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The Trickle-Down War

“War made the state, and the state made war.”

- Charles Tilly²

The history of the European nation-state, wrote political sociologist Charles Tilly, is inextricably bound up with the history of warfare. To oversimplify Tilly’s nuanced and complex arguments, the story goes something like this: As power-holders (originally bandits and local strongmen) sought to expand their power, they needed capital to pay for weapons, soldiers and supplies. The need for capital and new recruits drove the creation of taxation systems and census mechanisms, and the need for more effective systems of taxation and recruitment necessitated better roads, better communications and better record keeping. This in turn enabled the creation of larger and more technologically sophisticated armies.

The complexity and expense of maintaining more professionalized standing armies made it increasingly difficult for non-state groups to compete with states, giving centralized states a war-making advantage and enabling them to increasingly monopolize the means of large-scale violence. But the need to recruit, train and sustain ever-larger and more sophisticated armies also put pressure on these states to provide basic services, improving nutrition, education, and so on. Ultimately, we arrive at the late 20th century European welfare state, with its particular trade-offs between the state and its subjects.³

By now, Tilly’s claim that “war made the state, and the state made war” is so widely accepted that it has become almost a truism⁴ — so much so that we’re apt to forget that the process of war making and state transformation is ongoing, and not merely a matter for the history books. Today as in the past, the state makes war – and though there is nothing deterministic or teleological about it, the manner in which the state makes war drives further changes both in the shape of the state itself and in its relationship with individuals.

“The state makes war” in several different senses. Most obviously, it is the state that *wages* war: the state chooses which wars to fight, and how to

¹ Professor of Law, Georgetown University Law Center, and Senior Fellow, New America Foundation. Zach Klein, Georgetown Law ’15, provided first rate research assistance and many thoughtful comments. My colleague David Cole saved me from making several errors. More generally, this article also owes a great deal to conversations with Steve Vladeck, Martin Flaherty and Mary Dudziak.

² Charles Tilly, *Reflections on the History of European State Making*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE*, 42 (Charles Tilly ed.), 1975.

³ *Id.*; See also CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 900-1992* (1st ed. 1990); Charles Tilly, *War Making and State Making as Organized Crime*, in *BRINGING THE STATE BACK IN 169* (Peter Evans et al. eds., 1985).

⁴ See, e.g., JOHN A. HALL & G. JOHN IKENBERRY, *THE STATE* 40-41 (1989); ANTHONY GIDDENS, *THE NATION STATE AND VIOLENCE* 112 (1985); JAN GLETE, *WAR AND THE STATE IN EARLY MODERN EUROPE* 216 (2002); Timothy Besley & Torsten Persson, *The Origins of State Capacity: Property Rights, Taxation, and Politics*, AM. ECON. REV., Sept. 2009, at 1218.

fight them. In 2001, for instance, the United States decided to go to war in Afghanistan, first relying largely on air power in conjunction with small numbers of Army Special Forces troops and CIA paramilitary personnel, then expanding the military effort until, by 2010, the US force in Afghanistan consisted of roughly 100,000 troops.⁵ Similarly, in 2003 the US chose to invade Iraq, launching an eight-year war; by 2007, US troop levels in Iraq peaked at nearly 170,000.⁶ These “traditional” forms of state war-making have institutional and budgetary implications and opportunity costs, and though their long-term impact remains unknowable, they appear to fit into Tilly’s paradigm in relatively straightforward ways.⁷

But the state “makes” war in other senses as well. From an institutional perspective, it is the state that decides which tasks to assign to civilian entities and which tasks to assign to the military (which we are apt to define, more or less tautologically, as that specialized state institution designated as having responsibility for the activity we call warfare).⁸ From a legal perspective, it is the state that chooses which activities will be categorized as “war” and war-related, thus determining the legal framework within which both individual rights and subsequent state uses of coercion and lethal force are evaluated.

The United States’ response to 9/11 is a case in point. The 9/11 attacks might have been viewed as egregious acts of criminality, for instance,

⁵ Paul Waldman, *The 13-Year War*, AM. PROSPECT (Jan. 18, 2013), <http://prospect.org/article/13-year-war>.

⁶ Chart: *U.S. Troop Levels in Iraq*, CNN (Oct. 11, 2011), <http://www.cnn.com/2011/10/21/world/meast/chart-us-troops-iraq/index.html>. Overall, some 2.5 million US military personnel had deployed to Iraq or Afghanistan by 2013. Chris Adams, *Millions Went to War in Iraq, Afghanistan, Leaving Many with Lifelong Scars*, MCCLATCHY DC NEWS (Mar. 14, 2013), <http://www.mcclatchydc.com/2013/03/14/185880/millions-went-to-war-in-iraq-afghanistan.html>.

⁷ One might argue, for instance, that the sheer cost of these two wars contributed to a spike in US debt increasing US vulnerability to financial crisis and US reliance on foreign creditors such as China with consequent constraints on US foreign policy and domestic spending options. (See, e.g., Laura Bilmes, *The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets* (Harvard University, Kennedy School of Government, Faculty Working Paper Series, March 2013, available at <https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=8956>; Max Fisher, “This surprising chart shows which countries own the most U.S. debt,” *The Washington Post*, October 10, 2013, available at <http://www.washingtonpost.com/blogs/worldviews/wp/2013/10/10/this-surprising-chart-shows-which-countries-own-the-most-u-s-debt/>). The military, under strain due to frequent combat deployments, pushed for and received substantial increases in compensation and benefits for service members and their dependents. Meanwhile, other federal employees saw stagnating salaries and cuts in benefits, potentially reshaping the nature of federal employment and shifting the civil-military balance (See Congressional Budget Office, *Analysis of Federal Civilian and Military Compensation*, January 20, 2011, available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12042/01-20-compensation.pdf>). At the same time, the greatly increased US reliance on private military contractors in these two wars helped fuel a vast expansion of private military and security companies, blurring the already blurry boundaries between public and private. (See, e.g., Shantanu Chakrabarti, *Growth and Implications of Private Military Corporations*, 2 *J. DEFENCE STUDIES* 109 (2008); see also Laura Dickinson, *OUTSOURCING WAR AND PEACE: PROTECTING PUBLIC VALUES IN AN ERA OF PRIVATIZED FOREIGN AFFAIRS* (2011)).

⁸ One might equally note that the state “makes” the military.

or as an armed attack of sufficient gravity to trigger an international law right to use force in self-defense, without triggering an armed conflict.⁹ The US opted instead to treat the 9/11 attacks and the US response as an “armed conflict.”¹⁰

This had legal consequences: once the US categorized the post-9/11 relationship between the US and Al Qaeda—and, later, between the US and Al Qaeda’s “associates”—as “war,” a large swathe of state and non-state activities were brought within the ambit of the international law of armed conflict, with its far more permissive rules for the state use of lethal force, and its far weaker protections for individual rights. The existence of a “war” on terrorism also had enormous consequences for domestic law. Historically, lawmakers have offered the executive branch far greater powers and judges have afforded it far greater deference during wartime than during peacetime, and the post-9/11 war on terrorism continued that trend.¹¹

Since 9/11, the US has continued to “make” war by placing more and more activities into the “war” category. Consider cyber security. As with terrorism, the US had a choice: it might have decided that cyber security should be the sole province of the private sector or civilian agencies and that cyber-attacks should be treated only as torts or crimes; instead, it opted to create a military Cyber Command and recruit “cyber warriors,” in addition to giving some cyber security responsibilities to civilian agencies,¹² and it chose to treat cyber-attacks as potentially constituting acts of war, subject to the laws of war.¹³

⁹ See, e.g., Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993 (2001), available at <http://www.ejil.org/pdfs/12/5/1558.pdf>; Matthew Jaffe & Jake Tapper, *Senate Republicans Block James Cole, Key Obama Nominee at Justice Dept.*, ABC NEWS (May 9, 2011), <http://abcnews.go.com/blogs/politics/2011/05/senate-republicans-block-james-cole-key-obama-nominee-at-justice-dept/>; Alain Pellet, *No, This is not War! The Attack on the World Trade Center: Legal Responses*, EUR. J. INT’L L. DISCUSSION FORUM (Oct. 3, 2001), https://www.unodc.org/tldb/bibliography/Biblio_Internat_Law_Pellet_2001.doc.

¹⁰ See, e.g., President George W. Bush, Address to the Nation on the Sept. 11th, 2001 Terrorist Attacks (Sept. 11, 2001) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>); President George W. Bush, News Conference on Efforts to Curb Terrorism (Sept. 13, 2001) (transcript available at http://www.washingtonpost.com/wp-srv/nation/transcripts/bushtext2_091301.html); William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 320 (2003). As I have argued elsewhere, there was nothing inevitable or legally “necessary” about the US decision to treat its post 9/11 relationship with Al Qaeda as an armed conflict for legal purposes: the Bush administration could have opted to view the conflict through a different lens, but preferred not to, with far-reaching consequences. See generally, Rosa Brooks, *Duck-Rabbits and Drones: Legal Indeterminacy in the War on Terror*, STAN. L. & POL’Y REV. (forthcoming 2014), on file with author.

¹¹ See generally Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004).

¹² Cheryl Pellerin, *Cybercom Builds Teams for Offense, Defense in Cyberspace*, U.S. DEP’T OF DEF.: AM. FORCES PRESS SERV. (Mar. 12, 2013), <http://www.defense.gov/news/newsarticle.aspx?id=119506>.

¹³ I recognize that this language anthropomorphizes the state. In reality, of course, “states” decide nothing; the people who govern states make decisions, influenced by a wide range of factors.

Though it takes us further from Tilly's original paradigm,¹⁴ this kind of state war-making can transform the state as much as the more traditional forms of state war-making.¹⁵ In the US, for instance, the perceived need to monitor and act upon a far-flung global network of loosely-affiliated non-state actors with which we are "at war" has driven state investment in new technologies designed to enable global surveillance and the cross-border use of lethal force. While it's too soon to say how this story will evolve, the increased use of these new capabilities is beginning to change the United States' relationship with other states and to further erode traditional conceptions of sovereignty.

New forms of state war-making also have significant implications for the relationship between individuals and the state. Some of these implications are relatively obvious: after 9/11, human rights advocates and civil libertarians were quick to point out the ways in which laws and policies purportedly necessary to the "war on terror" increased state power at the expense of transparency, accountability and individual rights. The indefinite detention of alleged terrorists as "enemy combatants" seemed at odds with due process norms, for instance, while the use of "enhanced" interrogation methods against terror suspects at times amounted to torture. More recently, media and advocacy attention has focused on National Security Agency monitoring of telephone and Internet communications and on drone strikes and other cross-border targeted killings of terror suspects in Pakistan, Yemen and Somalia.

Most of these post-9/11 state activities have been authorized by Congress and/or have been largely upheld -- or at least tolerated-- by US courts.¹⁶ After 9/11, the USA PATRIOT Act and similar legislation greatly enhanced the state's domestic search and seizure powers in national security-related cases, for instance.¹⁷ Meanwhile, the Justice Department's invocation of the state secrets doctrine made it difficult for litigants to challenge state actions undertaken in the name of national security, and courts have relied on other judicially-created doctrines to avoid ruling on the merits in most other cases challenging government activities arising out of the war on terror. Indeed, as Stephen Vladeck notes, "not a single damages judgment has been awarded in any of the dozens of lawsuits arising out of post-September 11

¹⁴ Tilly's paradigm was, in any case, historical in nature, developed to explicate the rise of the European nation-state rather than to suggest an eternal and unvarying relationship between war-making and state expansion.

¹⁵ See generally Philip Bobbit, *TERROR AND CONSENT* (2008), noting the numerous implications of the shift from wars between nation-states to war between states and powerful non-state actors.

¹⁶ The Supreme Court did impose some limits on early Bush Administration detention-related policies and efforts to remove detainees from the jurisdiction of US courts. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008). Similarly, Congress sought to rein in the US use of interrogation techniques amounting to torture. For the most part, however, Congress and the courts have acquiesced in the executive branch's post-9/11 policies; even with regard to claims of torture, federal courts have found numerous reasons to prevent lawsuits seeking damages for torture from going forward. *See Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1159 (2009) (noting that none of the cases seeking damages for alleged US torture have survived summary judgment).

¹⁷ *See What is the USA PATRIOT Act?*, AM. CIVIL LIBERTIES UNION (Dec. 10, 2010), <https://www.aclu.org/national-security/surveillance-under-usa-patriot-act>.

U.S. counterterrorism policies alleging violations of plaintiff's individual rights."¹⁸

The apparent erosion of individual rights stemming directly from the expansion of what the US treats as "war" and war-related is a phenomenon that has been well and amply documented.¹⁹ My purpose in this essay is not to add to that already vast literature, but rather to draw attention to some of the still more subtle ways in which U.S. practices and legal doctrines developed after 9/11 for "war-making" purposes may be altering the balance of power between individuals and the state.

Specifically, my goal in this short essay is to draw attention to the slow trickling down of war-related legal doctrines and practices into "ordinary" law and law-enforcement. This trickle-down effect is diffuse and difficult to discern—in many cases, its existence remains largely speculative.²⁰ But this makes efforts to document it all the more important, lest the very diffuseness and invisibility of trickle-down effects blind us to the ongoing and profound transformation of relations between individuals and the state.

I am by no means the first commentator to note the potentially distorting effect of national security practices and doctrines on seemingly unrelated areas of law and law enforcement. In September 2002, the Lawyers' Committee for Human Rights (now renamed Human Rights First) published a report called *A Year of Loss: Reclaiming Civil Liberties Since September 11*.²¹ This report—and a follow-up report published a year later²² -- looked at the impact of post-9/11 law and policy on such areas as general government transparency, the right to privacy, the treatment of immigrants, refugees and minorities, and the criminal justice system.

More recently, legal scholars have looked at the rising use of classified evidence in criminal cases; the increased invocation of the state secrets doctrine in ordinary tort and contract litigation; the spillover of national-security related changes to qualified immunity doctrines into other areas of law; the impact of post-9/11 changes on immigration law and policy and the importation of military and counterterrorism tactics into domestic policing, among other issues. Relatively few commentators, however, have sought to address the spillover of war and counter-terrorism practices and legal doctrines into "ordinary" law and law-enforcement as a distinct cross-cutting problem--²³ and to my knowledge, no one has yet sought to

¹⁸ See Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1296 (2012).

¹⁹ See, for instance, David Cole and Jules Lobel, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007); see also Susan G. Herman, *TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY* (2012).

²⁰ Indeed, the existence of such "trickle-down" effects is inherently hard to prove: disentangling correlation and causation is particularly difficult, and the secrecy shrouding some government activities—and even government legal arguments—makes matters all the worse.

²¹ LAWYERS COMM. FOR HUMAN RIGHTS, *A Year of Loss: Reexamining Civil Liberties since September 11* (Sept. 2002), available at https://www.humanrightsfirst.org/wp-content/uploads/pdf/loss_report.pdf.

²² LAWYERS COMM. FOR HUMAN RIGHTS, *Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties* (Mar. 2003), available at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/powers.pdf>.

²³ Stephen Vladeck is a notable exception. See Vladeck, *supra* note 17; see also Stephen I. Vladeck, *Foreword: National Security's Distortion Effects*, 32 W. NEW ENG. L. REV. 285

comprehensively assess the nature and extent of this spillover, looking across multiple areas of civil and criminal law and law enforcement.²⁴

This essay does not seek to offer such a comprehensive assessment. Instead, it seeks to develop a preliminary and partial terrain map of the trickle-down war, highlighting several areas in which there appear to be clear indications of a trickle-down effect, and noting also a number of areas in which the existence of current or future trickle-down effects seem probable, but in which the evidence is inconclusive or the terrain simply remains unexplored.

A major caveat is necessary here: it is extraordinarily difficult to “prove” trickle-down.²⁵ Trickle-down effects are generally gradual and subtle, rather than sudden and dramatic, making them inherently difficult to identify and measure—and it is more difficult still to determine the *causes*, rather than merely the *correlates*, of such gradual and subtle changes. My goal here is therefore not to reach definitive conclusions, but rather to outline a broader research agenda, in hopes that others will take up the challenge of comprehensively assessing the extent of the trickle-down war.

To that end, this essay focuses on several areas in which war’s trickle-down effects may exist: domestic policing, the use of the state secrets doctrine, the use of classified evidence in criminal cases, immigration policy, First Amendment jurisprudence, privacy and surveillance. I also identify a number of other areas for further exploration.

A. Policing:

The trickle-down effects of America’s post-9/11 wars are perhaps most outwardly visible in domestic policing. In general, American policing has become far more militarized over the last few decades.²⁶ The trend

(2010); Stephen I. Vladeck, *The New National Security Cannon*, 61 AM. U. L. REV. 1295 (2012); Stephen Vladeck, *Is “National Security Law” Inherently Paradoxical?*, 1 AM. U. NAT’L SECURITY L. BRIEF 11 (2011).

²⁴ Although little has been done to comprehensively map the trickle-down effects of the war on terror, a great deal has been written on the broad dangers posed by the normalization of emergency powers. I see this essay as a small contribution to that important literature. See generally Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1408 (1989); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY (Mark Tushnet ed., 2005); David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005 (2006); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210 (2004); Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA.L. REV. 699, 718-19 (2006); Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 CARDOZO L. REV. 1825 (2000); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003). See also Mary Duziak, *WAR TIME: AN IDEA, ITS HISTORY AND ITS CONSEQUENCES* (2012) (arguing that “wartime” has never been as sharply delineated as we often assume, and that far from being exceptional, various forms of war-related actions have been the norm for the United States throughout the last century).

²⁵ This problem is exacerbated by government secrecy.

²⁶ Abigail R. Hall & Christopher J. Coyne, *The Militarization of U.S. Domestic Policing*, THE INDEP. REV., Spring 2013, at 485; See generally, RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* (2013).

towards increased militarization predates 9/11, but accelerated substantially after the attacks. Consider the use of police SWAT teams, with their paramilitary tactics and equipment. The first police SWAT teams were created after the 1965 Watts riots in Los Angeles;²⁷ initially, they were used primarily for emergencies such as hostage situations and domestic terror threats. Over time, however, the number of SWAT teams expanded and SWAT teams were increasingly used in routine policing -- deployed to execute search and arrest warrants in drug-related cases, for instance. Radley Balko and Peter Kraska estimate that there were roughly 3000 SWAT raids nationwide in 1980; by 2006, the number of annual SWAT raids had jumped to 50,000, and Balko and Kraska believe that by 2012, there were as many as 80,000 SWAT raids per year.²⁸

The increased use of SWAT teams in ordinary policing has been paralleled by a similar post-9/11 rise in police efforts to adopt other tactics developed by foreign militaries and intelligence services for counterterrorism purposes,²⁹ the proliferation of police academy programs modeled on military basic training,³⁰ the increased use of military-style battle dress uniforms for police on the streets,³¹ and the growing use by police departments of weapons and other equipment developed for military purposes -- from Humvees to surveillance drones.³² Many of these weapons and equipment literally come direct from foreign war zones, through a Defense Department program that donates unneeded military equipment to police forces;³³ Homeland Security

²⁷ BALKO, *supra* note 23, at 53.

²⁸ See generally, *id.*; Tim Gurrister, *Why more SWAT-style raids? A 'militarized' world*, Standard-Examiner Aug. 10, 2013, <http://www.standard.net/stories/2013/03/23/why-more-swat-style-raids-militarized-world>; Sarah Stillman, *SWAT-Team Nation*, THE NEW YORKER, Aug. 8, 2013, <http://www.newyorker.com/online/blogs/comment/2013/08/swat-team-nation.html>.

²⁹ Consider stop-and-frisk programs. See e.g., Patrice O'Shaughnessy, *NYPD Gathering Intel, on Lookout for Terrorists Around the World*, NEW YORK DAILY NEWS, July 6, 2008, <http://www.nydailynews.com/news/world/nypd-gathering-intel-lookout-terrorists-world-article-1.351616>; William Finnegan, *The Terrorism Beat: How is the N.Y.P.D. Defending the City?*, THE NEW YORKER, July 25, 2005, http://www.newyorker.com/archive/2005/07/25/050725fa_fact2; Anya Sostek, *Taking Action: New York's State of Mind*, MANHATTAN INST. FOR POL'Y RES. (Oct. 2004), http://www.manhattan-institute.org/html/_govmag-out_of_the_twin_towers.htm; David Reeder, *NYPD's Elite E-Men: Ready to Counter Attack Terror*, TACTICAL-LIFE (July 2009), <http://www.tactical-life.com/magazines/tactical-weapons/nypds-elite-e-men/>.

³⁰ Karl W. Bickel, *Recruit Training: Are we Preparing Officers for a Community Oriented Department?*, COMMUNITY POLICING DISPATCH, June 2013, http://cops.usdoj.gov/html/dispatch/06-2013/preparing_officers_for_a_community_oriented_department.asp.

³¹ Karl W. Bickel, *BDUs and Community Policing?*, COMMUNITY POLICING DISPATCH (Nov. 2012), <http://cops.usdoj.gov/html/dispatch/11-2012/bdus-community-policing.asp>.

³² John Hanrahan, *Local Police Forces are Now Little Armies. Why?*, NIEMAN WATCHDOG (Oct. 6, 2011), http://www.niemanwatchdog.org/index.cfm?fuseaction=ask_this.view&askthisid=529;

Defense Department Gives Local Police Equipment Designed for a War Zone, FOXNEWS.COM, (Nov. 27, 2013), <http://www.foxnews.com/us/2013/11/27/defense-department-gives-local-police-equipment-designed-for-warzone/>; Michael Shank & Elizabeth Beavers, *The Militarization of U.S. Police Forces*, REUTERS (Oct. 22, 2013), <http://www.reuters.com/article/2013/10/22/us-opinion-shank-idUSBRE99L12420131022>.

³³ Michael Shank & Elizabeth Beavers, *America's Police are Looking More and More Like the Military*, THE GUARDIAN (Oct. 7, 2013), <http://www.theguardian.com/commentisfree/2013/oct/07/militarization-local-police-america>.

counterterrorism grants have also fueled the police acquisition of tools more popularly associated with war.³⁴

Increasingly, war and policing have begun to converge both in terms of tactics and in terms of outward appearance. As John Parry has noted, “[W]ar has changed in its functions, to become more like policing, [and] policing too has changed, to become more like war.”³⁵ On the covert battlefields of the war on terror, outside of Iraq and Afghanistan, U.S. war-making often superficially resembles policing in that it involves individuals and small teams rather than the large-scale armies associated with 19th and 20th century warfare, and its victories and defeats are defined in terms of the activities of individuals and organizations, rather than in terms of terrain held or surrendered. Meanwhile, as U.S. police departments increasingly use military tactics, weapons, equipment and even apparel, U.S. domestic policing has come to look more and more like war.

B. *The State Secrets Privilege in Civil Cases*

The state secrets privilege is a common law evidentiary rule permitting the government to block the release of information in civil litigation if the information would reveal secrets damaging to U.S. national security interests. The privilege can be invoked by the government even in litigation between private parties, and while courts have the power to make an independent evaluation of whether to accept government claims of state secrets, courts have generally deferred to executive branch requests.³⁶

Numerous commentators have decried the U.S. government’s frequent invocation of the state secrets privilege to prevent direct challenges to post-9/11 U.S. government policies from moving forward in the courts.³⁷ Laura Donohue has gone further, however, examining the ways in which the state secrets doctrine has increasingly been used by private litigants in areas far-removed from war and national security.³⁸ Donohue examined docket records from the past thirty years and records from the more than 1300 case holdings since 1790 that refer to state secrets, supplementing this with an examination of “citations in pleadings, motions, briefs, memorandum opinions, judicial decisions, Headnote strings, legislative searches, and secondary source materials.”³⁹ She found that while the state secrets doctrine

³⁴ Andrew Becker & G.W. Schulz, *Local Cops Ready for War With Homeland Security-Funded Military Weapons*, THE DAILY BEAST (Dec. 21, 2011), <http://www.thedailybeast.com/articles/2011/12/20/local-cops-ready-for-war-with-homeland-security-funded-military-weapons.html>.

³⁵ John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 768 (2007).

³⁶ See generally TODD GARVEY & EDWARD C. LIU, CONG. RESEARCH SERV., R41741, THE STATE SECRETS PRIVILEGE: PREVENTING THE DISCLOSURE OF SENSITIVE NATIONAL SECURITY INFORMATION DURING CIVIL LITIGATION (2011).

³⁷ See, e.g., Erin E. Bohannon, *Breaking the Silence: A Challenge to Executive Use of the State Secrets Privilege to Dismiss Claims of CIA Torture in Mohamed v. Jeppesen Dataplan, Inc.*, 65 U. MIAMI L. REV. 621 (2010); D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2012); Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81 (2012); *100 Days: End the Abuse of the State Secrets Privilege*, CENTER FOR CONST. RIGHTS, <https://ccrjustice.org/learn-more/faqs/100-days%3A-end-abuse-state-secrets-privilege> (last visited Apr. 10, 2014).

³⁸ Laura Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010).

³⁹ *Id.* at 85.

is generally regarded as an evidentiary rule within the broader executive privilege doctrine, it has recently come to be used in a far wider range of ways.⁴⁰

The expansive war on terror has led to increased interpenetration of the government and the private sectors; the government has relied on private companies to provide a range of support services, and the government's desire to access information such as private internet records as led to complex and generally secret new relationships between the military, the intelligence community and private companies. As a result, more and more private actors are in possession of government "secrets," increasing the number of cases with no surface connection to national security in which private actors might nonetheless have to disclose classified information in the course of routine litigation.⁴¹ Thus, Donohue found that the state secrets privilege has increasingly been invoked by private litigants in cases relating to "breach of contract, patent disputes, trade secrets, fraud, and employment termination Wrongful death, personal injury, and negligence"⁴²

Donohue also noted the rise of a form of "graymail," in which corporations that possess sensitive information as a result of government contracts seek to pressure the government to intervene in private litigation by suggesting that absent government invocation of the state secrets doctrine, they may be "forced" to reveal state secrets in order to defend themselves.⁴³ Such subtle threats then create incentives for government intervention in litigation.⁴⁴ Even when the government declines to intervene or when courts ultimately reject state secrets claims, the use of the state secrets doctrine as a litigation tool can delay cases or force their removal to federal courts, severely disadvantaging undercapitalized plaintiffs.

In recent years, Donohue notes, the state secrets doctrine has evolved into a "powerful litigation tool, wielded by both private and public actors. It has been used to undermine contractual obligations and to pervert tort law, creating a form of private indemnity for government contractors in a broad range of areas. Patent law, contracts, trade secrets, employment law, environmental law, and other substantive legal areas have similarly been affected, even as the executive branch has gained significant and unanticipated advantages over opponents in the course of litigation."⁴⁵

C. *Classified Information in Criminal Cases:*

The state secrets doctrine is not the only way in which the protection of secret information can have a distorting effect on "ordinary" law. In the context of criminal prosecutions, parallel dangers are raised by the Classified Information Procedures Act (CIPA). Under Section 4 of CIPA, the government can make an in camera, ex parte submission to the court to

⁴⁰ *Id.* at 90-91.

⁴¹ Thus, an employment discrimination case against a private contractor might require disclosure of the existence and nature of a classified program operated in support of the government, for instance. *See generally* McQueen, *supra* note 37.

⁴² *Id.* at 87-88; *see also* Anjetta McQueen, *Security Blanket: The State Secrets Privilege Threat to Public Employment Rights*, 22 LAB. LAW. 329, 335 (2007).

⁴³ *See* Donohue, *supra* note 34 at 88.

⁴⁴ This is even the case when the "graymailing" corporations are acting in bad faith.

⁴⁵ *Id.* at 91.

request authorization “to delete specified items of classified information from documents to be made available to the defendant through discovery..., to substitute a summary of the information for such classified documents, or to substitute a statement admitting the relevant facts that classified information would tend to prove.”⁴⁶ Under Section 6 of CIPA, the defendant can be excluded from a hearing during which the court “make[s] all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial...”⁴⁷

CIPA is not new, but in the post 9/11 context it is has a newly worrisome impact. Joshua Dratel⁴⁸ and Ellen Yarochefsky⁴⁹ argue the government has recently been classifying (most critics would say “over-classifying”) documents at an unprecedented pace,⁵⁰ and, as noted above, an ever-growing number of private companies have become involved in the production and use of classified information.⁵¹ As the sheer quantity and range of classified information increases, they note, we can expect an increase in the number of ordinary criminal cases that touch upon classified national security information in a purely ancillary way, thus also increasing the number of cases in which CIPA can be invoked by the government.

CIPA was originally intended to prevent criminal defendants who had prior access to classified information as a result of their jobs from using discovery procedures to “graymail” the government into dropping or reducing charges, by raising the threat that the discovery process would require the disclosure of sensitive information.⁵² But CIPA is also applicable in criminal prosecutions in which the defendant has no access to classified documents, but believes that classified documents exist that might be important in his or defense case. In such contexts, the *in camera* and *ex parte* hearings permitted under CIPA can be extremely damaging to defendants: redacted or summarized classified documents may lose context, texture and detail that

⁴⁶ See Title 18, U.S.C. App III § 4.

⁴⁷ See Title 18, U.S.C. App III § 6(a).

⁴⁸ Joshua L. Dratel, *Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process*, 53 WAYNE L. REV. 1041 (2007).

⁴⁹ Ellen Yarochefsky, *Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063 (2006). See also Anna Maria Martignetti, *The Classified Information Procedures Act (CIPA) and Suspected Terrorists in Federal Civilian Courts: Subject to the Most Exacting Demands of Justice?* (Spring 2010) (unpublished LLM thesis, Lund University) (available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1670606&fileId=1670607>)

⁵⁰ See, e.g., INSPECTOR GEN., U.S. DEP’T OF DEF., DODIG-2013-142, *DoD EVALUATION OF OVER-CLASSIFICATION OF NATIONAL SECURITY INFORMATION*, (2013), available at <http://www.dodig.mil/pubs/documents/DODIG-2013-142.pdf>; see also Nick Schwellenbach, *Could Secrecy Caps Reduce Over Classification?* CENTER FOR EFFECTIVE GOV’T (Aug. 5, 2013), available at www.foreffectivegov.org/blog/could-secrecy-caps-reduce-over-classification.

⁵¹ See Dana Priest & William M. Arkin, *Top Secret America: A Hidden World, Growing Beyond Control*, THE WASHINGTON POST (July 19, 2010), <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control> (“Some 1,271 government organizations and 1,931 private companies work on programs related to counterterrorism, homeland security and intelligence in about 10,000 locations across the United States.... An estimated 854,000 people, nearly 1.5 times as many people as live in Washington, D.C., hold top-secret security clearances.”).

⁵² See Martignetti, *supra* note 51, at 7.

might be important to the defense, and judges may have little ability to evaluate whether classified information submitted *ex parte* would help the defendant and should be made discoverable.⁵³

“The impact of secret evidence upon the adversary system has yet to be acknowledged,” argues Yaroshefsky, “in large measure because of the unstated belief that [CIPA is] confined to a narrow range of terrorism cases.”⁵⁴ But, she asserts, “secret evidence is seeping into the criminal justice system,” as a result of over-classification, the growing number of individuals and companies involved in classified activities and the tendency of prosecutors to “overcharge” ordinary crimes under anti-terrorism statutes.⁵⁵

As Yaroshefsky also notes, the “internationalization of crime and law enforcement” also increases the likelihood that information relevant to a U.S. criminal case will draw upon classified sources or methods.⁵⁶ As more and more crime crosses international borders, for instance—consider drug crime, financial crime, internet-related crime and trafficking and prostitution-related crime—U.S. domestic law enforcement officials increasingly seek the assistance of the intelligence community to gain information about foreign activities linked to US criminal investigations. Such information may stem from sensitive relationships with foreign intelligence services or assets, however, or from classified intelligence collection methods. As a result, many domestic criminal prosecutions are increasingly intertwined with classified programs. This, in turn, can lead to the increased government invocation of CIPA in criminal cases that are themselves unrelated to national security, with the ultimate effect of depriving defendants of access to vital information.⁵⁷

D. *Immigration Law and Policy*

Since 9/11, U.S. immigration law and policy have become deeply bound up with counterterrorism efforts. The 9/11 attackers were all foreigners, and the apparent ease with which they entered the United States raised obvious questions about the adequacy of U.S. border-control methods and screening programs. After 9/11, the Immigration and Naturalization Service was relocated into the newly created Department of Homeland Security and reorganized; most of its responsibilities shifted to DHS’s new Immigration and Customs Enforcement division (“ICE”).⁵⁸ The name change signaled a shift away from a “service” model to an “enforcement” model.

There has been enormous post-9/11 increase in funding for immigration programs with connections to homeland security;⁵⁹ in particular,

⁵³ See Yaroshefsky, *supra* note 51, at 1070-72; see also Martinetti, *supra* note 51, at 59.

⁵⁴ *Id.* at 1080.

⁵⁵ *Id.* at 1080-1082. Yaroshefsky also notes “a growing concern that CIPA is being used as a back door means for the government to withhold information otherwise subject to discovery under Rule 16.” *Id.* at 1072.

⁵⁶ *Id.* at 1082.

⁵⁷ See *id.* at 1068.

⁵⁸ MICHELLE MITTELSTADT ET AL., MIGRATION POL’Y INST., THROUGH THE PRISM OF NATIONAL SECURITY: MAJOR IMMIGRATION POLICY AND PROGRAM CHANGES IN THE DECADE SINCE 9/11 10 (2011).

⁵⁹ *Id.* at 3 (CBP’s budget more than doubled since FY2002, and the staff increased 43%, including a 104.6% increase in Border Patrol personnel. The ICE budget also more than doubled and increased 39.7% in manpower).

as a 2011 Migration Policy Institute Report documents,⁶⁰ the post 9/11 era has given rise to “a new generation of interoperable databases and systems that sit at the crossroads of intelligence and law enforcement, reshaping immigration enforcement . . . through increased information collection and sharing.”⁶¹

The original purpose of this extensive data collection – including the collection of biometric data -- was driven by the desire to identify those with connections to AL Qaeda and prevent additional terrorist attacks. Numerous US government organizations gather information on resident aliens and foreigners seeking entry into the US at airports and land borders. At least in theory, the ability to cross-check such information with information gathered by intelligence and law-enforcement agencies can enable US officials to prevent potential terrorist plotters from gaining entry into the United States, and trace connections between foreign nationals already inside the United States and foreign terrorist organizations.

But though only a tiny fraction of immigrants and foreign visitors have any nexus to terrorism, such extensive data-collection and information-sharing has become the norm for all immigrant groups and most foreign travelers to the United States. This has costs: it has led to substantial post-9/11 growth in the number of annual immigrant detentions and deportations, for instance. Information-sharing between law enforcement and immigration officials has increased the number of immigrants identified as deportable due to involvement in criminal activities (though the crimes involved are often exceedingly minor).⁶² Information-sharing between intelligence agencies and ICE has also led to increased scrutiny of immigrants from particular countries, ethnic groups and religious backgrounds, leading to unequal enforcement of immigration laws.⁶³

It is impossible to say for sure whether these changes have reduced the risk of terrorism. What does seem clear, however, is that they have made individual immigrants and foreign nationals far more vulnerable to various forms of surveillance, detention and removal.

E. The First Amendment

In June 2010, the Supreme Court rejected a constitutional challenge to 18 U.S.C. § 2339B3 (2006), which criminalizes the provision of material support or resources to designated foreign terrorist organizations.⁶⁴ The statute

⁶⁰ *Id.*

⁶¹ *Id.* at 2. US-VISIT collects fingerprints and photographs for all noncitizens entering the country and stores them in the IDENT database, which is interoperable with the FBI’s Integrated Automated Fingerprint Identification System. The Student and Exchange Visitor Information System (SEVIS), authorized by the 1996 reforms, permits the tracking of international students. Other databases abound. *Id.* at 5.

⁶² See Paige Scheckla, *Personal Security for Citizens and Non-Citizens in Post-9/11 US Immigration Policy*, U. CHI. INT’L HUM. RTS CLINIC (Nov. 19, 2013), <https://ihrcclinic.uchicago.edu/blog/personal-security-citizens-and-non-citizens-post-911-us-immigration-policy-paige-scheckla-11>; see also SAMANTHA HAUPTMAN, *THE CRIMINALIZATION OF IMMIGRATION: THE POST 9/11 MORAL PANIC* (2013).

⁶³ Deepa Iyer & Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, 38 HUM. RTS. MAG. (Winter 2011), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_winter2011/9-11_transformation_of_us_immigration_law_policy.html.

⁶⁴ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

defined material support broadly, to include “any property, tangible or intangible, or service... training, expert advice or assistance... communications equipment [or] facilities.” It was challenged by the Humanitarian Law Project, which argued that the statute’s language was impermissibly vague, and could be construed to criminalize its own efforts to marshal expert legal and policy arguments for the purpose of persuading the Kurdistan Workers’ Party (which the Secretary of State had designated as a “foreign terrorist organization”) to refrain from violence and pursue its political goals through peaceful means, thus effectively criminalizing mere speech.⁶⁵

The Court agreed that the statute might have the effect of criminalizing mere speech, and that strict scrutiny should therefore apply. Traditionally, strict scrutiny requires the government to show that restrictions on individual constitutional rights are necessary and “narrowly tailored” to further a compelling government interest.⁶⁶ In *Holder*, the Court found that the prevention of terrorism constitutes a compelling government interest—but rendered the requirement that the restriction on First Amendment rights be necessary and narrowly tailored almost meaningless by deferring to government assertions that the type of speech contemplated by the Humanitarian Law Project would interfere with government terrorism prevention efforts.⁶⁷

As David Cole has noted, the case was not decided on national security grounds as such, but as a question of general constitutional law.⁶⁸ This raises troubling questions about “the decision’s potential consequences for First Amendment doctrine more generally.” Cole comments, “For the first time in its history, the Court upheld the criminalization of speech advocating only nonviolent, lawful ends on the ground that such speech might unintentionally assist a third party in criminal wrongdoing... The Court treated a viewpoint-based motive for suppressing speech not as grounds for invalidation, but as a *justification* for the law. And the Court reduced the right of association to an empty formalism, allowing the government to prohibit, under the rubric of “material support,” virtually any concrete manifestation of association—such as paying dues, donating funds, volunteering one’s time or services, or working together toward common ends, no matter how lawful.”⁶⁹

Here, the existence of trickle-down is much more speculative. Though the Court’s decision in *Holder v. Humanitarian Law Project* was clearly influenced by the counter-terrorism context of the statute, the Court’s holding could have significant consequences far beyond the counterterrorism context. In *Humanitarian Law Project*, “strict scrutiny” looked far more like rational basis review—a highly deferential standard of review. As Cole notes, this raises troubling questions about the future of First Amendment rights:

⁶⁵ *Id.* at 2713.

⁶⁶ *See, e.g.,* *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (plurality); *see also* *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality); *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

⁶⁷ David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL’Y REV. 148, 158 (2012).

⁶⁸ *Id.*

⁶⁹ *Id.* at 149.

“Could training in nonviolent mediation [for gang members] be prohibited on the ground that it might ‘legitimate’ the gang,” he asks, “thereby making it more attractive to new members who might commit future crimes? Could peaceable environmental advocacy coordinated with Greenpeace be banned because the organization sometimes engages in illegal trespass or property damage as civil disobedience?”⁷⁰

It is of course too soon to determine the impact of *Holder v. Humanitarian Law Project*. Perhaps courts will find ways to limit its impact; in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*,⁷¹ the 9th Circuit read *Humanitarian Law Project* narrowly.⁷² But there is already some evidence that the material support statute and similar provisions have had a chilling effect on civil society organizations. A 2007 report published by the International NGO Training and Research Centre (INTRAC) notes, for instance, that “[i]n the absence of clear, sensible guidance and information from government about . . . what is legally required, confusion and fear are driving the response of the nonprofit sector in the campaign against terror”⁷³ For instance, “[i]n recent decades the best practice trend in aid has been for northern NGOs to move away from service provision and to partner with local NGOs who actually do the work. However, in the current climate the risk of partner selection is so great and demands from the government so onerous that many US agencies find that being a service provider is safer.”⁷⁴

F. Privacy and Surveillance

The war on terror has also led the US government to dramatically step up its efforts to collect and analyze an extraordinarily wide range of information, from cell phone metadata and Internet communications to biometric data. Meanwhile, technological advances have enabled the more effective analysis of information gathered through various forms of surveillance. (Surveillance imagery can now be subjected to facial recognition analysis, for instance, enabling an unprecedented degree of tracking: given one photograph of an individual, facial recognition software can sift through countless other images—whether provided by government surveillance cameras or posted by acquaintances on social media sites—to find matches.)⁷⁵

In the national security context, recent technological leaps in surveillance and analysis capabilities have also enabled a recent shift towards identifying and targeting “enemy combatants” who have been identified as such purely by pattern analysis, with no specific information linking

⁷⁰ *Id.* at 157

⁷¹ 686 F.3d 965 (9th Cir., Feb. 27, 2012).

⁷² *Ibid.*, 995-1001. The 9th Circuit argued that while strict scrutiny might be satisfied in the specific factual context at issue in *Humanitarian Law Project*, it could not be satisfied with regard to government efforts to ban speech coordinated with a domestic affiliate of a foreign terrorist organization under circumstances rendering it unlikely that the speech at issue would interfere with the government’s compelling interest of preventing terrorism.

⁷³ Tim Morris, *The Impact of Counter-Terrorism Measures on Civil Society*, INT’L NGO TRAINING & RESEARCH CTR. 3 (2010), <http://www.timmorris.info/cairo%20CTM%20presentation.pdf>.

⁷⁴ *Id.* at 4.

⁷⁵ See generally Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age.*, 97 MINN L. REV 407 (2012).

identifiable individuals to hostile activities. This has led to an increase in so-called “signature strikes”: drone strikes against unidentified people presumed to be targetable enemies because of their communications patterns, travel patterns, and so on.⁷⁶

Domestically, the existence of a trickle-down effect remains speculative, but fears of trickle-down seem well founded. The post 9/11 USA PATRIOT Act effectively eliminated the pre-9/11 “firewall” between foreign intelligence gathering and domestic law enforcement, permitting intelligence agencies to engage in the surveillance of US citizens believed to be agents of a foreign power, as long as the gathering of foreign intelligence is a “significant” purpose of the surveillance.⁷⁷ The PATRIOT Act also permits federal law enforcement officials to access a wide range of sensitive information (including internet records, telephone metadata, library records and credit and banking information of US citizens) upon successful application to the Foreign Intelligence Surveillance Court. Law enforcement officials need not show probable cause, however; they need only show that “there are reasonable grounds to believe that the tangible things sought are *relevant* to an authorized investigation... to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.”⁷⁸ (My emphasis).

It’s easy to imagine information gained in this manner being “repurposed” by law enforcement officials. Even if such information cannot be used in criminal prosecutions, embarrassing information gleaned through data collection and surveillance might be used in other ways by law enforcement officials—to put pressure on potential witnesses or informants, for instance.⁷⁹ Similarly, the sophisticated pattern-recognition technologies originally developed for military and intelligence purposes can also easily be used by domestic law enforcement officials in ways that do not require extensive “new” data collection or surveillance, but that nonetheless shift

⁷⁶ See, e.g., David S. Cloud, “CIA drones have broader list of targets,” The Los Angeles Times, May 5, 2010, available at <http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506>; see also Cora Currier and Justin Elliott, “The Drone War Doctrine We Still Know Nothing About,” ProPublica, Feb. 26, 2013, available at <http://www.propublica.org/article/drone-war-doctrine-we-know-nothing-about>

⁷⁷ USA Patriot Act, Pub. L. No. 107-56, § 218, 115 Stat. 272 (codified at 50 U.S.C. § 1804 *et seq.*). Previously, foreign intelligence gathering had to be a “primary” purpose. See generally, Susan Landau, *National Security on the Line*, 4 J. TELECOMM. & HIGH TECH. L. 409 (2006); Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264 (2004).

⁷⁸ USA PATRIOT Act, § 215, codified as amended at 50 U.S.C. § 1861. The court conducts an *in camera* review, and issues *ex parte* approval orders. See also 18 U.S.C. § 2709(b); Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3414(a)(5)(A); Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681u(b), 1681v(a); National Security Act, 50 U.S.C. § 436(a)(3). The National Security Agency’s program to collect telephone metadata on US citizens was approved under Section 215 of the PATRIOT Act. See Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*, January 23, 2014, <http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf>.

⁷⁹ Timothy B. Lee, *Here’s How Phone Metadata Can Reveal Your Affairs, Abortions, and Other Secrets*, WASH. POST, Aug. 27, 2013, <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/27/heres-how-phone-metadata-can-reveal-your-affairs-abortion-and-other-secrets>.

away from individualized determinations in a manner that raises troubling constitutional questions.⁸⁰

Beyond this, widespread surveillance and government access to personal data can have obvious chilling effects on the exercise on constitutionally protected rights. Consider, for instance, the impact on journalists, who must rely heavily on information provided confidentially by sources.⁸¹ “Some of our longtime trusted sources have become nervous and anxious about talking to us, even on stories that aren’t about national security,” Associated Press President Gary Pruitt noted in a 2013 speech.⁸² “And in some cases, government employees that we once checked in with regularly will no longer speak to us by phone, and some are reluctant to meet in person.”⁸³

Pruitt adds that “[t]his chilling effect is not just at AP, it’s happening at other news organizations as well. Journalists from other news organizations have personally told me it has intimidated sources from speaking to them. Now, the government may love this. I suspect they do. But beware the government that loves secrecy too much.”⁸⁴

Conclusion:

In this brief essay, I have focused above on policing, the state secrets privilege in civil litigation, classified information in criminal litigation, immigration, first amendment jurisprudence and surveillance issues for the simple reason that these are the areas in which I was able to find the largest amount of information suggesting a potential spillover of war into ordinary law and law enforcement. Many other areas call out for research in addition to these, however.

For instance, one might wish to look more broadly at various forms of judicial deference to the executive, to see if the patterns of deference emerging from national security-related cases are correlated with an increase in deference in other kinds of cases. Stephen Vladeck has already done some valuable work in this and related areas, looking at the political question doctrine, the availability of Bivens remedies, federal common law defenses to state-law suits against government contractors and qualified immunity. Ultimately, he notes, as “‘national security’-based exceptions increasingly become the rule in contemporary civil litigation against government officers—whether with regard to new ‘special factors’ under *Bivens*, new bases for contractor preemption under Boyle, proliferation of the political question doctrine, or even more expansive reliance upon the qualified immunity defense—the line between the unique national security

⁸⁰ Imagine, for instance, the use of pattern recognition technologies to identify, investigate and potentially entrap users of prohibited drugs. See generally, Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1351–52 (2004).

⁸¹ See Emily Bell et al., *Comment to Review Group on Intelligence and Communications Technologies Regarding the Effects of Mass Surveillance on the Practice of Journalism* (Oct. 4, 2013), <http://towcenter.org/wp-content/uploads/2013/10/Letter-Effect-of-mass-surveillance-on-journalism.pdf>.

⁸² Mackenzie Weinger, *AP Boss: Sources Won’t Talk Anymore*, POLITICO, <http://www.politico.com/story/2013/06/ap-sources-93054.html>, (last updated June 20, 2013).

⁸³ *Id.*

⁸⁴ *Id.*

justifications giving rise to these cases and ordinary civil litigation will increasingly blur.”⁸⁵

It would also be valuable to explore the enduring impact of 9/11 on principles of government transparency: after 9/11, many once-public government documents (such as those relating to public water management supply systems,⁸⁶ blueprints of government buildings and so on) ceased to be public, due to fears that these documents might make it easier for terrorists to plan attacks. But the removal of such documents from the public domain also reduces government transparency vis a vis citizens.⁸⁷ Has the post-9/11 trend towards limiting publicly available information continued? Has it spread?

One might also look at whether the increased use of *ex parte* and *in camera* proceedings in cases touching upon classified information is correlated with a greater judicial willingness to permit *ex parte* proceedings in other contexts *not* involving classified information. On a different issue, one might seek to determine whether US government efforts to redefine “imminence” in the international self-defense context are correlated with similar efforts to reconceptualize imminence in domestic self-defense contexts. (The Bush Administration’s doctrine of preemptive self-defense—more or less carried on by the Obama Administration via its changed understanding of imminence—parallels the logic of domestic “stand your ground” laws).

I could go on, but in general, I share Vladeck’s suspicion that, “[f]or better or worse, one can find national security considerations influencing ordinary judicial decision making across almost the entire gamut of contemporary civil and criminal litigation.”⁸⁸ To this, I would only add that national security considerations have likely also seeped into law enforcement practices,⁸⁹ immigration policies, and a range of other non-judicial activities.

As I noted at the beginning of this essay, trickle-down effects are inherently difficult to discern and measure,⁹⁰ and it is also extraordinarily difficult to determine causation. Perhaps 9/11 merely accelerated pre-existing trends; perhaps it had no causal impact at all. Perhaps some or all of the trends hinted at above would have emerged with or without 9/11 and the war making that followed.⁹¹ But these difficulties do not make the project of seeking to identify trickle down effects less important.

⁸⁵ Vladeck, *The New National Security Canon*, supra note 17, at 1330.

⁸⁶ R.I. Affiliate, *The Legacy of the Indefinite “War on Terror” in Rhode Island: Civil Liberties in the Aftermath of 9/11*, AM. CIVIL LIBERTIES UNION 14 (2011), <http://riaclu.org/images/uploads/WaronTerrorinRhodeIslandReport.pdf>.

⁸⁷ LAWYERS COMM. FOR HUMAN RIGHTS, *A Year of Loss: Reexamining Civil Liberties since September 11*, supra note __, and LAWYERS COMM. FOR HUMAN RIGHTS, *Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties*, supra note __.

⁸⁸ Vladeck, *Foreword: National Security's Distortion Effects*, supra note 21, at 288.

⁸⁹ Tellingly, for instance, the USA PATROT Act’s authorization of delayed-notice search warrants (permitting so-called “sneak and peak” searches) was motivated by counterterrorism concerns, but studies suggest that less than one percent of delayed notice warrant cases have actually involved terrorism. The rest have involved ordinary crimes; 75 percent of delayed notice warrants are used in drug cases. See Jonathan Witmer-Rich, *The Rapid Rise of ‘Sneak and Peak’ Searches, and the Fourth Amendment ‘Rule Requiring Notice’* 41 PEPPERDINE LAW REVIEW ___, (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226977

⁹⁰ This problem is exacerbated by government secrecy.

⁹¹ As Vladeck notes in *The New National Security Canon*, for instance, “. . . the Rehnquist and Roberts courts have systematically made it more difficult for civil plaintiffs to obtain

This short essay only scratches the surface. Nonetheless, my hope is that it will inspire additional efforts to map the trickle-down effects of the war on terror in a more comprehensive manner, challenging as that task may be. So far, most efforts to examine the spillover of post-9/11 doctrines and practices into ordinary law and law enforcement have been piecemeal and ad hoc. But thirteen years after 9/11, we may now be able to look at the phenomena more comprehensively. Given the close historical interrelationship between war-making and state transformation, can we afford not to?

damages in cases arising out of governmental misconduct.” Vladeck, *supra* note 17, at 1297. See also Laura Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573 (2011) (charting the timelines of national-security-discourse-driven laws and suggesting that 9/11 likely just accelerated the expansion of state power vis a vis individuals); Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008) (arguing that increased government surveillance is driven by accelerating developments in information technology, and that the war on terror is not its sole or most important cause); John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 834-835 (2007) (noting that while 9/11 “accelerated the development of a new criminal process,” the post-9/11 changes also “reflect trends in ordinary criminal procedure. That is to say, the pressures that generate the processes associated with the war on terror apply more broadly, so that we are experiencing a general modification of the way in which our government investigates and imposes punishment on people.... [T]hese processes.... reflect a larger shift in our approach to governing, in which legally authorized discretion is increasingly valued as a way to respond to a steady stream of perceived crises”). See also Marcus D. Dubber, *Preventive Justice and the Quest for Principle*, in Andrew Ashworth, Lucia Zedner and Patrick Tomlin, ed., PREVENTION AND THE LIMITS OF THE CRIMINAL LAW (2013), arguing that recent scholarship focusing on the shift towards preventing policing fails to understand that the shift’s historical antecedents.