Lessons on the Law

The Separation of Powers and 15 Years of Anti-Terrorism Policies Since 9/11

Steven D. Schwinn

September 11, 2016, marked the fifteenth anniversary of the 9/11 attacks. It also marked 15 years of government policies designed to root out international terrorists, destroy their networks, and prevent a repeat of those attacks. But these policies have been anything but straightforward. Instead, they have evolved and taken shape over time as they have bounced like a pinball among the three bumpers of government—the executive branch, the legislative branch, and the judiciary.

The evolution was, at least, in part, necessary. That’s because the terrorist threat after the 9/11 attacks was different from any kind of armed conflict that we had faced in the past. We did not have pre-existing policies to deal with the threat; indeed, we did not even have a completely adequate legal framework to develop and support those policies. Much of this was new, and the three branches of government struggled to sort out the separation-of-powers issues that it all inevitably implicated.

We did have some guidance. For example, we knew the time-tested framework designed by Justice Robert Jackson in the canonical 1952 Supreme Court case, *Youngstown Sheet & Tube Co. v. Sawyer*. That framework, in three tiers, is widely recognized as the standard for sorting out separation-of-powers problems between the president and Congress. It says that in the first tier, when Congress authorizes the president to act, the president’s authority is at its maximum, for then the president acts with all of the authority granted him or her in Article II of the Constitution plus all the authority that Congress can delegate. In the second tier, when Congress is silent, the president’s authority is limited to the inherent Article II authority, including any portion of that authority (a “zone of twilight”) where Congress has concurrent authority. In Justice Jackson’s formulation: “Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law.” In the third tier, when Congress restricts the president, the president’s authority is at its “lowest ebb,” and limited to any Article II authority minus any concurrent power that Congress has in the area.

We also knew that in matters of foreign affairs and national security, the president’s powers are often heightened relative to Congress and the courts. And we knew that some separation-of-powers doctrines can cut against judicial oversight entirely in these areas.

Finally, we knew certain bedrock rights in our Constitution. Thus, we knew the First Amendment right to free speech, the Fifth Amendment right to due process, and the right to habeas corpus (affording protections against government detention), among others, even if we didn’t always know when, where, and how these rights should apply in a new, international fight against terrorism.

Still, despite this background knowledge, we also knew that so much of separation-of-powers analysis is situation-specific. And because we faced new and different situations, we didn’t always know how these principles should apply in the new, post-9/11 world. As a result, the president, Congress, and the courts pin-balled policies back and forth in an iterative and evolutionary process that led to where we are today.

This article explores the post-9/11 history of three policy areas—detention of alleged terrorists, treatment of alleged terrorists, and surveillance of alleged terrorists. These histories, perhaps as well as any history of anti-terrorist policy, illustrate the back-and-forth, separation-of-powers struggle and evolution that consumed our government in its fight against international terrorism.

One note before we begin: These recent histories are extremely complex, involving complicated executive actions, legislation, and judicial rulings. This article paints them with a broad stroke, aiming only to use them to show some of the most important separation-of-
powers issues in the post-9/11 era.

**Detention of Alleged Terrorists**

The history of the government’s policies for detention of alleged terrorists tells perhaps the most interesting separation-of-powers story. It starts one week after the 9/11 attacks, when Congress enacted the Authorization for Use of Military Force. It authorized the president to “use all necessary and appropriate force against those nations, organizations, or persons that he determines planned, authorized, committed, or aided the terrorist attacks” or that “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

Using this authority, President George W. Bush ordered the U.S. armed forces to invade Afghanistan in order to pursue and capture or kill members of al Qaeda and the Taliban, a regime that supported al Qaeda. The government captured thousands of individuals, and labeled them “enemy combatants,” a new designation not previously recognized by the international law of war. The government transferred detainees to various detention sites, most notably Guantanamo Bay, Cuba, and took the position that they, as “enemy combatants,” were not entitled to protections under the Geneva Conventions, which set international law standards for humanitarian treatment during war. According to the government, this meant that it could detain so-called enemy combatants indefinitely, without charges or a trial, and without access to an attorney.

Two important U.S. Supreme Court cases challenged the government’s sweeping position. In the first, *Rasul v. Bush* (2004), the families of 14 foreign nationals detained at Guantanamo Bay brought a habeas corpus case against the government, arguing that the detention was illegal. The Supreme Court held that detainees at Guantanamo Bay could take advantage of the federal habeas statute and bring the case, although the Court did not rule on the merits.

In the second case, *Hamdi v. Rumsfeld* (2004), the father of Yaser Esam Hamdi, an American detainee held as an enemy combatant at a brig in Charleston, South Carolina, brought a similar habeas corpus claim. The Court held that the government could not hold Hamdi indefinitely, without charges, and without access to an attorney. Instead, the Court said that the government had to provide some measure of due process (although it did not say exactly what process was due).

In response to *Rasul* and *Hamdi*, the Defense Department established Combat Status Review Tribunals (CSRT) and Administrative Review Boards (ARB). A CSRT was a one-time hearing that the U.S. government convened in order to determine whether a detainee was correctly classified as an enemy combatant. An ARB was an annual review to determine if an enemy combatant still presented a threat, and therefore whether continued detention was warranted. Tribunals and Review Boards provided only limited due process rights for detainees. Still, they resulted in the recommendation of release for a limited number of detainees.

Congress responded to *Rasul*, *Hamdi*, and the Defense Department procedures by enacting the Detainee Treatment Act (DTA) in 2005. The DTA validated the CSRT and ARB procedures and provided for congressional oversight. It also sharply limited detainees’ right to appeal a Tribunal or Review Board decision in federal court by requiring detainees to file their appeals exclusively in the U.S. Court of Appeals for the D.C. Circuit. The Detainee Treatment Act also stripped all federal courts of habeas jurisdiction over detainees’ claims.

While this back-and-forth was going on, the government also created military commissions to try detainees for war crimes. Unlike the Combat Status Review Tribunals and Administrative Review Boards, the military commission was not designed to determine whether the government properly held a detainee. Instead, the military commission was designed as a criminal tribunal, to determine whether a detainee violated the laws of war, and whether and how the detainee could be punished.

The government sought to try Salim Ahmed Hamdan, a Yemeni national, using a military commission. Hamdan brought a habeas claim in federal court, and his case worked its way to the Supreme Court. The Court ruled in *Hamdan v. Rumsfeld* (2006) that the Detainee Treatment Act’s habeas-
stripping provision did not apply to Hamdan’s case (because Hamdan’s case was pending when Congress enacted the DTA), and that the government did not properly convene his military commission pursuant to domestic and international law.

Congress then responded to Hamdan by enacting the Military Commissions Act (MCA) of 2006. The MCA authorized the government to convene military commissions (like Hamdan’s) and again stripped federal courts of jurisdiction over any detainee habeas case (pending or future).

In a final move to date, the Supreme Court held in Boumediene v. Bush (2008) that the MCA’s habeas-jurisdiction stripping provision was an unconstitutional suspension of the right of habeas corpus. The Court said that Congress could not strip the courts of habeas review without an adequate substitute, and that the limited judicial review under the Detainee Treatment Act appeals process was not an adequate substitute. As a result, detainees filed numerous habeas claims in federal court, arguing that their detention was unlawful. The courts rejected most of these claims.

The federal government has acknowledged that many detainees at Guantanamo Bay were wrongly held. President Obama has moved to transfer wrongfully held detainees to their home countries, or to third countries, and to transfer properly held detainees out of Guantanamo Bay, and, ultimately, to close Guantanamo Bay. (Congress has prevented Obama’s executive order closing the detention facility at Guantanamo Bay by enacting legislation that prohibits the use of federal funds to close the facility. But this is yet a different separation-of-powers story, perhaps for another day.)

In all, 779 detainees have been held at Guantanamo Bay since 2002. Of those, 693 have been released or transferred, one was transferred to the United States for criminal trial, and nine have died. There are currently 76 detainees at Guantanamo Bay; 31 of these have been recommended for release.

**Treatment of Alleged Terrorists**

In the early period after the 9/11 attacks, the Bush administration set off a firestorm by maintaining that it could use “enhanced interrogation techniques” to extract intelligence information from detainees in order to stop future terrorist attacks. But many of these “enhanced interrogation techniques” (most notably water-boarding) were widely considered to be torture or inhuman treatment in violation of international and domestic laws. Still, the Bush administration defended these techniques under international and domestic law, arguing that they did not amount to the legal definition of “torture,” and fell under the president’s inherent constitutional powers to protect the nation. The Office of Legal Counsel in the U.S. Department of Justice provided the legal justification in a series of now-revoked memos.

Congress responded by banning “cruel, inhuman, or degrading” treatment of detainees in the Detainee Treatment Act of 2005. President Bush signed the legislation, but he also issued a constitutional signing statement, arguing that the provision encroached on his inherent Article II powers. The signing statement said that the president would therefore not enforce this ban. (The validity of constitutional signing statements is a hotly contested separation-of-powers issue, which the Supreme Court has not yet resolved. It remains open whether and to what extent presidents may ignore enacted legislation because they believe it encroaches upon their inherent constitutional powers.)

Since that time, the Bush and Obama administrations have walked back the Bush administration’s initial and sweeping claim that a president may authorize “enhanced interrogation techniques” as part of the president’s inherent Article II powers. And President Obama has announced that the military would not engage in water-boarding or other treatment that is widely recognized as torture or inhuman treatment.

But still, when victims have sued in court for damages resulting from their treatment, the executive branch has consistently and successfully defended against those suits based on separation-of-powers principles. Thus, the U.S. government successfully defended a series of torture claims based on the “state secrets privilege.” It successfully defended other torture claims based on “special factors” that counsel against a federal judicial remedy. Most recently, the federal government has successfully defended against torture claims based on the “political question doctrine.” Each of these defenses has roots in a separation-of-powers principle. That principle says that certain kinds of issues, like national security issues, are appropriate for executive, not judicial, resolution. The Bush and Obama administrations have been extremely successful in asserting these defenses in the lower courts, and the Supreme Court has yet to weigh in.

**Surveillance of Alleged Terrorists**

In 1978, Congress enacted the Foreign Intelligence Surveillance Act (FISA). The FISA was designed to authorize and regulate certain government surveillance of communications related to foreign intelligence. Under the FISA, Congress created the Foreign Intelligence Surveillance Court (FISC) to approve electronic surveillance for foreign intelligence so long as there is probable cause to believe that “the target of the electronic surveillance is a foreign power or an agent of a foreign power.”

Soon after the 9/11 attacks, President Bush secretly authorized the National Security Agency (NSA) to conduct the Terrorist Surveillance Program (TSP). The program authorized the NSA to conduct warrantless wiretapping of telephone and e-mail communications “into and out of the United States” by “a member or agent of al Qaeda or an affiliated terrorist organization,” without judicial review. But the TSP was not specifically authorized by Congress; instead, President Bush asserted a unilateral and inherent “constitutional authority to conduct warrantless wartime electronic surveillance of the enemy.” In other words,
President Bush justified the clandestine surveillance program solely under his wartime power as commander in chief—a power that he saw as remarkably broad—without the need for congressional authorization or judicial review.

But the Terrorist Surveillance Program faced public scrutiny when The New York Times revealed in December 2005 that the federal government had “monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people in the United States without warrants.” The TSP came to a halt around January 2007.

At that same time, the Foreign Intelligence Surveillance Court issued orders that authorized the government to target these same communications where there was probable cause to believe that one participant to the communication was a member or agent of al Qaeda or an associated organization. The FISC subsequently narrowed this authority, however, and the president then asked Congress to amend the FISA to give the government additional surveillance authority.

Congress responded by enacting the Protect America Act in 2007 and amending the FISA (Foreign Intelligence Surveillance Act Amendments Act of 2008). Section 702 of the FISA Amendments Act permits the NSA to collect these same international communications with Foreign Intelligence Surveillance Court authorization. (The Protect America Act provided similar authorization, but for a short period of time.) In particular, Section 702 requires the government to obtain FISC approval of targeting procedures, “minimization” procedures, and a government certification regarding proposed surveillance. (One of the released FISC decisions shows that this review is not toothless. After the government recently discovered that its upstream surveillance activities inadvertently swept in unrelated international communications and wholly domestic communications, the FISC held that the government’s minimization procedures violated the Act and the Fourth Amendment. The government then modified its procedures, and the FISC approved them.) Upon FISC approval, Section 702 authorizes the attorney general and the director of national intelligence jointly to approve surveillance of these communications. The authorization has some limits. Most importantly, it can only last for one year; surveillance cannot be intentionally targeted at any person known to be in the United States or any U.S. person reasonably believed to be located abroad; and surveillance is subject to the Fourth Amendment and congressional and executive oversight. But at the same time, Section 702 authorization does not require the government to show probable cause that the target of the surveillance is a foreign power or an agent of a foreign power, and it does not require the government to specify the nature and location of each of the particular places or facilities where its surveillance will occur. Recipients of Section 702 orders (like communications providers) are prohibited from revealing that they have received such an order, even to their customers.

Using Section 702, the U.S. government principally collects “metadata”—records of the people, locations, equipment, times, dates, and durations of communications, but generally not the content of those communications—from communications providers. But documents released by Edward Snowden in 2013 revealed that the government used Section 702 authority for another, more sweeping program called “PRISM.” The PRISM program allows the government to gain access to data directly from the servers of certain U.S. internet and tech companies (including Google, Facebook, Microsoft, and Apple, among others), and to collect e-mails, login credentials, metadata, stored files, and more. The Foreign Intelligence Surveillance Court authorizes the program once a year in a secret order. There are no individual warrants.

Under Section 702, the NSA collected 250 million Internet communications per year. Of these, 91 percent were acquired “directly from Internet Service Providers,” while the other 9 percent were acquired by intercepting Internet traffic in transit from one unspecified location to another.

The day that Congress enacted Section 702, a group of attorneys and human rights, labor, legal, and media organizations sued, arguing that Section 702 violated the First and Fourth Amendments, Article III, and separation-of-powers principles. The plaintiffs argued that Section 702 would impede their work, because it allowed the NSA to intercept their communications with overseas clients and sources. But the Supreme Court dismissed the case. The Court ruled in Clapper v. Amnesty International (2013) that the plaintiffs lacked standing to sue, because they could not show that they suffered the kind of harm, with the requisite certainty, that would satisfy U.S. Constitution Article III “case or controversy” requirements.

Although the Court’s ruling in Clapper v. Amnesty International means that civil plaintiffs may never be able to challenge Section 702, criminal defendants may. At least five criminal defendants have moved to suppress the government’s evidence gathered under Section 702 surveillance. These cases are now working their ways through the lower courts and may bring the issue back to the Supreme Court.

In addition to authorizing surveillance under Section 702, in October 2001, soon after 9/11, Congress enacted the USA PATRIOT Act. Section 215 of the Act substantially expanded the government’s existing authority (under FISA) to order the production of any “tangible things (including books, records, papers, documents, and other items)” as part of a foreign intelligence investigation. Under this authority, the government could petition the Foreign Intelligence Surveillance Court for such an order against any person “to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.” (This low
standard means that FISC review is really just a formality.) This authority thus permitted the government to seek information concerning persons not necessarily under investigation but who are connected in some way to another person or entity under investigation. Section 215 orders impose a “gag order” on recipients, so that they may not reveal that they received an order.

The Snowden documents revealed that the government used Section 215 authority to collect and preserve communication records of millions of Americans from some of the largest telecommunications providers in the United States. Like information collected in bulk under Section 702 authority, this information included only metadata and was used only for national intelligence and security purposes, or so the government said.

The USA PATRIOT Act expanded another pre-existing authority, too. Section 505 of the Act expanded the government’s authority to issue “National Security Letters” (NSL). NSLs allow the government to obtain information similar to Section 215 orders, but NSLs do not require judicial review. The USA PATRIOT Act authorized the FBI to issue an NSL through a regional FBI office, without approval from headquarters; and the Act required merely that the information be “sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities.” Like Section 215 orders, Section 505 NSLs impose a “gag order” on recipients.

Civil liberty groups brought a series of lawsuits arguing that Sections 215 and 505 violated the First and Fourth Amendments, and they achieved some important victories in the lower courts. The Supreme Court has yet to weigh in. Congress responded to the lower-court

continued on page 223
the class in half; consider a classroom debate in which students discuss the various ways in which forcing students to salute the flag impinged on their First Amendment rights. In addition, students could go further by researching a current event in which First Amendment rights have been challenged.

Research Project Assignment:
Assign students a project around the topic of religious liberties and freedom of speech. Consider asking students to create a spoken word piece, poster, or other kind of visual product that outlines the issues and their thoughts about them. Numerous court cases are available through Docs Teach at www.DocsTeach.org, or through the National Archives online catalog at www.archives.gov/research/catalog, both of which can aid in this research.

Research Resources

Documents
Pages 18 and 19 of the Direct Examination of Walter Gobitis, from Walter Gobitis v. Minersville School District et al.; Equity Case #9727; Eastern District of Pennsylvania; Record Group 21; Records of the United States District Court National Archives at Philadelphia; https://catalog.archives.gov/id/279031.

J. F. Rutherford, God and the State, Watchtower Bible and Tract Society (New York: Watchtower Bible and Tract Society, 1941). This pamphlet was included as an exhibit in the following case: Barnette et al. v. West Virginia State Board of Education; Civil Case #242; Charleston Division; Southern District of West Virginia; United States District Court; National Archives at Philadelphia; https://catalog.archives.gov/id/279127.

Notes

LESSONS ON THE LAW
from page 218

rulings by tightening these authorities in amendments to the Act, in particular by creating new procedures for judicial review and enforcement of the National Security Letters and gag orders in the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006.

Most recently (and after quite a bit of back-and-forth), in June 2015, Congress responded to the outcry over the sweeping metadata programs revealed in the 2013 Snowden documents by enacting the USA FREEDOM Act. This legislation ends bulk collection under Section 215; allows challenges to NSL gag orders; and implements new procedural protections at the Foreign Intelligence Surveillance Court that are designed to protect privacy, promote civil liberties, and increase transparency.

Each of these policies—detention of alleged terrorists, treatment of alleged terrorists, and surveillance of alleged terrorists—evolved in the months and years after the 9/11 attacks, as the president, Congress, and the courts each tried to protect the nation while respecting separation-of-powers and other constitutional principles. The evolution was at least in part necessary, because we did not have pre-existing policies, or even a complete pre-existing legal framework, to develop policies. And while we have come a long way in our understanding of the separation of powers, these issues will continue to arise, and policies will continue to evolve, as we continue to deal with these problems and others in the ongoing fight against international terrorism.

Lessons on the Law is a contribution of the American Bar Association Division for Public Education. The content in this article does not necessarily represent the official policies or positions of the American Bar Association, its Board of Governors, or the ABA Standing Committee on Public Education.

STEVEN SCHWINN is a professor of law at the John Marshall Law School, and writes numerous articles about constitutional law and policy. He may be reached at sschwinn@jmls.edu.

Grace DiAgostino is an Archives Technician at the National Archives at Philadelphia. She can be reached at grace.diagostino@nara.gov. Andrea Reidell served as editor on this article and is the Education Specialist at the National Archives at Philadelphia. She can be reached at andrea.reidel@nara.gov.