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# RSIS COMMENTARIES

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## **Rule of Law or National Security? Legal Policy Shifts under Obama**

Alvin Tan

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*While the George W Bush administration was internationally vilified for applying legal double standards in its “war on terror”, President Barack Obama has been earnest in ensuring that US national security policy adheres to the rule of law, leading to significant policy shifts.*

IN THE REALM of international law, American exceptionalism is nothing new. It can occasionally be witnessed in a range of forms, including efforts by the United States to exempt itself from various international law rules and conventions. The US State Department’s Legal Adviser, Harold Koh, had previously pointed out that a real problem however arose when the US used its exceptional power to apply different rules to itself and the rest of the world. The post-9/11 Bush Doctrine, which Koh characterised as having “a schizophrenic sense of immense global power coupled with great domestic vulnerability”, unfortunately made such double standards the norm rather than the exception.

The most prominent examples of double standards were the conceptual creation of *extralegal persons* and *extralegal zones*. Extralegal persons were not accorded procedural or substantive rights provided either by domestic and international law. Extralegal zones were where terrorism suspects were detained without legal protection. Although meant to support and serve the fight against terrorism, both have unequivocally worked against and hurt US national security and foreign policy interests. President Barack Obama in fact publicly noted that the previous administration had “established an *ad hoc* legal approach for fighting terrorism that was neither effective nor sustainable – a framework that failed to rely on our legal traditions and time-tested institutions; that failed to use our values as a compass”. Increased adherence to the rule of law under the Obama administration was therefore only to be expected.

### **Major changes to US law**

Despite the Obama administration’s foreign policy shifts, the ‘big picture’ in US national security has basically been inherited from the preceding Bush administration. The US under President Obama remained focused on successfully concluding the wars in Iraq and Afghanistan, and the defeat of Al

Qaeda and its affiliates. Nevertheless, President Obama has worked hard since taking office to ensure respect for the rule of law and to make it a cornerstone of his national security policy. Unsurprisingly, two key targets for change had been the thorny notions of extralegal persons and extralegal zones.

With the issuance of Executive Order 13491, President Obama established new standards and practices for the detention and interrogation of individuals in US custody. Individuals held by the US were now only to be subjected to interrogation techniques or treatments explicitly authorised by and listed in the US Army Field Manual 2–22.3. Government agents could specifically no longer rely upon the controversial interpretations of the laws governing interrogation issued by the US Department of Justice between 11 September 2001 and 20 January 2009. For the avoidance of doubt, *Geneva Convention Common Article 3* standards were to be used as the minimum baseline for the treatment and interrogation of detainees

In addition, President Obama ordered the Central Intelligence Agency to close as expeditiously as possible any detention facilities that it operated and not to operate any such detention facility in the future. Furthermore, the US government would now provide an independent humanitarian organisation, the International Committee of the Red Cross, with notification of, and timely access to, any individual detained in any armed conflict in its custody or under its effective control.

Through Executive Order 13492, President Obama called also for the closure of detention facilities at Guantánamo Bay Naval Base, and the immediate review of all Guantánamo detentions. Standards of confinement must now be in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions.

Late last year, President Obama subsequently signed into law the Military Commissions Act (MCA) of 2009, which changed the term of “alien unlawful enemy combatants” to “alien unprivileged enemy belligerents”. This shift brought US legislation and military law closer to standard international humanitarian law definitions and protections. Most importantly, MCA (2009) also rescinded MCA (2006) passed during the Bush administration, which allowed the use of detainee statements obtained through torture, coercion, or cruel, inhuman and degrading treatment.

### **Rule of law or national security first?**

In the name of national security, the Bush administration had to a large extent turned its back on both international and US domestic law. In particular it held that the Geneva Conventions did not apply to members of Al Qaeda and its affiliates captured in the US-led global “war on terror”. The legal changes made by President Obama regarding prosecutions, detentions and interrogations are clear and significant reversals of the hardline Bush doctrine.

This begs the question whether President Obama’s position has been too soft on national security. More importantly, did his commitment to the rule of law come at the cost of American interests? The answer would clearly be no on both counts. General Counsel at the US Department of Defence, Jeh Johnson, has stressed that President Obama’s respect for the law did not mean that he was myopically fixated with it. The protection of US security and interests would always be the overriding priority. For example, although President Obama strongly believed in transparency, he ordered the Department of Defence not to release photographs showing alleged abuse of prisoners in detention facilities in Afghanistan and Iraq. This decision was based on the same reason given by the Bush administration not to release the photographs – the safety of American soldiers still in those areas.

In this connection, it becomes clear that respect for the rule of law and international standards, rather than the promotion of double standards, would better protect US troops serving abroad. For example, by adopting a universal interpretation of the Geneva Conventions as operating rules, there would be little basis for others to develop arguments and legal interpretations that could exclude US military

personnel from international legal protection. President Obama has therefore been earnest in ensuring that US national security policy adheres to the rule of law, and shown that one need not be sacrificed to achieve the other.

*Alvin Tan is an Associate Research Fellow at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University.*