

The single most important role for Congress to play in addressing targeted killing . . . is to assert openly, unapologetically, and plainly that the U.S. understanding of international law on this issue of self defense is legitimate . . . and to put the weight of the legislative branch behind the official statements of the executive branch as the *opinio juris* of the United States.

Anderson suggests several specific legislative measures by which Congress may accomplish that goal, ultimately advising both Congress and the President that they must “use or lose” the ability to justify legitimately targeted killings as a measure of self-defense under international law.

Concluding Thoughts

Perhaps surprisingly, none of the essays in this book actually seeks to *define* terrorism, nor recommend that there be a single accepted definition throughout the United States Code. The term is presently defined several different ways in federal statutes and regulations, some of which include, for example, political motivation, and some which do not. Waxman and Chesney probably come the closest. Waxman implores policymakers to think through the strategy and goals of detaining terrorists before formulating the appropriate rules and systems to suit those purposes. Focusing on the goals of detention, i.e. *why* we detain certain people, as he explains, certainly will help to determine *who* we detain. But without a clear definition of what behavior might make one detainable, there will remain a significant gap in the law. Chesney’s chapter includes an entire section on “substantive grounds for prosecution in terrorism-related scenarios,” describing, as relayed above, various authorities in federal criminal law to subject terrorists to the jurisdiction of Article III courts, but several of the statutes upon which that section relies have differing definitions of what “terrorism” really is. However, his writing suggests that Chesney sees as integral the element of 18 U.S.C. § 2332(d), that an act of terrorism be intended to “coerce, intimidate, or retaliate against a government or civilian population.” Indeed, Jack Goldsmith, in his chapter, suggests that the “definition of the enemy” is “the hardest question in detention policy,” but his discussion, too, speaks of the complexities of detaining “terrorists,” while omitting what “terrorism” actually is.

Although the conspicuous absence of a proffered single definition of terrorism may simply indicate a common acceptance that we are in a fight with enemies incapable of a one-size-fits-all legislative definition, its absence leaves open the possibility of uneven, indeed perhaps even arbitrary, applications of the term. Common colloquial usage does not sound policy make. Rather, its greatest potential is to feed the divisive fervor of political rhetoric used by those in office to justify extraordinary uses of power by themselves, and leads to charges of fear-mongering by those who are not. Several authors in this book point out that dictators often begin their tyranny by labeling dissenters as “terrorists,” and argue that the distinction between liberty and security is a false one. And in recalling the lessons of our own history, perhaps best highlighted by the disdain with which we associate McCarthy-era blacklists, we

are reminded of the effect that labeling peoples and behaviors can have on national political and policy priorities, and how they impact our well-being as a nation under the rule of law. Should a man who flies his single-engine propeller plane into an IRS building staffed entirely by civilians, to protest government policies, beget the same label as members of a foreign organization who fly a jet into the headquarters of our military departments? This question, and others like it, are both difficult to ask and disquieting to consider. But if we as a citizenry are to expect Congress to attempt to tackle many of the extraordinarily tough issues presented in this fine book, they are questions we must ponder with all deliberateness and nuance that both accounts for the requirements of law and the operational necessities of maintaining our security.

Policy Paralysis and Homeland Security: A Review of *Skating on Stilts: Why We Aren't Stopping Tomorrow's Terrorism*

BY STEWART BAKER

Review By Gregory S. McNeal*

The Department of Homeland Security is paralyzed by civil-libertarian privacy advocates, business interests, and bureaucratic turf battles. The result of this paralysis is a bias toward the status quo that is preventing the United States from protecting the homeland. According to Stewart Baker, in his must read book *Skating on Stilts: Why We Aren't Stopping Tomorrow's Terrorism* (Hoover, 2010), this policy dynamic, combined with exponential advances in technology are key threats to U.S. national security.

As this review was going to print, the news was filled with the story of a video that went viral; in the video a passenger was subjected to an intrusive TSA pat down after he refused to pass through a full-body scanner. Privacy groups seized on the controversy, as the ACLU declared “Homeland Security wants to see you naked” and that “the jury is still out on the effectiveness of these machines or whether they justify the invasion of privacy involved.”¹ One cannot fault the ACLU for questioning whether these systems are effective—in fact the GAO raised similar questions, inquiring as to whether the full-body scanners would have prevented the Christmas Day bombing attempt.² What one can fault them for, though, is what Baker describes as advocating for “suffocating controls” on the information the U.S. gathers about suspected terrorists and how it is used (p.27). Consider this telling example recounted by Baker:

I started to believe that some of the privacy groups just objected in principle to any use of technology that might help catch criminals or terrorists. The example I remember best was when the police at Logan Airport got handheld computers. The computers were connected to public databases so they could check addresses and other

* Associate Professor of Law, Pepperdine University School of Law

information when they stopped someone. It was pretty much what any businessman could do already with a Blackberry or iPhone. The American Civil Liberties Union went nuts. The executive director of the Massachusetts chapter called the handhelds “mass scrutiny of the lives and activities of innocent people,” and “a violation of the core democratic principles that the government should not be permitted to violate a person’s privacy, unless it has a reason to believe that he or she is involved in wrongdoing.” (p.27)

These were computers tied to public databases that any citizen could search, and still privacy groups fought tooth and nail to prevent their use. Stories and anecdotes like this one appear throughout *Skating on Stilts* as Baker recounts his tenure in the Department of Homeland Security as Assistant Secretary for Policy. Such stories reveal just how entrenched interest group politics are, and illustrate how resistance to change in the name of privacy has unintended consequences like the pat downs we are now witnessing at the airport. Stewart’s personal quips and observations also liven up the policy discussion, which is accessible even for the non-national security law and policy specialist. For example, when recounting the handheld computer flap above, Stewart writes, “If the ACLU considered that a civil liberties disaster . . . we’d better not tell them that we also have access to the White Pages” (p.28).

Of course, it’s not just the ACLU who is opposed to innovation in security policy. The profits of businesses depend on the status quo (p.26) and the international community simply doesn’t like it when the United States changes policies (p.28). The result is a homeland security system that is nearly paralyzed, especially when powerful interest groups challenge innovation in the media and on Capitol Hill.

Baker explains how policy paralysis is the product of a left-right privacy machine. For example, the U.S. has good information on four hundred thousand terrorism suspects, “of whom less than twenty thousand are on lists that TSA uses to screen air travelers. That means that 95 percent of the identified terrorist suspects get on a plane bound for the United States without receiving any more scrutiny than a grandmother from Dubuque” (p.191). Why? According to Baker, it’s “[b]ecause that’s the way the privacy campaigners want it. It’s the intended result of their remarkably successful effort first to stall and then to roll back the security reforms undertaken after 9/11” (p.191). Privacy advocates turned travel reservation information such as name, address, gender, travel history, and phone number—the same things that are tracked as part of your frequent flier mileage program—into the policy equivalent of a toxic waste site (p.194). If privacy advocates want to blame someone for “touching their junk,”³ they need only look in the mirror.

The book covers issues outside the traditional homeland security policy stovepipes, with four chapters dedicated to technology and tomorrow’s threats. These issues, ranging from intrusions of classified networks to cyberattacks span the homeland security, national security, and defense policy divide.

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* Stewart Baker’s *Skating on Stilts: Why We Aren’t Stopping Tomorrow’s Terrorism* is published by Hoover Institution Press.

Baker’s reasoning for including these chapters is to illustrate how the exponential growth in information technology capabilities has benefited the Pentagon and the nation’s economy, but eventually these advances in technology will become a national weakness. This chapter may strike the reader as an outlier, but it is emblematic of Baker’s larger point—technology is a force multiplier for the nation *and* for the nation’s enemies. For example, advances in biotechnology—which are occurring at an exponential rate on par with that in information technology mean that “[w]ithin ten years, any competent biologist with a good lab and up-to-date DNA synthesis skills will be able to recreate the smallpox virus from scratch. Millions of people will have it in their power to waft this cruel death into the air, where it can feed on a world that has given up its immunity” (p.277).

Readers looking for optimism in Baker’s work should probably look elsewhere. In particular, conservatives and libertarians who fear big government and the tyranny of bureaucracy will find ample evidence to rail against the Homeland Security bureaucracy. For example, even when a controversial policy like the handing over of U.S. ports to a Dubai based company placed the regulation of a key security issue squarely within the public’s mind, “the nations and companies that opposed any regulation had successfully advocated for a law and executive order that undermined the security agencies, at least somewhat. That they accomplished their mission in the teeth of noisy public demands for tougher security standards is a testament to their formidable clout” (p.273). In another instance recounted by Baker, he explained how at the National Security Council, Homeland Security was consistently opposed by the State Department, who was more concerned with maintaining U.S.-Europe relations (which had soured after the Iraq invasion) than they were with protecting national security (p.116). Moreover, for those optimists who believe that September 11th heralded a new age of information-sharing between law enforcement and intelligence agencies all acting in the nation’s, rather than their bureaucracies’, best interest, Baker offers this story about the FBI’s opposition to sharing European airline reservation data with other U.S. agencies:

[A]fter long discussions, we figured out what the problem was. The FBI apparently had many agreements with foreign agencies that required it to keep the data to itself and not share it with other U.S. agencies. . . . If the United States declared that [the law] required reconsideration of such restrictions, we realized, the FBI and Justice might have to reconsider their own restrictions on sharing data with other agencies. And Justice did not want to do that. These were the same prosecutors who had fought like tigers to tear down the wall that restricted their access to intelligence agencies’ information; but now, with the shoe on the other foot, they were fighting almost as hard to keep other agencies from seeing the data they were getting from foreign partners. . . . DHS was fighting tooth and nail to win the right to share terrorism data with Justice, to break down the wall; and Justice was fighting just as hard to keep us from succeeding—for fear that it might then have to share more data with us.

Or consider the smallpox example from earlier. If a biological attack were to occur, what kind of government response can the nation expect? Surely nine years after September 11th these issues have been worked out. For example, one response that might resonate with conservatives is to trust people to treat themselves by allowing them to store antibiotics in their homes (p.286). As Baker tells it, this idea ran into the big government buzzsaw. First, the bureaucrats in the Health and Human Services slow-rolled the idea. Next, “to prove that you and I can’t be trusted, and to wait out their bosses, they insisted on a large-scale test” to see whether citizens might improperly open and use their antibiotic kits (p.286). That test proved that government doesn’t know best, in fact only one person opened her kit improperly. Of course, the bureaucrats in HHS were undeterred and ordered more tests and further studies. The result? In December 2009 the White House unveiled the “Roles and Responsibilities” of citizens in the face of a biological threat. The list “says individuals are supposed to ‘follow guidance’ about keeping food and other materials at home . . . and you’re only to keep materials ‘as recommended by authorities’” (p.287). How will the Obama administration get antibiotics to you in an emergency? According to Baker, “[t]he Obama administration decided to make a big bet on the postal service’s nimbleness, sense of urgency and dedication to duty” (p.287). In short, you must bet your life on the postal service. In perhaps one of the most telling anecdotes in the book, Baker asks the reader to consider how much they trust government:

Stop for a moment to imagine the scene. Postal workers will be asked to drive into contaminated neighborhoods even though they can’t be sure their countermeasures will work against whatever strain has spread there. The neighborhoods will be full of people desperate to get antibiotics, so for protection, the postal workers will first have to meet up with guys with guns whom they’ve never seen before. They also have to collect antibiotics from pickup points that they may or may not have seen before. They’ll meet the guys with guns there, or someplace else that may have to be made up at the last minute. Then they’ll start out on routes that almost certainly will be new to them. As they go, they will be expected to seamlessly and fairly make decisions about whether to deliver the antibiotics to homes where no one is present, to rural mailboxes that may or may not be easily rifled, to people on the street who claim to live down the way, to the guys with guns who are riding with them and have friends or family at risk, and to men in big cars who offer cash for anything that falls off the truck. . . . And this will put antibiotics in the hands of every single exposed person within forty-eight hours, from a no-notice standing start? (p.288)

Not holding back, Baker declares “no one but an idiot would bet his life or his children’s lives on flawless execution from a public agency doing something it’s never done before” (p.288). He then goes on to recommend you stockpile your own antibiotics in violation of federal law (p.289). It’s a funny, but also deadly serious passage.

Having recounted all of these problems (and more), what does Baker offer in the form of solutions? Most are

integrated throughout the book, and most were rejected by the bureaucracy or one of the powerful alliances of special interests. Followers of public policy won’t be surprised by this stasis; the status quo bias is a well-established principle in the public policy literature. Nonetheless, most readers will be disheartened by Baker’s account, and close watchers of national security policy will remember the prophetic words of one FBI agent investigating al Qaeda who, on August 29, 2001, sent an email to FBI headquarters, writing “Whatever has happened to this—someday someone will die . . . and the public will not understand why we were not more effective and throwing every resource we had at certain ‘problems.’”⁴ Sadly, someday we may say the same thing about the missed opportunities identified in *Skating on Stilts*. This book is a must-read.

Endnotes

- 1 <http://www.aclu.org/blog/technology-and-liberty/homeland-security-wants-see-you-naked>.
- 2 <http://www.npr.org/templates/story/story.php?storyId=124838054>.
- 3 http://technolog.msnbc.msn.com/_news/2010/11/22/5510440-tell-the-tsa-dont-touch-my-junk-heres-how.
- 4 The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States, at 271.

