33 *Id.* at 2821–22.

34 *See* Robert H. Bork, The Tempting of America: The Political Seduction of the Law 66 (1990); George, *supra* note 25, at 181–82, 196.

35 *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, *supra* note 1.

Institutionalizing Counterterrorism: A Review of *Legislating the War on Terror: An Agenda for Reform*

Edited By Benjamin Wittes

*By Adam R. Pearlman**

Late last year, Benjamin Wittes compiled a series of ten essays that offer a range of suggestions for congressional action with respect to U.S. counterterrorism policies. He means for the text not to be taken as a fluid whole, but rather as a series of independent observations and examinations of the broad, complex swath of legal and policy issues encompassing the once-called War on Terror.

The authors of the various pieces range greatly in both their backgrounds and political persuasions. Contributors include noted scholars as well as practitioners, including former officials from both Democratic and Republican administrations, but, Wittes tells us, the common thread among them is "the belief in the value of legislative action to help shape the contours of the continuing U.S. confrontation with terrorism." In this period of institutionalizing counterterrorism legal authorities in such a way as to recognize evolving strategies and constantly changing tactics, this text overwhelmingly favors statutory lawmaking to establish what can be done, rather than relying on jurisprudential fiat to decree what cannot.

What follows will read more like a "book report" than a book review, but, with a modicum of commentary interspersed throughout, it offers an outline of the key points of each chapter, with the goal of piquing the reader's interest in this interesting compilation.

I. Mark H. Gitenstein: Nine Democracies and the Problems of Detention, Surveillance, and Interrogation.

Mark Gitenstein offers an informative review of the United States' and eight other democratic countries' practices with respect to the detention, interrogation, and surveillance, of suspected terrorists. Gitenstein begins with brief descriptions of Australia, France, Germany, India, Israel, Spain, South Africa, and the United Kingdom's respective experiences with terrorism, discussing major attacks each country has faced and from what groups they face threats. He notes the uniqueness of the United States in terms of our governing structures (including the bifurcation of criminal investigation and intelligence functions), robust civil liberties, and the fact that those who would do us harm generally reside, train, and plan far from our borders. The post-9/11 treatment of terrorism as a largely military operation, Gitenstein says, is therefore partly a result of the fact that the American criminal justice process "is quite restrictive and because the enemy, in any event, tends to reside in areas where application of U.S. law is difficult."

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Regarding the power to detain, Gitenstein notes that the U.S. has not had "a stable statutory policy" governing the detention of suspected terrorists, and instead has relied on a series of executive actions mostly rooted in either a broadly-construed power to detain material witnesses, or detention under the laws of war. With the exception of Israel, Gitenstein asserts that none of the other countries he examines have employed the latter basis. Still, nearly every other country had broader domestic, non-military detention authorities than does the U.S., albeit with statutory procedural protections including judicial review.

Whereas each government's detention regime has distinct characteristics, authorities, and limitations, "the world's democracies have shown a remarkable convergence concerning appropriate legal restraints on interrogation." Gitenstein bases much of his discussion on interrogation practices on interpretations of the Convention against Torture, its definition of what constitutes 'torture,' and generalizations about four countries' legal limits on physical interrogation, although he suggests that some such limits, while constituting national policy, nevertheless are not hard-and-fast rules without exceptions.

Finally, Gitenstein reviews how all eight other democracies' powers to engage in electronic surveillance of terror suspects are far broader than those of the United States government. Such relatively permissive laws governing monitoring practices, for example, "generally do not require advance judicial authorization for intelligence-gathering wiretaps." Gitenstein briefly examines legal authorities in each of the countries, and under what circumstances information obtained pursuant to a national security investigation can be shared with law enforcement authorities for criminal prosecution. South Africa's laws, which in every instance are influenced by the country's desire to promote privacy and civil liberties in the post-apartheid era, come the closest to resembling American restrictions on surveillance and uses of so-procured information. Although Gitenstein asserts that none of the other countries allows its executive to bypass the statutory framework of its surveillance capabilities (an apparent jab at President Bush's authorization of the National Security Agency's Terrorist Surveillance Program, which operated outside the restrictions of the Foreign Intelligence Surveillance Act (FISA)), he also "cautions against too rigid an insistence on the precise lines that FISA draws."

Gitenstein concludes with two parting notes: first, that the United States has the potential to deploy far broader domestic (rather than military) detention and surveillance policies without running afoul of "the mean" of other democratic countries, and second, that the most unique feature of the U.S. battle against terrorism is the "virtually unlimited executive authority" exercised with the above-examined three features of counterterrorism policy. Regarding the former, Gitenstein notably uses language such as "consensus" and "norms" when speaking of common threads between the countries he examines: the word "custom" is noticeably absent from his discussion. As for the latter, although he acknowledges the fundamental differences in governmental structure between the United States and the other nations, he seems to give somewhat short-shrift to the fundamental differences between the dynamics of legislative and executive power in parliamentary systems versus our own. To be fair, however, such differences are ancillary at best to his main premise, as the first chapter lays important groundwork for much of the rest of the book: giving perspective to the options U.S. policymakers have as they move forward with developing our own institutions to fight terror.

* Legislating the War on Terror: An Agenda for Reform *is published by Brookings Institution Press*.

II. Matthew C. Waxman: Administrative Detention: Integrating Strategy and Institutional Design

Professor Waxman's essay is adapted from a longer piece published last year in the Journal of National Security Law and Policy: "Administrative Detention of Terrorists: *Why* Detain and Detain *Whom*?" In this chapter, Waxman does not offer substantive answers to those two questions as much as a road-map or suggested approach by which policymakers can shape a sound detention policy. He begins with the most basic question, asking Congress to start a policy from scratch: what is the strategic purpose of detaining terrorists? The answer to that question, Waxman asserts, is essential to determining who should be detained, which will inform the resulting institutional design of the detention system. That ultimate discussion of design, the question of "*how* to detain," Waxman says, too often comes before the foundational questions of "why" and "whom" are answered.

Waxman briefly explains the rationales behind criminal detention (prosecution and punishment for past wrongs) and detention under the law of armed conflict (removing hostile forces from the battlefield), and asserts that the United States "needs to think through how to define the set of cases that fall between the two existing systems" and determine the proper role for a prevention-based administrative detention system. He identifies four possible strategic rationales around which such a system can be designed: incapacitation, deterrence, disruption, and intelligence gathering. While several features of these rationales work in tandem, Waxman says, there are also "tensions and trade-offs" between them, as he demonstrates by discussing who the potential targets of detention would be under each strategy. Targeting individuals determined to be the greatest threat of carrying out a specific attack, for example, is somewhat distinct from targeting those who plan or coordinate attacks, or who have the most information about a given organization's structure and operating bases.

Based on an assertion that overbroad administrative detention powers risk both liberty (in terms of potential for governmental abuse) *and* security (by alienating and radicalizing groups of people who perceive themselves to be victimized by detention), Waxman concludes that two potential strategies, those that prioritize deterrence or information gathering, should be discarded as primary bases for detention. Instead, Waxman says that either incapacitation of individuals or disruption of plots serve as the most sound strategies upon which to design a detention system.

But the distinctions between these two strategies can result in very different systems. The goal of incapacitation

will tend to result in long-term detention of individuals likely targeted either because of their immediate dangerousness or perhaps because of certain prior violent acts or membership in a particular group. Detaining individuals so as to disrupt particular terrorist plots, however, begets shorter periods of detention, and also will likely require far more restrictions on a detainee's access to counsel and the transparency of any proceedings pursuant to the detention so as not to tip-off the detainee's co-conspirators. Waxman emphasizes that legislators and agency decision makers must think through these problems from their strategic underpinnings so that any system eventually developed is one that coincides with sound policy priorities and fits the purpose(s) for which it is designed.

III. Jack Goldsmith: Long-term Terrorist Detention and a U.S. National Security Court

Professor Goldsmith's chapter seeks to simplify the issues surrounding the potential of setting up an Article III national security court. He begins with a very clear-cut proposition: the debate about whether there should be one "is largely a canard," as there already *is* a de facto national security court set-up in the federal courts of the District of Columbia. Although long-term military detention is lawfully possible during the present armed conflict against terrorists, Goldsmith says, three characteristics of the conflict make reliance on military detention problematic. First, the nature of the un-uniformed enemy increases the risk of erroneous detentions; second, "this war, unlike any other in U.S. history, seems likely to continue indefinitely"; and third, the possibility of such indefinite detention "strikes many as an excessive remedy" for mere membership in a terrorist group (referring to the fact that classic military detention models are status- rather than conduct-based).

Still, Goldsmith is not advocating for the elimination of traditional military detention in favor of holding all captured terrorists in some sort of Article III treatment. Several detainees legitimately qualify for noncriminal military detention, and, as a policy matter, it would be untenable if such individuals were found not guilty by a jury (a distinct possibility, given the recent verdict in *Ghailani*), or given a light sentence by a judge. Furthermore, Goldsmith says, subjecting terrorists to traditional, unqualified criminal processes in Article III courts risks precedents that erode the rights of other criminal defendants (Goldsmith uses the examples of the Moussaoui trial's watered-down confrontation procedures, and the Padilla prosecution's "unprecedentedly broad conception of conspiracy law").

According to Goldsmith, although the D.C. federal courts have amassed some of the virtues of his ideal national security court (i.e. a centralized body with limited members who have developed an expertise in national security matters), it is nevertheless largely an ad hoc system that grew up out of the courts themselves, rather than as part of a comprehensive legislative effort to vest jurisdiction in a body with a prescribed set of rules and procedures. He raises and makes suggestions regarding four overarching issues. First, he suggests that national security court jurisdiction and procedures be applied to U.S. citizens and non-citizens alike, to ensure fairness in the system. Second, he discusses at length the problem of defining the class of persons subject to detention reviewable by a national security court, arguing for a conduct-based criterion for detention measured by a detainee's direct participation in hostilities (likely similar to the functional test the D.C. courts have adopted in the Guantanamo habeas cases). As the reader might intuit, such "participation" will have both substantive and temporal elements, although Goldsmith leaves it to the political branches to decide how to determine and measure such elements, almost implying that a "reasonableness" metric might be relied upon.

Third, Goldsmith raises a few of the plethora of procedural issues that will have to be addressed for a functioning national security court. Evidentiary issues such as hearsay and the handling of classified information tops his list, but he also argues for "maximum public disclosure" of proceedings, judicial review of the grounds of detention at regular intervals, and for detainees to be able to access counsel via a "standing pool of government-paid defense lawyers." Finally, Goldsmith skims some of the issues relating to the institutionalization of the court. Here, his most assertive statement is that, if the national security court is to be a stand-alone institution, Congress should *not* merely expand the FISA court, which handles matters that require maximum secrecy. Professor Goldsmith concludes by recommending that Congress build a sunset provision into any legislation creating and empowering a national security court, so that it is forced to revisit the issue in the coming years, and determine which aspects of the court work well, and which do not.

IV. Robert M. Chesney: Optimizing Criminal Prosecution as a Counterterrorism Tool

Acknowledging there is no single "correct" response to terrorism, Professor Chesney posits that whether the United States should ensure that we have a criminal justice system capable of trying terrorists is beyond debate. And, especially in light of President Obama's preference to try terrorists in federal court when possible, Chesney echoes the common prediction that Article III courts will continue to be pressured by increasing terrorism-related caseloads, and demands not commonly imposed upon them in regular criminal trials. Still, he says that what are perhaps the most common objections to criminal process—that it is neither a tool of prevention, nor is it readily flexible enough to handle the demands of terrorism proceedings—are over-stated.

Chesney describes several federal criminal statutes already on the books to support his proposition, and fills-in many potential jurisdictional gaps using examples of prosecuting defendants linked to terrorism with other, ancillary crimes, as well (i.e. the "Al Capone strategy"). These include material support and conspiracy statutes, which to an extent serve as de facto prohibitions on membership and association with terrorist groups, thereby attaching criminal liability to terrorist associates before any attacks are carried out. Chesney explains, however, that prosecutions under such statutes are limited to individuals associating with formally designated terror groups, at a time after the defendant's group of choice has been duly designated. Still, Professor Chesney points out that the prosecution of Jose Padilla in federal court resulted in a conviction based on his "informal 'membership' in the jihad movement itself,

irrespective of whether [he could] be linked to any particular organization or plot." Although Chesney warns that the *Padilla* charging strategy may not be generalizable, as it is likely that some juries will not convict on that theory, the case shows the potential breadth of conspiracy liability as applied to defendants with links to terrorism.

Chesney notes that federal criminal laws do have some distinct limitations: ex post facto considerations are paramount, and criminal laws tend not to cover overseas acts by noncitizens against noncitizens, nor do they reach members and supporters of groups not federally designated as terrorist organizations. Chesney nevertheless argues that federal criminal legal authorities compare reasonably well to the government's asserted military detention authority and authority to prosecute a subset of those detained for war crimes via military commissions. The three distinct grounds upon which terrorists are subject to military detention—fighting with or on behalf of, membership in, and supporting terrorist organizations—are closely mirrored in criminal law. And the crimes that military commissions may charge are similar to the jurisdiction of federal prosecutors.

Procedural safeguards are also discussed in some detail. Chesney cites a Human Rights First report that suggests *Miranda* concerns are overstated because of the doctrine's public safety exception, and explains that the same report highlights problems concerning a criminal defendant's access to classified information, the fact that much intelligence information will not be able to be used in a criminal prosecution, and the requirement of proving guilt beyond a reasonable doubt, which are all significant concerns that create a gap between criminal proceedings and other options. Overriding constitutional concerns, including Confrontation Clause and Due Process implications, necessarily limit to some extent the flexibility the judiciary has to resolve some of these issues.

Ultimately, Professor Chesney suggests seven specific reforms to improve criminal processes with respect to terrorism trials: expand prohibitions on receiving "military-style training"; expand the War Crimes Act to cover attacks by non-citizens on civilians; revisit the mens rea requirement for material support charges; limit possible spill-over effects that material support prosecutions could have in other areas of law; examine the proper scope of conspiracy liability; define the scope of the government's duty to search for and disclose potentially exculpatory but classified information; and amend the Classified Information Procedures Act (CIPA, discussed further below) to address the possibility of a *pro se* terrorist defendant.

V. Robert S. Litt and Wells C. Bennett: Better Rules for Terrorism Trials

Current General Counsel for the Office of the Director of National Intelligence, Robert Litt, along with Wells Bennett, propose that the debate over whether to try terrorists via military commissions, regular Article III criminal proceedings, or in national security courts, is really a dispute about what procedural and evidentiary rules to apply to terrorism trials. Based on their analysis of publicly available information, they conclude that dramatic departure from existing federal court rules is not necessary to resolve potential unfairness to defendants and burdens upon prosecutors, and believe that federal criminal trials are generally a preferable method for prosecuting terrorists. But, they argue, Congress should create a national security bar of cleared lawyers to represent suspected terrorists, and should amend rules for handling classified evidence.

Noting the oft-cited concerns about trying terrorists in federal court—i.e. the potential release of classified information, the burdens on the federal court system, and issues surrounding the adaptability of procedural and evidentiary rules such as chain of custody, *Miranda* warnings, and the use of hearsay evidence—Litt and Bennett argue that many of these caveats to criminal trials are overstated. Establishing a complete chain of custody, they note, is not a hard-and-fast rule to authenticating evidence, as evidenced by the military commissions' rule, which is effectively the same as that found in the Federal Rules of Evidence. The authors also assert the possibility that a defendant can use the public forum of a criminal trial to communicate, undetected, with at-large co-conspirators is remote. And, they note, the Fourth Amendment's search and seizure restrictions do not apply to overseas searches of alien terrorist suspects.

Instead, the biggest problem with respect to terror trials is the use of classified information to secure a criminal conviction. The authors believe the structure that the Classified Information Procedures Act (CIPA) provides in espionage and other cases may also be useful in the terrorism context, though it is not the perfect solution. To take full advantage of a CIPA-like structure, however, requires the creation of a national security bar of defense attorneys whose security clearances are current, and who would develop expertise in handling classified information in the course of litigation. Litt and Bennett propose that CIPA should be amended such that no discoverable information can be withheld from a defense counsel who is a member of the national security bar, that it would be up to the defendant whether to accept counsel who is a member of that bar, and that information not provided to the defendant himself could not be used against him. As no classified information would be allowed to be presented to the defendant personally, it seems that the thrust of the argument for a national security bar is to ensure defendants charged with terrorism-related crimes have adequate representation in-chambers when prosecutors present their proposed unclassified summaries of classified information to a judge to review for adequacy.

The authors suggest that similar principles should apply to depositions of witnesses whose identities must be kept confidential. The authors believe adequately cleared counsel should be allowed to take the depositions of such witnesses, rather than merely have summaries provided to them. The authors note that defendants who wish to represent themselves will not be able to avail themselves of these benefits.

Finally, Litt and Bennett acknowledge that questions surrounding *Miranda*, coercive interrogation, and hearsay pose issues that would have to be resolved for successful trials to occur. Hearsay, they suggest, may be the easiest of the three, as prohibitions on hearsay evidence are based on federal rules with built-in exceptions, rather than constitutional requirements. Still, they believe that there are ways to address each of these concerns while balancing values with risks, and feel that trials that closely resemble criminal proceedings are the best way to prosecute suspected terrorists.

VI. David A. Martin: Refining Immigration Law's Role in Counterterrorism

Noting disadvantages of how immigration laws were used in the aftermath of the 9/11 attacks, David Martin suggests five specific changes to the use of immigration law as a counterterrorism tool. First, Martin suggests a "risk-based approach" to extensive screening of visitors. The current system employs "a double layer of screening" whereby an admissions applicant faces demanding scrutiny by an overseas consular officer and an immigration inspector at a U.S. port of entry. Martin believes such blanket procedures create "white noise" that makes it more difficult to identify true threats. Instead, giving immigration officers greater access to law enforcement and intelligence information will allow them to make better screening decisions.

Second, he notes the value of biometric information, and suggests strengthening authorities to include relevant criminal information in the Automated Biometric Identification System (IDENT) database, while rescinding the mandate to fingerprint all departing noncitizens at land borders. The IDENT database serves as the basis for the Department of Homeland Security's U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) screening system, and although the DHS system has some access to FBI fingerprint records, at the time of Martin's writing, the arrangements for full interoperability of those two systems had not been completed.

Third, Martin suggests that future uses of alien registration laws should be mindful of the effect such laws had in the wake of the 9/11 attacks, and their use should be constrained with respect to resident populations. Relatedly, fourth, Martin says that Congress should either narrow terrorism-based grounds of inadmissibility and deportability, or develop waiver procedures to admit certain individuals who may have ties to terrorist organizations. This latter proposal is one which could serve to roll-back the radioactivity of associating with terrorist organizations, but what links it to his previous point is Martin's suggestion that Congress made a mistake by applying the same stringent standards regarding terrorism links to deportability as it did to admission decisions. In short, he says that the stakes of deportation for the individual being deported can be quite high, especially for someone who has established a livelihood and potentially a family while living in the United States. Martin argues that the bar for deportability should therefore be higher than the superficial connections to terrorism that might make an individual inadmissible. Specifically, he advocates that "in the deportation setting the law should demand more of the government to prove the individual's knowledge and intent in connection with any assistance or support later shown to have gone to terrorist activity or organizations." He further believes that it is possible to distinguish between terrorist organizations that harbor interests inimical to the United States, versus those engaging in "just war[s]."

Fifth, Martin argues that immigration-based detention should be subject to safeguards and review, and that immigration authorities should not be used "as a de facto preventive detention power." Martin notes that, after 9/11, more than 700 "special interest" individuals were detained on immigrations charges, some for as long as a year. He advocates employing the *Zadvydas v. Davis* standards for immigration detention, which would require the government to deport as quickly as possible an individual subject to a removal order, or allow for supervised release. Pre-hearing immigration detention should be confined to individuals who pose a flight risk or danger to society; purely preventative detention, according to Martin, should occur under a separate legislative scheme, and not as part of immigration proceedings.

Finally, Martin echoes a common theme in other chapters that Congress should reexamine how classified information is used in immigration cases. He unequivocally asserts that the government should be permitted to use classified information in immigration proceedings. Consular officers, he explains, have always been allowed to use classified information to consider whether to admit or exclude a person seeking entry into the United States. Due process concerns exist, however, regarding the use of classified information in the course of deportation proceedings. For those purposes, Congress in 1996 created the special Alien Terrorist Removal Court, consisting of sitting federal judges appointed by the Chief Justice, which has never been used.

VII. David S. Kris: Modernizing FISA: Progress to Date and Work Still to Come

Current Assistant Attorney General for the National Security Division of the Justice Department, David Kris, provides a brief but thorough summary of the history of the Foreign Intelligence Surveillance Act (FISA) and the 2008 FISA Amendments Act (FAA). Noting that the 2005 disclosure of the NSA's Terrorist Surveillance Program was the "opening gambit" in the effort to modernize FISA, Kris argues that the FAA was likely not the end to updating federal surveillance authorities, and that much legislative work may yet need to be done. He opines that Congress may yet "want to overhaul the U.S. national security collection statutes *and* criminal investigative statutes." (Emphasis added.)

Traditional FISA warrants are subject to three key substantive requirements: probable cause that the target is a foreign power or an agent of a foreign power, probable cause that the target is "using or about to use the facility at which the surveillance will be directed," and specific minimization procedures to protect privacy interests. FISA does not apply to foreign intelligence collection outside of the United States, but changes in the nature of our national security interests, specifically the rise of stateless actors, have challenged the traditional notion of what it is to be a foreign power or agent thereof, and, more importantly, changes in technology, particularly email, have rendered the geographic notion of a "facility" less important.

Kris notes that FISA originally was designed to accommodate some warrantless wiretapping. He summarizes the three versions of the statute originally proposed prior to its enactment in 1978, and concludes that the final version of the bill contained specific exceptions "designed to accommodate the NSA. . . . FISA left the government free to monitor a great deal of international communications, including communications to or from Americans, without seeking warrants," but only

communications using certain technologies, at facilities located outside the United States. Now, under the FAA, "targeting is not limited to any particular facility or place," but is still limited in other ways, including who is targeted, who may approve the surveillance, and the minimization procedures to be employed.

The FAA, Kris says, both expands and contracts FISA's coverage (what expands FISA coverage decreases the government's warrantless surveillance authority; what contracts FISA generally expands that authority to operate outside the confines of the statute). For example, Kris explains that a statutory requirement of probable cause to initiate surveillance of a wire or radio communication now applies even when all parties to that communication are located abroad, if one of those individuals is a U.S. person. However, a warrant is not required to inspect the foreign-to-foreign email exchanges, even if those messages are stored on a U.S. based server. A warrant is now required for surveillance of U.S. persons located abroad, but not required for non-U.S. persons located abroad even if the monitoring occurs from within the United States.

Kris believes that the FAA does not represent the end-game for amendments to foreign intelligence surveillance authorities. He reasons that it is a complicated statute that "continues to rely on location as a trigger for legal requirements," and it may represent an incomplete regime with respect to the government's retention and dissemination of collected information. Instead, he suggests that it is possible in the long run "to imagine" a framework of only two major national security-oriented collection statutes: one to replace the varying laws governing national security letters, FISA pen registers and trap-and-trace devices, mail cover regulations, and Patriot Act business records acquisition authorities; and one governing the "acquisition of information for which a warrant would be required if undertaken for law enforcement purposes in the United States," which would treat physical and electronic searches similarly.

VIII. Justin Florence and Matthew Gerke: National Security Issues in Civil Litigation: A Blueprint for Reform

Justin Florence and Matthew Gerke argue that federal courts have increasingly conflated the two doctrines in civil cases that implicate U.S. national security: the jurisdictional or justiciability rule, and evidentiary privilege. They believe Congress should provide courts with legislative guidance to prevent judges from bringing those separate principles under the single heading of the "state secrets privilege" that prompts the dismissal of cases when it is invoked. Instead, the privilege should be deemed to be a rule of evidence, rather than justiciability, and should serve, when properly invoked, merely to exclude specific evidence from a case, not necessarily dismiss the action without further analysis. The authors also advocate for the adoption of certain procedural rules to help determine when dismissal is warranted. And they suggest that "Congress should put rules in place so that, even if secret evidence prevents the civil litigation system from dispensing justice in certain cases, other government institutions can fill in for the courts by providing redress to wronged parties and ensuring that the government is held accountable."

The authors briefly trace the history of state secrets doctrine from English royal prerogative to post-9/11 uses to block litigation pertaining to suits against telecommunications companies accused of being complicit in warrantless surveillance programs, and suits against the government into alleged torture and rendition of detained suspected terrorists. They say that reform of the privilege should be "guided by three overarching goals: protecting the national security of the United States, providing access to justice, and ensuring that government actions are legal and politically accountable." Although they assert that there should be "a strong state secrets privilege," Florence and Gerke argue that it should simultaneously "provide the maximum level of openness and adversariality possible," to allow individual cases to proceed as close to complete resolution as practicable, while at the same time preventing executive abuse of the privilege.

In sum, Florence and Gerke believe that Congress should clarify that the privilege should be invoked to protect disclosure of classified evidence, but not serve to block a pending lawsuit altogether, without further analysis of the classified evidence at issue. They also argue there should be greater judicial review of the evidence the government asserts is subject to the privilege, including bringing-in cleared national security experts to review the information and add "some modicum of adversariality" into the court's ultimate determination. Further, Congress should provide "a clear standard for determining what evidence is privileged" beyond merely noting the fact that a piece of information is classified, and outline the consequences of a finding of privilege, which could include the possibilities of developing a CIPA-like unclassified substitute for the privileged evidence, victory for the plaintiff, absolute privilege of the evidence, qualified privilege subject to balancing, judicial consideration of the merits without disclosure to the non-governmental party, or judicial consideration for the limited purpose of whether the finding of privilege requires dismissal, and therefore victory for the government.

According to the authors, the Department of Justice should be required to report to Congress' judiciary and intelligence committees about its invocation of the privilege, and Congress, in turn, should also allow judges to refer any concerns they have about how the privilege is used to Justice Department investigators. Finally, they say, treating state secrets as a justiciability doctrine requiring dismissal of a case that may invoke classified information, rather than an evidentiary privilege calling for analysis of the information the government seeks to protect, is erroneous as a default position. Instead, claims should be adjudicated to the extent possible, while still exercising measures to protect national security.

IX. Stuart Taylor Jr. and Benjamin Wittes: Looking Forward, not Backward: Refining U.S. Interrogation Law

Stuart Taylor and Benjamin Wittes engage in a fairly even-handed look at interrogation policy, and how to proceed in codifying laws that provide both sufficient guidance to those "in the room," and the flexibility decision-makers will need to respond effectively to the wide range of information-gathering scenarios likely to lay ahead. Although they describe the Bush administration's treatment of the issue to be characterized "with

a public bravado and an ostentatious disregard for international law," they also criticize the approach of human rights groups, observing that "Moral absolutes tend to founder in the turbulent seas of real life."

Taylor and Wittes preface their proposals by defining the terms that are so central to understanding the legal bounds of detainee treatment (e.g. "torture," "cruel, inhuman, or degrading," "highly coercive," and "mildly coercive"), and with a brief synopsis of post-9/11 interrogations and the situations that gave rise to prisoner abuse in some cases. They contrast the CIA's highly regulated interrogation program with the arguably disjointed and uncoordinated response of in-theater military questioning, what they call a "culture of confusion about what the rules were." The chapter continues by reviewing the reforms to interrogation policy that occurred during President Bush's second term, which included both internal executive branch initiatives (such as a DOD working group, revisions to the Army Field Manual banning all coercion and threats, and the withdrawal of certain OLC memos), and legislative action (specifically the McCain Amendment to the Detainee Treatment Act, and certain provisions of the Military Commissions Act). They also discuss President Obama's actions in this regard as of the date of their writing, specifically his Executive Order that the CIA comply with the Army Field Manual, a provision with which they strongly disagree.

The authors do not "pick a side" on the debate about whether coercive interrogation works. Rather, they acknowledge the debate and the uncertainty, and one-by-one prop up and knock down the arguments for banning *all* coercion. Instead, they support a measured and sensible division of labor between military and intelligence agencies, reflective of each entity's respective training, purpose, and structure. Intelligence agency interrogators, they reason, often have the benefits of extra specialized training, and can question a detainee away from the chaos of a battlefield. Still, they stress that torture should remain a crime in all circumstances, and that highly coercive methods should be off-limits as a matter of policy, subject to a narrow exception reserved for a small number of high-value detainees, upon presidential authorization.

X. Kenneth Anderson: Targeted Killing in U.S. Counterterrorism Strategy and Law

Professor Anderson makes a compelling argument that Congress should be proactive in preserving the United States' legal authorities to conduct targeted killings of terror suspects. Saying that the strategic, moral, and humanitarian logic of the practice is "overpowering," he asserts that targeted killing programs "will be an essential element of U.S. counterterrorism operations in the future." But he believes that by accepting broader applicability of international human rights law than is necessary, U.S. policy is inadvertently shrinking the legal space that permits the practice.

According to Anderson, even cabining the practice within the confines of the laws of war (international humanitarian law), and certainly by appealing to the operational authorities granted by Congress' Authorization for Use of Military Force, unnecessarily cedes ground to the United States' sweeping privilege of self-defense. Qualifying the nation's ability to carry out such operations via those bodies of law risks limiting our ability to do so when situations arise that do not fit into those specific authorities. Further, appealing to international precedents invites influence of the "soft law" developed by the international academics on U.S. national security prerogatives. The author calls on Congress "to reassert, reaffirm, and reinvigorate [targeting as an exercise of self-defense] as a matter of domestic law and policy and as the considered, official view of the United States as a matter of international law."

Anderson notes that a "full response" to terrorism generally, not merely in anti-al Qaeda operations, requires the United States to leverage its capabilities across all three operational paradigms covering counterterrorism measures: criminal law, the law of armed conflict, and intelligence-based uses of force. His view on this point of course echoes the 9/11 Commission's recommendations to "[r]oot out [terrorist] sanctuaries . . . using every element of national power." But in application, he notes that transnational terrorists are "more efficiently targeted through narrow[] means," and further points out the great political costs of capturing and holding detainees for whom the public demands trials, as opposed to eliminating enemy forces in the field. Yet Professor Anderson nevertheless makes a powerful argument for the "strategic and moral logic of targeted killing," that includes the humanitarian benefits of discriminating targeting coupled with technological advancements that allow U.S. forces, from a stand-off position, to minimize collateral civilian damage.

Professor Anderson continues with a discussion about principles of international law as they apply to U.S. targeting operations with a nuance that cannot be done justice in this brief space. He illustrates the debate over the meaning of "armed conflict" with respect to whether one is governed by the laws that allow for the resort to force, versus the rules of warfare governed by international humanitarian law, and why the distinction matters. He notes the attempts of certain factions of the international community attempting to thrust principles of international human rights law into the laws of war, and the potentially deleterious effect that could have on U.S. self-defense prerogatives if they are successful in doing so. And he describes how the United States' own stated justifications for engaging in lethal targeted operations are unwittingly aiding that effort by trying to fit our activities under the authorities granted by the AUMF or IHL, rather than the broader doctrine of self-defense.

Claiming that tailoring legal justifications narrowly to presently sufficient authorities (like the post-9/11 AUMF) may risk America's future ability to exercise targeting prerogatives under a self-defense doctrine, because of the developing international "soft law" against the practice, Anderson calls on Congress "to *preserve* a [legislative] category that is likely to be put under pressure in the future and, indeed, is already seen by many as a legal nonstarter under international law." He expresses that it is in the United States' interest to do "that exceedingly rare thing in international law and diplomacy: getting the United States out in front of the issue by making the U.S. position plain . . ." To that end,

> 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

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