



2008

The Twenty Year Test: Principles for an Enduring Counterterrorism Legal Architecture

James E. Baker
Georgetown University Law Center

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1451>
<http://ssrn.com/abstract=2557475>

2 Advance J. ACS Issue Groups 21-35 (2008)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Constitutional Law Commons](#), [Military, War, and Peace Commons](#), [National Security Law Commons](#),
and the [President/Executive Department Commons](#)

The Twenty Year Test: Principles for an Enduring Counterterrorism Legal Architecture

James E. Baker*

The United States faces three enduring terrorism-related threats. First, there is the realistic prospect of additional attacks in the United States including attacks using weapons of mass destruction (“WMD”). Second, in responding to this threat, we may undermine the freedoms that enrich our lives, the tolerance that marks our society, and the democratic values that define our government. Third, if we are too focused on terrorism, we risk losing sight of this century’s other certain threats as well as the capacity to respond to them, including the state proliferation of nuclear weapons, nation-state rivalry, pandemic disease, oil dependency, and environmental degradation.

The United States should respond to these threats using all available and appropriate security tools, on offense and in defense. Law is one of the essential security tools. Law provides substantive authority to act. Law can also provide and embed an effective process of preview and review to test proposals and validate actions, ensuring that they are both lawful *and* effective. Depending on how it is wielded, law can also serve as an independent policy value. However, the United States has been slow, or perhaps unwilling, to adopt a legal architecture that maximizes each of these legal benefits. Instead, the political branches have generally adopted an incremental approach, or relied on (*qua* deferred to) the President’s authority as Commander in Chief to define the law.

This paper describes four principles that should inform the design of a lasting legal architecture to counterterrorism:

First, *the architecture should reflect an understanding of the strategic value of law* in substance, process, and policy.

Second, *the architecture should reflect the threats it is intended to address*, including the potential catastrophic nature of the physical threat, which distinguishes this form of terrorism from that of the past. That means the Executive should have broad and flexible authority to act. But, the law should also acknowledge that with greater authority comes increased risk of overreach and misuse. That favors a meaningful process of ongoing internal and external validation and appraisal.

* Judge, United States Court of Appeals for the Armed Forces; adjunct professor at the Georgetown Law Center and the University of Iowa, College of Law. Previously he served as Special Assistant to the President and Legal Adviser to the National Security Council (1997–2000) and as Deputy Legal Adviser to the National Security Council (1994–1997). Baker has also served as a Marine Corp infantry officer, as an aide to a U.S. Senator, as a line attorney at the Department of State, and as Counsel to the President’s Foreign Intelligence Advisory Board. He is the author of *In the Common Defense: National Security Law for Perilous Times* (2007) and with Michael Reisman, *Regulating Covert Action* (1992).

The views expressed in this Article are those of the author and do not necessarily reflect the views of the Court of Appeals for the Armed Forces, the National Security Council, or any other governmental entity.

Third, *with limited exception, the law should avoid absolutes—in the authority asserted; in the authority prohibited; or, in bureaucratic design.* Instead, we should favor statutes and directives that accent the role of meaningful process. Good process addresses concerns that national security is or will become myopic in vision or tactics. Thus, a good process does not define terrorism in military or law enforcement terms, but rather encourages policymakers to consider all options and adopt the best policy tool in context. Good process also provides for timely and meaningful legal input on the law and on legal policy.¹

Finally, *the architecture should be lasting, which means among other things that it should be “constitutionally inclusive”* in design. A lasting and inclusive architecture will improve security—by maximizing the Executive’s authority to act, sustaining support for tools and policies, and improving the opportunity and efficacy to appraise U.S. actions.

Part V of this paper discusses the application of these principles with reference to two controversial security instruments: detention and rendition. With these principles in mind, we must ask: where should we be in twenty years, and how do we get there today?

I. THE VALUE OF LAW

Law is not an abstraction; it is an essential tool that helps us provide for our physical security and uphold and advance our constitutional values in doing so. Whether the law in fact serves these two purposes depends both on its design as well as the moral courage and integrity of those who wield its authority; if wielded wisely and honestly, law can play three critical and related roles. The law can provide the substantive authority to act. Law may also provide a procedural framework in which to act wisely and in timely fashion, including the architecture to meaningfully appraise U.S. actions. Finally, the law can also serve as a positive security tool, conveying societal values to a broader audience, as well as guiding policymakers to better substantive results.

SUBSTANTIVE AUTHORITY: The law provides substantive authority for the Executive to act. This is an intuitive point; however, the security benefits of clear substantive authority embedded in law are not. When the authority to act is clear, and clearly demarcated in statute or executive directive, risk-taking increases in the field. This is especially true in intelligence practice. Consider the statement of former Central Intelligence Agency (“CIA”) Assistant Deputy Director for Operations Robert Richer, “We were always conscious in the agency that we are judged not by the standards of today, but by the standards of tomorrow.”² Uncertain authority can seed such caution; certain authority can mitigate it.

Substantive law also provides for policy continuity in an area where public and political perceptions of the threat may vary depending on the physical and temporal proximity of the last attack. An enduring threat requires a sustained response—in building alliances, in how we deploy finite resources, and in how we apply the law. Where policy is embedded in law, it is more likely to survive the vicissitudes of public

¹ The distinction is grossly summarized as the difference between “can” and “can’t” on the one hand, and the pros and cons that inform the “should” or “shouldn’t” in choosing between lawful options, on the other.

² Mark Mazzetti & Scott Shane, *Question Time for Nominee Linked to Interrogations*, N.Y. TIMES, June 19, 2007, at A17.

and political opinion. Many homeland security programs, for example, will only pay dividends over time and then only if the programs are sustained. A customs regime will hardly work if it is implemented at only 10 out of 351 ports of entry.

PROCESS: The law, in statute and executive directive, also helps to define national security process, which in turn defines procedural expectations and norms. Process addresses the twin pathologies of national security decision-making: secrecy and speed. Both are essential components of effective action; however, by design or default, speed and secrecy may also exclude critical viewpoints. Good process includes avenues to test ideas and assumptions, mitigate risks, voice dissent, and ensure that the long-term implications of policy options are considered along with the immediate security gains. Moreover, although some may find it counterintuitive, good process can improve speed through the use of tried and tested mechanisms, like the military chain of command.

Good process also helps to ensure that in addressing threats, we preserve and advance our constitutional values in doing so. That is because there is nothing automatic about the application of law to security policy. Process can create an expectation of legal review, as well as serve as the vehicle by which the lawyer gains access to policy deliberation. But the lawyer must then hold his or her place through the timely provision of meaningful advice. Where such process is embedded in statute or executive directive, it is harder to avoid (or evade), and less likely to succumb to speed, secrecy, or the pressure of the moment when policy actors tend to focus on the immediate problem, and not the process of decision.

SECURITY VALUE: Finally, law is itself a security policy value. To borrow from a related context: Law is about who we are. Law enables us to preserve and advance our constitutional values as we address security threats. These same legal values also enhance security.

This is true on a tactical level, as former CIA case officer Milt Bearden has illustrated with reference to Soviet operations in Afghanistan. When Bearden arrived as U.S. intelligence liaison to the tribal mujahadeen he was shown a picture of a Soviet pilot who, having successfully parachuted from his stricken aircraft, shot himself in the head rather than be taken alive and tortured. Bearden objected, noting that the Afghan treatment violated the law of war. More effectively, he also noted the impact such treatment had on reciprocal practice and pointed out that the practice discouraged intelligence collection. Dead pilots don't talk. A more humane and lawful practice followed. In course, some pilots chose defection or cooperation to suicide with resulting tactical intelligence benefit to the mujahadeen and strategic intelligence benefit to the United States.³

The point is also true on a macro level as illustrated by the Army's 2006 Counterinsurgency Manual, which describes in operational terms how the legal principles of discrimination, proportionality, and necessity improve military efficacy and result. Similarly, perceptions about the U.S. application of law, in our handling of detainees, fairly or unfairly, have undermined our capacity to collect intelligence through liaison, and damaged our ability to find, hold, and lead allies. They have also served as a source of propaganda and recruitment for our opponents.

³ Milt Bearden, *When the C.I.A. Played by the Rules*, N.Y. TIMES, November 4, 2005, at A17.

In the domestic context, perceptions of constitutional exceptionalism or divisive legal arguments are less likely to garner and sustain support for policies that will only work over time and through successive administrations. They will also undermine support for the creation and exercise of broad national security authority of the sort necessary to address the threat of WMD terrorism.

II. A FRAMEWORK COMMENSURATE WITH THE THREAT

Disagreement over the shape of the law results in part from disagreement on the nature of the threats the law is intended to address. This is the product of honest differences of view inherent in intelligence analysis, including how one defines and calculates risk, probability, and cost. A nuclear attack (even an unsuccessful one), for example, is surely less probable than a conventional suicide attack, but its cost in terms of human life,⁴ social impact, and economic destabilization is infinitely higher.

Different perspectives also derive from the use of “terrorism” as a political tool as well as a policy concept. Where politicians use “terrorism” or “liberty” as political banners, observers and particularly those with differing political outlooks, may discount the validity of concerns otherwise embedded in political hyperbole. As a result, the audience may discount the message.

Is a nuclear attack a realistic threat? The government thinks so. Consider the President’s May 2007 Homeland Security Policy Directive, “National Continuity Policy,” the bureaucratic term to describe the continuation of government after a catastrophic emergency or event. Agencies are directed to reconstitute within twelve hours in the event of a “no-warning” attack, an apparent euphemism for a terrorist nuclear attack, or perhaps a cyber attack.⁵ The President has also directed that the government develop the nuclear forensics capacity to trace the signature of a nuclear device after detonation.⁶

Here is a dilemma. While we might reach an acceptable degree of risk-management, we can never assume that we have eliminated the risk. As long as this threat is realistic, it does not matter whether experts place the probability of such an attack as “more likely than not”⁷ or at 10% per year;⁸ we must defend against it.

WMD terrorism raises societal risks on both sides of the national security ledger that conventional terrorism does not. As a matter of physical security, a nuclear device could kill thousands, potentially many more, and reap untold economic devastation. As a liberty concern, a successful WMD attack could transform American society from one marked by tolerance and optimism to one marked by fear and isolation; government likely would be evaluated based on security indicators alone and not by its commitment to democratic due process and transparency.

⁴ Former Secretary of Defense William Perry has indicated that “for those within a two-mile wide circle around a Hiroshima-sized detonation or just downwind, little could be done.” William J. Perry, Ashton B. Carter & Michael M. May, *After the Bomb*, THE N.Y. TIMES, June 12, 2007, at A23.

⁵ NATIONAL CONTINUITY POLICY, NSPD 51/HSPD 20 (May 9, 2007), available at <http://www.fas.org/irp/offdocs/nspd/nspd-51.htm> (last visited May 25, 2007).

⁶ David Sanger & Thom Shanker, *U.S. Debates Deterrence for Nuclear Terrorism*, N.Y. TIMES, May 8, 2007, at A1.

⁷ Graham Allison, *Fast Action Needed to Avert Nuclear Terror Strike on U.S.*, BALTIMORE SUN, July 2, 2007, at 11A.

⁸ See Richard Garwin, *Living with Nuclear Weapons: Sixty Years and Counting* (Apr. 30, 2005) (transcript available at <http://www.fas.org/rlg/050430-aps.pdf>).

The potential of nuclear terrorism is as enduring as it is likely catastrophic. It takes only a few zealous actors to sustain this threat and only one to succeed. Moreover, Al Qaeda and other extremists have stated, and intelligence indicates, that they have sought nuclear weapons and continue to do so.⁹ One does not need access to intelligence to know that if they obtain them, they will try to use them. Rational deterrence, it would appear, is less effective against a non-state, messianic opponent, intent on destruction and without concern for the survival of its “soldiers,” nor a constructive agenda to preserve or a constituency to protect; Al Qaeda has no elite, fixed territory, or institution to protect and no positive political program to advance. Moreover, as Harvard’s Graham Allison has explained, it does not ultimately take a rocket scientist to make a “nuke.”¹⁰ It takes fissionable material. The International Atomic Energy Agency and the Department of Homeland Security indicate that there is such a supply of fissionable material potentially available to the terrorists.¹¹ Therefore, while we might hope to reach an acceptable degree of risk management, we can never assume that we have eliminated the threat.

The dilemma is compounded because as 9/11 demonstrated, it does not take a WMD to have much the same effect. Consider that estimates place the lethal blast range of a tractor trailer loaded with 60,000 lbs of conventional explosives at 600 feet in diameter from the point of impact. Non-lethal collateral impact (as well as lethal depending on circumstance) would extend to 7,000 feet, and potentially further.¹² In the words of the Defense Department’s senior Homeland Defense official, “Katrina by comparison to foreseeable terrorist attacks must be viewed as a catastrophic event at the low-end of the spectrum.”¹³

A. BROAD AND FLEXIBLE INTELLIGENCE AUTHORITY

Intelligence is *the* essential ingredient in addressing the physical threat of terrorism. One might get lucky during a customs stop; but, as a general rule, one is not likely to find a sleeper cell embedded in New York or London or a nuclear device in a suitcase without information garnered through intelligence means. Nor can one protect everything; rather, intelligence and intelligence analysis inform judgments about risk management and concentric defense. Intelligence is also the predicate for determining which of the security tools is best used in context. As Secretary Gates has said, “over the long term, we cannot kill or capture our way to victory,”¹⁴ we must effectively use all the security tools including the law.

⁹ See, e.g., Nat’l Int. Council, *Prospects for Iraq’s Stability: A Challenging Road Ahead* (Feb. 2, 2007) (Unclassified Key Judgments of the National Intelligence Estimate); FBI Director Robert Mueller, Speech to the Global Initiative Nuclear Terrorism Conference (June 11, 2007), available at <http://www.fbi.gov/pressrel/speeches/mueller061107.htm> (last visited June 14, 2006).

¹⁰ See, Graham Allison, *Nuclear Terrorism* (2004). More recently, Allison wrote: “Based on current trends, a nuclear terrorist attack on the United States is more likely than not in the decade ahead.” Graham Allison, *No Loose Nukes: Preventing a Terrorist Nuclear Attack on the U.S.*, EVENING BULLETIN (June 28, 2007).

¹¹ JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 10 (2007).

¹² Spencer Hsu & Sari Horwitz, *Impervious Shield Elusive Against Drive-By Terrorists*, WASH. POST, Aug. 8, 2004, at A1.

¹³ Ass’t Sec. of Defense for Homeland Defense Paul McHale, *quoted in* Geoff Fein, *Katrina Showed Need for Rapid Damage Assessment, Improved Communications*, 231 Defense Daily 16, July 27, 2006.

¹⁴ Robert Gates, Speech to the U.S. Global Leadership Campaign (July 15, 2008), available at <http://www.defenselink.mil/news/newsarticle.aspx?id=50518> (last visited July 23, 2008).

The nature of the threat and the role of intelligence in responding means the government will by necessity push the intelligence envelope out, in many cases to the limits of the law. CIA Director Hayden has explained:

If you take nothing else from what I say, I hope it will be this: CIA operates only within the space given to us by the American people. That is how we want it to be, and that is how it should be. That space is defined by the policymakers we elect and the laws our representatives pass. But once the laws are passed and the boundaries set, *the American people expect CIA to use every inch we're given to protect our fellow citizens.*¹⁵ (Emphasis added.)

The extremist opponent is ruthless; he has also shown creative capacity in the means of attack, resilience in recovery, and an ability to adopt countermeasures. Without broad and flexible substantive authority, the intelligence instrument may miss critical intelligence. However, in the absence of express law, actors may hesitate to push, and in adhering to the law may lack authority to do so. Presidents and intelligence actors may do so anyway, relying on assertions of executive authority alone. This may diminish risk taking and will certainly minimize the processes of internal and external appraisal, because such operations are necessarily conducted with secrecy.

B. A CORRESPONDING PROCESS OF INTERNAL AND EXTERNAL REVIEW

If the physical threat argues for a broad and flexible authority to act, exercise of that authority places added pressure on constitutional values. With increased authority, flexibility, and secrecy, comes increased risk of misuse. In liberty terms, three values may be tested: freedom, tolerance, and the democratic process of government. In security terms, we risk jeopardizing long-term support for the tools essential to addressing the physical threats ahead.

Difficulty in finding an agreed and lasting intelligence framework, especially in the domestic context, is compounded because not everyone trusts the government to use the intelligence tools wisely or lawfully—with some cause. These tools are subject to witting and unwitting abuse and misuse,¹⁶ even if used exactly as intended. Why? Because even if they are used effectively there will remain a circular error probable (“CEP”), to borrow a term from nuclear doctrine. This is the measure of the radius of a circle within which half of the weapons fired will fall in relation to the intended target or at the aim point. I use the term to suggest that not all legal weapons fall within the intended target circle. Indeed, it is a necessary cultural tendency of security specialists to push this circle out (as opposed to nuclear doctrine where the goal is to diminish the circle’s size as an indicator of accuracy). When searching for a mole, for example, the counterintelligence specialist would rather investigate twenty honest

¹⁵ Gen. Michael Hayden, Remarks at the Council on Foreign Relations (as prepared for delivery) (Sept. 7, 2007), *available at* <https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html> (last visited Sept. 10, 2007).

¹⁶ The electronic surveillance instrument, for example, has been misused before. *See e.g.*, S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., FINAL REPORT (April 26, 1976) (“Church Committee Report”); COMM. ON CIA ACTIVITIES WITHIN THE U.S., FINAL REPORT (June 6, 1975) (“Rockefeller Commission Report”); DEP’T. OF JUST., A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS (Mar. 2007) *available at* <http://www.usdoj.gov/oig/special/s0703b/final.pdf> (raising more recent concerns about the misuse of National Security letters).

employees beyond the target circle than one spy short. Where we are searching for the potential nuclear terrorist, the CEP will increase. It should. The problem is that with expansion of the CEP, the risk of misuse, overuse, and potentially, abuse expands as well. In short, there are two structural risks—that security services will collect too little; and that they will collect too much. The remedy is effective processes of internal and external review.

Recall Director Hayden's words about using every inch of available legal space. Consider as well the innate sense of mission security officials and their lawyers already feel, without direction from above. The potential impact on the culture and the shape of daily legal practice is apparent; the necessity for introspective, retrospective, and objective appraisal of U.S. actions should be as well.

III. AVOID ABSOLUTES IN SUBSTANCE; FAVOR GOOD PROCESS

The law, by which I mean statutes as well as executive directives, can respond in three ways: (1) with express permits and prohibitions; (2) with required processes of decision; and/or (3) with mechanisms of internal and external appraisal. Proscriptions might be appropriate with respect to instruments or applications that inherently offend U.S. values, like torture. However, most intelligence tools are not inherently immoral or unlawful—like data mining, liaison, or electronic surveillance. Rather, the legality and morality of their use depends on context. Therefore, the better course is to craft laws and directives oriented toward meaningful processes of decision and appraisal that can weigh the legal and policy costs and benefits of action in context, rather than seek to regulate behavior with substantive and absolute permits and prohibitions.

Zero-sum solutions, which posit false substantive choices between security and liberty, risk not effectively providing for *either* our physical security or our constitutional values. In a nuclear context, for example, this paradigm may result in a diminution of an essential ability to locate the threat while at the same time minimizing or eliminating opportunities to determine if extant authorities are used wisely. Instead of trading-off, we must find ways to optimize both values. After all, liberty is one of the values the Constitution seeks to secure; and, physical security permits the exercise of liberty.

Good process is a start. The effective application of process before action is taken, and through effective appraisal after it is taken, helps to ensure that operating assumptions that may have been considered under constraints of speed and secrecy are validated. Where they are not validated, use of the tool should stop. Such processes not only ensure that the security tools are used in accordance with law, they also allocate finite resources to more palpable threats.

It is the duty of lawyers—and the law through use of process—to find where and when this has occurred and, in a timely manner, adjust the instruments of security on to the correct target area. This role is no less patriotic than that of ferreting out the opponent. Surely, it takes more moral courage to stop an unwarranted or unsubstantiated national security investigation than it does to start one, “just to play it safe.” The risk of being wrong in the first instance is concrete and potentially measured in the loss of human life; the risk of being “wrong” in the second instance is specific to the target of surveillance, but otherwise diffuse and often unknown in terms of the societal risk to our collective constitutional values.

There are ways to regulate broad authority that go beyond trust and do not rely exclusively on the moral integrity of executive actors and their lawyers. The substantive framework itself can minimize the risk of unwarranted intrusion. In the case of

data mining, for example, the degree of intrusion will depend on the nature of the data searched, the pattern used to search, and the model used to analyze the data located. Pattern analysis might be designed to identify persons who have engaged in certain behaviors at a time-certain, e.g., men aged 20-40, who have traveled to Europe in the past month and have bank accounts in Boston. Computer modeling tools seek to relate data in meaningful manner, perhaps through the identification of predictive behavior, patterns of conduct that might suggest a degree of heightened risk, and associational data, which might identify links between seemingly unconnected persons. Telephone calling patterns might indicate that an unknown actor has telephoned an unknown phone number with the same frequency as a terrorist suspect. The computer algorithms can be set and applied so as to limit the data searched, and to alert if extraneous (or unauthorized) data is collected or retained.

In the end, however, procedural thresholds are more reliable than substantive thresholds in regulating the use of authorized tools. First, procedural standards usually entail review by persons beyond those immediately involved in the selection and use of the intelligence instrument in the first instance. Independent actors in or outside the executive branch can test and validate executive actions. Where surveillance has been conducted pursuant to the FISA, for example, it is the independent actors, the FISA judges, and internally the lawyers, who have the role of testing substantive propositions and asking the difficult questions of why, what, and for how long?

Second, most national security standards are malleable, especially when “vital national security” interests are at stake, like protecting the country from WMD attack. In the covert action context, for example, it is the process that generates careful review, not the necessity of the President finding that an action “supports identifiable foreign policy objectives,” as the law requires.

Third, emphasis on process rather than substantive absolutes will also result in a more inclusive result, which for the reasons below, will be more sustainable and enhance security.

IV. A LASTING ARCHITECTURE

Because the threat of WMD terrorism is enduring, United States legal policy should embrace not only a threat-based paradigm, but a corresponding long-term outlook. An enduring legal framework is one that defines the exercise of presidential authority not in absolutes, or in terms of emergency or exigent circumstance alone, but in terms of optimums that will sustain commitment over decades. Such a long term framework permits opportunity to catch our constitutional breath, and find our equilibrium, and if need be start over again. And, it is a framework that embraces rather than eschews processes of executive, legislative, and judicial deliberation where deliberation is warranted and time permits.

Emphasis on the immediate over the long-term nature of the threat diminishes the value of process and law in the development of better national security policy because process and law take time to shape and refine. The National Security Council (“NSC”) process, as a normative baseline, works well in part because it has evolved over time. As with the military chain of command, bureaucracies have conditioned themselves to the process. Not surprisingly, homeland security process is less well-developed. It is too early to tell, for example, whether the Homeland Security Council (“HSC”) and related process will become a permanent part of security process or a passing experiment. The same can be said for the Department of Homeland Security as the headquarters element for many of the essential homeland security agencies. In times of

crisis and with matters of immediacy, the tendency is to stick with existing mechanisms or laws, or to adopt immediate *ad hoc* mechanisms, because the costs of defining new regimes outweigh the immediate benefits. In constitutional terms, that means reliance on the Commander in Chief's authority to define and refine new internal and external processes. But is that the preferred outcome?

A. THE CENTRAL ROLE OF THE PRESIDENT AS COMMANDER IN CHIEF

Make no mistake: The President, by constitutional design and statute, *is* the central and essential national security actor. The Constitution makes him so. As Commander in Chief, he is charged to “preserve, protect, and defend the Constitution.”¹⁷ The Constitution requires that he swear an oath to do so. He is also the Chief Executive who alone has the legal, bureaucratic, and moral capacity to coordinate and direct the intelligence instrument and unify national plans for homeland security and defense.

These are not statements of constitutional interpretation or executive assertion (although in breadth they may become so). This is constitutional law. It is statutory law as well. The Congress and not just the President have placed the President at the head of the security table, at the NSC and the HSC. In turn, the NSC and HSC systems serve as the President's principal processes for national security decision-making.¹⁸ The National Security Act also makes the President the essential intelligence consumer and decision-maker. Thus, since 1947 the CIA has performed “such other functions and duties related to intelligence affecting national security as the President may direct.”¹⁹

Further, in time of conflict, the President's role expands, not just because he is the Commander in Chief, but for the intangible reasons Alexander Hamilton identified when he wrote: “Safety from external danger is the most powerful director of national conduct ... It is the nature of war to increase the Executive at the expense of the legislative authority.”²⁰

It is not surprising then that, as a matter of presidential choice, constitutional perspective, or perhaps by necessity, the President's constitutional authority, and in particular the Commander in Chief clause, has been central to the post 9/11 legal debate. But, as Justice Jackson observed, just what powers accompany that authority has “plagued presidential advisors who would not waive or narrow it by non assertion yet cannot say where it begins and ends.”²¹ It is worth pausing to recall that Justice Jackson was addressing the Commander in Chief clause in the context of a different president with different lawyers—who also did not wish to dilute or cede presidential authority in time of conflict.

¹⁷ To be sure, as a matter of law, persons appointed to certain positions in the federal government also swear to “support and defend” the Constitution. The presidential oath reflects the responsibility, which derives from the President's collective constitutional authorities as well as the National Security Act, which create the President's responsibility to prevent attack.

¹⁸ Memorandum on Organization of the National Security Council System (NSPD-1) (Feb. 13, 2001); Memorandum on Organization of the National Security Council (PDD-2) (Jan 20, 1993).

¹⁹ National Security Act of 1974 §103(d)(5), 50 U.S.C. §403-3(d)(5)(2006), *amended by* Intelligence Reform and Terrorism Prevention Act of 2004 §104A(d)(4), P.L. 108-458. Many of the other security tools are predicated on presidential decision as well, like IEPPA, and certain of the Foreign Assistance draw-down authorities.

²⁰ THE FEDERALIST NO. 8 (Alexander Hamilton).

²¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641(1952)(Jackson, concurring).

They dare not do so. When it comes to the constitutional separation of powers, where one sits often influences how one stands on the law. But it is not just the law that looks differently depending on where one sits. It is also one's sense of responsibility—the roles are different. In *Youngstown*, Jackson cautioned that the Courts should be the last branch, rather than the first to give up our constitutional form of government. Presidents, however, are more likely to place security before liberty in defining their roles; or to place the thought in constitutional context, to emphasize their singular responsibility as Commander in Chief to defend the U.S.

Future presidents, who assume responsibility for protecting the nation from nuclear and other attack, will also focus on the immediate. As a result, they too will look to the Commander in Chief clause to find the flexibility, speed, and authority they feel they need. This point warrants emphasis. Presidents will act when they feel the country threatened from attack. Thus, as in international law, where presidents of both parties have expressed, at least in theory, a desire to use force in concert with U.S. allies, all presidents have reserved the right to use unilateral force when necessary.²² The same imperatives are at play in constitutional context. The Executive will act, either pursuant to executive authority alone or pursuant to an inclusive and meaningful framework agreed to by the political branches.

B. THE CENTRAL ROLE OF THE PRESIDENT SHOULD NOT OBSCURE THE ADVANTAGES OF CONSTITUTIONAL INCLUSION

An enduring legal framework should address this practice realistically by seeking preferred functional outcomes. Absolute and exigent positions, legal and political, make it hard to do so. The focus on the Commander in Chief authority has also distracted from equally important elements of a long-term framework because of the Manichaeian nature of the debate. Arguments about the Commander in Chief clause, couched in absolutes, drive advocates into their constitutional corners. Advocates of a broad reading of the Commander in Chief clause tend to disregard the President's parallel responsibilities to "take care that the laws be faithfully executed" including statutory law and the application of the framework of the Constitution itself, with its checks and balances between branches. They also tend to overlook longstanding legal traditions distinguishing between foreign and domestic applications of law. Advocates of limited presidential authority, on the other hand, tend to downplay the nature of the threat as well as the President's singular constitutional responsibility as Chief Executive and Commander in Chief to protect the country from attack.

In a long-term conflict the preferred paradigm is one that is constitutionally inclusive, in which the extraordinary circumstance remains the exception and not the norm—in practice as well as law. Such a framework recognizes the need for exigent action, and provides mechanisms to trigger appropriate appraisal when doing so. This is the formula adopted in the covert action context, where the law incorporates the seemingly incompatible constitutional positions of the political branches—in the case of the legislative branch, a right to prior notification, and in the case of the Executive, a right to withhold notification until after the fact.²³ The result preserves both constitutional positions by defining a norm of prior notification but recognizing the exception as well. Thus, in "extraordinary circumstances" the president may limit prior

²² The "National Security Strategies" of President Clinton and President George W. Bush use almost identical language in making this point, which tracks as well with numerous public statements of presidents past and present.

²³ 50 U.S.C. §§413b(c)(1)-(3)(2006).

notification of covert actions to select members. And, in exceptions that go beyond even the extraordinary, the Act comprehends that the President might withhold notification altogether. But, the law requires him to inform the Congress that he did so and to justify the reasons for doing so. The exceptional argument is reserved for the exceptional moment. Ultimate constitutional arguments are deferred for when they are addressed to specific scenarios. This makes sense in a context where policy options may range from low threshold actions like press placements to covert acts of war.

The covert action statute is also process oriented. The law provides substantive authority, but is largely designed to encourage deliberation and accountability through the creation of procedural thresholds—foremost the requirement that the President personally “find” that the covert action in question is “necessary to support identifiable foreign policy objectives and is important to the national security of the United States.”²⁴ This is not a high substantive threshold, but it is an important procedural threshold. Because the law also requires that findings specify certain implementation mechanisms, the president is accountable for both the policy and its implementation. Thus, through process, the law ensures that activities that historically have borne heightened policy and legal risks are vetted at the highest levels and in an accountable way.

Laws of constitutional inclusion, focused on process and review, have a number of concrete security advantages. Inclusive laws maximize the Executive’s authority to act. An inclusive process is also more effective in validating options and thus achieving intended security results. Such laws are also more likely to be passed, enacted, and followed. Where the political branches have agreed on mechanisms to address differences of law or substance in context, the Executive will be less likely to fill the legal void with assertions of constitutional authority. This should result in greater sustained support over years for essential security instruments and policies. It should also increase, but not necessarily solidify, public confidence that U.S. security instruments are being used lawfully and effectively. This confidence should increase where the judicial branch also plays a role in validating facts and law.

Operational Authority: An inclusive paradigm maximizes the Executive’s authority to act. This is a legal truism reflected in the *Youngstown* paradigm. The President acts at the zenith of his authority when he acts pursuant to congressional authorization as well as pursuant to his own constitutional authority. But this point is sometimes lost in the separation of powers scramble, especially where the Commander in Chief authority is used.

An exclusive and excessive reliance on unilateral executive authority may also, ironically, lead to a diminution of operational authority. Where the Congress or the courts perceive that the Executive has overreached, they may restrict the Executive in ways that place intended and unintended substantive limits on executive action. Larger debates over constitutional authority in one context may spill over into other contexts, resulting in hesitation to assert an argument or perhaps undue debate over its validity.

In the homeland security context, for example, an immediate and overwhelming federal response may be the essential policy ingredient to address an incipient, but potentially catastrophic event. But such an intervention might necessarily occur where the facts are inchoate, and thus in the face of state and local opposition. In reaction to the use of executive authority in one context, the Congress may pass legislation to

²⁴ 50 U.S.C. §413b(a)(2006).

curtail or limit the President's reliance on constitutional authority generally, or in a different context. Whether constitutional or not, congressional opposition may increase the political costs to a president in acting, making the president hesitant to act. Of course, the President can help to address this situation by reserving the exceptional legal argument for the truly exceptional factual circumstance.

Support and Commitment: This conflict is different in many ways from past U.S. conflicts, including the nature of the opponent, the scope and intermittent nature of threat at home, and the role of law. This conflict is also different because it is enduring, meaning that it will be fought through administrations and over decades. In other words, constitutional "command" will transition from one president to the next, rather than reside exclusively with a Lincoln, Wilson, or a Roosevelt. Enduring threats require enduring rather than *ad hoc* solutions that will stand the test of time and the transition between political parties.

A long-term solution that garners the support of only one party or one branch should be viewed with suspicion, not because it may not be the correct policy, but because it is less likely to be sustained over time. With finite resources, the United States can ill afford needless vacillations in policy and funding. Moreover, a policy that cannot win the sustained support of both political parties in the Congress is unlikely to persuade allies and intelligence partners of its credibility. If the U.S. policy is not credible, our allies and liaison partners may delay or demur in identifying terrorist actors overseas or transferring such actors to U.S. custody.

As a result, at home, as abroad, divisive legal arguments and stratagems should be eschewed where there are viable legal arguments that will gain broader support. Lawyers might favor that outcome because it tends to emphasize constitutional structure. Security specialists should favor that outcome because the threat is potentially catastrophic and enduring and we need to maximize both domestic and international support in combating the threat over years.²⁵

V. PRINCIPLES APPLIED—DETAINEES AND RENDITION

Having described four essential principles that should inform a lasting legal architecture, it may be useful to consider how these principles might apply in context.

"Guantanamo" is a lightning rod, but it is just the most visible facet of a series of related intelligence, interrogation, adjudication, and detention issues. These issues include:

- How should the U.S. balance the need for intelligence to prevent future attack with legal values and principles that define who we are and, in the longer run, will deter recruitment to the extremists cause?
- What law applies, or should apply, to persons seized on and off the "battlefield" in a conflict against non-state actors engaged in terrorism?
- What role, if any, and in accordance with what procedural and substantive limitations should rendition, secret detention, and coercive interrogation play in such a conflict?

²⁵ The list of principles discussed in this article is not exhaustive. Global threats require global responses. A long-term architecture should therefore seek to better shape and then harness the positive value of international law to U.S. security practice. See J. Baker, *What's International Law Got to Do With It? Transnational Law and the Intelligence Mission*, 28 MICH. J. INT'L L. 639 (2007).

There are no easy answers to these questions because they find root in six some-time competing policies and values. That means that singular substantive answers in the form of permits or prohibitions are unavailing.

First, detainees can and have provided valuable intelligence.²⁶ An isolated prisoner, without benefit of counsel or friendly contact is more likely to succumb to interrogation. We know this from domestic law enforcement interrogation.²⁷

Second, the United States has, will, and must detain persons who have as a goal wanton killing, including through mass casualty events.

Third, there have been and will be persons detained by the United States who are *not* in fact lawful or unlawful combatants. This may result from mistaken identity, a process of bounty, or from terrorists using non-combatants for concealment. It might also result from the absence of a clear demarcation line between those who passively associate with terrorist groups and those who actively participate.

Fourth, “Guantanamo” as a symbol of U.S. rendition and detention practice, has had significant negative impact on how the United States is perceived. Perception can fuel conflict and deter alliance and liaison.

Fifth, some detainees who have been released from U.S. detention have returned to the conflict and been captured a second time. Others, no doubt, are at large.

Sixth, there is some agreement on the law. This agreement embraces an understanding that detainees should be subject to a bifurcated process of adjudication, first of their status, and then, if appropriate, allegations of unlawful conduct. The debate seems focused on how to do this, not on whether it should be done.

In light of these factors, the central question is: Where should we be in twenty years, not twenty months, and how do we get there today? There are pros and cons incumbent with every option. There are only obvious answers if one believes that the threat is one dimensional—to our physical security alone, or to our legal values alone. Answering these questions requires us to be honest about the threat, its risks on one side, and its duration on the other, as well the intangible costs and benefits to U.S. policy caused by the legal choices we make. If we cannot persuade ourselves—across parties and between administrations—we surely cannot hope to persuade a wider audience.

We will more likely succeed in answering this question in sustained manner if we break it down into its constituent parts—capture, interrogation, status adjudication, conduct adjudication, detention, and release—rather than just “Guantanamo.” Where mixed values are at stake and sometimes in tension as they are here, rigorous contextual process is also the best mechanism for adjudicating competing national security interests and values. Such contextual review is not facilitated by the resort to banners, like security and liberty or, for that matter, “Guantanamo.” Closing Gitmo may be wise, but Guantanamo is a symptom not a solution. Detainees will still be taken, they must still be interrogated, and their status and conduct must still be adjudicated. Then, they must be detained somewhere. The less the United States takes the lead in these areas the more likely it will employ third-country locations or alternatives through the process of ordinary and extraordinary rendition.

Rendition is an important security tool.²⁸ It is a faster and more secure means to

²⁶ E.g., Mark Bowden, *The Ploy*, ATLANTIC MONTHLY, May 2007.

²⁷ Interrogation is inherently coercive; I am not engaged in a euphemism about coercive methodology, only making a point about physical isolation at the outset of detention.

²⁸ For a fuller discussion of the legal, moral, and policy issues surrounding “extraordinary rendition,” see BAKER, *supra* note 11, at Ch. 7.

transfer suspects than extradition or deportation, including from a locale where they are not subject to lawful prosecution to one where they are. Rendition allows states that are either unwilling or unable to transfer subjects publicly to do so secretly. Rendition also raises the prospect of gathering intelligence and making further arrests before a subject's colleagues are aware of his capture. The prospect, accurate or otherwise, of third-party rendition may also induce subjects to cooperate.

Rendition is also subject to mistake and misuse. Advantages in secrecy and speed create risk. Persons rendered to third countries may be subjected to unlawful practices, including torture and extrajudicial punishment. Further, in the absence of the procedural safeguards applicable to extradition, subjects may be misidentified; or, where correctly identified, may be transferred based on information that is not subject to adjudication or independent validation through judicial and media oversight. Moreover, secrecy and speed can result in an internal process that minimizes the ordinary cross-checking that occurs when decisions are sent up the chain of command.

There is also little question that apparent mistakes or "notorious" cases become the lens through which the general audience evaluates the practice. As a result, rendition has taken on an importance in public perception disproportionate to its actual role in practice. To some, the United States commitment to the rule of law is judged by this practice, or better said, by real or perceived failures in practice.

Where the United States is perceived to act outside the law or its legal values, security may also be damaged and not just in intangible ways. Officials may be banned or placed at greater risk when operating overseas. Foreign governments may hesitate to act, share, or transfer at the critical moment when an attack might be averted. U.S. flight clearance may be denied.

For all these reasons, rendition practice warrants careful regulation, but regulation and not blind proscription. It is a necessary tool whose risks, costs, and benefits are best assessed in context. A good process for authorizing renditions is one that:

- Includes role-playing by persons not directly associated with the proposed activity, including persons whose sole responsibility is to the law and to the foreign policy implications of the conduct in question.
- Is secret and fast, but also meaningfully considers the predicate for rendition; the range of alternatives for displacing the subject and the U.S. experience with each alternative; the opportunities available to garner intelligence from the subject, based in part on projections of knowledge; the relative merits of public prosecution in the United States or a third state; and the actual and potential positive and negative repercussions of each rendition operation.
- Takes substance into account. Process is also substance where it dictates which views are considered or excluded, which options are tabled, and which risks are addressed. With respect to rendition, if one wants to "get to yes," then one should limit the decisional process to national security specialists. If one wants to "get to no," then one might give a veto to those officials responsible for human rights. Within an agency, the same results might be obtained by selecting the persons who attend a decisional meeting. That is not to say intelligence personnel do not value human rights, or human rights advocates do not value physical security. But if an official is charged with providing for security, chances are that as a matter of culture, practice, and interpretation, that official will lean in the direction of his or her perceived role.

With responsibility comes accountability, and with accountability comes care. A good process establishes a chain of responsibility for confirming identity, vetting operational details and, where applicable obtaining and verifying meaningful assurances from third countries. Here, the law might encourage rigorous process by requiring written authorization at the highest level of government feasible under operational circumstances, prior to third-country transfers. A process of periodic, rather than operational, external validation can also test whether practices that should remain extraordinary in practice, do indeed remain extraordinary rather than normative in practice as well as in name. Finally, a good process will double back, and once beyond the moment of necessity, consider whether the results were morally and legally sound and the security benefit validated.

VI. CONCLUSION

Law is not an abstraction, but an instrument intended to address real threats and sustain our constitutional values while doing so, to provide for the common defense of our physical security, our liberty, and our way of governance.

The terrorism threat is potentially catastrophic and in response we should adopt a legal architecture that is broad and flexible in authority. Use of the authorities in practice may be controversial but the necessity of having these tools in the counterterrorism quiver should not be, at least not if the threat is nuclear in dimension. Our legal architecture should also respond to security culture and practice, including the practice of presidents in executing their responsibility to protect the United States from attack. Presidents will act in response to threats. The question is: in accord with what framework?

Practice advises that where there is broad authority, there is increased risk of overreaching and thus a corresponding risk to our constitutional values and process of government. Independent mechanisms of appraisal, by detached executive actors, or through review by different branches of government are the most effective way to appraise options and then evaluate their implementation. Proactive appraisal results in better decisions. Independent actors ask tougher questions and are more probing in testing results. They also safeguard against bureaucratic propensities toward group think, factual complacency, secrecy, and default tendencies of security bureaucracies to allow the mission and not the law to define the exercise of power. Moreover, such appraisals make it easier to defend decisions internally and externally in the face of unanticipated, unintended, or simply unpleasant outcomes.

Finally, our legal architecture should maximize the use of law as a positive security value and virtue. In few other conflicts have the reaction of other states—and, as importantly, their citizenry—played such an important role in the conduct of the conflict. The United States is dependent on intelligence gathered at the ground level through law enforcement and intelligence liaison. The United States also depends on immediate access to foreign territory, or alternatively, credible local assistance. Our opponents rely on the cycle of action-reaction to U.S. policy, including legal policy, as a recruiting mechanism. If law defines who we are, it also distinguishes us from our opponents and defines how we are seen by others in a global contest with extremist terrorism.