

National Intelligence and the Rule of Law

Deborah N. Pearlstein*

I. INTRODUCTION

For the past seven years, public discussion about national security policy has been plagued by a mistake in framing made in the immediate aftermath of the attacks of September 11, 2001. It was in those frightening times that both public leaders and legal scholars identified the key challenge of counterterrorism as how best to balance liberty and security. But as has since become apparent, the balance metaphor is, at best, inexact. As the 9/11 Commission Report itself made clear, the fundamental freedoms of our open society were not the primary or even secondary reason the terrorists succeeded on September 11. Societies decreasingly concerned with human rights, like Russia, have not necessarily been increasingly well protected from terrorism. And the most important actions Congress has taken to protect against catastrophic attacks—like legislation expanding U.S. involvement in international cooperative efforts to inventory, secure, and track the disposition of fissile materials—have involved no compromise of human rights.

The balance metaphor made thinking about post-9/11 security policy easy—fewer liberties equals better security—but it as often made it misguided. We began rounding up suspects before we knew what questions to ask, alienating the communities we needed most when we knew enough to be more targeted in our search. We subjected detainees to brutal treatment and torture, without reconciling ourselves to how such practices would compromise the hope of bringing the guilty to justice. We declared ourselves loosed of international legal obligations before coming to terms with how such decisions would compromise our international allies' willingness and ability to work with us in preventing terror. The result has been to damage our intelligence collection capacity, leave the full strategic power of our criminal justice system untapped, and weaken the scope of our international reach. As we think about designing national security policy going forward, we need to leave this most simplistic kind of balancing behind.

At the same time, a new security policy agenda is inadequate if it does no more than identify what has not worked and correct our most recent mistakes. The Military Commissions Act of 2006, the Foreign Intelligence Surveillance Act amendments of 2007, perennial post-9/11 proposals for a new legal regime of “preventive” detention—all are examples of rights reduction masking as affirmative approaches to national security. Such initiatives, which chip away at basic rights of due process, privacy, and judicial review, are simply efforts, however misguided, to correct the “balancing” mistakes of the current Administration. There are no doubt some important corrections we must make, including to resolve the situation of the detainees at Guantanamo Bay and to clarify at last that a single, humane standard of treatment governs all U.S.

* Visiting Scholar, Woodrow Wilson School of Public and International Affairs, Princeton University.

interrogation operations—no distinction between the Central Intelligence Agency (“CIA”) and the Defense Department, no daylight between military and civilian. But the unique package of limited corrections necessary to resolve these existing problems should not be mistaken for an answer to the real policy challenges that remain about how best to protect the United States from terrorism. We must not let the hard case of fixing Guantanamo make bad law for all future approaches to intelligence collection.

Instead, we must return to the more basic questions that have not much occupied the legal debate: what specifically is the threat of terrorism; what is a realistic national goal to work toward in addressing it; what is our strategy for reaching that goal; and what tools are necessary to make that strategy a success? To be sure, these questions of threat assessment, objective setting, strategy and tactics are questions in the first instance not for lawyers, but for experts in psychology, history, technology, religion, organizational design and decision-making, policing, and national security. Wise policy will rely on their insights.

What lawyers can perhaps offer at this stage is some guidance about the role law can play in aiding this task of government—from security policy development to its deployment. The remainder of this essay aims to do that, with a particular focus on the role of law in aiding the collection of intelligence. It begins with a simple premise that has been, surprisingly, much challenged in recent years: there is no “intelligence collection” exception to the commitment of the U.S. government to operate under a system bound by the rule of law. To be clear, the expression “rule of law” does not refer, in particular, to a list of rules to be followed. It means a set of ideas: people will be governed by publicly known rules that are set in advance, that are applied equally in all cases, and that bind both private individuals and the agents of government.

Our society has long thought the rule of law a good idea for reasons that are centrally relevant to the intelligence collection mission. The law can create incentives and expectations that shape institutional cultures. It can construct decision-making structures that take advantage of comparative institutional competencies, and maximize the chance for good security outcomes. It can provide a vehicle for building and maintaining more reliable working relationships with international partners. Finally, and not least, it sets limits on behavior and ensures accountability. This list of virtues is, of course, only the way law functions ideally; the law itself must be clearly conceived and reliably enforced. But in considering the lessons of the past several years, it becomes apparent that *intelligence collection needs law* to fulfill these roles. Put differently, law must be considered an essential component of counterterrorism strategy going forward.

II. SHAPING INSTITUTIONAL CULTURE

Among the many insights of the 9/11 Commission Report was the extent to which the age-old culture of secrecy within the intelligence community compromised terrorism threat assessment and analysis. Information was hoarded rather than shared within the federal government; state and local officials and first responders felt cut off from federal information sources, and vice versa. While some small progress has been made, a recent Government Accountability Office (“GAO”) report finds that much of the sharing that occurs today is in gross—access to mammoth databases, of uncertain accuracy or relevance, that accordingly are, at best, of questionable benefit to national security.¹

¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-35, HOMELAND SECURITY: FEDERAL EFFORTS ARE HELPING TO ALLEVIATE SOME CHALLENGES ENCOUNTERED BY STATE AND LOCAL INFORMATION FUSION CENTERS 6-9 (2007).

Unnecessary secrecy has hamstrung our intelligence community with a host of ills. It of course undermines government's ability to "connect the dots" between facts that might alert officials to an impending attack. It also handicaps the important need for intelligence collection to adapt to changing environments over time. As organizational theorists have long emphasized, the ability of organizations to learn from mistakes (and successes) and to incorporate those lessons into ongoing operations is essential for organizational effectiveness. Compartmentalization of knowledge limits this critical ability to learn. Indeed, secrecy can all but exclude the possibility of independent judgment or meaningful review, creating an environment in which, as cognitive psychologists helped explain a quarter-century ago, "groupthink" can flourish. U.S. national security history is replete with mistakes made by homogenous groups, insulated from competing ideas or processes, moving forward without critically evaluating their own ideas of balancing tactical advantage against strategic goal.

Perhaps most troubling, secrecy can disable the ability of agreed-on laws to function, and create conditions that make it more likely for abuse of all kinds. As former UN Special Rapporteur on Torture Nigel Rodley has written in the context of detention, "the more hidden detention practices there are, the more likely that all legal and moral constraint on official behavior [will be] removed."² It is for this reason that a host of domestic and international human rights laws disfavor government secrecy. And why organizations like the International Committee of the Red Cross—while recognizing the importance of and upholding strict commitments to confidentiality—believe that even confidential engagement with government operations is better than no engagement at all. Even modestly intrusive structures of independent monitoring can help. Particularly in a conflict in which, it is often said, it is necessary to "win the hearts and minds" of those who would reject our system, it is in no one's interest to have laws on the books only to have them violated with impunity because of efforts to keep secret information demonstrating that violations have occurred.

Excessive secrecy is hardly the only disadvantageous cultural phenomenon that exists in the intelligence community, but it provides a particularly useful example of how law can help by shaping cultural norms. Consider just a few examples. As the 9/11 Commission pointed out in its report, the rule incentive structures on 9/11 imposed risks on intelligence community members for inappropriately sharing classified information.³ But there was no penalty for failing to share information that should be transmitted. Nor was there any reward for responsiveness and communication. Rules that disfavor secrecy yet provide no advantage to critical information sharing only perpetuate the destructive cultural norm. The law can be redesigned to help work against it.

Much the same case may be made for the role of congressional oversight. The law currently requires congressional intelligence committees to exercise broad oversight of executive intelligence activities, but makes an exception for certain highly classified activities, allowing some to be briefed only to a "gang of eight"—the leadership of the House and Senate and of the intelligence committees, with no staff present or able later to learn about the content of the briefing from the members. As Suzanne Spaulding and others intimately familiar with the process on Capitol Hill have warned, such limitations on the process of information sharing and analysis make meaningful

² NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 244 (Oxford Univ. Press 2d ed. 1999).

³ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 416-18 (2004).

oversight virtually impossible.⁴ Members are generally not capable of sorting through complex legal requirements on their own, and their ability to take any effective action against a troubling program is sharply constrained by the dearth of facts required to craft a response and persuade others to join in support. In short, the current “gang of eight” exception amounts to no effective oversight at all. The absence of even this kind of *ex post facto* independent review insulates poor policy-making and abuse, and badly hamstrings the learning capacity of the intelligence community over time. Revised legal structures may help cure the learning disability that results from such crabbed review.

A final example: Recent use of the so-called “state secrets privilege” has enabled the executive branch to escape all judicial scrutiny of major government counterterrorism initiatives posing a potentially (or actually) significant burden on individual rights. While the protection of legitimate government secrets is essential, the shield of secrecy should not be used to hide unlawful government activities, or to immunize government officials against accountability for the unlawful breach of human rights. From the National Security Agency’s engagement in domestic warrantless surveillance, to the extraordinary rendition of suspects, to limits on the scope of whistleblower lawsuits—the common law state secrets privilege has been expanded through executive usage and judicial decision beyond what is legitimate or necessary for the protection of national security secrets, and at the expense of checks to ensure government conduct remains within the bounds of law. Congress should move to limit the privilege’s scope, and to make clear that while procedural steps can and should be taken to protect legitimate interests in secrecy, the existence of secrets cannot justify the dismissal by courts altogether of claims for the violation of individual rights.

The culture of secrecy can only be partly solved by law. But law is an essential element of the cure. We should pursue as a matter of national security the kind of legal rules economists would call information-forcing defaults. The law should err on the side of forcing more information to more people, inside and outside the executive branch. Indeed, a government under the rule of law functions best when its actions and policies are known broadly and subject to public scrutiny. While there is no question that secrecy is sometimes required for the success of security operations, secrecy must not become the U.S. government’s default position. Measures to protect secrets should be drawn as narrowly as possible to serve the interest of national security. The need for secrecy can never excuse the government from the accountability law requires.

III. STRUCTURING DECISION-MAKING

One of the most interesting insights to come out of government documents leaked in the wake of revelations of torture at Abu Ghraib was the extent to which elements of the professional military pushed back against civilian authorities demanding a “gloves off” approach to intelligence collection. Within the Pentagon, for example, the top Judge Advocate General’s Corps officers in each of the services responded vigorously against proposals to authorize the use of dogs and “stress positions” to educe information from U.S.-held detainees on the grounds that such techniques were contrary to law and would undermine the U.S. mission; their opposition in that instance led quickly to the rescission of official authorization of some of these most violent techniques. At the same time, on the front lines, reservists and contract employees tasked with detention or intelligence functions lacked even the most basic instruction,

⁴ Suzanne E. Spaulding, *Power Play*, WASH. POST, Dec. 25, 2005, at B01.

much less the kind of expert decision-making judgment that comes with career experience; these troops were among those implicated in some of the worst forms of abuse. The military was not the only agency struggling with inadequate expertise to meet and evaluate policy taskings. The CIA was placed at the forefront of operations to detain and interrogate suspected terrorists worldwide in the days following the September 11 attacks—despite both the absence of significant detention experience within the agency and a profound dearth of trained interrogators.

While classification rules may prevent us ever knowing in detail whether these interrogation programs produced any security benefits, there can be little question about their security burdens. Beyond the damage these policies have done to counterterrorism cooperation efforts with traditional U.S. allies, discussed more below, intelligence sources have pointed to the particular impact of such practices on intelligence collection. As one U.S. Army intelligence officer who served in Afghanistan put it in his subsequent book, *The Interrogators*: “The more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect.”⁵ Today, extremist websites invoke the image of Abu Ghraib to generate support for terrorist action against the United States.

It is hardly news that professional expertise—the acquisition and maintenance of a set of technical knowledge, skills, norms, and ethics—can be a constructive force through which policy judgments may be filtered and improved. As Samuel Huntington theorized in the military context in his classic 1957 work, *The Soldier and the State*, “[a] strong, integrated highly professional officer corps... immune to politics and respected for its military character, would be a steadying balance wheel in the conduct of policy.” Beyond the military, traditional administrative law has long recognized the virtues of agency expertise. As the Supreme Court put it in the 1944 case *Skidmore v. Swift*:

We consider that the rulings, interpretations and opinions of the [Agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁶

Courts respect these judgments not solely because agencies are empowered to make them, but because executive agencies house one of the U.S. government’s primary sources of expertise and persuasive professional judgment about what should be done. Today, understanding how to design effective responses to the most potentially damaging terrorist threats—nuclear and biological terrorism in particular—requires highly technical knowledge of how such weapons might be acquired and what consequences a successful attack could have. In such a complex environment, a security policy approach based on nothing more than political instincts will not suffice to defuse the threat, and we should question whether it is invariably enough to persuade under law.

⁵ CHRIS MACKAY & GREG MILLER, *THE INTERROGATORS: TASK FORCE 500 AND AMERICA’S SECRET WAR AGAINST AL QAEDA* 44–45 (Little, Brown & Co. 2004).

⁶ 323 U.S. 134, 140 (1944).

In the security context, as elsewhere, much may be gained by legal rules designed to ensure that decision-making structures include—or perhaps more important, are not subverted to exclude—those with the most relevant professional knowledge about what approaches are likely to be effective. When courts are asked to review executive actions, deference may be greater when the political and professional arms of the executive branch are in agreement, far less when they are in discord. Likewise, in assessing the level of deference to which security-related judgments are entitled, courts should most respect authority exercised pursuant to a decision-making process likely to yield rational, fact-based decisions. Decision-making in a crisis may of necessity take a modified form. But the vast majority of day-to-day judgments to be made in a years-long struggle against terrorism—including decisions taken in any months-long build-up to war—may be effectively improved by setting structural legal expectations that make clear that process matters and expertise counts.

IV. STRENGTHENING INTERNATIONAL ALLIANCES

One can scarcely travel abroad without understanding the extent to which a host of U.S. intelligence collection operations since September 11 have put a strain on relations with the United States' closest allies. The strain shows in more than our allies' rhetoric. As a remarkable recent study by the Intelligence and Security Committee of the British Parliament found, widely reported U.S. practices of kidnapping and secretly imprisoning and torturing terrorist suspects led the British to withdraw from previously planned covert operations with the CIA because the United States failed to offer adequate assurances against inhumane treatment and rendition.⁷ At the same time, the GAO reports that efforts by U.S. law enforcement agencies to help other nations identify, disrupt and prosecute terrorist crimes have been limited by a host of administrative factors—from staffing limitations to a lack of clear guidance, defined roles and responsibilities—compromising joint operations.⁸ By failing to address these issues, we risk sending a message that such cooperative efforts are lower on America's list of priorities than even the current Administration believes they should be.

The importance of these relationships in efforts to combat terrorism is hard to overstate. Beyond the critical partnerships of U.S. and foreign law enforcement agencies, there is broad, bipartisan agreement that a central pillar of U.S. efforts to prevent a terrorist nuclear attack is to bolster international cooperative efforts to inventory, secure, deter, and track the disposition of fissile materials. The same may be said for efforts to prevent biological terrorism, for which international public health surveillance is our first and essential line of defense. Such efforts require the cooperation not only of our close allies, but also countries with which the United States has more complex relationships—Russia and Pakistan at the top of the list.

Despite the central role such international relations play in any U.S. counterterror-

⁷ See Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007 at A6 (“Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment, the report said.”). See also INTELLIGENCE AND SECURITY COMMITTEE, *RENDITION*, 2007, isc 160/2007, available at http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isc_final.pdf.ashx (providing the full report of the Committee).

⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-687, *COMBATING TERRORISM: LAW ENFORCEMENT AGENCIES LACK DIRECTIVES TO ASSIST FOREIGN NATIONS TO IDENTIFY, DISRUPT, AND PROSECUTE TERRORISTS* (2007).

ism strategy, recent years have seen the United States back away from a host of international agreements and legal regimes, from the Geneva Conventions to the Anti-Ballistic Missile Treaty. Even where the treaties the United States has abandoned have not directly governed our intelligence activities, there can be no doubt that our relationships with our treaty partners overall have been touched by our disengagement from such legal obligations of longstanding. Such regularized disengagement is a profound mistake.

Treaty law, like all U.S. law, binds the actions of our government because our government has given its consent to be bound. We gave that consent for a reason that was, of course, in part based on our calculation about our interests in the subject matter of the treaty at the time it was drafted and ratified. But our consent was also based on our broader desire to be part of an international legal system, a system that has shaped relations between nations (in greater or lesser measure) for centuries. It was to support this system that the Supreme Court interpreted treaties for much of our nation's history according to a canon of good faith or reciprocity—a rule of legal construction providing that if the plain terms of an international agreement were ambiguous, the treaty would be “construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.”⁹ As Emer de Vattel, a key architect of modern international law, explained: “There would no longer be any security, no longer any commerce between mankind, if [nations] did not think themselves obliged to keep faith with each other, and to perform their promises.”¹⁰

Whatever the reciprocity canon's status today as a matter of law, there is no escaping its relevance as a matter of policy. Our good faith in abiding by the legal promises set down in treaties is an inescapable measure by which the strength of our relations with other nations continue to be tested. It would be surprising indeed if one could betray a substantial promise in one context and not have it affect the character of our relations as a whole. Conversely, exercising good faith in this context can produce reciprocal benefits when the time comes to seek partnerships toward other objectives. Given the extraordinary importance of international partnerships as a pillar of any U.S. counterterrorism strategy going forward, the cost-benefit calculation between the use of any single intelligence collection tool and any associated breach of treaty obligations such collection may require, should tilt heavily in favor of a choice that strengthens key international bonds.

V. SETTING LIMITS ON BEHAVIOR

The past six years have been an object lesson in what goes wrong when existing legal constraints are disabled with no clear rules constraining behavior in intelligence collection set in their place. As Major General George Fay explained in his post-hoc investigation of the abuses at Abu Ghraib, “By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved.” Beyond the few highly publicized incidents of torture at Abu Ghraib, a joint study by New York University, Human Rights First, and Human Rights Watch issued in April 2006 and based primarily on official government documents found more than 330 cases in which U.S. military and civilian personnel were credibly

⁹ *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933).

¹⁰ *Chew Heong v. United States*, 112 U.S. 536, 539 (1884) (citing 2 EMMERICH DE VATTEL, *LE DROIT DE GENS*, ch. 12, ¶ 163 (Edward D. Ingraham trans., AMS Press 1982) (1883)).

alleged to have abused or killed detainees.¹¹ The cases involved more than 600 U.S. personnel and over 460 detainees held at U.S. facilities throughout Afghanistan and Iraq and at Guantánamo Bay. Whatever techniques may or may not have been authorized by the Administration following its decision that the Geneva Convention rules on detainee treatment were not applicable to “enemy combatants,” such widespread abuse was an outcome no one purported to seek.

The Army Field Manual on Intelligence Interrogation operative at the time of the September 11 attacks had anticipated the security consequences likely to accompany a coercive approach to custodial interrogation:

Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear. Revelation of use of torture by U.S. personnel will bring discredit upon the U.S. and its armed forces while undermining domestic and international support for the war effort. It may also place U.S. and allied personnel in enemy hands at greater risk of abuse by their captors. Conversely, knowing the enemy has abused U.S. and allied [prisoners of war] does not justify using methods of interrogation specifically prohibited by [law].¹²

Indeed, as noted above, the effect of such practices on U.S. intelligence collection efforts was devastating. Yet while the most recent review of the subject by the U.S. Intelligence Science Board uncovered no study that had ever found that torture or coercion produces reliable information,¹³ there remains a live debate about whether the CIA may be exempted from the very constraints that their line partners in the military must observe.

Getting the law right in this context—and ensuring its vigorous enforcement—is essential. One of the central purposes of criminal law is deterrence: bad acts should be met by the state with a predictable form of punishment so that the bad actor himself, and anyone else who might think to follow in his footsteps, will refrain from committing such acts anymore. But the idea that law proscribes certain conduct and imposes adverse consequences on violators is hardly limited to criminal acts. If a man breaches the terms of a contract, the law generally promises that the person’s contracting partner will be able to recover money damages from the man in breach. This basic principle can be found across all bodies of law from tort to copyright to government regulation. Critically, in all of these contexts, one need not oneself engage in the practice addressed by the rules to be certain that predictable consequences will follow, and to conform one’s behavior accordingly. Law works mostly through such

¹¹ N.Y. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE ET AL., *BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 2* (2006), <http://www.humanrightsfirst.info/pdf/06425-ctn-by-the-numbers.pdf>.

¹² U.S. DEP’T OF THE ARMY, *FIELD MANUAL 34-52 INTELLIGENCE INTERROGATION* (1992), <http://www.fas.org/irp/doddir/army/fm34-52.pdf>.

¹³ Gary Hazlett, *Research on Detection of Deception: What We Know vs. What We Think We Know*, in *EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART—FOUNDATIONS FOR THE FUTURE* (U.S. Intelligence Science Board, ed., 2006), at 45, 52.

indirect effects. In the normal course, one need never go near a court to have one's behavior effectively constrained by the law.

Beyond that, and whatever limits on behavior we set, the laws on detainee treatment during custodial interrogation will reflect profoundly on who we are as a people and what kind of world we want to live in when the acuteness of today's terrorist threat is behind us. As the 9/11 Commission explained: "[T]he United States has to help defeat an ideology, not just a group of people. . . . America and its friends have a crucial advantage—we can offer these parents [of potential terrorist recruits] a vision that might give their children a better future. If we heed the views of thoughtful leaders in the Arab and Muslim world, a moderate consensus can be found." We cannot let short-term tactical choices compromise our overarching strategic goal. In this sense, we can no longer afford for there to be any doubt about how the United States will treat other human beings in our custody.

The laws governing the treatment of U.S.-held detainees—rules already established by the Constitution, treaties, and statutes of the United States, and reflected in the U.S. Army Field Manual on Intelligence Interrogation—should be standardized government-wide. U.S. efforts to educe information from detainees, whether held by our own military or intelligence agencies, or other agents acting at the United States' behest, should be guided by uniform rules and training programs, backed by the clear support of the law and the best evidence of what is effective. And violations of these rules should be met with swift and sure discipline proportionate to the offense. Whether to deter the kind of policy disaster we saw with Abu Ghraib, or to clarify for ourselves and the rest of the world the advantages of a free and democratic society, the law is the most important communications tool we have.

VI. CONCLUSION

If we are to avoid the errors of the past seven years in counterterrorism, we must return to the founding idea that law is not an obstacle that powerful governments must overcome to meet their objectives—it is a vital tool that power must respect in order to wield successfully. From law's broad structural role in shaping decision-making and institutional culture, to its immediate and instrumental function in constraining behavior and building international partnerships, law helps U.S. policy-makers avoid having to reinvent the wheel every time a terrorist attack occurs. The law exists, and should be designed, to serve America's long-term interests. It is time U.S. counterterrorism policy settles in for the long term.