” in investigations, but conceal interpretations that depart from common understandings of these constitutional standards, that selective secrecy defeats efforts to understand the risk to individual rights. Similarly, where government officials announce that U.S. citizens are targeted for assassination only where the threat is “imminent,” but withhold how far their notions of “imminence” have strayed from conventional interpretations, they diminish the public’s ability to judge whether the government really kills its citizens only as a last resort. The following two Parts describe these three examples of rule of law tropes.

II. THE REASONABLE SUSPICION STANDARD FOR TERRORIST WATCHLISTING

Until recently, few external constraints existed on the Executive’s use of terrorist watchlists. For a decade, courts had largely dismissed lawsuits challenging terrorist watchlists for lack of standing, lack of subject matter jurisdiction, or on related grounds.⁸¹ Congress had

⁸¹ See, e.g., *Latif v. Holder*, 686 F.3d 1122, 1124 (9th Cir. 2012) (reversing dismissal of watchlist challenge on jurisdictional grounds and failure to join required party); *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 991, 999 (9th Cir. 2012) (reversing for a second time district court’s dismissal of watchlist challenge, first on jurisdictional grounds, then on the grounds of failure to state a claim upon which relief could be granted); *Rahman v. Chertoff*, 530 F.3d 622, 622 (7th Cir. 2008) (overturning class certification in challenge to watchlist-based detentions at U.S. borders); *Mohamed v. Holder*, 995 F. Supp. 2d 520, 520, 523 (E.D. Va. 2014) (denying government motion to dismiss most claims after appeals court vacated earlier district court order transferring claims to appeals court on jurisdictional grounds); *Shearson v. Holder*, 865 F. Supp. 2d 850, 850 (N.D. Ohio 2011) (dismissing watchlisting challenge on exhaustion of remedies and other grounds); *Scherfen*

legislated little on watchlisting beyond requiring agencies to screen airline passengers⁸² and establish an ill-defined process for individuals to complain about mistakes.⁸³ For the most part, the Executive alone created the system, set the rules, and oversaw them.⁸⁴

One rule regularly cited to persuade Congress, the courts, and the public that the system adequately protected individual rights was the threshold requirement of “reasonable suspicion.” As described in *Latif v. Holder*,⁸⁵ one of the first cases to reach the merits of a watchlisting challenge, the FBI’s Terrorist Screening Center (TSC) “generally” adds individuals to its master watchlist on “a showing of ‘reasonable suspicion’ that the individuals are known or suspected terrorists based on the totality of the information.”⁸⁶ The court explained: “TSC defines its reasonable-suspicion standard as requiring ‘articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual “is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities.”’”⁸⁷

The *Latif* court drew a direct connection between the watchlisting standard and the Fourth Amendment test for stopping individuals on city streets: “This ‘reasonable suspicion’ standard is the same as the traditional reasonable suspicion standard commonly applied by the courts.”⁸⁸

Court decisions and unauthorized leaks in 2014, however, made clear that security agencies had departed in secret from the standard one might have expected based on its resemblance to the Fourth Amendment test. In appearing to adopt an exogenous standard and then departing from it, the government hindered public understanding about the actual extent of watchlisting constraints.

This Part describes, first, executive agencies’ adoption of a reasonable suspicion standard for watchlisting; second, the Fourth Amendment origins and evolution of reasonable suspicion; and finally, the government’s invocation of, departures from, and continued strategic use of the constitutional standard.

v. U.S. Dep’t of Homeland Sec., No. 3:CV-08-1554, 2010 WL 456784, at *1 (M.D. Pa. 2010) (granting motion to dismiss watchlist challenge on standing and jurisdictional grounds).

⁸² See 49 U.S.C. § 114(h) (2012).

⁸³ See *id.* § 44926.

⁸⁴ See *infra* section II.A, pp. 1583–86.

⁸⁵ 28 F. Supp. 3d 1134 (D. Or. 2014).

⁸⁶ *Id.* at 1141.

⁸⁷ *Id.* (quoting Joint Statement of Stipulated Facts at 4, *Latif*, 28 F. Supp. 3d 1134 (No. 3:10-CV-00750)).

⁸⁸ *Id.* at 1151 (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

A. Adoption of the Reasonable Suspicion Standard

The uses of terrorist watchlists have proliferated.⁸⁹ When a person buys an airline ticket, attempts to enter the United States at an airport or land border, applies for a U.S. visa, or is stopped by state or local police, government officials now check her name against databases that draw information from a consolidated terrorist watchlist.⁹⁰ That consolidated watchlist, known as the Terrorist Screening Database, is maintained by the TSC and feeds the slew of separate databases used by federal, state, local, and even foreign law enforcement agencies.⁹¹ (Throughout this article, the phrase “*the* watchlist” refers to the consolidated watchlist; references to “watchlists” or “databases” in the plural encompass the broader set of agency lists that are fed by the consolidated watchlist. Where relevant, other specific lists, like the No Fly List, are identified by name.)

Based on these lists, individuals may be prohibited from flying domestically or abroad, barred from entering the United States, hindered from acquiring citizenship, or subjected to lengthy and intrusive questioning — all without necessarily engaging in any criminal conduct. Despite the growing impact of these lists, advocates have charged that the decision to place a person on the watchlist is increasingly unmoored from objective threat perceptions: recent lawsuits have even alleged that government officials used the No Fly List to coerce individuals to become informants for the FBI.⁹²

Watchlisting expanded as a direct result of the September 11 attacks. At the time of the attacks, security directives barred only a dozen individuals from flying.⁹³ After the attacks, Congress and the public demanded to know how nineteen hijackers could have entered the country and boarded airliners despite the intelligence community’s awareness of their terrorist affiliations.⁹⁴ Coordinating intelligence sharing and inhibiting terrorist travel quickly became national security priorities, although institutional turf battles over watchlisting continued long after the attacks.⁹⁵

⁸⁹ For an outstanding account of the evolution of terrorist watchlists, see generally JEFFREY KAHN, *MRS. SHIPLEY’S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS* (2013).

⁹⁰ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER, at i, v (2007), <https://oig.justice.gov/reports/FBI/ao741/final.pdf> [<http://perma.cc/D4D5-2VMR>].

⁹¹ See *id.* at v, 7.

⁹² See, e.g., First Amended Complaint at 17, *Tanvir v. Holder*, No. 13-CV-6951 (S.D.N.Y. Apr. 22, 2014).

⁹³ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 83 (2004).

⁹⁴ See KAHN, *supra* note 89, at 136–37.

⁹⁵ *Id.* at 137–43.

Responding to the persistent coordination failures, a 2003 presidential directive required the Attorney General to “establish an organization to consolidate the Government’s approach to terrorism screening.”⁹⁶ The TSC, created as a result of that order, established a consolidated watchlist that eventually relied on two primary sources of information: the National Counterterrorism Center (NCTC), which would compile names of “international” terrorists from the CIA, State Department, FBI, and other sources and send them to the TSC; and the FBI, which would send the TSC the names of purely “domestic” terrorists.⁹⁷ The TSC would then provide subsets of that data in unclassified form to agencies according to their functions; some agencies received the entire watchlist, while others, like the Transportation Security Administration, received a narrower set of names meeting the additional criteria for the No Fly List, which barred individuals from flying altogether rather than subjecting them to additional scrutiny.⁹⁸

Initially, the process for adding individuals to the TSC’s watchlist involved what national security officials acknowledged were vague standards and little vetting. Applying the broad standard of the 2003 directive, the TSC added anyone “known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.”⁹⁹ The agency “err[ed] on the side of caution” by including individuals with any degree of nexus to terrorism.¹⁰⁰ Moreover, it relied predominantly on the judgments of the NCTC and the FBI that enough facts supported the inclusions, without independently vetting that information.¹⁰¹ Yet these source agencies themselves used avowedly subjective “standards of reasonableness” in naming individuals,¹⁰² and the NCTC presumed that individuals whose names it acquired from other intelligence agencies passed the threshold unless it had “specific and credible information” that they did not.¹⁰³

Between 2004 and 2007, the watchlist swelled from approximately 158,000 records to nearly 755,000 records.¹⁰⁴ The cost to civil liberties was also apparent, as individuals on a list or mistaken for someone on a list with a similar name were prohibited from flying, repeatedly questioned, and exhaustively searched at airports and land borders

⁹⁶ Homeland Sec. Presidential Directive 6, 2 PUB. PAPERS 1174, 1174 (Sept. 16, 2003).

⁹⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-110, TERRORIST WATCH LIST SCREENING 2–3 (2007) [hereinafter GAO 2007 REPORT].

⁹⁸ *Id.* at 8–9, 34.

⁹⁹ *Id.* at 18.

¹⁰⁰ OFFICE OF THE INSPECTOR GEN., *supra* note 88, at viii.

¹⁰¹ GAO 2007 REPORT, *supra* note 97, at 22 & n.35.

¹⁰² *Id.* at 18.

¹⁰³ *Id.* at 20.

¹⁰⁴ *Id.* at 23.

across the country. U.S. citizens and longtime residents, especially those of South Asian or Middle Eastern descent, reported facing harassing questioning and intrusive searches every time they entered the United States.¹⁰⁵ Even public officials were not immune: airline agents on several occasions tried to block Senator Ted Kennedy from flying because his name matched a terrorist's alias.¹⁰⁶ Individuals filed suit alleging violations of substantive and procedural due process rights, the Equal Protection Clause, and the Fourth Amendment,¹⁰⁷ internal audits within the Justice Department and the Department of Homeland Security (DHS) regularly critiqued the accuracy and quality of watchlist information and the sufficiency of redress processes for individuals who felt they were wrongly listed.¹⁰⁸

Following such calls for transparent and fair procedures, an inter-agency working group in 2009 adopted a "reasonable suspicion" standard for including names on the watchlist.¹⁰⁹ TSC Director Timothy Healy described that standard to Congress, noting that determinations were to be based on the "totality of the circumstances," with "[d]ue weight . . . given to the reasonable inferences that a person can draw from the facts," and without reliance on "[m]ere guesses or inarticulate 'hunches.'"¹¹⁰ He did not publicly share that the agencies had already created at least one secret exception to the standard: as early as 2009, Dr. Ibrahim had been placed back on the watchlist pursuant to a secret exception.¹¹¹

Further loosening of the rules followed in the wake of a narrowly averted terrorist attack. On December 25, 2009, two weeks after Healy testified to Congress, a twenty-three-year-old Nigerian man attempted to set off an explosive device in his underwear on a Detroit-bound airliner.¹¹² Umar Farouk Abdulmutallab was not on the TSC

¹⁰⁵ See ASIAN LAW CAUCUS, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP 4 (2009).

¹⁰⁶ Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, N.Y. TIMES, Aug. 19, 2004, at A1.

¹⁰⁷ See *supra* note 81 and accompanying text.

¹⁰⁸ See, e.g., OFFICE OF THE INSPECTOR GEN., *supra* note 90, at i-xxii; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM 89-96, 125-28 (2009).

¹⁰⁹ *Sharing and Analyzing Information to Prevent Terrorism: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 101 (2010) [hereinafter *Sharing and Analyzing Information to Prevent Terrorism*] (responses submitted by Rep. Daniel Lungren).

¹¹⁰ *Five Years After the Intelligence Reform and Terrorism Prevention Act: Stopping Terrorist Travel: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 91 (2009) (statement of Timothy J. Healy, Director, Terrorist Screening Center, FBI).

¹¹¹ *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 923 (N.D. Cal. 2014).

¹¹² SENATE SELECT COMM. ON INTELLIGENCE, ATTEMPTED TERRORIST ATTACK ON NORTHWEST AIRLINES FLIGHT 253, S. REP. NO. 111-199, at 1 (2010) [hereinafter FLIGHT 253 SENATE REPORT].

watchlist,¹¹³ even though his father had told U.S. embassy officials in Nigeria that his son had fallen under the influence of Yemeni extremists.¹¹⁴ The State Department had sent a brief cable to Washington recommending that Abdulmutallab be placed on the No Fly List, but NCTC analysts had not sent his name to the TSC because they believed the information did not meet watchlist guidelines.¹¹⁵ Healy told a congressional committee that the reasonable suspicion standard was “reasonably low” and not the cause for the omission, but that implementing guidelines may have hindered Abdulmutallab’s inclusion.¹¹⁶ A Senate investigation found multiple “systemic failures”¹¹⁷ in not identifying Abdulmutallab as a threat, concluded that standards had been “interpreted too rigidly,”¹¹⁸ and called for greater flexibility in watchlisting decisions.¹¹⁹

In the wake of the incident, the watchlists grew explosively.¹²⁰ U.S. citizens increasingly found themselves barred from flying, even stranded abroad — separated from family, job opportunities, and their country with no means to contest the information that condemned them.¹²¹ Behind closed doors, national security officials revised the watchlist standards downward, while still maintaining publicly and in court that reasonable suspicion “[g]enerally” governed.¹²²

B. Reasonable Suspicion in Fourth Amendment Law

The “reasonable suspicion” standard in Fourth Amendment law originated in *Terry v. Ohio*, the 1968 Supreme Court decision that authorized the police to stop and frisk an individual on a city street on a showing of less than probable cause.¹²³ The facts of *Terry* are well-known: A police officer on patrol observed two men separately pacing back and forth on a Cleveland street, peering into a store window, and

¹¹³ *Id.* at 2.

¹¹⁴ See Jill Dougherty, *Official: Dad Warned U.S. of Son but “No Suggestion” of Terrorist Act*, CNN (Dec. 28, 2009, 8:28 PM), <http://www.cnn.com/2009/CRIME/12/28/terror.suspect.father> [<http://perma.cc/85UH-VBKA>].

¹¹⁵ FLIGHT 253 SENATE REPORT, *supra* note 112, at 4.

¹¹⁶ *Intelligence Reform — 2010: Hearings Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 100 (statement of Timothy J. Healy, Director, Terrorist Screening Center, FBI).

¹¹⁷ FLIGHT 253 SENATE REPORT, *supra* note 112, at 1.

¹¹⁸ *Id.* at 4.

¹¹⁹ *Id.* at 1–2, 4.

¹²⁰ Shaun Waterman, *Terror Watch List Grows to 875,000*, WASH. TIMES (May 3, 2013), <http://www.washingtontimes.com/news/2013/may/3/terror-watch-list-grows-875000/?page=all> [<http://perma.cc/32BP-6FCA>].

¹²¹ See Complaint for Injunctive & Declaratory Relief at 3, *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (No. 3:10-cv-00750).

¹²² See, e.g., Declaration of Christopher M. Piehota at 10, *Latif*, 28 F. Supp. 3d 1134 (No. 3:10-cv-00750); *infra* p. 1594; *infra* p. 1595.

¹²³ 392 U.S. 1, 30–31 (1968).

then conferring, a ritual they repeated five or six times each.¹²⁴ Suspecting that the two men (and a third who had approached and conversed with them) were “casing a job,”¹²⁵ the officer approached them and asked for their names.¹²⁶ After they mumbled a response, the officer grabbed Terry, one of the men, and patted down his clothing for weapons, discovering a .38-caliber revolver in his overcoat.¹²⁷ The state charged Terry with carrying a concealed weapon, and he moved to suppress evidence of the revolver.¹²⁸

Affirming the lower courts’ denial of the suppression motion, the Court ruled that the Fourth Amendment’s prohibition against unreasonable searches and seizures, not the more demanding probable cause requirement, governed the police’s decision to question an individual about possible criminal activity and to search his outer clothing for weapons.¹²⁹ That more flexible standard required the police to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”¹³⁰ The Court emphasized the objective nature of the standard,¹³¹ and stated that “due weight must be given, not to [an officer’s] inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”¹³²

Nearly fifty years later, numerous Supreme Court and lower court decisions on police-citizen encounters have applied the reasonable suspicion standard in a range of factual contexts and have found the standard to be met upon facts considerably less clear-cut than those in *Terry*. The Supreme Court has repeatedly emphasized that officers and courts should assess the “totality of the circumstances” in determining whether reasonable suspicion exists, rejecting more restrictive per se rules.¹³³ Its decisions stress that, even where the known facts appear “innocent” if viewed separately, they might constitute reasonable suspicion when aggregated.¹³⁴ In addition, the Court has

¹²⁴ *Id.* at 6.

¹²⁵ *Id.*

¹²⁶ *Id.* at 6–7.

¹²⁷ *Id.* at 7.

¹²⁸ *See id.*

¹²⁹ *Id.* at 20.

¹³⁰ *Id.* at 21.

¹³¹ *Id.* at 21–22.

¹³² *Id.* at 27.

¹³³ *E.g.*, *Alabama v. White*, 496 U.S. 325, 330 (1990) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1980)); *United States v. Sokolow*, 490 U.S. 1, 8 (1989) (quoting *Cortez*, 449 U.S. at 417).

¹³⁴ *Sokolow*, 490 U.S. at 8–10 (holding that law enforcement officer’s judgment that defendant fit a “drug courier profile” did not detract from significance of facts, where defendant paid \$2,100 in cash for airline tickets, appeared to be traveling under an alias, and traveled from Honolulu to Miami for a forty-eight-hour trip).

increasingly permitted informants' tips to supply the requisite suspicion. Four years after *Terry*, the Court permitted law enforcement to rely on a known informant's tip, rather than firsthand observations, in conducting an investigatory stop.¹³⁵ Since then, the Court has sanctioned reliance on anonymous tips with declining corroboration requirements: in 2014, a 5–4 decision held that the California police had reasonable suspicion to stop a vehicle based on an anonymous 911 call — uncorroborated by their own observations — reporting that the vehicle had driven the caller off the road.¹³⁶

Furthermore, the Court has permitted officers to use, as a factor in the reasonable suspicion analysis, membership in a particular racial or social group or characteristics that might correlate heavily with such membership. Thus, the Court invalidated a “roving” Border Patrol stop of a car suspected of carrying undocumented immigrants near the Mexican border where the stop was based *solely* on the occupants' “apparent Mexican ancestry,”¹³⁷ but stated that such a factor could be a relevant consideration for a stop.¹³⁸ And the Court blessed the police stop of a man who fled upon seeing the police, even though they had no basis to suspect him apart from the flight and his presence in a “high crime” neighborhood.¹³⁹

Legal scholars, and the Court's dissenters, have called out these cases as expanding *Terry* far beyond its facts and significantly eroding constraints on police activity.¹⁴⁰ Nonetheless, even in this considerably weakened form, the *Terry* standard arguably retains a few minimal requirements. Summarizing what is left of *Terry*, Professor Andrew Ferguson has argued that reasonable suspicion still requires four baseline elements: individualization, corroboration, particularized detail, and timeliness of information.¹⁴¹ While the Court has accepted progressively lower levels of factual support to meet these elements, it has not departed altogether from the requirements that the facts be specific to an individual, indicate that a crime is underway or is imminent, and

¹³⁵ *Adams v. Williams*, 407 U.S. 143, 146 (1972).

¹³⁶ *Navarette v. California*, 134 S. Ct. 1683, 1686 (2014); *see also White*, 496 U.S. at 327–28, 332.

¹³⁷ *United States v. Brignoni-Ponce*, 422 U.S. 873, 876–77 (1975).

¹³⁸ *Id.* at 885–87.

¹³⁹ *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

¹⁴⁰ For a sample, *see Navarette*, 134 S. Ct. at 1692–97 (2014) (Scalia, J., dissenting); David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975 (1998); and Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883 (2013).

¹⁴¹ Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 EMORY L.J. 259, 292 (2012).

bear indications of reliability.¹⁴² For instance, the Court invalidated a police stop based on an anonymous tip that a black male in a plaid shirt at a bus stop had a gun, where the tip “provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility.”¹⁴³

In light of the Court’s weakening of the reasonable suspicion requirement in the years since *Terry*, one might wonder whether it retains any legitimacy for those concerned about rights. One indicator might be that, for all the criticism of the standard’s inability to constrain police stops, civil liberties advocates have *advocated* a reasonable suspicion standard in various national security contexts. For instance, rights advocates urged the adoption of a reasonable suspicion requirement for searching laptop computers and cell phones at U.S. borders — where currently Customs and Border Protection officers are not subject to an individualized suspicion requirement at all.¹⁴⁴ Similarly, rights advocates have pushed to limit the FBI’s investigations of religious communities to cases where the agency has reasona-

¹⁴² In another line of cases, the Court has found searches constitutionally justified based on a variant of reasonable suspicion for circumstances in which “special needs” exist, apart from normal law enforcement objectives. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (holding searches of probationers’ homes by probation officers to be a special need that may justify departures from warrant requirements); *O’Connor v. Ortega*, 480 U.S. 709 (1987) (finding public employer searches of employees for noninvestigatory, work-related purposes to be a special need); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding searches of students by public school officials justified upon a showing of reasonableness). These cases did not necessarily require suspicion of a *crime*. See, e.g., *O’Connor*, 480 U.S. at 726 (finding a public employer’s search of an employee justified based on the existence of reasonable grounds for suspecting work-related misconduct); *T.L.O.*, 469 U.S. at 341–42 (concluding that, ordinarily, a school official’s search of a student would be “justified at its inception,” *id.* at 342, where there were reasonable grounds to suspect a violation of school rules). I focus on the *Terry* doctrine because *Terry* stops are where the reasonable suspicion standard originated and the context that most law-conscious audiences would associate with that standard. In addition, it bears noting that the Supreme Court described the standard it was adopting in the special needs cases as a “reasonableness standard” rather than “reasonable suspicion” standard, likely because those cases left open the question of whether individualized suspicion was required. See *Griffin*, 483 U.S. at 872–73; *O’Connor*, 480 U.S. at 725–26; *T.L.O.*, 469 U.S. at 341–43. “Reasonable suspicion,” in contrast to “reasonableness,” suggests an individualized inquiry. The irony is that the Executive, had it wanted to draw on the Fourth Amendment for a relaxed standard of scrutiny, could have chosen even less restrictive conceptions of Fourth Amendment law (perhaps a general “reasonableness” test that arguably applies whenever a warrant and probable cause are not required). But by calling the watchlisting threshold a “reasonable suspicion” requirement — and by describing the standard in the language it did — executive officials triggered natural associations with *Terry*.

¹⁴³ *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

¹⁴⁴ See Press Release, Am. Civil Liberties Union, Groups Sue over Suspicionless Laptop Search Policy at the Border (Sept. 7, 2010), <https://www.aclu.org/news/groups-sue-over-suspicionless-laptop-search-policy-border> [<http://perma.cc/K848-UA7H>]; *Hearing on “Racial Profiling in America” Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 10 (2012) (statement of Muslim Advocates and 27 American Muslim, Arab, Middle Eastern, and South Asian Organizations), <http://pa.cair.com/files/cr/Muslim%20Advocates%20written%20testimony.pdf> [<http://perma.cc/5YDQ-DPVH>].

ble suspicion of criminal conduct.¹⁴⁵ And privacy advocates urged the Director of National Intelligence to restrict information retention from police “suspicious activity reports” to cases in which reasonable suspicion existed.¹⁴⁶ In fact, in that context, the ACLU called the standard a “reasonable, time-tested law enforcement standard” that would discourage the reporting of behavior insufficiently linked to criminal or terrorist conduct.¹⁴⁷ The advocacy for reasonable suspicion requirements in these contexts suggests that it retains some legitimacy even among rights advocates likely to be most skeptical.

C. Reasonable Suspicion as Rule of Law Trope

1. *Invoking Terry.* — Government officials frequently cited the reasonable suspicion standard, before both Congress and the courts, in seeking to alleviate civil liberties concerns with watchlists. The director of the NCTC testified to Congress that the standard served to protect civil liberties and privacy.¹⁴⁸ The TSC filed declarations in court cases describing the standard using language that judges and lawyers would instantly associate with *Terry*.¹⁴⁹ On occasion, government officials directly linked the watchlisting threshold to the Fourth Amendment test: for instance, in multiple court cases Justice Department attorneys argued that the watchlisting standard could not be unconstitutionally vague because it was “widely recognized, widely used, generally understood, and deeply rooted in constitutional jurisprudence.”¹⁵⁰

¹⁴⁵ See, e.g., CTR. FOR CONSTITUTIONAL RIGHTS ET AL., SUSPICIONLESS SURVEILLANCE OF MUSLIM COMMUNITIES AND THE INCREASED USE AND ABUSE OF MUSLIM INFORMANTS: NGO SHADOW REPORT BEFORE THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 8–9 (2014).

¹⁴⁶ *More About Suspicious Activity Reporting*, ACLU, <https://www.aclu.org/more-about-suspicious-activity-reporting> [http://perma.cc/7QBJ-YFGQ].

¹⁴⁷ *Id.*

¹⁴⁸ See *Ten Years After 9/11 — 2011: Hearings Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 963 (2012) (statement of Matthew G. Olsen, Director, National Counterterrorism Center, FBI).

¹⁴⁹ See, e.g., Declaration of Christopher M. Piehota at 10, *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (No. 3:10-cv-00750) (explaining that listings on the Terrorist Screening Database require “rational inferences” from “articulable” facts, and disclaiming resort to “[m]ere guesses or ‘hunches’”).

¹⁵⁰ Official-Capacity Defendants’ Memorandum in Support of Motion to Dismiss Plaintiff’s Second Amended Complaint at 20, *Fikre v. FBI*, 23 F. Supp. 3d 1268 (D. Or. 2014) (No. 3:13-cv-00899), 2014 WL 3924954; see *id.* (“‘Reasonable suspicion’ is thus an appropriate standard whose meaning has been reinforced by years of precedent. The TSC’s criteria use well-defined, settled terms that appropriately guide Government officials in making assessments of risks to aviation security.”); see also Reply in Support of Defendants’ Motion for Partial Summary Judgment or, in the Alternative, for Dismissal in Part at 15 n.9, *Mohamed v. Holder*, No. 1:11-cv-00050 (E.D. Va. Jan. 13, 2015) (arguing that “reasonable suspicion” has “a settled meaning and deep roots in constitutional jurisprudence”).

Despite these linkages to *Terry*, government officials did not take the position that the *placement* of an individual on a watchlist actually constitutes a search or seizure giving rise to Fourth Amendment protection.¹⁵¹ Therefore, by incorporating the reasonable suspicion standard into internal guidelines, national security lawyers were not actually seeking to conform agency conduct to any binding constitutional precedent; rather, they likely adopted the standard for some combination of reasons associated with other kinds of legal transplants.¹⁵² For U.S. lawyers seeking a standard that would offer a somewhat intermediate level of protection — lower than “beyond a reasonable doubt” or “probable cause,” but higher than nothing at all — it probably easily came to mind. Like other cost-saving transplants, it thus offered a ready resource, obviating the burden of coming up with an original term.¹⁵³ But it also likely appealed to those officials because its very familiarity and the set of associations it might trigger could legitimize a determination made in secret by executive officials alone.

Invoking reasonable suspicion subtly gestured toward a set of interconnected ideas. First, the recognizability of “reasonable suspicion” linked the watchlisting decision with established practice and tradition. In an area of national security practice that was radically new, that familiarity alone might reduce fears of exceptional deviations from legal norms. Second, and relatedly, the standard evoked constitutional fidelity, suggesting conformity not only to the rule of law in general but also to constitutional rights in particular. Without representing that Fourth Amendment law actually bound their decisions, national security officials could still profit from the linkage with deeply rooted constitutional norms. Third, *Terry* stops are frequently justified as relatively brief, minimal intrusions. Although civil rights advocates have long challenged that portrayal, such a characterization is at least the theory.¹⁵⁴ Security officials equally sought to portray watchlist-based screenings as limited and temporary inconveniences — resulting in individuals simply “cooling their heels at the border,” as one unsympathetic court described.¹⁵⁵ Fourth and finally, the idea of pragmatically

¹⁵¹ See *infra* section II.C.3, pp. 1598–1600.

¹⁵² See *supra* section I.B.1, pp. 1573–76.

¹⁵³ See *supra* section I.B.1, pp. 1573–76.

¹⁵⁴ Supreme Court cases extending *Terry*, for instance, have described that case as involving a “brief detention short of traditional arrest,” *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975), or a “brief stop of a suspicious individual,” *Adams v. Williams*, 407 U.S. 143, 146 (1972). The language of *Terry* itself is more circumspect on this point. The Court acknowledged that public frisks present a “serious intrusion upon the sanctity of the person.” *Terry v. Ohio*, 392 U.S. 1, 17 (1968). At the same time, the Court viewed the probable cause standard for arrest as inapplicable, deeming an arrest “a wholly different kind of intrusion upon individual freedom” and characterizing a frisk for weapons as a “brief, though far from inconsiderable, intrusion upon the sanctity of the person.” *Id.* at 26.

¹⁵⁵ *Rahman v. Chertoff*, 530 F.3d 622, 627 (7th Cir. 2008).

balancing privacy and law enforcement needs runs through *Terry*, which the Supreme Court decided in explicit recognition of violent crime and unrest in America's cities.¹⁵⁶ The image of balancing liberty and security at a time of heightened threats, of course, is rife throughout national security legal discourse. It is also how national security officials sometimes explained the reasonable suspicion standard — as “low enough to be able to include people . . . [and] high enough to make sure that we balance civil liberties and protection of the American people.”¹⁵⁷ Linking watchlisting to all four of these ideas — tradition, constitutional fidelity, minimal intrusions, and a reasonable balance — might aid in beating back fears of lost liberty.

2. *Departing from Terry*. — From the outset, the watchlisting standard diverged from the *Terry* standard for investigatory stops. Some of these differences were publicly disclosed, if insufficiently understood. Perhaps most significantly, the predicate for suspicion differed considerably: *Terry* required suspicion of a *crime*, while watchlisting required only suspicion of activities with an undefined relationship to terrorism.¹⁵⁸ A person could be designated if reasonably suspected of being “engaged in conduct constituting, in preparation for, in aid of *or related to*, terrorism or terrorist activities.”¹⁵⁹ Setting aside definitional questions related to “terrorism” and “terrorist activities,” the catch-all modifier “related to” potentially enabled the listing of individuals not suspected of criminal conduct. Could a person qualify merely by traveling to a country where extremists — but also millions of ordinary people — are said to live? What about by attending a religious institution where some suspects had previously studied? One district court noted that “it is not difficult to imagine completely innocent conduct serving as the starting point for a string of subjective, speculative inferences that result in a person’s inclusion on the No Fly List.”¹⁶⁰ Indeed, a senior DHS official stated that the misfortune of bumping into a suspected terrorist at a restaurant could land a person on the watchlist if an FBI agent happened to observe the encounter from across the street.¹⁶¹

¹⁵⁶ See, e.g., *Terry*, 392 U.S. at 10, 14 n.11, 23–24.

¹⁵⁷ *Sharing and Analyzing Information to Prevent Terrorism*, *supra* note 109, at 67 (statement of Timothy J. Healy, Director, Terrorist Screening Center, FBI).

¹⁵⁸ *Terry* referred to a police officer’s suspicion that “criminal activity may be afoot.” 392 U.S. at 30. Later cases have refined the test for investigatory stops to require suspicion of an ongoing, imminent, or past crime. See, e.g., *United States v. Hensley*, 469 U.S. 221, 228–29 (1985); *United States v. Cortez*, 449 U.S. 411, 417 & n.2 (1981).

¹⁵⁹ *Latif v. Holder*, 28 F. Supp. 3d 1134, 1141 (D. Or. 2014) (emphasis added) (quoting Joint Statement of Stipulated Facts at 4, *Latif*, 28 F. Supp. 3d 1134 (No. 3:10-cv-00750)).

¹⁶⁰ *Mohamed v. Holder*, 995 F. Supp. 2d 520, 532 (E.D. Va. 2014).

¹⁶¹ KAHN, *supra* note 89, at 142, 152.

Moreover, common articulations of the watchlisting standard, including in the intelligence community's own interpretive guidance, actually called for listing individuals based on reasonable *suspicion* of being a *suspected* terrorist — a formula that, like the squaring of a fraction less than one, presumably resulted in an even smaller quantum of necessary suspicion.¹⁶²

Despite these differences with the *Terry* formulation, the standard, as publicly articulated, might still be thought to require suspicion specific to the individual, grounded in articulable facts with some basis for reliability. In fact, however, current watchlisting procedures do not validate even these minimal expectations. In 2014, the *Ibrahim* district court opinion and a leaked copy of the intelligence community's 2013 Watchlisting Guidance, previously withheld in litigation under the state secrets privilege,¹⁶³ made clear that the government's interpretation of the standard largely undermined such expectations.¹⁶⁴

First, the Watchlisting Guidance makes a broad, explicit exception to the reasonable suspicion requirement for the watchlisting of non-U.S. citizens for certain immigration and visa screening processes.¹⁶⁵ The Immigration and Nationality Act¹⁶⁶ (INA) authorizes the United States to exclude noncitizens on terrorism-related grounds that go beyond suspicion of personal involvement in terrorism, and based on one of the most far-reaching definitions of terrorism found in U.S. law.¹⁶⁷ Certain exceptions to the reasonable suspicion standard in the Watchlisting Guidance, specifically allowing information to be sent to the State Department and DHS, track these broad grounds for exclusion. For instance, one exception allows the inclusion on the watchlist of the noncitizen spouses and children of suspected terrorists, while another exception permits the inclusion of individuals who endorse

¹⁶² See, e.g., OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE FEDERAL BUREAU OF INVESTIGATION'S MANAGEMENT OF TERRORIST WATCHLIST NOMINATIONS 3 (2014) [hereinafter 2014 DOJ IG REPORT] (describing standard as "reasonable suspicion that an individual is a known or suspected terrorist"); WATCHLISTING GUIDANCE, *supra* note 17, at 33 (same).

¹⁶³ See Defendants' Motion to Dismiss Plaintiff's Complaint as a Result of the Assertion of the State Secrets Privilege exhibit 1 at 7, *Mohamed*, 955 F. Supp. 2d 520 (No. 1:11-CV-0050).

¹⁶⁴ See *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 922–23 (N.D. Cal. 2014); Jeremy Scahill & Ryan Devereaux, *The Secret Government Rulebook for Labeling You a Terrorist*, THE INTERCEPT (July 23, 2014, 2:45 PM), <https://theintercept.com/2014/07/23/blacklisted> [<http://perma.cc/C57X-32MY>] (describing and linking to leaked document).

¹⁶⁵ See WATCHLISTING GUIDANCE, *supra* note 17, at 42–45.

¹⁶⁶ Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of the U.S. Code).

¹⁶⁷ For example, the INA makes inadmissible an alien who "endorses or espouses terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(VII) (2012). The child or spouse of an alien inadmissible on terrorism grounds is also inadmissible for five years after the relevant terrorist activity. *Id.* § 1182(a)(3)(B)(i)(IX). The INA's definition of terrorism includes using, or threatening to use, any weapon to endanger the safety of one or more individuals. *Id.* § 1182(a)(3)(B)(iii)(V)–(VI).

and espouse terrorist activity.¹⁶⁸ These exceptions might seem relatively less objectionable, in that they at least track grounds that Congress has (rightly or wrongly) authorized for immigration exclusion.

Other exceptions to the reasonable suspicion standard for noncitizens do not track preexisting statutory grounds; instead, they seem premised on the idea that sketchy information justifies watchlisting where noncitizens are involved. Thus, the Guidance permits the listing of noncitizens “described by sources as ‘terrorists,’ ‘extremists,’ ‘jihadists,’” or other similar terms¹⁶⁹ — referred to as “labels plus” nominations.¹⁷⁰ In fact, the Guidance specifies that even information that the NCTC keeps under a special database code because it is “very limited or of suspected reliability” may be exported to the TSC for visa and immigration purposes.¹⁷¹ As a result of these exceptions, the Guidance does not protect noncitizens, including legal permanent residents, from being included on the terrorist watchlist merely because someone described them as a threat.

These exceptions can reach large numbers of individuals with strong ties to the United States. A longtime resident returning to the United States from abroad might find herself denied entry at the border because a source labeled her an extremist, with no elaboration; a U.S. citizen might find herself separated across countries from a noncitizen husband because shadowy information of “suspected reliability” surfaced against him. The vast majority of those on the terrorist watchlist are reportedly noncitizens;¹⁷² for them, the self-described “exceptions” to reasonable suspicion swallow the rule.

Second, even for U.S. citizens, the procedures now permit the government to temporarily “upgrade” entire categories of individuals to watchlists, without reasonable suspicion, where credible intelligence information indicates that a “certain category of individuals may be used to conduct an act of domestic or international terrorism.”¹⁷³ The

¹⁶⁸ WATCHLISTING GUIDANCE, *supra* note 17, at 43–44.

¹⁶⁹ *Id.* at 44 (original formatting omitted). The Guidance states that such information must be “credible,” *id.*, although apparently not so credible as to constitute reasonable suspicion. The authorization to use “labels plus” nominations appears to have been a result of the 2009 Christmas Day incident; the NCTC, which did not send Abdulmutallab’s name to the TSC, later claimed that their analysts could not have watchlisted him because then-existing guidelines prevented the listing of “[m]ilitants, extremists, [and] jihadists . . . without particularized derogatory” information. *Sharing and Analyzing Information to Prevent Terrorism*, *supra* note 109, at 68 (statement of Russell Travers, Deputy Director, National Counterterrorism Center, FBI).

¹⁷⁰ WATCHLISTING GUIDANCE, *supra* note 17, at 22 n.28.

¹⁷¹ *Id.* at 45.

¹⁷² See Waterman, *supra* note 120 (reporting that as of late 2012, less than one percent of the 875,000 individuals in the NCTC’s TIDE Database — a classified database broader than the TSC’s watchlist — were U.S. citizens or legal permanent residents).

¹⁷³ WATCHLISTING GUIDANCE, *supra* note 17, at 26 (original formatting omitted). The 2014 DOJ Inspector General report, a redacted version of which was released several months before

Guidance makes clear that such upgrades are to be based on exigent circumstances, require the high-level approval of national security officials, and apply only for renewable thirty-day periods of time.¹⁷⁴ Despite these restrictions, the implication is clear: the requirement of individualization can be completely set aside, so long as a threat persists, solely at the discretion of national security officials.¹⁷⁵

This exception arose from the direct aftermath of the December 2009 underwear bomber incident. Beginning that evening and for the next seven weeks, national security officials ordered the TSC to add to the terrorist watchlist categories of individuals who had not previously been found to meet its criteria, and to “upgrade” certain categories of individuals from the watchlist to more restrictive lists like the No Fly List.¹⁷⁶ It appears that country affiliations largely drove these determinations; it is not clear whether the TSC added only individuals who had recently traveled to or otherwise voluntarily “affiliated” with those countries, or also included individuals who merely had ethnic ties to those countries.¹⁷⁷ Either way, the TSC acknowledged that it added individuals to even the most restrictive of the watchlists, the No Fly List, “without any information indicating a personal involvement in terrorism,” let alone satisfaction of the more particular criteria for the No Fly List.¹⁷⁸ A surge of individuals, including U.S. citizens, were denied boarding as a result of these measures.¹⁷⁹ A DOJ Inspector General audit concluded that it took nearly two years for the TSC to review and readjust the watchlist status of everyone affected by the group-based inclusions.¹⁸⁰

The Watchlisting Guidance does not provide examples of either the kind of threat that can justify a group-based departure from the reasonable suspicion requirement or the characteristics by which such groups can be defined. No public information indicates whether, or how often, the government has made such categorical additions since the Abdulmutallab incident. In fact, no public information exists as to whether watchlist records are routinely tagged on the basis of ethnicity, national origin, or other categories that would facilitate profiling —

the Watchlisting Guidance was leaked, had stated that new watchlisting protocols permitted threat-based watchlist modifications, without providing details. 2014 DOJ IG REPORT, *supra* note 162, at ii, 25.

¹⁷⁴ WATCHLISTING GUIDANCE, *supra* note 17, at 25–27.

¹⁷⁵ *Id.* at 27 (stating that a threat-based upgrade is “valid until the threat no longer exists”).

¹⁷⁶ 2014 DOJ IG REPORT, *supra* note 162, at 14–15, 19.

¹⁷⁷ The language of the 2014 DOJ Inspector General report suggests that broad affiliations might have qualified. The report notes that categories included “individuals with a nexus to three specific countries who also met certain other criteria” and “individuals affiliated with two specific countries.” *Id.* at 15.

¹⁷⁸ *Id.* at 19; *see id.* at 24–25.

¹⁷⁹ *Id.* at 20–21.

¹⁸⁰ *Id.* at 23.

although the upgrades in the wake of the underwear bomber incident show that at least some kinds of country affiliations are already tagged. What is clear though is that, in undefined exigent circumstances, the Guidance authorizes the addition of categories of individuals without individualized determinations.

Beyond the two explicit exceptions, the Guidance departs from expectations of individualized suspicion through other interpretive moves. First, it presumes that individuals who have come to the TSC's attention through certain specified processes meet the standard. For instance, if a U.S. agency determines that a group is engaging in terrorist activities — even if *not* pursuant to congressionally authorized processes for designating groups as terrorist organizations — then members of that group may be nominated without “particularized derogatory information.”¹⁸¹ The Guidance says nothing more about which agency processes are intended to be covered or how rigorous they must be, exempting only “[n]eutral associations” with a group such as the provision of janitorial, repair, or delivery services.¹⁸² If these internal, nonreviewable processes sweep in broad political, religious, or cultural organizations, this presumption could reach many individuals not personally suspected of, or linked to, any terrorist activities.¹⁸³ Second, the government may presume that individuals identified by certain foreign governments meet the reasonable suspicion standard, without assessing the accuracy of the information supporting the identification in a given case or the propriety of using it.¹⁸⁴

¹⁸¹ WATCHLISTING GUIDANCE, *supra* note 17, at 38 (original formatting omitted).

¹⁸² *Id.*

¹⁸³ This is especially so as the definition of “terrorist activities” includes “activities that facilitate or support terrorism and/or terrorist activities.” *Id.* at 35–36 (original formatting omitted).

¹⁸⁴ See *id.* at 38. This provision takes a different approach from *Terry*-stop jurisprudence related to whether police departments can rely on other departments' suspicion of unlawful conduct, although analogizing across the two contexts is problematic. In *United States v. Hensley*, 469 U.S. 221 (1985), one city's police officers stopped a man they recognized from another city's flyer reporting that he was wanted for armed robbery. *Id.* at 223–24. The Court held that the validity of the police stop did not depend on the detaining officers' knowledge of the underlying facts that supported the first police department's suspicion. *Id.* at 231. However, for the stop to be valid, the department that issued the wanted flyer must have had “articulable facts supporting a reasonable suspicion that the wanted person has committed an offense.” *Id.* at 232. Thus, under Fourth Amendment law, law enforcement agencies can rely on other agencies' suspicion in detaining a person, but for a court to ultimately find the detention lawful, the originating agency's suspicion must have been reasonable. By contrast, the Watchlisting Guidance presumes that reasonable suspicion is satisfied for anyone named as a terrorist by certain foreign governments without requiring, at any point in time, that the source government be found to have had reasonable suspicion. This is where analogizing to *Terry* stops breaks down, of course, since the watchlisting context presents no back-end, structural mechanism to review the factual basis for the first agency's suspicion. Moreover, it is not clear that the Court would even have reached the same conclusion in *Hensley* if a *foreign* police agency had issued a “wanted” flyer; the police forces of other U.S. jurisdictions presumably operate with knowledge of U.S. law. By contrast, the Watchlisting Guidance provides no reason to assume that foreign intelligence agencies are apply-

Decisions to accept such information are made at the country-by-country level without individualized review.¹⁸⁵

In all, the Watchlisting Guidance devotes seventeen pages to explaining the minimum factual basis for watchlisting, beginning with the reasonable suspicion language but then substantially qualifying the need for individualized determinations and the extent of confidence required.¹⁸⁶ Some language cautions against overinclusion, for instance, noting that behaviors indicative of terrorism might also have innocent explanations or implicate First Amendment rights.¹⁸⁷ But other language notes that “irrefutable evidence or concrete facts are not necessary,” that information from a single, uncorroborated source may suffice, and that accuracy should be verified just “to the extent possible.”¹⁸⁸ Veering between constraint and permission, the Guidance appears to have drifted increasingly toward permission after the underwear bomber attempt.

3. *Strategically Avowing and Disavowing Terry*. — The government continues to cite the reasonable suspicion threshold for watchlisting and connect it to constitutional doctrine. But since the underwear bomber incident, the government has also disclaimed the comparison where it does not serve its interests. Directly following the attempted attack, many Republicans assailed the Obama Administration for providing undue constitutional protections to foreign terrorists. Most famously, some attacked the reading of *Miranda* rights to Abdulmutallab.¹⁸⁹ But they also targeted the “reasonable suspicion” standard. A *Wall Street Journal* op-ed argued that Abdulmutallab had managed to get on an airplane because the Obama Administration had granted “foreign terrorists . . . Fourth Amendment reasonableness rights that courts intended to protect Americans being searched by the

ing the TSC’s reasonable suspicion requirement before designating individuals as threats. In addition, even if one analogizes tips from foreign intelligence agencies to tips from private informants, for which corroboration requirements appear to be loosening, *see, e.g.*, *Navarette v. California*, 134 S. Ct. 1683, 1688 (2014), law enforcement officials still evaluate the information received from private informants to form a judgment as to whether reasonable suspicion is met, *see id.* at 1690. In the watchlisting context, the threat designations of particular foreign intelligence agencies are adopted without U.S. assessment as to any individual. Whether reliance on foreign agencies’ judgments is appropriate in the watchlisting context is a larger question that this Essay does not purport to answer. The point here is more modest: aspects of the Watchlisting Guidance depart from what one might expect of a “reasonable suspicion” standard based on a comparison with *Terry* jurisprudence.

¹⁸⁵ WATCHLISTING GUIDANCE, *supra* note 17, at 38.

¹⁸⁶ *See id.* at 33–49.

¹⁸⁷ *Id.* at 34–35.

¹⁸⁸ *Id.* at 34.

¹⁸⁹ *See, e.g.*, Charlie Savage, *Debate over Delaying of Miranda Warning*, N.Y. TIMES (Apr. 20, 2013), <http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html>.

local police.”¹⁹⁰ The opinion piece lambasted the “legalistic language” of the standard for prohibiting hunches that might stop terrorist attacks; it linked the watchlisting standard with other practices, such as prosecuting terrorists in civilian courts, which it viewed as projecting the “legalistic culture” of domestic law enforcement onto counterterrorism.¹⁹¹ Repeating the charge in a congressional hearing, Representative Daniel Lungren accused the Administration of applying *Terry* to aliens not entitled to Fourth Amendment protections.¹⁹²

On the defensive, TSC Director Timothy Healy, a witness at that hearing, acknowledged that *Terry* was a “legalistic opinion by the Supreme Court” but said it provided only “a baseline” that was “adopted and adjusted to meet the intelligence and law enforcement requirements.”¹⁹³ He defended the standard as striking the right balance between “civil liberties and protection of the American people,”¹⁹⁴ and attributed the failure to stop Abdulmutallab to flawed interpretation of the standard rather than to the standard itself.¹⁹⁵

Following the hearing, Patricia Cogswell, a senior DHS official, went even further in disavowing connections between the watchlisting standard and *Terry*. The “[g]overnment did not choose to invoke a Fourth Amendment standard and does not consider watchlisting to be a search or seizure under the Fourth Amendment,” she wrote in her response to Representative Lungren’s questions for the record.¹⁹⁶ Instead, she attributed the standard to a 2008 presidential directive that called for the sharing of biometric information on individuals where there was an “articulable and reasonable basis for suspicion.”¹⁹⁷ Disavowing any intended connections to *Terry* seems disingenuous in the face of the nearly identical language and the TSC’s acknowledgment that the standard provided a baseline.

¹⁹⁰ L. Gordon Crovitz, *Intelligence Is a Terrible Thing to Waste*, WALL ST. J. (Jan. 3, 2010, 7:04 PM), <http://www.wsj.com/articles/SB10001424052748704065404574636130361837754>; see also John Lehman, *How Obama Is Blowing the Terror War*, DAILY BEAST (Jan. 18, 2010, 5:42 PM), <http://www.thedailybeast.com/articles/2010/01/18/how-obama-is-blowing-the-terror-war.html> [<http://perma.cc/YJB4-Y6G8>].

¹⁹¹ Crovitz, *supra* note 190.

¹⁹² *Sharing and Analyzing Information to Prevent Terrorism*, *supra* note 109, at 66 (statement of Rep. Daniel Lungren, H. Comm. on the Judiciary).

¹⁹³ *Id.* (statement of Timothy J. Healy, Director, Terrorist Screening Center, FBI).

¹⁹⁴ *Id.* at 67.

¹⁹⁵ See *id.* at 67, 69.

¹⁹⁶ *Id.* app. at 101 (statement of Patricia Cogswell, Acting Deputy Assistant Secretary, DHS).

¹⁹⁷ *Id.* (quoting Directive on Biometrics for Identification and Screening to Enhance National Security, 1 PUB. PAPERS 757, 758 (June 5, 2008)). While the directive required agencies to share biometric and other information on “persons for whom there is an articulable and reasonable basis for suspicion that they pose a threat to national security,” it did not set articulable and reasonable suspicion as the floor for sharing biometric information, nor did it require that standard as the minimum for input of information into the TSC’s consolidated watchlist. Directive on Biometrics for Identification and Screening to Enhance National Security, *supra*, at 758.

Yet this was not the sole occasion on which the use of the trope backfired. While some charged that the standard afforded too much constitutional protection, the *Terry* linkage helped persuade others that watchlisting was constitutionally deficient. In 2014, a district court judge in Oregon called the bare procedures available to challenge one's placement on the No Fly List "wholly ineffective" and ordered the government to develop new procedures that satisfied due process.¹⁹⁸ *Latif v. Holder* primarily concerned the post-deprivation process available to individuals on the No Fly List who were barred from flying, not the initial standard for including a person on the broader watchlist.¹⁹⁹ Nonetheless, the court's judgment that the front-end reasonable suspicion standard was "low," enabling factual errors to go uncorrected, informed its conclusion that the back-end redress process violated due process.²⁰⁰ And crucially, the court determined that the standard was low largely by equating it with the "traditional reasonable suspicion standard" and citing Fourth Amendment cases that described that standard as undemanding.²⁰¹

Although these particular associations with *Terry* were counterproductive, the government continued to cite the comparison where it appeared to serve its interests, as in its repeated arguments in 2014 and 2015 that the watchlisting standard could not be constitutionally vague because of its "well-defined" and "settled" nature in constitutional law.²⁰² Where the comparison to Fourth Amendment reasonable suspicion seemed helpful for legal or political reasons, government lawyers embraced it; where it did not, they disclaimed it.

* * *

The watchlisting system presents far bigger questions than an essay on tropes can begin to answer. But perhaps it is worth surfacing one question that the language of *Terry* invites us to consider. In approv-

¹⁹⁸ *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014).

¹⁹⁹ *See id.* at 1147.

²⁰⁰ *Id.* at 1152.

²⁰¹ *Id.* at 1151. Although criticisms of the reasonable suspicion standard in the stop-and-frisk context were not new, developments in a New York City case at the time of the *Latif* court's decision had intensified criticism. In 2013, Judge Scheindlin of the Southern District of New York concluded that New York City's massive stop-and-frisk program violated equal protection. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013). That decision, concluding that the police had conducted at least 200,000 police stops without reasonable suspicion, *id.* at 559, was arguably the most important decision regarding stop-and-frisk policies in decades, receiving exceptional national coverage and helping to elect a mayor who promised major reforms, Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>. The public attention to stop-and-frisk policies may have intensified negative associations with "reasonable suspicion."

²⁰² *See supra* note 150 and accompanying text.

ing police stops based on reasonable suspicion, *Terry* relied on the availability of judicial review over police decisions, noting that Fourth Amendment rights became “meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge.”²⁰³ That potential for back-end independent review is arguably what made an otherwise open-textured standard tolerable.²⁰⁴ Watchlisting cannot be simplistically analogized to police stops, for any number of reasons. But the question remains whether an internal standard, applied by security officials alone with little threat of external review, can ever sufficiently constrain.

III. OTHER RULE OF LAW TROPES IN NATIONAL SECURITY

Watchlisting is not the only context in which national security officials have advanced misleading rule of law tropes. This Part presents two others, one sounding in international law and another in constitutional law.

A. “Imminence” in Targeted Killings of U.S. Citizens

For more than a year after CIA drones killed U.S.-born preacher Anwar al-Awlaki and two other U.S. citizens in northern Yemen,²⁰⁵ senior national security officials made public speeches to convince Americans that strict legal limits governed the targeted killings of U.S. citizens.²⁰⁶ Attorney General Eric Holder provided the most detailed account of the Administration’s legal framework in a March 2012 speech at Northwestern University, where he justified the use of lethal force under both U.S. and international law.²⁰⁷ Stating that “[t]he American people” should feel assured that “actions taken in their defense are consistent with their values and their laws,” Holder offered the following description of the Administration’s legal position:

[A]n operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would

²⁰³ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

²⁰⁴ Of course, even with respect to law enforcement activity actually subject to Fourth Amendment protection, recent Supreme Court decisions have cut back on judicial enforcement by widening exceptions to the exclusionary rule. See, e.g., *Herring v. United States*, 555 U.S. 135 (2009).

²⁰⁵ See Craig Whitlock, *U.S. Airstrike that Killed American Teen in Yemen Raises Legal, Ethical Questions*, WASH. POST (Oct. 22, 2011), https://www.washingtonpost.com/world/national-security/us-airstrike-that-killed-american-teen-in-yemen-raises-legal-ethical-questions/2011/10/20/gIQAdvUY7L_story.html.

²⁰⁶ See *New York Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 524–29 (S.D.N.Y. 2013) (discussing official speeches), *aff’d in part, rev’d in part*, 756 F.3d 100 (2d Cir. 2014).

²⁰⁷ See Holder, *supra* note 45.

be lawful at least in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that *the individual poses an imminent threat of violent attack against the United States*; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.²⁰⁸

The requirement of an “imminent threat of violent attack,” in a speech explicitly justifying U.S. drone strikes under international law, seemed to invoke either of two conceptions of “imminence” under international law. One conception of imminence comes from law of war principles governing the anticipatory use of force in self-defense. Although the U.N. Charter does not specifically permit the anticipatory use of force — instead pinning the right of self-defense on the existence of an “armed attack” — many international law commentators (and states) believe that such a right exists.²⁰⁹ Those who recognize such a right have often conditioned it on the *imminence* of the threat faced: the *Caroline* Doctrine, the most famous exposition of that principle, limits anticipatory self-defense to cases where “the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation.”²¹⁰

A second conception of imminence in international law comes from the separate body of international human rights law, which applies in the absence of a recognized armed conflict. According to international law scholar Kevin Jon Heller, under international human rights law, the state can kill an individual only where it is “both proportionate and necessary.”²¹¹ The necessity principle precludes the use of deadly force against a person who can be arrested or deterred through other means, and, “[i]n practice . . . means that the extraterritorial use of lethal force is justified only to prevent an imminent attack.”²¹²

Among audiences with some exposure to international law, the Attorney General’s references to an imminent threat might call to mind relatively restrictive conceptions of the term in either international humanitarian law (governing armed conflicts) or international human rights law (applicable outside armed conflicts). To be sure, the Attor-

²⁰⁸ *Id.* (emphasis added).

²⁰⁹ See Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 422, 437–39 (2006).

²¹⁰ Noura S. Erakat, *New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self-Defense*, 56 ARIZ. L. REV. 195, 203 (2014) (quoting LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 890–91 (1980)). By contrast, an even more controversial and far less accepted claim — that of preemptive self-defense — dispenses with the imminence requirement to permit the use of force against evolving threats that do not yet present a direct threat. See W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525, 526 (2006).

²¹¹ Kevin Jon Heller, ‘One Hell of a Killing Machine’: *Signature Strikes and International Law*, 11 J. INT’L CRIM. JUST. 89, 113 (2013) (emphases omitted).

²¹² *Id.*

ney General's speech suggested a more permissive concept of imminence than conventional understanding of either of these doctrines. Holder noted that the test considered the "relevant window of opportunity" for the United States to act, in light of the fact that terrorists did not behave like traditional militaries and could strike with little notice.²¹³ In particular, he argued that "the Constitution does not require the President to delay action until some theoretical end-stage of planning — when the precise time, place, and manner of an attack become clear."²¹⁴ In addition, an earlier speech by the President's top terrorism adviser had also suggested a "more flexible" and "broadened" understanding of "imminence."²¹⁵ Thus, the degree to which the Administration concealed the divergence between the invoked standard and its actual interpretation is less pronounced in this case than, for instance, in the terrorist watchlist context.

The extent to which the Administration had left aside traditional understandings of imminence, however, only became clear after the leak of a Justice Department White Paper setting forth the legal rationale for targeted killings of U.S. citizens.²¹⁶ Justifying the legality of targeted killings under both U.S. and international law, the White Paper expanded on the Administration's "broader concept of imminence."²¹⁷ According to the White Paper, an individual could be viewed as posing an "imminent threat" so long as he was "personally and continually involved in planning terrorist attacks"; furthermore, a person could be presumed to pose such a threat if he had been "recently" involved in such activities and "there is no evidence suggesting that he has renounced or abandoned" them.²¹⁸ In the Administration's conception, therefore, imminence was *presumed* based on a target's recent involvement in terrorism. Heller observed that the White Paper's interpretation implausibly placed the burden on a target to show that he no longer intended to attack the United States.²¹⁹ Even someone who fully understood, based on the Administration's public statements, that the Administration did not interpret "imminence" to require knowledge of a specific, intended attack, might have been sur-

²¹³ Holder, *supra* note 45.

²¹⁴ *Id.*

²¹⁵ John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> [http://perma.cc/4537-8CYR].

²¹⁶ See U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE WHITE PAPER (2011).

²¹⁷ *Id.* at 7.

²¹⁸ *Id.* at 8.

²¹⁹ See Kevin Jon Heller, *The DOJ White Paper's Confused Approach to Imminence (and Capture)*, OPINIO JURIS (Feb. 5, 2013, 3:21 AM), <http://opiniojuris.org/2013/02/05/the-doj-white-papers-confused-approach-to-imminence-and-capture/> [http://perma.cc/MKY8-E8NS].

prised to see that the standard could be satisfied by past conduct alone.

One year after the White Paper's release, the Second Circuit ordered the government to disclose the underlying OLC legal memo on the applicability of criminal and constitutional law to the targeting of Anwar al-Awlaki.²²⁰ The government had fought the memo's release, winning in the district court, but the Second Circuit held that the official disclosure of the White Paper following the leak waived secrecy claims over the OLC memo.²²¹ The memo did not offer a fuller explanation of the Administration's approach to imminence, at least in the sections of the memo that were publicly disclosed.²²² It did suggest, however, that the Administration did not believe that the imminence standard of international self-defense law actually applied to U.S. strikes against individuals in Yemen: the Administration took the position that the United States was already in an armed conflict with al Qaeda in Yemen, making it unnecessary for individual targeting decisions to independently satisfy international law governing the resort to self-defense.²²³ Instead, the memo used the determination that al-Awlaki presented a "continued and imminent threat" to support a host of legal conclusions: that al-Awlaki fell within the congressional post-9/11 Authorization to Use Military Force against al Qaeda, thus lending support to the memo's conclusion that killing him would not be unlawful murder;²²⁴ that an operation in Yemen would be within the scope of a recognized armed conflict between the United States and al Qaeda;²²⁵ and that targeting al-Awlaki would not violate either due process or Fourth Amendment rights.²²⁶

Commentators remained puzzled as to why exactly the Administration was invoking imminence at all.²²⁷ Whatever the precise theory,

²²⁰ See *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 124 (2d Cir. 2014).

²²¹ *Id.* at 108, 116.

²²² See Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Eric Holder, Att'y Gen., U.S. Dep't of Justice (July 16, 2010) [hereinafter OLC 2010 Memo]; see also *N.Y. Times Co.*, 756 F.3d at 115–16 (explaining distinct portions of the memo and ordering release only of legal analysis).

²²³ See, e.g., Benjamin Wittes, *Whence Imminence in that Drone Memo? A Puzzle and a Theory*, LAWFARE (June 24, 2014, 11:19 AM), <https://www.lawfareblog.com/whence-imminence-drone-memo-puzzle-and-theory> [<http://perma.cc/AM2E-V9D4>].

²²⁴ OLC 2010 Memo, *supra* note 222, at 21.

²²⁵ *Id.* at 27.

²²⁶ *Id.* at 38–41.

²²⁷ See, e.g., Wittes, *supra* note 223 (speculating that the requirement came from a presidential covert action finding, rather than international law); Ingber, *supra* note 68 (manuscript at 24 n.76) (suggesting that the argument may have derived from both international law on self-defense and interpretation of an internal standard). Thus, it is not clear whether the Administration was applying and extending a standard from international law that it thought at least indirectly applied to the legal question at hand, or whether it was purely borrowing the term from another domain for persuasive purposes alone.

the many public references to the concept seem largely oriented to convincing public audiences that the strikes were legitimate in that they were grounded in some pedigreed legal concept. After Holder's speech, a lay reader of the media accounts, which widely cited the imminence language,²²⁸ might draw on the ordinary meaning of the term in assuming a higher level of threat immediacy than the Obama Administration in fact required; a legally informed reader might draw on common international law interpretations to come to the same conclusion. The Administration could have chosen language that did not obscure the actual argument or create misimpressions based on the term. For instance, it might have forthrightly argued that, due to the unconventional nature of the conflict and the lack of notice presented by terrorist plotting, the assassination of U.S. citizens serving as senior operational leaders of terrorist groups would be justified where they presented a "continual" or "ongoing" threat. Instead, national security officials invoked a concept that they must have known would be interpreted against the backdrop of international law — and did so at least until the leaked White Paper led commentators to protest the Administration's interpretation of the term.²²⁹

B. "Least Intrusive Method" in FBI Investigations

The Attorney General's Guidelines for Domestic FBI Operations (Attorney General's Guidelines) direct agents to use the "least intrusive

²²⁸ See, e.g., Kevin Johnson, *Holder: Constitution Doesn't Cover Terrorists*, USA TODAY (Mar. 5, 2012, 8:24 PM), <http://www.usatoday.com/news/washington/story/2012-03-05/eric-holder-killing-us-citizens-terrorist-threat/53374776/1> [<http://perma.cc/A5YZ-TNDD>]; Charlie Savage, *U.S. Law May Allow Killings, Holder Says*, N.Y. TIMES (Mar. 5, 2012), <http://www.nytimes.com/2012/03/06/us/politics/holder-explains-threat-that-would-call-for-killing-without-trial.html>; Richard A. Serrano & Andrew R. Grimm, *Eric Holder: U.S. Can Target Citizens Overseas in Terror Fight*, CHI. TRIB. (Mar. 5, 2012), http://articles.chicagotribune.com/2012-03-05/news/chi-eric-holder-northwestern-terrorism_1_anwar-awlaki-drone-attack-obama-and-holder [<http://perma.cc/V9B7-MRNY>].

²²⁹ See, e.g., Jeffrey Rosen, *Drone Strike Out*, NEW REPUBLIC (Feb. 6, 2013), <https://newrepublic.com/article/112338/obama-administrations-drone-memo-unconstitutional> [<http://perma.cc/8L78-CW77>]; Heller, *supra* note 219; Erakat, *supra* note 210, at 200 (arguing that Obama Administration "redefines the traditional meaning of imminence by relaxing its temporal standards"). Given that some "leaks" turn out to have been authorized, see Pozen, *supra* note 79, at 559–60, it is at least conceivable that the Obama Administration approved the leak of the White Paper. The official disclosure of the White Paper just four days after its leak, see *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 110–11 (2d Cir. 2014), lends some support to this possibility.

If the Administration deliberately leaked the White Paper, it suggests that administration officials did not predict that their interpretation of imminence would attract such criticism. Whether or not the leak was unauthorized, the usage of the term in the Administration's public speeches seems explainable only as an effort to legitimize targeted killings with reference to an established international law concept.

method feasible” in domestic investigations.²³⁰ The FBI’s website touts the rule as evidence that it “defend[s] the Constitution by upholding the law, while protecting privacy and civil liberties.”²³¹ The principle evokes the “least intrusive alternative” or “least restrictive alternative” requirement rife in constitutional law and other fields.²³² Most commonly, that requirement is associated with strict scrutiny, constitutional law’s most exacting test for sustaining the validity of rights-implicating government conduct.²³³ As described in an FBI internal guide disclosed after lawsuits from civil liberties groups, however, the requirement amounts to a simple balancing test that heavily weighs the government’s security interests.

In constitutional doctrine, the requirement that the government use the “least restrictive alternative” to achieve its goals is one formulation of the “narrow tailoring” requirement of strict scrutiny review.²³⁴ When a court analyzes challenged legislation under strict scrutiny, it will uphold it “only if ‘necessary’ or ‘narrowly tailored’ to promote a ‘compelling’ government interest.”²³⁵ A law is not necessary if the government could achieve the same ends with means less restrictive of protected rights.²³⁶ A 1988 article deemed “least intrusive alternative analysis” to be “integral”²³⁷ to the Supreme Court’s review of freedom of speech and association, the free exercise of religion, substantive and procedural due process, equal protection, and other constitutional rights.²³⁸ In the First Amendment and equal protection contexts, strict scrutiny is typically differentiated from less demanding “intermediate scrutiny” or “rational basis” forms of review.²³⁹ Compared to those

²³⁰ OFFICE OF THE ATT’Y GEN., THE ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS 12 (2008) [hereinafter ATT’Y GEN. GUIDELINES], <http://www.justice.gov/archive/opa/docs/guidelines.pdf> [<http://perma.cc/67CX-KZSN>].

²³¹ *Addressing Threats to the Nation’s Cybersecurity*, FBI, <https://www.fbi.gov/about-us/investigate/cyber/addressing-threats-to-the-nations-cybersecurity> [<http://perma.cc/9VGW-MMRT>].

²³² Courts and commentators frequently use these terms interchangeably; “least intrusive alternative” may be more common in the specific context of law enforcement searches. See, e.g., Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988).

²³³ See *infra* notes 234–242 and accompanying text.

²³⁴ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326 (2007).

²³⁵ *Id.* at 1268.

²³⁶ *Id.* at 1326.

²³⁷ Strossen, *supra* note 232, at 1210.

²³⁸ *Id.* at 1210–11. Although associated most recognizably with constitutional law, the least restrictive alternative test also appears in common law and in statutory law on civil commitment, see *id.* at 1208, 1213–14, antitrust law, see C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. (forthcoming 2016) (manuscript at 4) (on file with author), and international trade law, see Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 403 (2003).

²³⁹ Fallon, *supra* note 234, at 1298–99.

forms of review, strict scrutiny requires a particularly close fit between the government's claimed interest and the means it has adopted to promote that interest.²⁴⁰ Moreover, in determining whether the government could have accomplished its objectives with an approach less restrictive of individual rights, many courts do not rigorously examine whether the proposed alternative would really meet government objectives in equal measure.²⁴¹ For that reason, commentators have often viewed strict scrutiny as putting a thumb on the scale in favor of the right in question, and rights advocates have pressed for a least restrictive alternative requirement where existing doctrine merely calls for balancing competing interests.²⁴²

To be sure, courts are not uniform in how stringently they conceive of or apply the test. One empirical study challenges the oft-quoted notion that strict scrutiny is "strict in theory, fatal in fact," by demonstrating that strict scrutiny does not always, or even mostly, lead courts to invalidate state action.²⁴³ Moreover, some courts explicitly limit their conception of a less restrictive alternative to alternatives that are equally effective²⁴⁴ — an interpretation that, rigorously applied, might strike only the most invidiously based or thoughtlessly adopted policies. In fact, some have argued that, while the Supreme Court has sometimes interpreted strict scrutiny as establishing a "nearly categorical prohibition against infringements of fundamental rights," it has in other cases applied a version of the test that amounts to little more than "weighted balancing."²⁴⁵ Despite these critiques, the least restrictive alternative requirement is still associated with the most demanding tier of constitutional scrutiny and is frequently described by courts in ways that highlight its stringency. Furthermore, the Supreme Court's separate Fourth Amendment jurisprudence reinforces the notion that a least intrusive method test would restrict government searches to a greater degree than a simple "reasonableness" approach. For instance, in a recent case upholding the search of a government employee's text messages, the Court stated that it had "repeatedly refused" to require the "least intrusive" search practicable" in the Fourth Amendment context because judges can "almost always imagine some

²⁴⁰ *Id.* at 1274.

²⁴¹ In the particular context of law enforcement investigations of political organizations, for instance, see *Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1055–56 (N.D. Ill. 1985) (holding that city police department's infiltration of political organization's private meetings violated First Amendment rights where city failed to show that objectives could not be achieved through less drastic means, such as the sending of informants to public meetings).

²⁴² See, e.g., Strossen, *supra* note 232, at 1174–77.

²⁴³ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96 (2006).

²⁴⁴ See Hemphill, *supra* note 238 (manuscript at 20).

²⁴⁵ See Fallon, *supra* note 234, at 1302.

alternative means by which the objectives of the government might have been accomplished.”²⁴⁶

Thus, for legal audiences, a least intrusive method requirement for FBI investigations would likely call to mind the relatively demanding strict scrutiny approach required in certain areas of the law (and rejected in others). Nonetheless, as interpreted by the FBI, the principle calls for simple balancing, at best, of investigative need and any intrusion on privacy or civil liberties. Moreover, significant language in both the publicly released Attorney General’s Guidelines and the initially withheld FBI Guide appears to put a thumb on the scale in favor of security, rather than individual rights.

Since the 1970s, the Attorney General’s Guidelines, which serve as the “primary constraint”²⁴⁷ on the FBI’s operations, have directed the agency to apply some version of the least intrusive method principle in its inquiries and investigations.²⁴⁸ The current version of the Guidelines, issued in 2008 during the waning months of the Bush Administration, indicates that the requirement is qualified. First, the requirement applies only to scenarios in which FBI agents have a choice between investigative methods “that are each operationally sound and effective.”²⁴⁹ Second, and more significantly, the Guidelines direct that the FBI “shall not hesitate to use any lawful method . . . even if intrusive,” when warranted by the seriousness of the threat.²⁵⁰ In fact, the Guidelines state further that this point “is to be particularly observed

²⁴⁶ *City of Ontario v. Quon*, 560 U.S. 746, 763 (2010) (first and second quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995); then quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 629 n.9 (1989)).

²⁴⁷ Berman, *supra* note 41, at 14.

²⁴⁸ *Id.* at 39. The source of the requirement, from the FBI’s perspective, is unclear. The FBI guidance states that the least intrusive method principle is “reflected in” Executive Order 12,333, which governs U.S. intelligence activities. FBI, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 4.4.1 (2011) [hereinafter FBI GUIDE]. That order calls on intelligence agencies to use “the least intrusive collection techniques feasible within the United States or directed against United States persons abroad.” Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 note (Supp. V 1981). Very little about how intelligence agencies interpret that executive order is known, however, and the FBI Guide does not state that the principle is required by the order. In addition, the FBI Guide cites two lower court decisions that required satisfaction of that standard in investigations burdening First Amendment rights, but describes the requirement in those cases as only a “factor to be considered in assessing the reasonableness” of a search. FBI, *supra*, § 4.4.1 (citing *Clark v. Library of Congress*, 750 F.2d 89, 94–95 (D.C. Cir. 1984); *Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1055 (N.D. Ill. 1985)). The FBI Guide, in any event, goes beyond those cases in applying the rule to investigations not involving First Amendment activity. In the end, it seems clear that the least intrusive method principle is an executive rule not required by external branches, but the extent to which it is required by presidential order, as opposed to flowing from the Attorney General Guidelines alone, is unclear.

²⁴⁹ ATT’Y GEN. GUIDELINES, *supra* note 230, at 12.

²⁵⁰ *Id.* at 13.

in investigations related to terrorism.”²⁵¹ The Attorney General first added that instruction in revising the Guidelines in 2002 following the September 11 attacks.²⁵²

The Attorney General’s Guidelines, including the above qualifications on the least intrusive alternative principle, were publicly released. The FBI’s Domestic Investigations and Operations Guide,²⁵³ however, which represents the FBI’s own interpretation of its authority, was not released until public interest groups sued under the Freedom of Information Act to obtain it²⁵⁴ — and then only in redacted form.²⁵⁵ The Guide, produced by the FBI itself and setting out more detailed rules, elaborates on the least intrusive method test. It presents the requirement as a simple proportionality test, far from conventional conceptions of strict scrutiny: investigators are asked to balance identified factors to “determine whether the method and the extent to which it intrudes into privacy or threatens civil liberties *are proportionate to the significance of the case and the information sought.*”²⁵⁶ The Guide repeatedly advises that intrusive measures may well be appropriate: for instance, while agents should be cautious in investigating religious and political groups, as opposed to known criminal organizations, “[t]his is not to suggest that investigators should be less aggressive in determining the true nature of an unknown group that may be engaged in terrorism.”²⁵⁷ Likewise, operational security needs “should not be undervalued” and may “justify covert tactics” that would otherwise not be deemed the least intrusive.²⁵⁸ The Guide’s discussion of the requirement ends by repeating the instruction to use any lawful method, even if intrusive, where warranted by the national security threat at hand.²⁵⁹

One might view this interpretation as falling within the spectrum of judicial interpretations of the least restrictive alternative test, rather than fundamentally departing from the constitutional standard.²⁶⁰ Yet

²⁵¹ *Id.*

²⁵² See Berman, *supra* note 41, at 39–40.

²⁵³ FBI GUIDE, *supra* note 248.

²⁵⁴ Josh Gerstein, *2nd Group Sues for FBI Snooping Rules*, POLITICO: UNDER THE RADAR (Sept. 16, 2009, 1:21 AM), <http://www.politico.com/blogs/under-the-radar/2009/09/2nd-group-sues-for-fbi-snooping-rules-021419> [<http://perma.cc/BX9C-D7RP>].

²⁵⁵ See Charlie Savage, *Loosening of F.B.I. Rules Stirs Privacy Concerns*, N.Y. TIMES (Oct. 28, 2009), <http://www.nytimes.com/2009/10/29/us/29manual.html>.

²⁵⁶ FBI GUIDE, *supra* note 248, § 4.4.4 (emphasis added).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* § 4.4.5.

²⁶⁰ See Fallon, *supra* note 234, at 1306–08 (describing a version of the constitutional strict scrutiny test that amounts to “little more than a balancing test,” *id.* at 1306). Nonetheless, Professor Fallon describes this version of the test as distinguishable from other balancing tests by its “premise that the stakes on the rights side of the scale are unusually high,” *id.*, and notes that “balancing

given that, in constitutional jurisprudence, the requirement is contrasted with a host of less demanding alternatives — rational basis review, intermediate scrutiny, mere balancing, or determinations of reasonableness — it is hard to see how the FBI’s approach falls closer to a least intrusive alternative approach than to the available doctrinal alternatives. The trope suggests elevated, even priority, attention to individual liberty concerns; the Guide suggests instead that if agents can think of a plausible benefit from a more intrusive investigative tool, they ought to use it. While the public Attorney General’s Guidelines hint that something less than the demanding constitutional test is envisioned, only the FBI’s guidelines — withheld until litigation forced disclosure — make that interpretation crystalline. As interpreted there, the rule retains little of the constitutional standard’s professed stringency.

IV. A FEW WORDS ON IMPACT, INTENTIONALITY, AND INDETERMINACY

This Part considers three final questions that rule of law tropes raise: What are their costs? Does bad faith account for the Executive’s secret departures from exogenous legal standards? And is the real problem the indeterminacy of commonly used legal standards, rather than departures from them?

A. *The Costs of Rule of Law Tropes*

Public accountability is the most obvious cost of rule of law tropes that are unconventionally interpreted in secret. I have argued above that tropes can mislead observers into making unjustified assumptions about the extent of national security constraints. Rule of law tropes are most likely to mislead those who have some awareness of, and interest in, the law but who nevertheless do not have the time or attention to probe an issue in depth. Perhaps many members of Congress, many nonspecialist lawyers, or many readers of the *New York Times* might fall into that category. For law-conscious elites with some sympathies for civil liberties, subtle linkages to constitutional or international law may pay legitimacy dividends, while time-constrained attention will prevent them from reflecting fully on either the flexibility of the original legal standards or available information regarding the Executive’s adaptations. This group may well include the judges and lawmakers asked to make decisions on matters of security — such as those who equated the watchlisting standard with *Terry*. Even beyond

applications frequently draw outraged protests from dissenting Justices who contend that the Court has betrayed the staunch commitment to preserve individual rights that the strict scrutiny test rightly embodies,” *id.* at 1307–08.

decisionmakers, casually informed elite audiences may matter a lot to political administrations; the Obama Administration, for instance, devoted considerable attention to convincing elites that its national security policies were sufficiently rights-respecting.²⁶¹

Tropes seem less likely to directly affect average voters, who would not necessarily draw from them any particular associations with constitutional or international law (even if they were inclined to care about the issue in question).²⁶² They also seem less likely to affect civil liberties advocates or legal experts who are immersed in the details of a policy, acutely conscious of the capacious meanings of legal terms, or already strongly committed to particular positions on the issue in question.

Even lay citizens or legal specialists may be affected in some ways, however, by the rhetorical practice. An individual seeking redress for a government practice — perhaps a U.S. citizen whose foreign spouse is denied entry into the United States — might be misled by an ordinary immigration lawyer’s explanation of government policy informed by a trope. Similarly, tropes can breed confusion about the government’s legal analysis even among specialists. International law scholars struggled to understand, for instance, why the Obama Administration invoked “imminence” at all when an internally consistent view of the Administration’s legal position on its conflict with al Qaeda did not seem to require it.²⁶³

Rule of law tropes exact a second cost, beyond the accountability harms of misunderstanding, when the dissonance between apparent and actual interpretations is revealed. A court-ordered disclosure or unauthorized leak exposing such dissonance can undercut the very legitimacy that a trope’s usage aimed to confer. The widespread condemnation of the Obama Administration’s interpretation of imminence is one clear example. In fact, the distrust may extend even to those observers who were not originally misled; some who might have accurately suspected an executive reinterpretation of a concept may still become more cynical upon confirmation of the extent of that reinter-

²⁶¹ See generally KENNETH ANDERSON & BENJAMIN WITTES, *SPEAKING THE LAW* (2015) (describing addresses of senior Obama Administration officials on national security policy).

²⁶² Such individuals might, however, be misled when a legal term not only evokes constitutional or international law but also has a meaning in ordinary language that departs from the Administration’s interpretation. “Imminence” is a good example.

²⁶³ See Heller, *supra* note 211, at 92; Wittes, *supra* note 223; see also Rick Pildes, *Confusion About “Imminence” and Targeted Killings*, *LAWFARE* (Feb. 6, 2013, 11:27 AM), <https://www.lawfareblog.com/confusion-about-imminence-and-targeted-killings> [http://perma.cc/WMR6-EMLC].

pretation. Indeed, the disclosure of the White Paper had exactly that effect.²⁶⁴

Critics now cite an entire lexicon of terms that appear to be national security doublespeak: terms like “imminence” and “relevance” and “targeted.”²⁶⁵ Some of these are rule of law tropes, invoking standards from constitutional or international law for the purposes of public persuasion. The stretched interpretation of other terms serves a different function, not to persuade but to supply an *ex ante* legal justification — some might call it a “get out of jail free” card — for an otherwise unauthorized program. It is now well known, for instance, that executive lawyers secretly justified torture and mass surveillance through far-fetched interpretations of statutory language.²⁶⁶ OLC legal memos authorized during the Bush Administration infamously narrowed the definition of torture to acts creating pain severe enough to cause death, organ failure, or substantial bodily impairment,²⁶⁷ and the Justice Department under two administrations authorized the bulk collection of Americans’ phone records on the grounds that all such records were “relevant” to an authorized terrorism investigation.²⁶⁸ In the torture and phone records contexts, the revelation of the government’s contorted interpretations battered trust in the administrations that advanced them. Whether it is tropes offered for public persuasion or legal standards reinterpreted to make lawful what would otherwise be unauthorized, the recurring revelation of unnatural secret reinterpretations may erode trust in law itself; if law can be twisted so far from expectations, is there any meaning left to the “rule of law”?

A third cost of rule of law tropes is the potential for departures from conventional meanings to become acceptable and affect interpretation of the original standards. Legal scholars have pointed elsewhere to the risk of “seepage” — that “exceptional” national security interpretations will seep into “ordinary” law, diminishing rights in contexts far

²⁶⁴ See, e.g., Heller, *supra* note 219 (arriving at the “cynical explanation” that the requirement was adopted only “for show”).

²⁶⁵ See, e.g., Jeffrey Rosen, *The Lies Aren’t What Make Obama’s NSA Stance So Awful*, NEW REPUBLIC (Aug. 12, 2013), <http://www.newrepublic.com/article/114276/obama-surveillance-comments-dishonesty-isnt-only-problem> [<http://perma.cc/FQ3Z-H5GN>] (criticizing the use of “imminence,” “relevance,” and “targeted”).

²⁶⁶ See Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST (June 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html> [<http://perma.cc/7QBD-P6ZG>].

²⁶⁷ E.g., Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def. 38–39 (Mar. 14, 2003), <http://nsarchive.gwu.edu/torturingdemocracy/documents/20030314.pdf> [<http://perma.cc/YX4H-86SL>].

²⁶⁸ See *ACLU v. Clapper*, 785 F.3d 787, 796, 818 (2d Cir. 2015) (rejecting statutory argument in phone records case).

removed from security threats.²⁶⁹ The risk of seepage is greater where divergent interpretations are widely publicized in the media or court decisions, providing ready mechanisms for their diffusion. For instance, if legal scholars interpret the Obama Administration's discussion of imminence as endorsing a new doctrine of preemptive resort to force,²⁷⁰ even if not intended as such, other scholars and states might capitalize on that interpretation in factual contexts far removed from the circumstances in which the Administration used the trope. The risk of seepage is also greater to the extent that courts outside the national security context are addressing similar questions; for example, the turn to predictive analytics and big data in ordinary policing may invite attention to the interpretation of reasonable suspicion in watchlisting.²⁷¹ Finally, to the extent that divergent interpretations are framed as exceptions to, rather than elaborations of, an original standard, that framing might protect *against* seepage. The fact that the most permissive watchlisting rules were presented as exceptions to the reasonable suspicion requirement, for example, reduces the risk of thoughtless absorption elsewhere, although it does not preclude others from similarly creating exceptions for noncitizens or "emergency" circumstances.

B. *Revisiting Explanations for Rule of Law Tropes*

In discussing why the Executive adopts and promotes legal standards from constitutional and international law, this Essay earlier drew on Miller's typology of legal transplants,²⁷² especially the explanation that borrowing such standards helps legitimize the Executive's national security practices. But what explains the Executive's practice of *departing*, at least partly in secret, from prevailing understandings of those borrowed standards? Are national security officials deliberately using rule of law tropes as a ruse, to obfuscate the true scope of constraints on their conduct?

Some articulations of internal standards seem hard to explain without considering bad faith. For instance, the Justice Department's legal briefs asserting that the watchlisting standard is not constitutionally vague, because the standard tracks "widely used" and "settled" mean-

²⁶⁹ See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1097 (2003); Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. 1501, 1501 (2010).

²⁷⁰ See Erakat, *supra* note 210, at 220–27.

²⁷¹ See generally Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327 (2015) (predicting that big data will influence all aspects of ordinary policing and that reasonable suspicion may become irrelevant in an age of big data).

²⁷² See Miller, *supra* note 50, at 842.

ings in constitutional law,²⁷³ seem disingenuous in light of the way the government has actually interpreted the watchlisting standard.

But bad faith is not a necessary — or even the most likely — explanation for secret reinterpretations, at least if bad faith is defined as a conscious intent to deceive. Three other possibilities suggest themselves, although none are ultimately reassuring. First is the “stickiness” of announced legal standards over time, coupled with a tendency toward interpretive drift in light of changed circumstances or decisionmakers. Once a standard is publicly announced, it is difficult to change, even where executive officials would prefer to do so. Agreement on a standard may have taken extraordinary effort in the first place, perhaps through a complex and time-consuming interagency process. Once agencies commit to a standard, changing it is unattractive for both external and internal reasons. Externally, a standard announced to Congress, courts, and the public is difficult to abandon wholesale; an open retreat is likely to elicit attention, some of it unfavorable.²⁷⁴ Internally, executive officials may be reluctant to abandon standards that they have transmitted through a bureaucracy and have trained agency personnel to implement. Thus, rather than change an announced rule at one fell swoop, agencies may instead reinterpret it incrementally. The slippage over time may lead to significant divergence between the public and internal understandings of a rule. Yet at no point would any official have deliberately decided to deceive the public.

An example here might be the “least intrusive method” rule for FBI investigations, adopted decades ago; growing concerns over terrorism as well as the loosening of First Amendment restrictions on law enforcement intelligence gathering may have led the FBI to interpret it more loosely.²⁷⁵ In addition, while security officials adopted at least one secret exception to the reasonable suspicion standard almost contemporaneously with announcing the standard, they created other exceptions after the 2009 underwear bomber incident arguably height-

²⁷³ Official-Capacity Defendants’ Memorandum in Support of Motion to Dismiss Plaintiff’s Second Amended Complaint, *supra* note 150, at 20.

²⁷⁴ Public attention need not be uniform to be unwelcome. Some segments of the public may protest a change that appears to limit civil liberties protections. Other segments might support the change — but still use it to attack an administration. For instance, if the Obama Administration had announced that it was abandoning the reasonable suspicion standard after the Abdulmutallab incident, *see supra* p. 1586, it might have fueled critics’ claims that the Administration’s undue “legalism” had nearly enabled a terrorist attack. “Retaining” the standard while creating “exceptions” enabled them to avoid the appearance of conceding that the prior standard had been a mistake.

²⁷⁵ *See* Jerrold L. Steigman, Note, *Reversing Reform: The Handschu Settlement in Post-September 11 New York City*, 11 J.L. & POL’Y 745, 765–70, 795–96 (2003) (describing modification of consent decrees over city police departments in two cases).

ened threat perceptions.²⁷⁶ Interpretive drift over time is less objectionable than the public invocation of a rule of law trope and the simultaneous adoption of an unexpected internal interpretation. Even so, at a certain point, officials must surely consider whether a public rule and its internal interpretation have diverged to such a point that publicizing the former and concealing the latter is fundamentally misleading. The opportunity for selective secrecy makes the slippage in this context more disturbing than elsewhere. For instance, courts also tend to retain celebrated constitutional rights in principle while eroding their content over time.²⁷⁷ But courts do so publicly, while executive agencies acting in the name of security often do so in secret.

A second explanation is that executive national security guidelines are sometimes the product of conflicting impulses within and across organizations, such that the mismatch between public articulation and internal rules reflects less an intentional attempt to deceive than a result of complex organizational behavior.²⁷⁸ This theory seems at least partially to explain the dissonance with respect to the watchlisting standard. Language in parts of the Watchlisting Guidance lurches between constraint and permissiveness; indeed, some chapters call to mind a jaunt through the famously haphazard Winchester Mystery House, with its twisting hallways and secret passageways, constructed piecemeal by multiple builders over time.²⁷⁹ Moreover, retaining a standard but creating loopholes may be the product of interagency compromise: perhaps some institutions, like the TSC, preferred a consistent baseline standard to govern the entire watchlisting operation, while the agencies that screened noncitizens for visas and border entry desired access to greater information. Security officials might have rationalized their decision to hide the exceptions that resulted as necessary to protect security; they may have told themselves that only the

²⁷⁶ See *supra* notes 176–180 and accompanying text.

²⁷⁷ The erosion of *Miranda* rights over time offers a clear example. See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010) (ruling that a suspect's prolonged silence in interrogation followed by a subsequent statement impliedly waives his or her right to remain silent).

²⁷⁸ Note that Ingber credits “the simple messiness of bureaucratic decision making,” Ingber, *supra* note 68 (manuscript at 60), as the most likely explanation for the Administration's current interpretation of, and reliance on, the “co-belligerency” concept, *id.* (manuscript at 59). She suggests that domestic law experts within the executive branch may have proposed a creative interpretation of the congressional force authorization, possibly based on a misunderstanding of international law, and international law experts elsewhere in the Administration may have acquiesced because the question concerned domestic law (or because they were simply not consulted). See *id.* (manuscript at 58–60).

²⁷⁹ The San Jose, California, mansion was designed without an architect, with rooms and features “added on to the building in a haphazard fashion, so the home contains numerous oddities such as doors or stairs that go nowhere, windows overlooking other rooms and stairs with odd-sized risers.” *Winchester Mystery House*, WIKIPEDIA, http://en.wikipedia.org/wiki/Winchester_Mystery_House (last modified Feb. 18, 2016, 5:07 AM) [<http://perma.cc/G34M-LK8C>].

bare standard could be made public without facilitating circumvention of the watchlist.

A third alternative to a bad faith explanation is that, in any given case, national security officials may have believed that they had adequately signaled departures from a borrowed international or constitutional law standard. It is possible, for instance, that the reaction to the White Paper's interpretation of imminence caught the Obama Administration by surprise, because officials thought they had sufficiently indicated their reinterpretation of the traditional concept.²⁸⁰ In the FBI context, too, Justice Department officials may have believed that revisions to the public Attorney General's Guidelines sufficiently signaled a retreat from a demanding least intrusive method test. This is a harder argument to make with respect to watchlisting. While national security officials stated after 2009 that they "generally" used a reasonable suspicion standard, rather than asserting its applicability across the board,²⁸¹ such a qualifier hardly seems adequate to signal that the vast majority of watchlisted individuals would be subject to exceptions.²⁸²

All of these explanations may have some purchase as applied to particular circumstances or actors, and no single motive can be coherently attributed to any large bureaucracy. Ultimately, however, the question of subjective bad faith matters less than the question of objective unreasonableness of government conduct. For one thing, a lack of bad motives does not preclude the existence of institutional biases that systematically lead to the watering down of constraints alongside the rationalization of nondisclosure. National security officials face enormous pressure to prevent the next terrorist attack, creating strong incentives to expand programs and ratchet down restrictions on executive action. Professor Jeffrey Kahn, describing these pressures in the watchlisting context and the impact on security officials of reading chilling threat assessments each day, writes:

The culture that will develop is one that naturally will diminish the importance of individual liberties in the light of perceived threats to the nation. . . . To suggest bias is not to suggest malice. It is simply the natural result of the day-to-day experience of a keeper of the watchlist, especially those at the higher levels of government.²⁸³

In the wake of terrorist attacks (or near misses), security officials face particular political pressures to use counterterrorism programs

²⁸⁰ Indeed, if the Administration actually *planted* the White Paper, *see supra* note 229, this explanation seems likely.

²⁸¹ *Latif v. Holder*, 28 F. Supp. 3d 1134, 1141 (D. Or. 2014).

²⁸² They may have rationalized the exceptions here partly because, apart from the provision for emergency threat-based upgrades, they applied to noncitizens.

²⁸³ KAHN, *supra* note 89, at 186.

ever more aggressively and expansively. When the only applicable legal constraints are internal ones, it is particularly easy for those constraints to wither away. And in institutional cultures that prize secrecy, not telling the public might be justified as a necessary cost at a negligible price.

C. *On the Determinacy of Legal Standards*

One's assessment of the *objective* unreasonableness of the government's invocation of the legal standards here turns partly on how wide a gap one perceives between the legal standards invoked and the Executive's interpretation of them. In fact, one might object that in certain cases, security agencies did not depart from exogenous standards so much as choose more advantageous interpretations of them — that the crux of the matter is that broad legal standards like reasonable suspicion afford wide interpretive latitude.

It is certainly true that the “original” standards, as interpreted by courts and legal scholars, lend themselves to a wide spectrum of interpretations, particularly because some of these standards have been used in multiple areas of the law. Even in the legal context that observers would most likely associate with a given standard, major doctrinal questions may be unsettled. For instance, how much, if any, corroboration of an anonymous report is now required under the *Terry* reasonable suspicion standard?²⁸⁴ To what extent can law enforcement rely on a person's membership in racial or other demographic groups in forming suspicion?²⁸⁵ How flexible should international law on anticipatory self-defense be with respect to the urgency of a threat faced? Before ever being adopted or invoked by national security officials, constitutional and international law standards typically have a range of interpretations in existing law.

In one respect, the problem lies in security officials' argument that these borrowed standards *do* have discernible, well-established content, as in the repeated claims made in court on the “settled” meaning of reasonable suspicion. Invoking a standard and suggesting it has fixed content that can constrain executive officials is itself a problem, if the original standard is actually more capacious than those officials suggest.

But the rule of law tropes critiqued here do not simply capitalize on legal ambiguity; they also depart from prevalent interpretations or understandings of the standards invoked. Some departures are starker

²⁸⁴ Compare *Navarette v. California*, 134 S. Ct. 1683, 1690–92 (2014), with *id.* at 1692 (Scalia, J., dissenting).

²⁸⁵ See *United States v. Montero-Camargo*, 208 F.3d 1122, 1131–35 (9th Cir. 2000) (en banc) (rejecting the view that Latino appearance remains a relevant factor, despite Supreme Court case law).

than others. For instance, the Watchlisting Guidance did away with core, foundational features of the reasonable suspicion standard, such as eliminating the need for personal suspicion of an individual or belief in the reliability of information used.²⁸⁶ In other cases, the extent of the Executive's departure from existing interpretations of a legal standard — or whether it departed at all — might be contested. One might argue, for instance, that the FBI's interpretation of the stringency of the least intrusive method falls within a broad spectrum of existing constitutional interpretations, rather than representing an untenable outlier. Drawing the line between an acceptable and unacceptable interpretation is no easy task; for instance, even the widespread denunciation of the OLC torture memos' crabbed definition of torture has run up against the charge that law's indeterminacy excuses the OLC's interpretation.²⁸⁷

Even where an internal interpretation of a legal standard is not facially frivolous or completely outside the range of existing approaches, however, tropes may still mislead. Law-conscious audiences bring to legal terms expectations from their prior exposures that may be more specific than the full range of existing interpretations or applications of a doctrine. For instance, returning to the "least intrusive alternative" example, the very cliché that strict scrutiny is "fatal in fact" suggests a popular conception of that standard's stringency that is not reflected in the FBI's version. Whatever the full spectrum of available interpretations of a standard in judicial opinions or legal scholarship, a trope that has a certain set of associations for many observers can still mislead. Rule of law tropes do not simply capitalize on the open-textured nature of legal standards, but also on a set of inferences that legally conscious audiences are likely to draw from chosen language.

CONCLUSION

Legal philosopher David Dyzenhaus, commenting some years ago on detention during states of emergency, drew a distinction between the law's "black holes" and "grey holes." A declared state of emergen-

²⁸⁶ In the watchlisting context, some of the most egregious departures from "reasonable suspicion" were framed as exceptions to that standard. *See supra*, pp. 1593–95. One might wonder whether these kinds of explicit departures are better or worse than less explicit interpretive departures. On the one hand, the creation of secret exceptions seems to create the greatest gulf between the public and actual versions of a standard. On the other hand, explicit exceptions are less problematic *once revealed*; the very fact that they are demarcated as exceptions reduces the obscuring power of the trope. Indeed, at the point of revelation, the fact that the government has created exceptions to a familiar constitutional or international law standard may make such departures even more salient to rights-minded audiences. By contrast, other forms of interpretive drift may be both harder to discern and harder to make salient to various audiences.

²⁸⁷ *See* DAVID LUBAN, TORTURE, POWER, AND LAW 228–34 (2014) (responding to the indeterminacy critique).

cy, he wrote, is a “lawless void, a legal black hole, in which the state acts unconstrained by law.”²⁸⁸ Grey holes, by contrast, offer individuals minimal procedural protections, but procedures that prove insufficient to enable them to contest meaningfully the basis for their detention.²⁸⁹ Dyzenhaus argued that grey holes are ultimately worse because they provide a “façade of legality.”²⁹⁰

Rule of law tropes arise in law’s grey holes — areas of law, like watchlisting, targeted assassinations, or domestic intelligence gathering, where constraints are at best minimal, at worst a façade. Where the Executive sets the rules that govern its conduct, yet partially cloaks these rules from public knowledge, the public cannot judge the extent of internal constraints. Announced rules, evoking familiar concepts from constitutional or international law, may offer false comfort in the Executive’s ability to protect liberty and to police itself — hindering accountability especially while the Executive’s interpretation of those rules remains secret. But as secrecy dissipates, the loss of accountability gives way to a secondary loss of trust. Neither development is conducive to the rule of law. A system of internal rules, secret interpretations, and limited oversight should cause us to reflect on Dyzenhaus’s warning: “A little bit of legality can be more lethal to the rule of law than none.”²⁹¹

²⁸⁸ Dyzenhaus, *supra* note 23, at 2006.

²⁸⁹ *Id.* at 2026.

²⁹⁰ *Id.* at 2038.

²⁹¹ *Id.* at 2026.