

Introduction

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Looking back with the perspective of more than a decade, we can see that the terrorist attacks on September 11, 2001, were an inflection point in American law and policy. Controversies continue, but many of the fundamental legal changes seem, at this distance, to have become an accepted part of our system of governance and, indeed, our way of life.

Before the 9/11 attacks, other dramatic events—such as the 1995 Oklahoma City bombing—occurred, and policy decisions were questioned in every administration. Sensational courts-martial, though rare, were convened and merited widespread media coverage. For the most part, though, journalists' interest in the legal evolution of national security law was minor unless it seemed to run smack into First Amendment speech issues.

Times have changed. One way of capturing that change is to survey journalists' use of some common phrases regarding national security law and policy.

Anecdotally, the changes are stunning. Mentions of “military commissions” in newspapers and wire services, for example, rose from just eight in 2000 to nearly 900 in 2011.¹ “Cybersecurity” merited only 144 mentions in 2000 compared with more than 3,000 in 2011. “Border security” similarly jumped from fewer than 300 mentions to more than 3,000. And “drones” were just a gleam in their designers' eyes with zero mentions in 2000 and more than 1,900 in 2011 (likewise “targeted killings” rose from four to over 400). The figures give substance to the fundamental premise of this book—that after September 11 the language of public discourse changed.

Not only has the language of our public policy changed, but so too has our collective experience. A list of high points and low points of the past decade would reflect a global and national reality that is significantly different from that of the

1. The data we present here are from a broad-based Lexis-Nexis search of major U.S. newspapers and wire services during the years in question. We thank John Odle, a student at Emory University School of Law, for his research assistance in collecting this data.

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turn of the century, including of course the 9/11 attacks themselves, the invasion of Iraq, and the war in Afghanistan.

Experiences like Transportation Safety Administration screenings at the airport have become shared reference points and part of popular culture. Guantanamo Bay, which had faded in American memory, returned to prominence. And perhaps most tellingly, obscure corners of law and policy now have a significant impact on American conversations that erupt over national security issues.

Almost everyone has an opinion about what is happening: The introduction of backscatter X-ray machines in 2010 as part of airport security prompted a spate of protests by some who saw them as an invasion of privacy. When President Barack Obama chose to commit American military forces to the NATO mission in Libya in 2011, the public argument over the wisdom of that course of action was vocal and widespread. Even as we write this, the same argument is recurring over the decision *not* to intervene militarily in Syria.

The level of public engagement in issues of national security concern has returned to levels not seen in America since the 1960s and 1970s. The discussion is at once invigorating, engaging, frustrating, and challenging. Journalists, as the voice of a free people, are at once responsible for reporting on that discourse and, to some degree, creating it.

This book is intended to help journalists reporting on those discussions understand the legal underpinnings so they can provide context and avoid factual missteps. Others in the public sphere likewise find the law obscure. Our thesis, amply substantiated by the essays in this volume, is that the United States is a country bound by the rule of law and, thus, that behind every policy question lurks a legal landscape. Obama's Libya decision was not only a policy issue but also an occasion for the discussion of the lawfulness of presidential war making without the benefit of congressional approval.

In short, the law matters. But because lawyers have a tendency to speak a foreign language—that is, “lawyer-ese”—and to cite earlier case histories in shorthand, the legal landscape is often inaccessible to those outside that profession. Journalists and others without legal training but eager to inform the general public often have difficulty making sense of the volumes of judicial decisions, administrative rulings, and other mandates in the legislative and judicial universe.

We aim to lift those clouds of obscurity—particularly for journalists who cover the national security beat, though it is our hope that any interested layman also will find clarity in these pages. We have asked legal experts with a wide breadth of experience to provide us with clear and precise summaries of significant areas of law that bear on national security and homeland security policy. Many are current or former national security officials who represent various administrations. Others are widely respected academics. All have given of their time for the pure joy of the effort, and they have our deepest thanks.

Each chapter contains a summary of legal and policy issues of significance and is accompanied by an annotated bibliography for further reading. In

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addition, and especially helpful for journalists new to the particular legal issue, each chapter also contains a list of experts to contact for additional background and information.

Part I begins, as it should, at the beginning. This section contains essays on aspects of the law that pervade all of the other subjects. It includes chapters on the scope of the president's authority, the meaning and effect of the First Amendment, and basic rules of classification and secrecy that bear on all of the domestic issues discussed. This section also covers the role of international law in American courts and the problems attending even the basic question of defining exactly what terrorism is.

Part II turns the focus to the military and explores questions about military organization and operations. These topics range from broad questions about the laws of armed conflict and the allocation of responsibility between the military and intelligence community, to narrower questions about the legality of targeted killing and the lawfulness of our responses to piracy. There is also a discussion of the controversial military commission system and the far more common system of courts-martial.

Part III looks at the world of domestic law enforcement and intelligence collection. This section begins by describing how this world of government activity is organized. We then turn to a series of chapters on how government operates—looking first at the legal authorities to conduct investigations broadly, and then at the narrower question of electronic surveillance. This section also has chapters on the material support provisions of law, the principal legal tools used to prosecute alleged terrorists and their supporters today, and the vexing question of how to apply U.S. law to acts outside our borders. We conclude with two of the hot-button issues of the day: the potential problems surrounding data mining (the collection and analysis of large quantities of personal data by the government) and the role of export controls in restricting access to technology.

Finally, in Part IV we turn to homeland security issues. Two of the topics in the section—border security and immigration, and the use of airport screening technology—will be familiar to almost everyone. The other two topics—the use of the military in the homeland and the scope of biological threats—will be less well known but will be of equal, if not greater, importance in the coming years.

Our goal is to demystify the law and how it developed. In doing so, our aim is to provide the necessary legal background and context for journalists and others who want to understand ongoing policy debates. Readers will have a better appreciation for the many legal and policy changes that have happened since September 11, how and why they came about, and whether they were overreactions or reasonable judgments. Our objective is to inform the discussion and, we hope, educate as well.