

# Counter-Terrorism under the Trump Presidency

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**Abstract: Le misure antiterrorismo sotto la Presidenza Trump** – This article provides a brief but comprehensive analysis of the distinctive features of the US counter-terrorism policy under President Donald Trump, in the context of his wider political action. The research shows that, while he waved counter-terrorism as a key argument of his nationalist and isolationist rhetoric, in fact Trump lacked an organized approach to the problem. In practice, the Trump Administration widely resorted to pre-existing counter-terrorism tools and in doing so, it reversed Obama's much-appreciated attempts to reinforce procedural guarantees and ensure a stronger respect for human rights. Authors argue that Trump's stance on counter-terrorism seriously impaired America's credibility among other countries, as a law-abiding reliable partner in the global fight against terrorism, and jeopardized the US government ability to build-up effective cooperation with Muslim communities, both at home and overseas.

1117

**Keywords:** Trump, Counter-Terrorism, Targeted Killings, Guantánamo, Torture, Human Rights.

## 1. Introduction

Since the aftermath of 9/11, the pressing need to counter international terrorism, and in particular jihadist terrorism,<sup>1</sup> has lied at the very core of the United States (US) national security strategy. The imperative to fight the so-called war on terror<sup>2</sup> and to destroy “the enemies of freedom”<sup>3</sup> has

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<sup>1</sup> International jihadist terrorism is a multifaceted and metamorphous phenomenon, lacking a unanimous legal definition, especially under the point of view of international law. On the nature and evolution of international terrorism, see A. Vendaschi, *Da al-Qā'ida all'IS: il terrorismo internazionale si è fatto Stato?*, *Rivista trimestrale di diritto pubblico*, No. 1, 2016, 41-80; A. Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, *J. Int. Crim. Justice*, Vol. 4, No. 5, 2006, 933-958. On definitory issues, B. Saul, *Defining Terrorism*, in E. Chenoweth, R. English, A. Gofas (Eds.), *The Oxford Handbook of Terrorism*, Oxford, 2019, 34-48; M. Scheinin, *Terrorism*, in D. Moeckli, S. Shah, S. Sivakumaran (Eds.), *International Human Rights Law*, Oxford, 2014, 550-566; A. Schmid, *The Definition of Terrorism*, in A. Schmid (Ed.), *The Routledge Handbook of Terrorism Research*, Abingdon-on-Thames, 2011, 39-98.

<sup>2</sup> On the concept of war on terror, see, generally, A. Lynch, E. MacDonald, G. Williams (Eds.), *Law and Liberty in the War on Terror*, Sidney, 2007.

<sup>3</sup> An expression used by President George W. Bush referring to perpetrators of the 9/11 attacks. See G.W. Bush, *Address to the Joint Session of the 107<sup>th</sup> Congress*, 20 September 2001, available at [georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected\\_Speeches\\_George\\_W\\_Bush.pdf](http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf).

shaped and modified the US international behavior, from geopolitics at large, to foreign relations with old and new superpowers, to military and defense policy, intelligence and counter-intelligence, and – last, but not least – homeland security. As well known, impacts of counter-terrorism policies on human rights and personal freedoms have sparked the strongest and liveliest debate.<sup>4</sup>

Counter-terrorism has kept its central and controversial role under the Presidency of Donald J. Trump as well. Yet the President's attitude toward the struggle against international terrorism must be read in the light of his wider political approach.

In this regard, the isolationist stance embraced by Donald Trump in international politics has been combined with a nationalist attitude (branded with a strong populist rhetoric) in domestic politics. As a matter of fact, with a view to “mak[ing] America great again”<sup>5</sup> and relying on “American exceptionalism”<sup>6</sup> in its most ‘dangerous’ meaning, President Trump pushed an agenda aimed at pulling the US out of some major international commitments.<sup>7</sup> At the same time, he promoted an ethnically, racially and culturally exclusionary view of the American identity, leveraging on American people's deepest cleavages<sup>8</sup> and flaring up resentment and fear toward all those who are ‘different.’<sup>9</sup>

<sup>4</sup> See, among American scholars, K.L. Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, *Univ. Pa. J. Const. L.*, Vol. 6, No. 5, 2004, 1001-1083; D. Cole, J.X. Demspey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, New York, 2002.

<sup>5</sup> As can be read in the National Security Strategy of the United States of America, December 2017, available at [www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf](http://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf).

<sup>6</sup> An expression that was used the first time by Alexis de Tocqueville. See A. de Tocqueville, *Democracy in America* (1835-1840), H.C. Mansfield, D. Winthrop (Eds., Transl.), Chicago, 2003. On its meaning's evolution (and distortion) before and under the Trump Presidency, see G. Löffmann, *America First and the Populist Impact on US Foreign Policy*, *Survival*, Vol. 61, No. 6, 2019, 115-138; J.D. Sachs, *A New Foreign Policy. Beyond American Exceptionalism*, New York, 2018.

<sup>7</sup> For instance, the US withdrew from the Paris climate agreement; from the Iran Nuclear Deal; from the United Nations Human Rights Council.

<sup>8</sup> B. Bonikowski, *Trump's Populism. The Mobilization of National Cleavages and the Future of US Democracy*, in K. Weyland, R. Madrid (Eds.), *When Democracy Trumps Populism: Lessons from Europe & Latin America*, Cambridge, 110-131.

<sup>9</sup> Trump's words at the 2020 State of the Union Address suggestively conveyed this idea. See Remarks by President Trump in State of the Union Address, 4 February 2020, available at [www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-3/](http://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-3/). Moreover, the hostility of the President to ‘diversity’ is evident also from the fact that he substantially de-funded the CVE (countering violent extremism) program within the Department of State and the Department of Homeland Security. This program was established by President Obama in order to support communities, civil society groups and other key actors working together to prevent violent extremism before terrorism occurs, both at home and overseas. CVE programs aim at combating terrorism in the medium-long term, by preventing radicalization and promoting the understanding and acceptance of democratic values, such as respect for human rights. They represent what scholars call “soft approach” to radicalization. See

Within this framework, the struggle against jihadist terrorism became, under Trump Presidency more than under any other of his predecessors, the ‘sword’ to be wielded by the Head of State to show Americans that he was “taking care” of them so that they could feel protected and safe.

Within this scenario, this paper sketches the fundamental guidelines of President Trump’s counter-terrorism policy, examining both his rhetorical discourse and concrete actions, in comparison with those of his predecessors (President Barack H. Obama,<sup>10</sup> in particular).

This analysis is structured as follows. After this brief Introduction, Section 2 focuses on the role that counter-terrorism has played in Donald Trump’s rhetoric. Then, Section 3 deals with some practical measures adopted by his Presidency. Examining rhetoric and practice at the same time is useful to understand whether (or not) the latter was coherent with the former. Ultimately, some brief concluding remarks try to provide some insights for the future, in the light of the election of Joe Biden as the 46<sup>th</sup> US President.

## 2. The President’s Rhetorical Approach to Terrorism and Counter-Terrorism

Although several emergencies hit the country in recent times, being the CoViD-19 crisis just the latest and probably the most evident one,<sup>11</sup> the threat of terrorism, especially international jihadist terrorism, has remained an ‘hot topic’ in the US public discourse. In 2016, right before Donald J. Trump’s election as the 45<sup>th</sup> President of the United States of America, the independent Pew Research Center asked Americans which subject they sought to hear about in presidential debates. Unsurprisingly, the most selected answer to the nation-wide poll was “keeping the US safe from terrorism.”<sup>12</sup>

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C. Walker, *The War of Words with Terrorism: An Assessment of Three Approaches to Pursue and Prevent*, *Journal of Conflict and Security Law*, Vol. 22, No. 3, 2017, 523–551. Therefore, the decision to de-fund such a program is a strong signal of the intolerance that characterizes Trump’s political choices, potentially resulting in (further) marginalization of some social groups.

<sup>10</sup> See, generally, on Obama’s Presidency and its legacy, G.F. Ferrari (Ed.), *The American Presidency after Barack Obama*, The Hague, 2019.

<sup>11</sup> For a comparative overview of measures aimed at fighting the Covid-19 pandemic and legal issues arising therefrom, see A. Vidaschi, *Il Covid-19, l’ultimo stress test per gli ordinamenti democratici: uno sguardo comparato*, in L. Cuocolo e A. Vidaschi (Eds.), *L’emergenza sanitaria nel diritto comparato: il caso del Covid-19*, in *DPCE Online*, No. 2, 2020.

<sup>12</sup> J.B. Oliphant, *In debates voters want to hear most about terrorism and the economy*, *Pew Research Center*, 15 August 2016, available at [www.pewresearch.org/fact-tank/2016/08/15/in-debates-voters-want-to-hear-most-about-terrorism-and-the-economy/](http://www.pewresearch.org/fact-tank/2016/08/15/in-debates-voters-want-to-hear-most-about-terrorism-and-the-economy/).

In fact, the campaign for the republican nomination, before, and the presidential campaign, after, conducted by Donald Trump in 2016, regarded jihadist terrorism as a very strong political argument to wave under the “America First” motto. On the one side, difficult relationships with Muslim communities at home, which helped fostering an irrational fear of Muslim immigrants, were exploited. On the other side, the desire to reaffirm US primacy on the international stage, against Middle-Eastern countries with a prevalence of Muslim citizens was revived.

Nonetheless, once elected, Donald Trump’s approach to counter-terrorism seemed to lack any original and comprehensive strategy. Rather, the new President based his counter-terrorism action on a variously blended mix between pre-existing policies and isolated ‘flagship’ measures (such as the infamous travel ban, also known as the Muslim ban<sup>13</sup>), having a very strong media impact, yet few to no evidence on their effectiveness on the long term.

It is a matter of fact that, along the first two years of his term in office, counter-terrorism has been more a rhetorical tool than a real policy commitment for Donald J. Trump, playing a crucial part in gaining his

<sup>13</sup> On January 27, 2017, Donald Trump issued the Executive Order 13769 (also known as First Travel or Muslim Ban 1.0), banning entry into the United States for 90 days of nationals from 7 Muslim-majority countries in the Middle-East and Africa (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen), suspending the U.S. Refugees Admission Program for 120 day and the entry of Syrian refugees indefinitely. Few days later, on February 3, 2017, a nationwide temporary restraining order (TRO) was issued by the District Court for the Western District of Washington in the case *State of Washington and State of Minnesota v. Trump*, C17-0141JLR (W.D. Wash. Feb. 3, 2017) and upheld by the United States Court of Appeals for the Ninth Circuit (*State of Washington and State of Minnesota v. Trump*, 847 F.3d 1151). Consequently, on March 6, 2017, the President revoked the first order and replaced it with a second and narrower one: the undetermined ban on Syrians refugees and the ban on Iraqi entrants were dropped, and the effective date of the order was delayed for ten days. A third version of the Muslim Ban was issued by Presidential Proclamation on September 24, 2017. The Proclamation, among others, indefinitely blocks the entry for certain individuals from eight countries: Iran, Libya, Chad, North Korea, Syria, Somalia, Venezuela, and Yemen. Yet, the addition of two non-Muslim countries (North Korea and Venezuela) appeared as an attempt to immunize the ban from discrimination-based critics. All of the Muslim (or Travel) ban orders are based on national security considerations and, according to the Administration, aim to protect American people from terrorism by foreign nationals admitted to the United States. As a matter of fact, in its introductory paragraph, the first Executive Order held as historic background the 9/11 terroristic attack. Indeed, until June 26, 2018, when the Supreme Court issued a 5–4 decision upholding Muslim Ban 3.0 in the landmark case *Trump v. Hawaii*, 585 U.S. 2018 (finding that the policy, under the rational basis review, “is expressly premised on legitimate purpose”), the Muslim Ban faced several legal challenges in federal courts on the ground of discrimination toward Muslim American and based on the violations of the First Amendment’s prohibition of government establishment of religion and the Fifth Amendment’s guarantees of equal treatment under the law as well as U.S. immigration statutes. See R. Scarciglia, *Immigration: The ‘Trump Effect’ from the Travel Ban to the Substantial Wall on the US-Mexico Border*, in G.F. Ferrari (Ed.), *The American Presidency under Trump*, The Hague, 2020, 173–185; E.M. Maltz, *The Constitution and the Travel Ban*, *Lewis & Clark L. Rev.*, Vol. 22, No. 2, 2018, 391–412.

Presidency the nickname of ‘never-ending campaign.’ From January 2017 to December 2018, President Trump dedicated 82 public speeches, in different contexts, to the ‘terrorist issue’ (meaning he mentioned ‘terrorism’ in public, on average, roughly once a week); just to have a term of comparison, President Barack H. Obama talked publicly about terrorism only 135 times in its whole eight years (it means one to two times per month on average).<sup>14</sup> The fear of terrorist attacks was knowingly used by Donald J. Trump as a further way to strengthen its nationalist policy, polarizing American public opinion in order to gain support for his rigid anti-immigration measures, whose main rationale were alleged security needs. The ‘Islamophobic’ attitude that characterized Trump’s discourse is well abridged in his call for a “total and complete shutdown of Muslims entering the United States,”<sup>15</sup> pointing in general at Muslim immigrants as increasing the risk of terrorist attacks on US soil.

President Trump differed from his predecessor also in the choice of words. While President Obama widely resorted to the broader and more neutral expression “extremists,”<sup>16</sup> for the sake of qualifying religiously-led terrorists, Donald Trump seasoned his public discourse with a number of xenophobic and anti-Muslim elements. For example, he overtly referred to “radical Islamic terrorism”<sup>17</sup> as the most important problem to tackle, and suggested that Muslim immigration could be “a Trojan horse threatening the American national security.”<sup>18</sup> Such a style, embraced by Trump, echoes a clash of civilizations and is very far not only from Obama’s attempt to avoid the public demonization of Islam,<sup>19</sup> but even from George W. Bush’s attitude, once considered the strictest approach on jihadist terrorism. As a matter of fact, just a few days after the 9/11 attacks, President Bush

<sup>14</sup> G. Rubin (Ed.), *Presidential Rhetoric on Terrorism under Bush, Obama and Trump. Inflating and Calibrating the Threat after 9/11*, London, 2020, 117 (the Author refers to presidential speeches where the term ‘terror’ is used at least three times).

<sup>15</sup> *Donald Trump calls for complete ban on Muslims entering the US*, *The Guardian*, 8 December 2015, available at [www.theguardian.com/us-news/video/2015/dec/08/donald-trump-calls-for-complete-ban-on-muslims-entering-the-us-video](http://www.theguardian.com/us-news/video/2015/dec/08/donald-trump-calls-for-complete-ban-on-muslims-entering-the-us-video). J. Johnson, *Trump calls for total and complete shutdown of Muslims entering the United States*, *The Washington Post*, 8 December 2015, available at [www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/](http://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/). See also J. Martin, A. Burns, *Blaming Muslims After Attack, Donald Trump Tosses Pluralism Aside*, *The New York Times*, 13 June 2016, available at [www.nytimes.com/2016/06/14/us/politics/donald-trump-hillary-clinton-speeches.html](http://www.nytimes.com/2016/06/14/us/politics/donald-trump-hillary-clinton-speeches.html).

<sup>16</sup> *Obama: Why I Won’t Say “Islamic Terrorism”*, *CNN*, 29 September 2016, available at [edition.cnn.com/2016/09/28/politics/obama-radical-islamic-terrorism-cnn-town-hall/index.html](http://edition.cnn.com/2016/09/28/politics/obama-radical-islamic-terrorism-cnn-town-hall/index.html).

<sup>17</sup> D.J. Trump, Remarks by President Trump in Joint Address to Congress, 28 February 2017, available at [www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-address-congress/](http://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-address-congress/).

<sup>18</sup> National Strategy for Counter-terrorism of the United States of America, October 2018, available at [www.hsdl.org/?view&did=816990](http://www.hsdl.org/?view&did=816990).

<sup>19</sup> See, generally, T. McCrisken, *Ten Years on: Obama’s War on Terrorism in Rhetoric and Practice*, *International Affairs*, Vol. 84, No. 4, 2011, 781–801.



delivered a speech in which he refrained from linking terrorism to the Muslim faith and defined Muslims as “brothers and sisters” of the Americans.<sup>20</sup>

On the side of action, though, the relevant data is that Donald J. Trump felt the need to adopt a comprehensive National Strategy for Counterterrorism only in October 2018,<sup>21</sup> at the dawn of his third year in office. Donald Trump appeared, on the one hand, not willing to ground his actions on a comprehensive and coherent strategy, capable of coordinating different areas of policy in the view of effectively reducing the risk and, on the other hand, very keen to pursue extemporaneous and individual measures that served to confirm certain kind of ‘nationalist’ rhetoric, more than a wider purpose. This stance resulted in a substantial misunderstanding of the terrorist threat, especially of the jihadist one, which has continued all over the Trump Administration. As a consequence, terrorism was regarded exclusively as a problem of foreign and military policy, to be addressed by brute force abroad and strengthening the borders at home. History, however, taught us this is not the case.

Beside strict immigration measures, the policy adopted in late 2018 by the Trump Administration relied, from the point of view of defense and homeland security, on the same substantive guidelines that had characterized President Obama’s action before.<sup>22</sup> First, the collection of relevant intelligence, both directly on field and by means of electronic and cyber-surveillance, was further reinforced, in order to anticipate potential threats and to discover terrorist networks before they can hit the US soil. Second, targeted military operations abroad were conducted, for the purpose of disrupting terrorist networks within their ‘safe-heavens’ and eliminating individual threats, represented by prominent terrorist leaders and their entourages.

What is more – following his war-like and bold public approach – President Trump generally loosened even those constraints that President Obama had put in place in order to reduce the negative impact of counter-terrorism policies on human rights and fundamental freedoms, both at home and overseas. Surely, President Obama’s approach to counter-terrorism was far from perfect: during his two terms in office, scholars have always stressed the need to pay stronger attention to the protection of human rights and the

<sup>20</sup> G.W. Bush, Remarks by the President at Islamic Center of Washington DC, 17 September 2001, available at [georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html](http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html).

<sup>21</sup> National Strategy for Counterterrorism of the United States of America, *supra*, note 18. See J.W. Rollins, *The Trump Administration’s National Strategy for Counterterrorism: Overview and Comparison to the Prior Administration*, Congressional Research Service Report, 29 January 2019, available at [fas.org/sgp/crs/terror/IN11027.pdf](https://fas.org/sgp/crs/terror/IN11027.pdf).

<sup>22</sup> C. Fonzzone, L. Harting, *The More Things Stay the Same: Why the Trump Administration’s Counterterrorism Strategy is Surprisingly Conventional*, *Just Security*, 13 November 2018, available at [www.justsecurity.org/61452/stay-same-trump-administrations-counterterrorism-strategy-surprisingly-conventional/](https://www.justsecurity.org/61452/stay-same-trump-administrations-counterterrorism-strategy-surprisingly-conventional/).

preservation of the rule of law while countering terrorism, insisting on the primary need to promote a stronger level of accountability for executive actions (with a focus on the infringements of constitutional and human rights that counter-terrorism policies can bring along and at times even favor).<sup>23</sup> Yet the rational approach that lied behind the actions of the Obama Administration in this specific field should be honestly recognized, favorably welcoming the steps forward taken by the former President towards a stronger level of transparency and a stricter adherence to the rule of law, with particular regard to the role of parliamentary oversight and the separation of powers. By contrast, President Trump's course of action and public rhetoric have proven to be entirely at odds with the efforts spent by the Obama Administration in establishing higher and stricter legal standards for counter-terrorism measures that have a potentially disruptive impact on individual rights.<sup>24</sup>

While the lack of innovative measures and pieces of legislation in the field of counter-terrorism seems partially in contrast with President Trump's public speeches, the weakened attention for human rights and personal freedoms, sacrificed on the altar of security, shows a perfect fit with his well-known rhetoric. In spite of his seeming lack of a personal and viable view on counter-terrorism, Trump's attempt to leverage on the fear of terrorist attacks to gain political support has characterized also the 2020 presidential campaign, when he repeatedly warned US people not to support Joe Biden, in order to avoid that his proposed policy on immigration could "open the door to terrorism."<sup>25</sup> This time, though, Trump's claims did not hit the mark, perhaps having been exposed as unreasonable by his own actions as President of the United States.

<sup>23</sup> On the President Obama's approach to counter-terrorism and human rights, see C.H. Pyle, *The Law, Barack Obama and Civil Liberties*, *Presidential Studies Quarterly*, Vol. 42, No. 4, 2012, 867-880; T. McCrisken, *Ten Years on: Obama's War on Terror in Rhetoric and Practice*, *International Affairs*, Vol. 87, No. 4, 2011, 781-801; For a more general focus on counter-terrorism tools and human rights, see, generally, M. Scheinin, M. Vermeulen, *Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism*, in M.T. Kamminga (Ed.), *Challenges in International Human Rights Law*, Abingdon-on-Thames, 2017; M. Scheinin, *Human Rights and Counter-terrorism: Lessons from a Long Decade*, in D. Jenkins et al. (Eds.), *The Long Decade*, Oxford, 2014, 289-303; A. Masferrer, C. Walker, *Counter-terrorism, Human Rights and the Rule of Law*, Celtenham (UK) – Northampton (USA), 2013; J. Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, *Eur. J. Int. Law*, Vol. 14, 2003, 241-264.

<sup>24</sup> G. Rubin, *Donald Trump, Twitter, and Islamophobia: The End of Dignity in Presidential Rhetoric About Terrorism*, in Rubin (Ed.), *supra*, note 14.

<sup>25</sup> *President Trump Delivers Remarks at a Political Rally in Gastonia, North Carolina*, *The Wall Street Journal*, 21 October 2020, available at [www.wsj.com/talk2020/transcript/CHTS000020201022egal00001?hl=CHTS000020201022egal00001\\_Q25\\_SP40655\\_EP41586](http://www.wsj.com/talk2020/transcript/CHTS000020201022egal00001?hl=CHTS000020201022egal00001_Q25_SP40655_EP41586).

### 3. The President's Practical Approach to Counter-Terrorism

Moving to concrete measures, as previously pointed out, President Donald J. Trump kept – to a large extent – policies and tools that were largely resorted to by President George W. Bush, before, and President Barack H. Obama, after. In other words, he refrained from introducing any ‘new vision’ on counter-terrorism, so that it will be hard, in future, to talk about a ‘Trump Doctrine’<sup>26</sup> on countering terrorism.

However, even in preserving the same ‘painting’, President Trump did not refrain from adding his own ‘brushstrokes’, which resulted in making the US counter-terrorism approach even more worrisome from the point of view of human rights and personal freedoms.

The following paragraphs look at how two main streams of the ‘war on terror’ were managed (or mismanaged) under the Trump Administration. Namely, reference is to drone strikes (better known as ‘targeted killings’) and detention at the Guantánamo Bay facility, often including the use of torture in order to collect intelligence.

1124

#### 3.1. Targeted Killings

Targeted killings (TKs) have been a well-known counter-terrorism tool at least since the nineties, but they have climbed to the frontline of the globally waged ‘war on terror’ under President George W. Bush, in the aftermath of the 9/11 attacks.<sup>27</sup> This practice consists of military actions conducted on foreign soil and aimed at physically ‘removing’ individuals who are considered an actual or anyway potential risk for US homeland security. In the wide majority of cases, TKs are carried out by the US through drone strikes.

This questionable practice has caused legal controversies in domestic and supranational fora and sparked a lively debate among prominent scholars from the point of view of both international law and constitutional law.

From the perspective of international law, it has been argued that drone strikes, which occur on foreign soil without the consent (or sometimes, even without the knowledge) of the foreign country involved,

<sup>26</sup> J.F. Addicott, *Prosecuting the War on Terror in The Trump Administration: The Trump Doctrine – Is There Really a New Sheriff in Town?*, *Alb. Gov't L. Rev.*, Vol. 11, 2018, 206-246.

<sup>27</sup> See A. Vidaschi, *The Dark Side of Counter-Terrorism: Arcana Imperii and Salus Rei Publicae*, *Am. J. Comp. L.*, Vol. 66, No. 4, 2018, 887-888; M.J. Foreman, *Comment, When Targeted Killing Is Not Permissible: An Evaluation of Target Killing Under the Laws of War and Morality*, *U. Pa. J. Const. L.*, Vol.15, 2013, 921-960; C. Finkelstein, J.D. Ohlin, A. Altman, *Targeted killings: Law and Morality in an Asymmetrical World*, Oxford, 2012; B.D. Shekell, *The Legality of the United States' Use of Targeted Killings*, *Wayne L. Rev.*, Vol. 57, 2011, 313 *et seq.* See also A. Vidaschi, *À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato*, Torino, 2007, 75 *et seq.*



entail an overt violation of sovereignty.<sup>28</sup> In fact, it can be well maintained that the government that conducts TKs abroad is using foreign airspace in order to perform military operations (the ‘war on terror’) on another state’s territory, which could well be considered as acts of war against the latter. In this regard, the doctrine of necessary prevention,<sup>29</sup> which aims at legitimizing drone strikes on foreign soil based on the unwillingness or the inability of the involved foreign country to cooperate in the fight against international terrorism is at least incomplete, or worse, ill grounded.<sup>30</sup>

From the standpoint of constitutional law and respect for human rights, a number of scholars over the years have branded TKs as unlawful extra-judicial executions. These acts are perpetrated by governments in the absence of any procedural guarantee and – what is more – in overt violation of the rights of the defense, provided within a due process of law, yet most of all of the right to life.<sup>31</sup>

A further problem, in relation to human rights and the foundations of a democratic regime, has been raised pointing at the cloak of secrecy and the complete lack of transparency and consequent accountability that characterize TKs in case of errors (including situations of mistaken identity) or ‘collateral damages’ (meaning involuntary killing of innocent bystanders).

While the practice of drone strikes has continued from the Presidency of George W. Bush, all along the Obama and the Trump Administrations, relevant differences can be outlined between the approach of Barack H. Obama and the one of Donald J. Trump to this measure, both in terms of prudence and self-restraint, and of policies introduced to mitigate the unwanted dark sides of this controversial practice.

<sup>28</sup> See T.G. Evers Mushovic, M. Hughes, *Rules for When There Are No Rules: Examining the Legality of Putting American Terrorists in the Crosshairs Abroad*, *New Eng. J. Int’l & Comp. L.*, Vol. 18, 2012, 157-184; W.J. Fisher, *Targeted Killing, Norms and International Law*, *Col. J. Transnat’l L.*, Vol. 45, 2006-2007, 711-747. See also R. Goodman, *The Obama Administration and Targeting War-Sustaining Object in Noninternational Armed Conflict*, *Am. J. Int’l L.*, Vol. 110, 663-679; A. Vedaschi, *Osama bin Laden: l’ultimo targeted killing. Gli Stati Uniti hanno dunque la licenza di uccidere?*, *Diritto Pubblico Comparato ed Europeo*, No. 3, 2011, 1196-1229.

<sup>29</sup> Meaning that, when a state is unwilling or unable to take action to remove a threat caused by a non-state actor and to prevent future attacks, another state could legitimately resort to the use of force on the former state’s territory. See A.S. Deeks, *“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self Defense*, *Va. J. Int’l L.*, Vol. 52, 2012, 483-550.

<sup>30</sup> See, e.g., L.R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, *Wm. Mitchell L. Rev.*, Vol. 38, 2011-2012, 1656-1657; J.J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, *J. Transnat’l L. & Pol’y*, Vol. 19, 2010, 237-279; C. Jenks, *Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, *N.D. L. Rev.*, Vol. 85, 2009, 649-671.

<sup>31</sup> See C. Crandall, *Ready...Fire...Aim! – A Case for Applying American Due Process Principles before Engaging in Drone Strikes*, *Fla J. Int’l L.*, Vol. 24, 2012, 55-90.

First, if one looks at numbers, the Obama Administration has proven much more reluctant than the Trump Administration to order drone strikes on foreign soil. According to a research of the Bureau of Investigative Journalism<sup>32</sup> (monitoring US drone strikes and resulting deaths in Afghanistan, Somalia, Yemen and Pakistan), President Obama has ordered 1878 deadly strikes over his eight years in office, while President Trump has ordered 2243 drone strikes over his first two years of his Presidency. In terms of statistics, this data shows, for President Obama, an average level of 234 strikes per year (or 0,64 strikes per day) and, for President Trump, an average level of 1122 strikes per year (or 3,07 strikes per day). In general terms, Donald J. Trump has resorted to targeted killings and, therefore, accepted their consequences, ‘with both hands’, roughly five times more than Barack H. Obama.

Second, while he did not renounce to the targeted-killing strategy, considering it to be effective and necessary within his counter-terrorism action, President Obama acknowledged the substantive issues that drone strikes raised, from the standpoint of human rights protection and – more generally – in terms of constitutional legitimacy.

In this view, he strove to provide some kind of procedural guarantees, something that is essential in a democratic framework.

In particular, President Obama managed to introduce stricter procedural constraints for the authorization of targeted operations, which aimed at ensuring a clearer chain of command and limit the attribution of the final decision to the highest level of his own Administration. In this way, stronger accountability was achieved.

Furthermore, he enacted a set of counter-measures, designed to review the intelligence basis upon which targeted killings were grounded, in order to limit errors or cases of mistaken identity. These counter-measures provided for the involvement (even if only *ex post*) of the Intelligence Committee of the Congress, thus introducing a rather limited, but still very welcome, form of parliamentary oversight over potential wrongdoings or errors committed by the Executive branch.

Lastly, President Obama laid down stricter guidelines for the conduction of targeting operations, by means of which he tried to reduce the risk of involvement of third parties (so-called ‘zero casualties’ policy).<sup>33</sup>

<sup>32</sup> The Bureau of Investigative Journalism, *Drone Warfare*, available at [www.thebureauinvestigates.com/projects/drone-war](http://www.thebureauinvestigates.com/projects/drone-war).

<sup>33</sup> Presidential Policy Guidance, Procedures for Approving Direct Action against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, 22 May 2013, available at [www.justice.gov/oip/foia-library/procedures-for-approving-direct-action-against-terrorist-targets/download](http://www.justice.gov/oip/foia-library/procedures-for-approving-direct-action-against-terrorist-targets/download); Executive Order 13732, United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, 1 July 2016, available at [fas.org/irp/offdocs/eo/eo-13732.htm](http://fas.org/irp/offdocs/eo/eo-13732.htm). See, generally, L. Trenta, *The Obama administration’s conceptual change: Imminence and the legitimization of targeted killings*, *European Journal of International Security*, Vol. 3, 2018, 69-93. For a comprehensive view

Through an Executive Order, adopted in 2019,<sup>34</sup> President Donald J. Trump did it best to reverse Obama's hardly conquered results in terms of increased transparency and, as a consequence, accountability.

First of all, President Trump simplified authorization procedures for TK operations (*inter alia*, widening the number of US officials capable of adopting relevant decisions in this field) and excluded any form of second-guess or oversight on pieces of intelligence upon which targeting operations are based.

Second, he completely scrapped the 'zero casualties' policy adopted by President Obama, *de facto* opening the door to an increased number of collateral damages and unwanted victims, sacrificed in view of a successful drone strike.<sup>35</sup>

These two simple but potentially destructive choices reflected Trump's war-like and retaliatory idea of the fight against international terrorism, targeting not only suspected terrorists and potential threats for the US national security, but also at 'hitting back at the heart of the enemy', inflicting as many damages as possible.

President Trump's attitude towards drone strikes seems, at a closer look, in line with his general approach to national security. Targeted operations partially lost their 'surgical' style (aimed at removing a particular target, without much ado) and became 'less-targeted', more a symbolic (and to some extent revengeful) measure than a preventive one, with a view to participating in the general strongman parade of the Administration.

This lax approach to targeted operations has had, among others, two major effects in the field of US international relations. On the one hand, it damaged US reputation as a credible and reliable partner for both Western allies (committed to fighting jihadist terrorism, while abiding international law) and moderate Middle Eastern countries. On the other hand, it rekindled feelings of hatred and resentment against the US among Muslim communities in America and overseas, grounded on the martyrization of the target and the occurrence of innocent victims. As a result, the job for terrorist recruiters has been certainly simplified.

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on enacted and desirable counter-measures, see J.G. D'Errico, *Executive Power, Drone Executions and the Due Process Rights of American Citizens*, *Fordham L. Rev.*, Vol. 87, 2018, 1185-1216. For a critical view on Obama's achievements, see P. Kebriaei, *The Distance Between Principle and Practice in the Obama Administration's Targeted Killing Program: A Response to Jeh Johnson*, *Yale L. & Pol'y Rev.*, Vol. 31, 2012, 151-172.

<sup>34</sup> Executive Order 13862, Revocation of Reporting Requirement, 6 March 2019, available at [www.federalregister.gov/documents/2019/03/11/2019-04595/revocation-of-reporting-requirement](https://www.federalregister.gov/documents/2019/03/11/2019-04595/revocation-of-reporting-requirement).

<sup>35</sup> See C. Zambakari, *Executive Powers and the Targeted Killing of Gen. Qassem Soleimani*, *Georgetown Public Policy Review*, 18 March 2020, [gppreview.com/2020/03/18/executive-powers-targeted-killing-gen-qassem-soleimani/](https://gppreview.com/2020/03/18/executive-powers-targeted-killing-gen-qassem-soleimani/); K.D. Atherton, *Trump Inherited the Drone War but Ditched Accountability*, *Foreign Policy*, 22 May 2020, available at [foreignpolicy.com/2020/05/22/obama-drones-trump-killings-count/](https://foreignpolicy.com/2020/05/22/obama-drones-trump-killings-count/).

### 3.2. *Guantánamo Bay and the Use of Torture*

The same tendency outlined with regard to targeted killings can be observed, *mutatis mutandis*, if one focuses on detention of suspected terrorists and resort to enhanced interrogation techniques, in order to obtain useful intelligence to prevent future attacks.

As well known, in the early 2000, during the first years of the ‘war on terror’, Guantánamo Bay became a symbol of pride and shame for opposite factions: there, suspected terrorists were detained *incommunicado* on merely administrative basis and widely subjected to grueling conditions of imprisonment. Moreover, they were repeatedly questioned resorting to enhanced interrogation techniques, which included procedures amounting to torture, such as the infamous waterboarding. And only after years of litigation before the Supreme Court<sup>36</sup> the US Administration granted Guantánamo prisoners the possibility to challenge the legality of their detention, although at first only before special jurisdictions (i.e. military commissions) highly relying on classified evidence. As a consequence, prisoners’ chance to organize an effective defense and being eventually discharged was significantly impaired.<sup>37</sup>

Anyway, detentions at Guantánamo Bay has since been controversial and widely debated, in and out of court, in relation to the alleged circumvention of human rights and personal freedoms protected by the US Constitution, as well as by international conventions, such as the right of *habeas corpus* and the right of the defense. In fact, besides being subjected to degrading treatments and harsh life conditions, while deprived of liberty, prisoners could be detained at Guantánamo Bay – for an indefinite time – on a preventive basis only, without being formally charged with any crime.

<sup>36</sup> Reference is to the so-called Guantánamo cases. *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 577 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008). M.I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, *Nw. U. L. Rev.*, Vol. 103, No. 4, 2009, 1683-1764.

<sup>37</sup> On serious violation of human rights deriving from this practice, see A. Vidaschi, *Has the balancing of rights given way to a hierarchy of values?*, *Comparative Law Review*, Vol. 1, No. 1, 2010, 18 *et seq.*; M.C. Rahdert, *Double-Checking Executive Emergency Powers: Lessons from Hamdi and Hamdan*, *Temp. L. Rev.*, Vol. 80, No. 2, 2007, 451-488; T. Yin, *Boumediene and Lawfare*, *U. Rich. L. Rev.*, Vol. 43, 2009, 865-892; M. Anderson, *Boumediene v. Bush: Flashpoint in the Ongoing Struggle to Determine the Rights of Guantanamo Detainees*, *Me. L. Rev.*, Vol. 60, 2008, 235 *et seq.*; J. Steyn, *Guantanamo Bay: The Legal Black Hole*, *International and Comparative Law Quarterly*, Vol. 53, No. 1, 2004, 1-15. See also, on the aftermath of the Guantánamo cases, C. Graziani, *La saga Al Bahlul v. Usa: ultimi sviluppi giurisprudenziali in merito alla giurisdizione delle military commissions*, *DPCE Online*, Vol. 34, No. 1, 2018, 299-305; O. Aronson, *In/Visible Courts: Military Tribunals as Other Spaces*, in D. Cole, F. Fabbrini, A. Vidaschi (Eds.), *Secrecy, National Security and the Vindication of Constitutional Law*, Celtenham (UK) – Northampton (USA), 2013, 229-249; D. Luban, *Lawfare and Legal Ethics in Guantánamo*, *Stan. L. Rev.*, Vol. 60, 2008, 1981-1999; C.A. Bradley, *Agora (Continued): Military Commissions Act of 2006*, *Am. J. Int’l L.*, Vol. 101, 2008, 327-328; P.J. Spiro, D. Bodansky, *International decisions: Hamdan v. Rumsfeld*, *Am. J. Int’l L.*, Vol. 100, No. 4, 2006, 888-895.

Not to mention the fact that, in many cases, prisoners ended-up at the US Naval Station Guantánamo Bay as the result of secret operations, conducted on foreign territory, which involved the forcible abduction of the suspected terrorist and his/her secret transfer – by means of covert flights (so-called ghost flights) – to the final detention facility. This controversial practice is known as extraordinary renditions.<sup>38</sup>

A number of legal challenges brought against these practices, together with the feelings of indignation they caused in the public opinion, had compelled President George W. Bush to adopt a gradual shift in his rendition and detention policy, providing for a gradual reduction in the number of prisoners at Guantánamo Bay. This choice was maintained and even reinforced by President Barack H. Obama, whose declared aim was the closure of the Guantánamo Bay detention facility by the end of his term in office.

President Donald J. Trump, once again, acted to reverse the efforts spent by his predecessors in re-conducting the ‘war on terror’ within the boundaries of the rule of law, insisting on the usefulness and full legitimacy of a special regime of detention and identifying Guantánamo Bay as the place where terrorists could be sent to ‘atone for their sins.’<sup>39</sup>

The first evidence of this shift comes, once again, from numbers. Looking at data,<sup>40</sup> New York Times reports on Guantánamo Bay show that – out of 780 prisoners detained at the US Naval Station at its peak, under George W. Bush – over 500 were subsequently transferred to other detention facilities or repatriated by the same President Bush. Subsequently, President Barack H. Obama released 197 of the 242 remaining detainees. As regards Donald J. Trump, while his much-advertised plan to “load up Guantánamo with bad dudes”<sup>41</sup> was not realized at all, under his Administration just two detainees left the US Naval Station on Cuban land and were repatriated to their country of origin to finish serving their sentence.<sup>42</sup>

<sup>38</sup> See, generally, A. Vidaschi, *Extraordinary Renditions: A Practice Beyond Traditional Justice*, in D. Bigo, E. Guild, M. Gibney (Eds.), *Extraordinary Renditions: Addressing the Challenges of Accountability*, Abingdon-on-Thames, 2018, 89-121; L. Fisher, *Extraordinary Rendition: The Price of Secrecy*, *Am. U. L. Rev.*, Vol. 57, 2008, 1405-1451; M.L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, *Geo. Wash. L. Rev.*, Vol. 75, 2007, 1333-1420; D. Weissbrodt, A. Bergquist, *Extraordinary Rendition and the Torture Convention*, *Va. J. Int'l L.*, Vol. 46, 2006, 585-650.

<sup>39</sup> Cf. P.G. Monateri, *Dominus Mundi. Political Sublime and the World Order*, Oxford, 2018.

<sup>40</sup> The New York Times, *The Guantanamo Docket*, 15 December 2020, available at [www.nytimes.com/interactive/projects/guantanamo](http://www.nytimes.com/interactive/projects/guantanamo).

<sup>41</sup> As he declared during his 2016 electoral campaign. See NPR, *Trump Has Vowed to Fill Guantanamo with “Some Bad Dudes” — But Who?*, 14 November 2016, available at [www.npr.org/sections/parallels/2016/11/14/502007304/trump-has-vowed-to-fill-guantanamo-with-some-bad-dudes-but-who](http://www.npr.org/sections/parallels/2016/11/14/502007304/trump-has-vowed-to-fill-guantanamo-with-some-bad-dudes-but-who).

<sup>42</sup> NPR, *U.S. Clears for Release Longtime Guantánamo Inmate Never Charged with a Crime*, 11 December 2020, available at [www.npr.org/2020/12/11/945565473/u-s-clears-for-](http://www.npr.org/2020/12/11/945565473/u-s-clears-for-)



From the point of view of the legal framework, as anticipated, , President Barack H. Obama had required the closure of the Guantánamo Bay detention facility “as soon as practicable, and no later than one year from the date” of his 2009 Executive Order.<sup>43</sup> This provision was adopted, by President Obama, following an electoral campaign where he openly declared his intention to stop imprisonments at Guantánamo Bay, outside the US territory, and considering that “in the dark halls of Abu Ghraib and the detention cells of Guantánamo, America has compromised its most precious values.”<sup>44</sup> Taking a completely opposite standpoint, President Trump reinstated detention at the Cuban base as one of the available options for handling suspected terrorists. By means of an Executive Order dated 30 January 2018 and suggestively titled “Protecting America Through Lawful Detention of Terrorists,”<sup>45</sup> he revoked Obama’s previous Order and provided that detention at US Naval Station Guantanamo Bay “shall continue to be conducted.”<sup>46</sup> What is more, the same Executive Order unambiguously stated that “the United States may transport additional detainees to US Naval Station Guantanamo Bay when lawful and necessary to protect the Nation.”<sup>47</sup>

To sum up, as regards Guantánamo Bay, President Donald J. Trump clearly broke with the approach of his predecessor, who tried (albeit with partial success) to bring the much-debated detention facility to a complete closure. While he did not manage to ‘refill’ the US Naval Station with freshly captured prisoners, still President Trump was firmer than George Bush in keeping Guantánamo’s gates closed, given the very limited number of prisoners released or repatriated under his Presidency.<sup>48</sup> This choice, once again, looks coherent with Trump’s narrative of a very hardly handed Administration, capable of administering draconian counter-measures, against the enemies of America (jihadist terrorist), whose purpose seems

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release-long-time-guantanamo-inmate-never-charged-with-a-crime?t=1608281228282&t=1608319030588; The Guardian, *Guantánamo prisoner released in surprise move by Trump administration*, 3 May 2018, available at [www.theguardian.com/us-news/2018/may/02/guantanamo-prison-ahmed-al-darbi-release-trump-administration](http://www.theguardian.com/us-news/2018/may/02/guantanamo-prison-ahmed-al-darbi-release-trump-administration).

<sup>43</sup> Executive Order 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009, available at [www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1893.pdf](http://www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1893.pdf).

<sup>44</sup> B.H. Obama, Speech of 1 August 2007 at the Woodrow Wilson International Center for Scholars, available at [www.wilsoncenter.org/sites/default/files/media/documents/event/obamasp0807.pdf](http://www.wilsoncenter.org/sites/default/files/media/documents/event/obamasp0807.pdf). Obama’s efforts to close Guantánamo were obstructed by Congress, concerned that this move could have entailed the risk of former detainees reverting back to terrorism.

<sup>45</sup> Executive Order 13823, Protecting America Through Lawful Detention of Terrorists, 1 January 2018, available at [www.hsdl.org/?abstract&did=807881](http://www.hsdl.org/?abstract&did=807881).

<sup>46</sup> Ibid., sec. 2(b).

<sup>47</sup> Ibid., sec. 2(c).

<sup>48</sup> See *supra*, note 42.

more impressing citizens with measures having great resonance on the media, enhancing perceived security rather than actual security.<sup>49</sup>

Almost identical remarks may be spent with regards to Donald Trump's attitude towards torture and degrading treatments of Guantánamo detainees. While the path towards full transparency and consequent accountability within intelligence operations (and interrogations in particular) was still a long way, under Obama Presidency significant steps were taken to ensure a sharp turn towards a full enforcement of the rule of law. One may remember the formal ban, issued by President Obama, on the use of interrogation techniques that involved inhuman and degrading treatments against detainees, including torture proper, both physical and psychological, increasing protection of human rights and enforcing international standards in the war on terror.<sup>50</sup> The position adopted by the Obama Administration was the outcome of – at least – two separate reasons. First, the resort to enhanced interrogation techniques, entailing acts of torture, was considered as an incentive to further radicalization of both prisoners that were subject to interrogation and other potential terrorists, within their communities, whose individual frustration and sense of anger may be fostered by the martyrization of a companion or friend. Second, intelligence obtained through such interrogation techniques has proven, in a number of cases, imprecise, unreliable and ineffective, since the source was compelled to provide as much information as possible, to avoid further sufferings.

Once again, following his – whatever-it-takes – war-like rhetoric, Donald J. Trump tried to tear the efforts of the previous Administration into pieces. As a matter of fact, during his 2016 electoral campaign, he promised to scrap the Executive Order enacted by President Barack H. Obama, with a view to jumping back to unconstrained and uncontrolled interrogation methods, by both the military and the intelligence community.<sup>51</sup> Yet, after Trump's election, his 'torture revival plan' was thwarted by one of his own cabinet nominees, the then-Defense Secretary James Mattis, arguing that enhanced interrogation is illegal and inappropriate and thus should not have been resorted to.<sup>52</sup> Therefore, the draft Executive Order,<sup>53</sup> revoking Obama's one, was dropped.

<sup>49</sup> On the relationship between perceived and actual security in times of international terrorism, see A. Vidaschi, *Seguridad y libertad en tiempo de terrorismo internacional: entre percepción de inseguridad y populismo*, in J.J. Fernández Rodríguez (Ed.), *Democracia y seguridad. Respuestas para avanzar en el sistema público*, Valencia, forthcoming.

<sup>50</sup> Executive Order 13491, Ensuring Lawful Interrogations, 22 January 2009, available at [www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1885.pdf](http://www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1885.pdf).

<sup>51</sup> *Donald Trump Faces Obstacles Resuming Waterboarding Torture*, New York Times, 28 November 2016, [www.nytimes.com/2016/11/28/us/politics/trump-waterboarding-torture.html](http://www.nytimes.com/2016/11/28/us/politics/trump-waterboarding-torture.html).

<sup>52</sup> J. Diamond, *Trump: Defense Secretary Mattis can 'override me' on torture*, CNN Politics, 27 January 2017, available at [edition.cnn.com/2017/01/27/politics/donald-trump-defense-secretary-override-on-torture/index.html](http://edition.cnn.com/2017/01/27/politics/donald-trump-defense-secretary-override-on-torture/index.html).

<sup>53</sup> This draft was published, on January 25, 2017 by the Washington Post. See G. Miller, *White House Draft Order to Review on the Use of CIA 'black sites prisons' overseas*,

Thankfully, in this particular circumstance, his own Administration hindered the President from going ‘back to the past’. Otherwise, effects of return to torture would have been detrimental in relation to respect for basic human rights and the rule of law as well as counter-productive. Actually, such step backwards would have contributed to damaging the image and international reputation of the United States even more than what had already been done.

#### 4 Concluding Remarks

As highlighted by the analysis developed in this Chapter, counter-terrorism played a key role in Donald Trump’s rhetoric, since public discourse on the fights against international jihadist terrorism was a powerful tool and argument in the hands of the President to fuel his stance based on exceptionalism and nationalism.

As regards ‘practice’, although he retained the same controversial measures that President Obama had already used, President Trump did everything was in his power to reverse many of the former’s – imperfect, but still praiseworthy – steps towards enhanced protection of human rights while countering terrorism. And one has to consider that the situation could be even worse, if Trump’s cabinet had not firmly opposed some of his harshest plans, for example the President’s commitment, during the 2016 electoral campaign, to get back to torture scrapping Obama’s ban.

Such a framework, showing President Trump’s eradication of improvements brought by the ‘Obama approach’ (or, in the case of torture, attempts to do so), has had at least two negative effects.

The first adverse impact is especially visible on the international scene. Being Trump’s counter-terrorism policy based on the continuous vilification of Muslims and Islam, allied countries, especially in the Middle East and in the Arab area, greatly reduced their will to positively cooperate with the US (and with Western countries in general) in fighting international terrorism. The case of Turkey represents the paramount example of a (Muslim) State, member of North Atlantic Treaty Organization (NATO), which has progressively distanced itself from effective cooperation with the US in the field of counter-terrorism, due to the anti-Muslim positions of the Trump Administration.

The second detrimental consequence affects the domestic level. Here, Trump’s choices severely damaged the relationship of mutual trust that had

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*Washington Post*, 25 January 2017, available at [www.washingtonpost.com/world/national-security/white-house-draft-order-calls-for-review-on-use-of-cia-black-sites-overseas/2017/01/25/e4318970-e310-11e6-a547-5fb9411d332c\\_story.html](http://www.washingtonpost.com/world/national-security/white-house-draft-order-calls-for-review-on-use-of-cia-black-sites-overseas/2017/01/25/e4318970-e310-11e6-a547-5fb9411d332c_story.html). The Executive Order would have been titled “Detention and Interrogation of Enemy Combatants.” See Human Rights First, *President Trump’s Draft Executive Order on Detention and Interrogation*, January 2017, available at [www.humanrightsfirst.org/sites/default/files/Interrogation-and-Detention-EO-Factsheet.pdf](http://www.humanrightsfirst.org/sites/default/files/Interrogation-and-Detention-EO-Factsheet.pdf).

difficultly been established over the years between US public powers and moderate Muslim communities living on the US soil. Hence, the US – and indeed Western countries in general – might be less likely to obtain cooperation within these communities, which should instead be enhanced to avoid an escalation of the phenomenon of social marginalization potentially leading to radicalization.

Therefore – and paradoxically – President Trump’s efforts to make “America great again”<sup>54</sup> even through his counter-terrorism strategy might have led to weaken the level of security of the US and of its citizens.

Against this alarming background, however, an optimistic note can be struck at the very end of this Chapter. As a matter of fact, the election of Joe Biden, former vice-President during the Obama Administration, as the 46th President of the United States allows those who are worried by the ‘Trump effect’ in the field of security to hope in a U-turn regarding counter-terrorism. The recently elected President may look back at President Obama’s path, so restoring and further reinforcing those measures that aimed at promoting transparency and related accountability.

At the domestic level, the ‘Biden age’ should give birth to a US Constitution-abiding criminal law model,<sup>55</sup> based on the prevention and prosecution of terrorist crimes according to federal laws and with all necessary procedural guarantees.

On the global scenario of the fight against international terrorism, measures ensuring transparency of targeted operations, both looking at the decision-making process and at available evidence to ground the action, should be reinstated and reinforced, granting Congress a stronger role of oversight and ensuring real accountability in case of mistakes or abuses.<sup>56</sup>

In general, the US should resume all necessary efforts to rebuild international credibility as a constitutionally governed Western democracy, grounded on the strict respect for the rule of law, capable of promoting liberal and democratic values by means of its example. Particularly, in the long term, engagement with minorities and local communities (both at home and overseas) should be reinforced, in order to de-escalate violence and

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<sup>54</sup> See *supra*, note 5.

<sup>55</sup> See A. Vidaschi, *The Dark Side of Counter-Terrorism: The Argument for a more Enlightened Approach Based on a Constitutional Law Paradigm*, in S. Shetreet, W. McCormack (Eds.), *Culture of Judicial Independence in a Globalised World*, Leiden, 2016, 94–115.

<sup>56</sup> See, *inter alia*, *El-Masri v. United States*, 437 F. Supp. 2d 530 (E.D. Va. 2006), in which the plaintiff, a suspect of terrorism, alleged that he was unlawfully detained and interrogated by the defendants (CIA and its employees). After the submission of a classified declaration by the Director of the CIA, the United States District Court for the Eastern District of Virginia granted the motion to dismiss the complaint under the state secrets doctrine. On appeal, the Court confirmed dismissal of the complaint. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). Ultimately, the US Supreme Court rejected the petition for certiorari. *El-Masri v. United States*, 552 U.S. 947 (2007). Vidaschi, *supra*, note 27.

prevent further radicalization, supporting educational and communication programs and building reciprocal trust.

By adopting a more rational and multifaceted approach to the fight against jihadist terrorism, aimed, among others, at eradicating the reasons for radicalization, the US can recover their role of ‘democracy model’, implementing the ‘bright side’ of American exceptionalism and leaving aside the ‘dark’ one. Only in this way, it will be possible to frustrate the foundations of terrorist recruitment and to effectively prevent terrorism before it occurs.

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