



**JHU/APL Rethinking Seminar Series**  
*Rethinking Future Environments  
and Strategic Challenges*



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**28 November 2017**  
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**Fordham University Law School**  
***The Strategic Threat of Terrorism***

**Notes:**

1. Below are informal notes of the speaker's remarks as taken by a JHU/APL staff member.
2. Links to the audio and video files from the Seminar can be found on Video Archives page of [www.jhuapl.edu/rethinking](http://www.jhuapl.edu/rethinking). Files from all other previous events are also available on the site, and recent years' videos may be found on the [JHU/APL YouTube Playlist](#).

**Introduction**

Dr. Greenberg began by noting that her book *Rogue Justice: The Making of the Security State* was completed about two years ago and that the last chapter needed to be updated. She did that in preparation for the Rethinking Seminar. Dr. Greenberg also described the work of the Center on National Security at Fordham University's School of Law, a think tank that she started shortly after the September 11<sup>th</sup> attacks. The organization is dedicated to fostering conversations between those involved in national security and those involved in civil liberties. Dozens of public and private events held each year bring together top government officials from all sides with other experts, both foreign and domestic. Their discussions involve serious concerns about both national security and civil liberties.

**September 11<sup>th</sup> Immediate Aftermath**

- Within 3 hours of the attacks, meetings with experts in and out of the government were going on all over Washington addressing the same basic concerns:
  - What to do about any follow-on attack, which seemed imminent
  - What to do to avoid new attacks in the future
  - Bottom line: A great deal of effort was put into thinking about both the intelligence and law enforcement challenges
- The first thing to remember about that day was that everything was happening very rapidly
  - Some proposals had existed before but had not be implemented
  - Some concepts were new to address pressing new concerns
- The first document the White House drafted that day was for authorization to use military force
  - Congress saw the original draft but few others did
  - Most interesting was the language that, in general, said the President could use force:
    - Against all those involved in the carrying out or planning the 9/11 attacks
    - To deter or preempt aggression or terrorism against the US
  - Enemies were not identified by any name or geographic label and there were no definitions terrorism or aggression
  - Congress said no to giving this broad type of power to the President, but it was a sign of what was to come
- Breadth soon became the driving force behind policy-making immediately after 9/11

- After identifying what we weren't doing right (many things), it was decided the one thing that was needed was *more* (not necessarily better) intelligence, more taxes to fund efforts, etc.
- The second general response was giving more power to the President
  - The President was given the authority to act and also to determine who the enemy was and wasn't
    - Not done for balance of power even though it was a Congressional authority
    - Sign of the future
  - Then-Attorney General Ashcroft said this was done for the survival of our society
    - Saw the situation as an existential threat not just to life but also to whom we were as a nation
- Early on there was debate on the powers but that got lost among partisan wrangling about who we were and who we wanted to be in the world
  - This issue is still not resolved
- Problem: The Patriot Act was not as specific as a responsible Congress would have made it, since it gave no definitions of the enemy, combatants, religion, or fighters
  - There was only an expansion of power to investigate and deter terrorists
  - The idea of more / wider / cumulative was more important than specifics and would come back to haunt us later

### First Actions

- Initially, the government rounded up 1500-2000 random Muslim / S. Asian / Middle Eastern individuals, both citizens and non-citizens
  - May have been a cosmetic move for political purposes
  - None of those arrested were ever indicted
- Same pattern occurred in the populating of Guantanamo where about 800 nameless, faceless individuals were sent
  - They came with no biographical material or well-documented indications of guilt
  - The US called in other countries to interrogate some of them
  - Some may have known the top leaders of al Qaeda but most were random
  - Bottom line: It was all about breadth
- One of the policies most abusive to civil liberties were the early surveillance policies
  - One Bush Administration lawyer, who also uncovered the torture memos, believed that these policies were far worse than what was wrong with the torture memos
    - Not because of the torture but because the American people didn't (and still don't) know what was being done in the name of national security
  - Two levels of policies
    - Those that we knew about like the Patriot Act, which expanded authorities
    - Those with problems that we didn't know about for another decade including:
      - Not individualizing warrants
      - Not bringing cases before the classified Foreign Intelligence Surveillance Act (FISA) court
  - Theory: Collect a great deal of data even from citizens you don't suspect, then you initiate a search to accumulate useful information on enemies
- Eventually, this mind set fostered a feeling of insecurity about knowing how to fix the problem
  - The idea developed that laws, including the Bill of Rights, were the problem and they were in the way, especially:
    - First Amendment – protects people allowing them to say what they want
    - Fourth Amendment – requires warrants to arrest and detain people
    - Fifth Amendment – states people under interrogation must have a lawyer

- Eight Amendment – doesn't allow abuse of people to get information out of them
- Another fallout of the 9/11 attacks was the revocation of some Bill of Rights amendments without clarification and without anyone making speeches supporting them
- Examples:
  - An individual in the US was declared an enemy combatant, defined in this case as someone who existed outside the terms of the law
    - Jose Padilla was taken out of federal custody and moved to military custody and held there for 3 years without access to a lawyer or any due process
    - This was well known because there were news reports about the case
  - However, in the most egregious sign of a country that had abandoned its basic values, the torture policy was kept secret
- By the summer of 2002 there was an understanding of what the laws should be, but there were also policies based on a disregard and even a contempt for the laws

### Geneva Convention Issues

- Then-Secretary of State retired General Colin Powell was very uncomfortable moving away from the prisoners of war protections provided by the Geneva Convention by not using the POW term
  - He believed that this could cause a reaction that would put US soldiers at risk because of reciprocity – if we step over the line, adversaries will step over the line
  - Then-Attorney General Alberto Gonzales didn't want Powell to win within the Bush Administration and wrote a response giving reasons why not to follow the Convention
    - Not following the Geneva Convention rules would be helpful in gathering all the information we needed
    - More important, the rules of the Geneva Convention were quaint and obsolete
- There seemed to be a mindset that went beyond the precepts of the Geneva Convention and questioned whether other basic laws were also really quaint and obsolete
  - No real debate occurred then
  - Basic question: Is the 21<sup>st</sup> century that different from the 19<sup>th</sup> and 20<sup>th</sup> centuries such that we need to rethink our basic principles and laws?
  - Bottom line: The concept does require rethinking
- There was immediate push back from the civil libertarians, but the most important push back came from within the Administration, from the Justice Department, and elsewhere
  - A lawyer from the Pentagon went over to Justice and saw the secret memos justifying massive warrantless surveillance, torture, treatment of detainees, etc.
    - More than being morally offensive, he saw them as legally wrong
    - Authors of these memos apparently *forgot* the cases that provided the basis for the laws, namely those relating to presidential powers
  - The lawyer tried have some of the memos revoked and others rewritten but was unable to do so before he left the Administration
  - Bottom line: Dissent from within is just as important as that from without
- The issues of trying to get the memos rescinded and forcing the White House to comply with the laws was subsequently handled by then-Deputy Attorney General James Comey
  - He told the White House they couldn't do what was laid out in the memos
  - He did manage to get policies on surveillance, etc., turned into laws and returned warrant cases to the FISA courts
- The Bush Administration rescinded, reformed, rebuked, or rewrote what had developed in the first two years in the War on Terror, including:
  - Codification of what were originally policies outside the law
  - Protection of detainees from cruel and abusive treatment (2005)

- Development of the Military Commission Act which established a lawful regime for treatment of detainees (2006)
- Decision by the Supreme Court that the Guantanamo detainees had the right to challenge their detention in a District of Columbia federal court (2008)
- Prosecutions of some US military personnel for abuse of detainees
- Bottom line: This was not a monolithic story

### **Changes Made during the Obama Administration**

- Much of what happened in the Bush Administration was secret until the Obama Administration
  - Obama continued what was started by constitutional lawyers in Bush Administration but building a more solid legal structure
  - Obama also established a tone that the Bush Administration had never been willing to
    - It was far enough away from 9/11 to say that we needed moral rethinking as well as legal rethinking
    - Within a day of taking office President Obama said he would end torture
      - However, Bush had already ended torture as well as moved detainees from CIA black sites to Guantanamo, but had not said so publicly
    - Bush could have said that after 9/11 we did everything we could to keep the country safe but we are now pulling back because we see we overstepped
      - Instead, he left the concept in place as if it could be of use in the future and without needing any discussion or accountability
  - Obama said he would be the moral leader and would close Guantanamo
    - Bush had wanted to close it and had already released 524 individuals from there
    - Obama didn't close it but changed the tone and direction
  - Obama also tried quietly to end the Military Commission activities in Guantanamo
    - Tried to move the trials of 9/11 conspirators into US federal courts but that still hasn't happened
    - Also used US federal courts for those non-American detainees who had conducted lethal attacks abroad that killed US soldiers in uniform
      - Obama was trying to expand the ability of federal courts to cover various terror cases as murder cases
      - His ultimate goal: Eliminate the need for the Military Commission
- Many believed that the Obama Administration did too little about the surveillance issues and didn't hold anyone responsible for torture
- Obama moved to a policy of targeted killing of individuals, attacks which the President and National Security advisors would approve at the White House level
  - Decisions should have been made by FISA, drone, or some other form of classified court or through some other transparent procedural process
- Obama introduced a moral tone and followed up on making more legal adjustments as well as making a number of symbolic moves
  - He got rid of some of the terminology being used such as enemy combatant and Islamic terrorists while moving toward the term violent extremists
  - Obama would often say *Trust me*
    - We aren't going to torture anyone
    - We don't need to hold anyone accountable
    - We will try to close Guantanamo
    - We will decide who is going to be killed as carefully as possible with help from military and intelligence advisors, eventually as constrained as possible
  - Bottom line: We will walk away from breadth and return to specificity and the old ways of thinking about guilt, innocence, crime, and war

## Important Studies and Changes from the Obama Administration

- Senator Diane Feinstein's Torture Report involved a year and half of collecting 6 million documents which included information about:
  - Who was tortured? Who did the torturing? What techniques were used?
  - What questions were asked? What was learned?
- Another study was commissioned right after the Edward Snowden revelations
  - Five national security experts from different backgrounds looked at current policies that Snowden had revealed to determine if they were useful or not
- The Privacy and Civil Liberties Oversight Board, a non-partisan watchdog body, was asked to also look at the same policies but from national security viewpoint before talking about legality
  - They reviewed the provisions of the Patriot Act and it said shouldn't be used anymore because they didn't work
  - Torture was already gone because the Feinstein Report stated that it didn't work
  - Other programs were deemed either useful or not
- Although Obama claimed the moral high ground, many of the programs and policies were ended for the pragmatic reason that they didn't work
  - Not about moral issues, nor the fact that a federal court in New York said it was illegal
  - Congress allowed the act to sunset because the review boards said that it did not work
- What remains at the end of the Obama era after his changes and those of the later Bush years
  - Renewed surveillance policy in the FISA Amendments Act that began under Bush
  - 41 individuals remained in Guantanamo
  - No one has been tried in federal court for 9/11 activities
  - More contained, more constrained policies and the beginning of a return to focus and specificity
- Bottom line: Obama (the constitutional lawyer) and civil liberties advocates reinstated the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 8<sup>th</sup> Amendment rights that were suppressed in the days right after 9/11

## Current Situation

- Under President Trump some of the earlier issues are back
  - Terminology such as *enemy combatant* and *Islamic extremism* have returned
  - Enemy combatant is the more worrisome
    - Has been used to identify an unknown American citizen captured in Syria and turned over to US forces in September
    - Two administrations had moved away from the problems this term brings up
      - Enemy combatants can be held in Guantanamo but US citizens can't be
      - So now what will happen to this unknown citizen?
  - There are new references to the use of torture and waterboarding since the campaign
    - May just be provocation or may be real
  - Detention authority for sending new people to Guantanamo has been discussed
- In the Benghazi case, the attacker was brought to the US and successfully tried in a federal court despite being a foreigner acting primarily on foreign soil
- Military Commissions in Guantanamo
  - Obama revived them after first closing them down
  - Most detainees now in Guantanamo are those who are assumed to have planned the 9/11 attacks or other lethal attacks against Americans
    - There are some opinions saying that they will never be tried
  - On Trump's watch there has been a recent major setback
    - The civilian defense team for one of the terrorists about to go to trial resigned
      - Exact reasons aren't known since the situation is classified

- It is believed that the matter may relate to attorney-client communications
      - The chief Military Commission’s defense authority approved it but then was put in custody for contempt of court – again, for classified reasons
      - All of these changes will cause the trial to be delayed even further
- Drones policy
  - Obama went to great lengths to set up a procedure and processes that would justify targeting and killing individuals including American citizens overseas
  - Drones are more active now than under Obama – two to four times as many attacks as last year depending on the area
  - Problem: This policy could be another case of the reciprocity threat such as those that concerned Colin Powell
- Something to watch: DoD has a new expanded surveillance authority for warranted monitoring of US citizens and green card holders who are deemed to be homegrown violent extremists
  - Problem: Much of the surveillance apparatus uses capabilities designed to be used in cases with some foreign element such as traveling abroad to join a terrorist organization

### **Lessons at an Extremely Critical Point in Time**

- There needs to be a reset button
  - Can’t be so determined to win the argument that won’t admit to resetting policies
- Pushing for changes can’t be done only from inside the Executive using “Trust me” statements as was done under Obama
  - Problem: Consolidating powers in the White House/presidency is dangerous since cannot know whether the next administration will believe in the same basic principles
- Insistence on greater breadth doesn’t mean better
  - Getting more detainees into Guantanamo didn’t help to get to the people we were after
  - More surveillance, according to the report that led to the sunseting of the Patriot Act, did not identify the people we had to watch
- Must make decisions based on facts, evidence, and specificity in order to get the people who want to do us harm
  - Concept was identified in the torture report and the surveillance studies
  - Civil liberties advocates talk about protecting rights from a moralistic point of view, but the Founding Fathers set out a series of principles that remain important today
    - We won’t have a general warrant
      - Can’t just say somebody in that neighborhood is guilty so the neighborhood needs to be attacked
      - Presidents can’t be the only ones to decide who can be killed/detained
    - Need to have a process and depend on specifics
  - Having the smartest way to find your enemy is the best way to keep you safe
- Bottom line: Using facts and evidence and relying on specificity is what keeps us safe and living in a democracy

### **QUESTION & ANSWER SESSION**

#### **Re: Combatant and Detainee Status**

- American citizens captured in Syria can’t be kept forever in a black hole
- In the Obama Administration, detainees had one status while they were being interrogated and another when it was determined that they could not be released after interrogation
- Another option would be confining them until the end of hostilities
  - But how will we know when hostilities will be over?

- Will we be in a perpetual state of war?
  - There is no end to hostilities given the way we have constructed this war
- Bottom line: We need to have discussions about this

#### **Re: Are We at War?**

- Yes, so the Laws of Armed Conflict apply
- Big problem: It was determined early on that there would be no prisoners of war, only detainees
- Obama came in and said he would close Guantanamo and establish a detention policy but he never did
- Actually, we have been both at war and not at war for 16 years

#### **Re: How Do We Know We Are at War?**

- We have an authorization for use of military force that we rely on to permit killing people around the world
  - We also have drone attacks and active battlefields
- Since 9/11 we have been trying to pretend that we aren't in a gray area between crime and war
  - Have been acting this way but not talking about it because it is too hard to do so
  - Military Commissions don't work and we can't even try the 9/11 defendants
- Bottom line: We are still in a very confused state
  - Killing people around the world to make ourselves safe sounds like war
  - But at the same time military officers are in a federal court testifying about the killing of fellow military personnel by al Qaeda outside the US

#### **Re: The Future**

- Some people say that Obama kept us out of war, but the US has been focused on non-state actors and now there are major threats from states even if the possibilities are remote
- As nation states reemerge as threats, the US national security apparatus, which is designed to handle such threats, this type of threat will become a larger piece of the discussion
  - Laws related to this type of threat are clearer
- Not really addressing whether there will be a larger or smaller force structure, but there will be changes in the discussion in a return seeing nation states as threats

#### **Re: Taking Prisoners in Syria**

- We have no plan for taking prisoners there
  - Have been giving them to the host country or to other nearby countries
- It appears we are at war there and elsewhere and the Syria situation is just muddying the waters

#### **Re: Targeted Killing Policy**

- Used to have to target an area, not an individual, then Obama wanted to get down to a more specific target with minimal collateral damage
- The real problem: Who decides who is to get killed?
  - How is this process taking place?
  - There apparently is a process but it is not transparent
- We are part way there but need to know more about who has the facts related to guilt or innocence

#### **Re: Guantanamo Detainee Status**

- Political issues are holding things up but it is clear that detainees will not be brought to the US
- Only 41 individuals there now and 5 have been cleared for release under Obama

- Really only 36, which is the number that the Bush Administration believed would have to be dealt with in perpetuity
  - Given their age and the medical and mental conditions, they now cost \$11 million a year per prisoner
  - Should be more confident as a nation and either try them or release them
- Given the problems with the Military Commissions, Congress should have them brought here for trial and get it over with
  - The prosecutors say they have the evidence they need to convict, but some will say that part of the evidence may have come from torture
  - Judges give lots of leeway to the government in cases of material support to terrorists and even more so with the 9/11 or other attacks
- The federal system is flexible enough and the judges are strong enough to handle these cases
  - It has all been done before
  - Only one Guantanamo detainee has been brought to federal court and he was acquitted on 283 of 284 counts
- Bottom line: We should have more confidence in ourselves

### **Re: Guantanamo Detainee Terminology**

- At first didn't know what to call them, just knew that they didn't want to be tied to the Geneva Convention but they were to be treated in the spirit of the Geneva Convention, but ...
  - Couldn't call them prisoners so referred to them detainees
  - Couldn't say that they are being held in the spirit of the Geneva Convention
- Bottom line: Detainees are being treated as if they were already convicted and some of them will never be released

### **Re: US Citizens' Rights**

- The issue: If brought to a federal court, would detainees receive all the rights of a US citizen in the court?
- Previous terrorists were given those rights
  - The African embassy bombers, who killed over 200 people, were given those rights
  - So why is this a problem?
- There is a right for the US victims and survivors to see the perpetrators tried
  - Survivors and victims of 9/11 have no sense of closure
    - The rest of Americans traumatized by the attack also have had no opportunity for developing a sense of healing allowing them to move on
  - It is incredibly important to have a 9/11 trial, but it doesn't matter where it is held
    - However, the Military Commission process is not working effectively or efficiently
- Bottom line: Trials are for meeting out justice, getting the story out, starting the healing process
  - The government has the duty to help this process begin for the American people

### **Re: Trials and Conviction Statistics**

- Guantanamo Military Tribunals: There have been 5 convictions since 2006
  - There were 3 others that were either vacated or overturned on appeal
- Federal Court System: Over 600 individuals have been tried and convicted in the US for terrorism related issues from lethal attacks to material support of terrorist groups since 9/11

### **Re: Foreign Nationals' Rights**

- Foreign nationals are afforded the punishments of the US system but it is a good, robust system
  - Not the same as giving them the rights or protections of US citizens

- We must have the philosophy “We have a system to try people in the most civilized way possible and we won’t give it up no matter who is involved”
- Could have tried some of the cases in Libya, but that wouldn’t have been satisfying

**Re: Issues Associated with Dealing with Classified Materials in Federal Courts**

- Classified Information Procedures Act was set up to handle classified evidence
  - Judges are very learned and very careful in such cases
  - Defense attorneys are not always happy about all elements
  - Prosecutors sometimes have to give a little
- Defendants might not always get to see what attorneys would want to be seen, but it allows the trial to go forward
- Bottom line: The federal court system is robust and can handle classified witnesses

**Re: The Federal Court**

- The courts are supposed to be a separate, independent branch
  - Judges should stand up for these principles
- There may be some new pressures from recent appellate and circuit level appointments but it is still unlikely detainees would be let go
- There are always worries about independence and the robustness of the courts, but it has been consistent over time

**Re: Drone Strikes vs. Capturing**

- Executive killing is wrong, which is really what the drone killing policy does
  - Shows a lack of trust in who we are
- Big concern: If compromise on respect for law and justice in one area, could extend to other areas
  - Should be using our system of laws the way they exist
- Attorney General Gonzales said that these laws were quaint and obsolete but then the discussion got overtaken by torture issues
- There have been no discussions about the Bill of Rights in the 21<sup>st</sup> century
  - Opinions polarized and partisanized so quickly that there was no chance
  - Not clear when the US could have this conversation
- The 21<sup>st</sup> century is very different now
  - Borders don’t matter
  - All sorts of identities can be chosen by individuals (gender, national, religious, etc.)
  - Communications are very very fast
- Since we have been tied up with the war on terror and who we should be afraid of, we haven’t come to terms with what this new century really means
- Looking back to the turn of the 20<sup>th</sup> century, people then also had to face disruption about life caused by the magnitude of the changes in travel and communications speed
  - Caused major changes in the European psyche, but then Europe lost a generation in WWI
  - Today, we have not lost that generation, which is most in touch with changes, but we do need to harvest their capabilities to think about what this century is supposed to be
- We should be considering whether our laws are quaint or obsolete
  - We need to figure out what needs to go
  - We should not be fearful about thinking about whether our laws fit the century

**Re: Iranian Proxy Violence and Proxy War**

- Proxy violence/warfare and what that means is the focus of the Center’s work this year
- One part of the effort will be to identify how to determine who to hold accountable