

National Security Law Advice to the New Administration

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By any measure, the period between September 11, 2001, and the 2008 presidential election witnessed an unprecedented tangle of controversies at the intersection of national security law and policy. The Bush administration responded to the September 11 attacks and the threat of further terrorism by asserting expansive executive authority across a wide range of national security domains. The President fashioned new rules for detaining those captured in what was called the “global war on terror.” Most of the detainees were held abroad, but a few were detained in military prisons here in the United States. Some detainees were subjected to coercive interrogation practices, including techniques that had been employed by members of the Japanese armed forces who were charged with war crimes by the United States after World War II. Secret prisons for Central Intelligence Agency detainees were acknowledged by President Bush, and the practice of extraordinary rendition of terror suspects to third countries was documented in instances embarrassing to the United States.

In November 2001, the President issued a military order to try detainees by military commissions, attended by limited protections for the rights of the accused. The President also vigorously asserted that habeas corpus relief in the federal courts should not be available to these detainees.¹ Meanwhile, the Bush administration launched a war against Iraq in 2003 at least in part on the basis of the controversial legal claim of preemption – the United States had to act to preempt a credible and imminent threat that Iraq would attack the United States and its allies with weapons of mass destruction. In December 2005, we learned that the National Security Agency (NSA) had since 2001 listened in on the conversations of U.S. citizens under a warrantless wiretapping program.

Congress did respond to the President’s request for support in the Authorization for the Use of Military Force,² the USA PATRIOT Act,³ the Detainee Treatment Act,⁴ and the Military Commissions Act.⁵ Yet these

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1. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

2. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

4. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

5. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

were exceptions to the rule of unilateral presidential action. Congress's independent duty to deliberate and legislate in response to national problems was largely forgotten during this decade, and that absence eliminated from our constitutional system the critical component of competition, clashes, and compromise that has served well over time to prevent the accumulation of power in any one branch. Although the precedents available to the courts often provided unclear and insufficient guidance in resolving the national security disputes of the twenty-first century, the Supreme Court rebuked the Bush administration and spurred some limited congressional reaction in a series of important decisions between 2004 and 2008.

It was thus to be expected that President Barack Obama entered office armed with a national security reform agenda. National security reform has been at or near the top of incoming administration priorities since the end of World War II. Most of the time, reforms have been directed at national security policies targeted in the incoming administration's election campaign. During the 2008 campaign, that list grew to include the detention and interrogation policies – most often associated with the Guantánamo Bay facility and the Abu Ghraib prison in Iraq – the warrantless surveillance program conducted by the NSA, and the use of preventive war in Iraq and its lingering costs.

Less often has national security reform focused on the structures and processes of the national security system, including departmental and agency organization, management, and interagency cooperation. The National Security Act of 1947⁶ was the product of one such effort, marking an unprecedented reorganization of the national security bureaucracy to respond to the post-war threats posed by the Soviet Union. Although there have been hundreds of systemic or structural national security reforms since 1947, accompanied by many more commission reports, legislative hearings, and studies, the only major reform occurred in response to the September 11 attacks. President Bush created an Office of Homeland Security and a Homeland Security Council in October 2001, and in 2002 Congress created the Department of Homeland Security and codified the HSC. The National Commission on Terrorist Attacks upon the United States released the 9/11 Commission Report in 2004⁷ and, among other things, structural reform of intelligence followed. Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004,⁸ creating the Office of the Director of National Intelligence.

6. National Security Act of 1947, Pub. L. No. 235, 61 Stat. 496 (July 26, 1947).

7. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004).

8. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

In the wake of the September 11 attacks, major reform studies proliferated, and recommended dramatic and systemic changes in our national security structures, processes, and policies. Consider these prominent examples, all published in this decade:

- The Advisory Group on Public Diplomacy in the Arab and Muslim World⁹
- Beyond Goldwater-Nichols: U.S. Government and Defense Reform for a New Strategic Era¹⁰
- Iraq Study Group Report¹¹
- Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction¹²
- United States Commission on National Security/21st Century¹³

On January 8, 2009, at the Association of American Law Schools' (AALS) annual meeting in San Diego, the Section on National Security Law hosted a panel discussion, "National Security Law Advice to the New Administration." An especially distinguished panel of academics covered a wide range of reforms, from strategic redesign of national security policy to specific proposals to change Bush administration legal interpretations of national security matters. Most of the articles that follow in this issue are based on papers first presented at the panel.

Dean Elizabeth Rindskopf-Parker opened the AALS panel by urging that the Obama administration move beyond Cold War thinking and the "global war on terror" to create new and realistic responses to the national security issues of our time.¹⁴ Dean Parker urged system redesign, not "spot-welding," and provided an overview of several geographic and global trouble spots for the United States. Drawing on her many years of

9. EDWARD P. DJEREJIAN, CHANGING MINDS, WINNING PEACE: A NEW STRATEGIC DIRECTION FOR U.S. PUBLIC DIPLOMACY IN THE ARAB & MUSLIM WORLD (2003), *available at* <http://www.state.gov/documents/organization/24882.pdf>.

10. CLARK A. MURDOCK, MICHELE A. FLOURNOY & MAC BOLLMAN, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, PHASE 2 REPORT (2005), *available at* <http://www.csis.org/publication/beyond-goldwater-nichols-phase-ii-report>.

11. JAMES A. BAKER, LEE HAMILTON & LAWRENCE S. EAGLEBURGER, THE IRAQ STUDY GROUP REPORT (2006).

12. LAURENCE H. SILBERMAN & CHARLES S. ROBB, COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES (2005), *available at* <http://www.gpoaccess.gov/wmd/index.html>.

13. U.S. COMM'N ON NAT'L SEC./21ST CENTURY, ROADMAP FOR NATIONAL SECURITY: IMPERATIVE FOR CHANGE (2001), *available at* <http://www.au.af.mil/au/awc/awcgate/nssg/phaseIIIfr.pdf>.

14. Elizabeth Rindskopf-Parker, *National Security Advice for a New Administration: Initial Thoughts*, 3 J. NAT'L SECURITY L. & POL'Y. 227 (2009).

experience in government service, Dean Parker offered guiding principles for a new national security policy based on engagement and pragmatic realism.

Dean Harold Hongju Koh followed with a succinct but comprehensive “Four Steps to National Security Reform.” Dean Koh asserted that the greatest challenge facing the new Administration is the need to restore the rule of law and rectify the human rights mistakes of the Bush administration. Dean Koh anticipated the President’s executive order closing the Guantánamo Bay detention facility, and he argued for new national security legislation to address, for example, shortcomings in the Foreign Intelligence Surveillance Act.¹⁵ Dean Koh also urged engagement with the International Criminal Court and a broader and deeper commitment to humanitarian crises internationally, such as the ongoing human rights tragedy in Darfur.

Professor Jules Lobel urged that the Obama administration break sharply from the national security policies of the Bush administration in four areas.¹⁶ First, Lobel recommended rejecting the preventive paradigm that in part steered U.S. Justice Department policies under the Bush administration. Second, Professor Lobel urged that the Obama administration repudiate the doctrine of unilateral preventive military action that was part of the National Security Strategy statements in 2002 and 2006 and was used in part to justify U.S. military action against Iraq. Third, moving beyond the closure of the Guantánamo Bay detention facility, Professor Lobel argued against an anticipated proposal for preventive detention of suspected terrorists, and asserted that such a policy is contrary to core constitutional and international law principles. Finally, Lobel urged the Obama administration to adopt a more neutral position in Palestinian-Israeli peace negotiations and serve as mediator of their negotiations.

Professor Michael Kelly emphasized the importance of international law in U.S. national security policies and urged that the Obama administration reengage the international community in addressing global threats to national security.¹⁷ Professor Kelly’s proposals for U.S. engagement include urging reform of the U.N. Security Council; reaffirming adherence to the Geneva Conventions; confronting global warming through the Kyoto process on climate change; and engaging the International Criminal Court. In conclusion, Kelly recommended that the Administration consider a new foreign aid program that would encourage adherence to international law standards by inviting government officials from the developing world to study law in the United States.

15. Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 18 and 50 U.S.C.).

16. Jules Lobel, *Preventive Detention and Preventive Warfare: U.S. National Security Policies Obama Should Abandon*, 3 J. NAT’L SECURITY L. & POL’Y. 341 (2009).

17. Michael J. Kelly, *Charting America’s Return to Public International Law Under the Obama Administration*, 3 J. NAT’L SECURITY L. & POL’Y. 239 (2009).

Assistant Dean Mark Shulman, winner of the Section's call for papers competition for the 2009 Section program, looked to President Franklin Roosevelt's famous Four Freedoms address to Congress in 1941 as a restorative guidepost for a new national security strategy.¹⁸ According to Shulman, the four freedoms – freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear – could form the twenty-first century basis for an enlightened national security policy founded on shared global objectives for peace and harmony. In a response, Professor Paul Rosenzweig argues that two realities – that some in the world hate Western freedoms, and that we cannot change their minds or prevent them from having the capacity to undermine our freedoms – stand in the way of making responsible policies on the basis of the four freedoms model.

At the Section's breakfast program on January 8, Gordon Lederman, who headed the Legal Working Group of the Project on National Security Reform, a nonpartisan initiative founded in 2007 that examines reorganization of the U.S. national security system to meet twenty-first century threats, discussed the need for new legislation to realize a set of national security authorities adequate to contemporary needs. Lederman's essay addresses the desirability of a statute over an executive order, and he highlights some of the reform components to be addressed in draft legislation, including merging the National Security Council and the Homeland Security Council, creating a Director for National Security (to replace the National Security Advisor), approving interagency teams on critical national security issues, and integrating civilian and military chains of command.¹⁹

Three additional articles, not presented at AALS, round out our "Advice" issue. First, co-authors J. Scott Carpenter, Matthew Levitt, and Michael Jacobson from the Washington Institute for Near East Policy, reshape their Institute task force report offering an integrated strategy for countering radical extremism.²⁰ Their thoughtful and provocative policy narrative offers a set of strategic, functional, and structural recommendations that will help frame the counterradicalization debate going forward. Next, Professor George Lucas, Jr. examines the moral challenges presented by unconventional warfare.²¹ Questions of that type

18. Mark R. Shulman, *The "War on Terror" Is Over – Now What? Restoring the Four Freedoms as a Foundation for Peace and Security*, 3 J. NAT'L SECURITY L. & POL'Y. 263 (2009).

19. Gordon Lederman, *National Security Reform for the Twenty-first Century: A New National Security Act and Reflections on Legislation's Role in Organizational Change*, 3 J. NAT'L SECURITY L. & POL'Y. 363 (2009).

20. J. Scott Carpenter, Matthew Levitt & Michael Jacobson, *Confronting the Ideology of Radical Extremism*, 3 J. NAT'L SECURITY L. & POL'Y. 301 (2009).

21. George R. Lucas, Jr., *"This is Not Your Father's War" – Confronting the Moral Challenges of "Unconventional" War*, 3 J. NAT'L SECURITY L. & POL'Y. 329 (2009).

have become prevalent, and Lucas maintains that we have not done well in educating military personnel about how to deal with them. His vignettes speak volumes about the dilemmas of modern military conflict. Finally, Professor Matthew Waxman analyzes the implications, since the September 11 attacks, of the greater use of state and local police agencies for national security.²² Waxman finds that the atomization of local policing in our federal system adds a new set of challenges to striking an appropriate balance between protecting national security and securing our civil liberties. His article shows how many of the important questions of national security law and policy are subnational, and that we ignore these issues at our peril.

In closing, readers of the *Journal of National Security Law & Policy* (JNSLP) will notice that the content of this issue differs from past JNSLPs in our publication of short articles and essays. In part, the essay format serves our present “advice” theme, but it also reflects a policy decision at the JNSLP to favor shorter articles that offer cogent, scholarly analysis of national security law and policy issues. (Traditional law review-length articles will still be accepted.) We will strive to review and edit accepted articles expeditiously and to post them on our website in advance of publication. All published articles will continue to engage the multiple audiences and disciplines relevant to the national security challenges we face.

22. Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT'L SECURITY L. & POL'Y. 377 (2009).