



## PREFACE

### A WATERSHED YEAR IN NATIONAL SECURITY LAW

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The inaugural issue of the *National Security Law Journal* appeared in March 2013 and much has changed since then in the field it covers. A number of the developments of the past year will almost certainly come to be seen as watershed moments in U.S. national security law. Among the most consequential was Edward Snowden’s massive release of classified documents on the surveillance programs of the National Security Agency (“NSA”). These events have reenergized debate about the proper scope of government data collection on American citizens and stoked a new debate on government data collection against foreigners abroad. Similarly, the legal significance (and policy implications) of the President’s request to Congress to authorize a limited military intervention in Syria—and the withdrawal of that request in light of evolving events abroad—is likely to be debated for years to come.

Other legal issues regarding war powers also moved to the forefront of public debate over the last year. Senator Rand Paul sought to filibuster the nomination of John Brennan to serve as

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Director of the Central Intelligence Agency over concerns that the President could ostensibly assert his commander-in-chief authority to conduct drone strikes against Americans in the United States.<sup>3</sup> Senator Paul's effort generated a back-and-forth letter exchange between the Senator and the Attorney General,<sup>4</sup> the introduction of legislation seeking to regulate such strikes,<sup>5</sup> and a range of op-eds on the topic.<sup>6</sup>

The United States also captured Sulemain Abu Gaith, the most significant Al Qaeda leader to be apprehended in recent years. The Obama Administration, however, declined to hold and interrogate him in temporary military or intelligence custody—as it had with other terrorist leaders, such as Ahmed Warsame—instead bringing Abu Gaith to the United States to face federal charges immediately upon capture.<sup>7</sup>

Members of Congress also began discussing whether revisions to the September 18, 2001 Authorization for the Use of Military Force (“9/11 AUMF”) were necessary and advisable.<sup>8</sup>

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<sup>3</sup> Lucy Madison, *Rand Paul Filibusters Vote on CIA Director Nominee John Brennan Over Drones*, CBS NEWS (Mar. 6, 2013, 4:45 PM), <http://www.cbsnews.com/news/rand-paul-filibusters-vote-on-cia-director-nominee-john-brennan-over-drones/>. See generally Noah Oberlander, Comment, *Executive Process: The Due Process of Executive Citizen Targeting by the Commander-in-Chief*, 1 NAT'L SEC. L.J. 124 (2013).

<sup>4</sup> Rachel Weiner et al., *Eric Holder Responds to Rand Paul with 'No,' Paul Satisfied*, WASH. POST (Mar. 7, 2013, 2:02 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/07/white-house-obama-would-not-use-drones-against-u-s-citizens-on-american-soil/>.

<sup>5</sup> A Bill to Prohibit the Use of Drones to Kill Citizens of the United States Within the United States, S. 505, 113th Cong. (2013).

<sup>6</sup> E.g., Editorial Board, *Op-Ed., More Oversight and Disclosure on Drones*, WASH. POST (Mar. 7, 2013), [http://www.washingtonpost.com/opinions/more-oversight-and-disclosure-on-drones/2013/03/07/2da5bd44-8756-11e2-98a3-b3db6b9ac586\\_story.html?hpid=z2](http://www.washingtonpost.com/opinions/more-oversight-and-disclosure-on-drones/2013/03/07/2da5bd44-8756-11e2-98a3-b3db6b9ac586_story.html?hpid=z2).

<sup>7</sup> Peter Finn, *Somali's Case a Template for U.S. as it Seeks to Prosecute Terrorism Suspects in Federal Court*, N.Y. TIMES (Mar. 30, 2013), [http://www.washingtonpost.com/world/national-security/somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fd0-988a-11e2-814b-063623d80a60\\_story.html](http://www.washingtonpost.com/world/national-security/somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fd0-988a-11e2-814b-063623d80a60_story.html).

<sup>8</sup> See John Bresnahan, *Senators Discuss Revising 9/11 Resolution*, POLITICO (May 7, 2013, 5:04 AM), <http://www.politico.com/story/2013/05/senators-discuss-revising-911-resolution-90989.html>; see also Press Release, Sen. Bob Corker, Corker: After 11

Proponents of an updated authorization note that the threat from terrorist groups appears to be diversifying, both in the range of U.S. and Western interests being targeted, and the types of entities engaged in such plotting.<sup>9</sup> This issue is likely to stir continuing public debate as the President seeks to wind down the “hot war” in Afghanistan and seeks to close the terrorist detention facility at Guantanamo Bay, Cuba.<sup>10</sup> The President has also publicly declared his intent to work with Congress to refine or repeal the 9/11 AUMF.<sup>11</sup> A number of our colleagues have joined the debate on this issue. Notably, Bobby Chesney, Jack Goldsmith, Ben Wittes, and Matt Waxman have called for a new resolution,<sup>12</sup> while Rosa Brooks,

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Years, Time to Consider Updating Authorization for Use of Force Against Al Qaeda to Address New and Emerging Threats (Mar. 20, 2013), <http://www.corker.senate.gov/public/index.cfm/2013/3/corker-after-11-years-time-to-consider-updating-authorization-for-use-of-force-against-al-qaeda-to-address-new-and-emerging-threats> (excerpting from hearings on counterterrorism policies before the Senate Foreign Relations Committee); Akela Lucy, *AUMF: Reasserting the Role of Congress*, DIPLOMATIC COURIER (Aug. 8, 2013), <http://www.diplomaticourier.com/news/topics/security/1640-aumf-reasserting-the-role-of-congress>.

<sup>9</sup> Edith M. Lederer, *U.N. Experts Say Al-Qaida Affiliates Remain A Threat*, ASSOCIATED PRESS (Aug. 7, 2013, 4:19 PM), <http://bigstory.ap.org/article/un-experts-say-al-qaeda-affiliates-remain-threat>.

<sup>10</sup> Press Release, White House, Remarks by the President at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>. The President stated:

In Afghanistan, we will complete our transition to Afghan responsibility for that country’s security. Our troops will come home. Our combat mission will come to an end. . . . As President, I have tried to close GTMO. . . . [T]here is no justification beyond politics for Congress to prevent us from closing a facility that should have never have been opened. . . . [O]nce we commit to a process of closing GTMO, I am confident that . . . legacy problem[s] can be resolved, consistent with our commitment to the rule of law.

*Id.*

<sup>11</sup> *Id.* In his remarks at the National Defense University, the President stated:

I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. That’s what our democracy demands.

*Id.*

<sup>12</sup> Robert Chesney, Jack Goldsmith, Matthew C. Waxman & Benjamin Wittes, *A Statutory Framework for Next-Generation Terrorist Threats*, HOOVER INST. (2013),

Jennifer Daskal, and Steve Vladeck question the need for a new, more flexible AUMF.<sup>13</sup> And yet others have directly called for repeal of the existing authorization in the near-term.<sup>14</sup>

The current administration, meanwhile, revealed the legal analysis underlying its decision to target for lethal action Anwar al-Awlaki, a key Al Qaeda leader who also happened to be an American citizen.<sup>15</sup> The terrorist attacks in Boston and their aftermath likewise renewed significant legal and policy debates on the appropriate handling of terrorism suspects, particularly with respect to their capture, detention, and interrogation, and whether and when they ought to be provided *Miranda* warnings.<sup>16</sup>

While direct American military operations in Afghanistan are scheduled to end in December 2014, some counterterrorism efforts may continue, and whether or not Afghanistan reverts to its pre-2001 status as a haven for terrorists, Syria will likely continue to

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available at <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>.

<sup>13</sup> See, e.g., Rosa Brooks, *Mission Creep in the War on Terror*, FOREIGN POL'Y (Mar. 14, 2013), [http://www.foreignpolicy.com/articles/2013/03/14/mission\\_creep\\_in\\_the\\_war\\_on\\_terror](http://www.foreignpolicy.com/articles/2013/03/14/mission_creep_in_the_war_on_terror); Jennifer Daskal & Steve Vladeck, *After the AUMF, III: A Surreply to Jack*, LAWFARE BLOG (Mar. 19, 2013, 12:28 AM), <http://www.lawfareblog.com/2013/03/after-the-aumf-iii/>.

<sup>14</sup> See e.g., Editorial Board, Op-Ed., *Repeal the Military Force Law*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/opinion/sunday/repeal-the-authorization-for-use-of-military-force-law.html>; Andrew Cohen, *This is Congress's Chance to Rein in the War on Terror*, ATLANTIC (May 16, 2013), <http://www.theatlantic.com/politics/archive/2013/05/this-is-congresss-chance-to-rein-in-the-war-on-terror/275902/>.

<sup>15</sup> Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?hp&r=0>; see Oberlander, *supra* note 3, at 126-134.

<sup>16</sup> See Richard A. Serrano, *Senators Say Tsarnaev Should Be Declared 'Enemy Combatant'*, L.A. TIMES (Apr. 20, 2013), <http://articles.latimes.com/2013/apr/20/nation/la-na-nn-miranda-boston-bombing-suspect-20130420>; see also Bill Chappell, *Miranda Rights And Tsarnaev: Ex-U.S. Attorney General Weighs In*, NAT'L PUBLIC RADIO (Apr. 21, 2013, 12:07 PM), <http://www.npr.org/blogs/thetwo-way/2013/04/21/178254784/miranda-rights-and-tsarnaev-ashcroft-says-u-s-move-is-the-right-one>; *Transcript of the Boston Bombing Suspect's Bedside Hearing* (Apr. 22, 2013), N.Y. TIMES, [http://www.nytimes.com/interactive/2013/04/22/us/tsarnaev-court-appearance.html?\\_r=0](http://www.nytimes.com/interactive/2013/04/22/us/tsarnaev-court-appearance.html?_r=0).

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serve as a training ground for violent jihadis. And there can be little doubt that the threat from Al Qaeda and other terrorist groups will continue to morph as the groups themselves evolve in response to external and internal pressures. Thus, the need to confront terrorism in a flexible and agile manner is unlikely to disappear in the near term and the legal and policy issues raised by such efforts will continue to stir debate.

But for most of the past year, legal issues surrounding offensive operations against terrorism were eclipsed by debate about surveillance programs. The middle of the year saw the initial disclosure by Edward Snowden<sup>17</sup>—since confirmed by the federal government—of the telephony metadata program conducted under the Foreign Intelligence Surveillance Act (“FISA”), as amended by Section 215 of the USA PATRIOT Act (“Section 215”).<sup>18</sup> Over the ensuing months, additional leaks by Mr. Snowden—assisted by various media outlets around the globe—provided more alleged details about the government’s surveillance efforts. Assuming they are accurate, these leaks (which continue unabated)—combined with other information disclosed by various media sources as a result of Mr. Snowden’s theft of government files—arguably represent the largest and most damaging disclosure of highly classified information in the nation’s history.

These recent leaks have also resulted in a major declassification of information about such programs and the legal regime supporting them. The Director of National Intelligence established a separate website, “IC on the Record,” to provide a home for various declassified documents from the Intelligence Community and other government agencies.<sup>19</sup> This repository has since been

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<sup>17</sup> Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, *GUARDIAN* (June 5, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

<sup>18</sup> Primary Order, *In re: Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. 13-80 (FISA Ct. Apr. 25, 2013), *available at* [http://www.dni.gov/files/documents/PrimaryOrder\\_Collection\\_215.pdf](http://www.dni.gov/files/documents/PrimaryOrder_Collection_215.pdf).

<sup>19</sup> Dara Kerr, *NSA and Intelligence Community Turn to Tumblr – Weird but True*, *CNET NEWS* (Aug. 21, 2013), [http://news.cnet.com/8301-1009\\_3-57599622-83/nsa-and-intelligence-community-turn-to-tumblr-weird-but-true/](http://news.cnet.com/8301-1009_3-57599622-83/nsa-and-intelligence-community-turn-to-tumblr-weird-but-true/).

populated with, among other items, numerous declassified pleadings and briefs filed by the U.S. government in surveillance cases, along with the details of various court orders and opinions issued by the Foreign Intelligence Surveillance Court (“FISC”). The declassified court opinions highlight a range of compliance issues at the NSA, including judicial complaints about the federal government’s implementation of its authority under the FISC’s orders, but generally endorse the government’s collection authority under FISA.<sup>20</sup>

These declassified materials also provide information about the government’s collection programs targeting the content of communications of non-U.S. persons located outside the United States conducted under the FISA Amendments Act of 2009,<sup>21</sup> and the collection of Internet metadata conducted pursuant to the pen register/trap and trace provision of FISA.<sup>22</sup> They also filled in some historical details about the surveillance program initiated by President George W. Bush soon after the terrorist attacks of September 11, 2001.<sup>23</sup>

These declassified materials have provoked a wide-ranging public and academic debate about the adequacy of legal controls exercised by the FISC.<sup>24</sup> There has also been wider debate about the

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<sup>20</sup> See generally Office of the Dir. of Nat’l Intelligence, *Declassified*, IC ON THE RECORD, <http://icontherecord.tumblr.com/tagged/declassified> (last visited Feb. 18, 2014).

<sup>21</sup> Office of the Dir. of Nat’l Intelligence, *Section 702 of the Foreign Intelligence Surveillance Act*, IC ON THE RECORD, <http://icontherecord.tumblr.com/topics/section-702> (last visited Feb. 18, 2014).

<sup>22</sup> James R. Clapper, *DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act: Additional Information on the Discontinued PR/TT Program*, IC ON THE RECORD (Nov. 18, 2013), <http://icontherecord.tumblr.com/post/67419963949/dni-clapper-declassifies-additional-intelligence>.

<sup>23</sup> Office of the Dir. of Nat’l Intelligence, *DNI Announces the Declassification of the Existence of Collection Activities Authorized by President George W. Bush Shortly After the Attacks of September 11, 2001*, IC ON THE RECORD (Dec. 21, 2013), <http://icontherecord.tumblr.com/post/70683717031/dni-announces-the-declassification-of-the>.

<sup>24</sup> *U.S. Domestic Surveillance*, COUNCIL ON FOREIGN REL. (Dec. 18, 2013), <http://www.cfr.org/intelligence/us-domestic-surveillance/p9763>.

legality and propriety of the programs themselves, the value of these collection efforts, the appropriate legal constraints on such collection, and the appropriate scope and depth of oversight over the U.S. intelligence community.<sup>25</sup> Legislation to significantly curtail or alter this collection has been introduced in Congress,<sup>26</sup> and the telephony metadata program narrowly survived a test vote of 217-205 in the U.S. House of Representatives.<sup>27</sup>

These programs have likewise provoked a broad debate in foreign nations regarding the scope of intelligence collection conducted by the United States (and allegedly by certain allied governments), including significant criticism of U.S. surveillance efforts by European politicians.<sup>28</sup> Interestingly, little of this criticism—at least on a comparative basis—has focused on the surveillance efforts of those nations themselves, even though many of these nations lack anywhere near the protections and legal restrictions the disclosed American programs operate under. President Obama responded to the range of domestic and international criticism by providing a limited defense of the contours of certain surveillance programs,<sup>29</sup> while embracing some (though

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<sup>25</sup> *Id.*

<sup>26</sup> See generally Michelle Richardson & Robyn Greene, *NSA Legislation Since Leaks Began*, AM. CIV. LIBERTIES UNION (Aug. 15, 2013), <https://www.aclu.org/blog/national-security/nsa-legislation-leaks-began> (providing a summary of NSA-related legislation introduced through August 2013).

<sup>27</sup> Donna Cassata, *House Narrowly Rejects Effort to Halt NSA Program*, ASSOCIATED PRESS (July 24, 2013, 8:17 PM), <http://bigstory.ap.org/article/backers-surveillance-program-battle-challenge>.

<sup>28</sup> See Josh Levs & Catherine E. Shoichet, *Europe Furious, 'Shocked' by Report of U.S. Spying*, CNN (July 1, 2013), <http://www.cnn.com/2013/06/30/world/europe/eu-nsa/>; see also Leslie Bentz, *EU Delegation Meeting at White House Over NSA Spying Concerns*, CNN (Oct. 30, 2013), <http://www.cnn.com/2013/10/30/politics/nsa-eu-delegation/>.

<sup>29</sup> See Press Release, White House, Statement by the President (June 7, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/07/statement-president>. The statement reads, in part:

I welcome this debate. . . . I think it's important for everybody to understand—and I think the American people understand—that there are some tradeoffs involved. I came in with a healthy skepticism about these programs. My team evaluated them. We scrubbed them thoroughly. We actually expanded some of the oversight, increased some of safeguards. But my assessment and my team's assessment was that they help us prevent

not all) of the reforms proposed by a review panel he appointed to examine these activities.<sup>30</sup> Pressure remains on both the legislative and executive branches to act further, with outside groups continuing to call for stronger reforms, and even the President himself calling on Congress to consider legislative modifications to existing programs and statutes.<sup>31</sup> Alongside the issues surrounding the war on terror, these surveillance matters are likely to remain in the headlines and be an active topic of discussion in the halls of Congress and the Executive Branch.

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terrorist attacks. And the modest encroachments on the privacy that are involved in getting phone numbers or duration without a name attached and not looking at content, that on net, it was worth us doing. Some other folks may have a different assessment on that. But I think it's important to recognize that you can't have 100 percent security and also then have 100 percent privacy and zero inconvenience. We're going to have to make some choices as a society. And what I can say is that in evaluating these programs, they make a difference in our capacity to anticipate and prevent possible terrorist activity. And the fact that they're under very strict supervision by all three branches of government and that they do not involve listening to people's phone calls, do not involve reading the emails of U.S. citizens or U.S. residents absent further action by a federal court that is entirely consistent with what we would do, for example, in a criminal investigation—I think on balance, we have established a process and a procedure that the American people should feel comfortable about. . . . I know that the people who are involved in these programs, they operate like professionals. And these things are very narrowly circumscribed. They're very focused. And in the abstract, you can complain about Big Brother and how this is a potential program run amuck, but when you actually look at the details, then I think we've struck the right balance.

*Id.* See also, e.g., Shane Harris, *NSA Veterans: The White House Is Hanging Us Out to Dry*, FOREIGN POL'Y (Oct. 10, 2013), [http://www.foreignpolicy.com/articles/2013/10/10/nsa\\_veterans\\_the\\_white\\_house\\_is\\_hanging\\_us\\_out\\_to\\_dry](http://www.foreignpolicy.com/articles/2013/10/10/nsa_veterans_the_white_house_is_hanging_us_out_to_dry).

<sup>30</sup> Press Release, White House, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>.

<sup>31</sup> See Julie Pace, *Obama Tightens Reins on Surveillance Programs*, ASSOCIATED PRESS (Jan. 17, 2014), <http://bigstory.ap.org/article/obama-back-modest-govt-surveillance-reforms>. As the *Associated Press* reported:

Privacy advocates said they were troubled that Obama's proposals did not go further. . . . Many of the president's recommendations were aimed at increasing the American public's trust in the spying operations. He called on Congress to approve a panel of outside advocates who could represent privacy and civil liberty concerns before the FISA court.

*Id.*



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The past year's developments in national security law, moreover, were not limited to the defense and intelligence arenas. Several serious legal issues arose from foreign policy challenges in the Middle East. In Egypt, the Obama Administration sought to walk a fine legal line following the military takeover of that nation's popularly-elected, but increasingly power-hungry (and unpopular) Muslim Brotherhood-backed government. In Syria, Congress sought to authorize overt military assistance and other aid to the Syrian opposition and then—at the President's request—to authorize direct military intervention in response to the Syrian regime's use of chemical weapons. In dealing with Iran, the President employed existing statutory sanctions waivers to complete an interim nuclear deal, while Congress sought to buttress the existing sanctions regime and constrain the President's use of such waivers. Whether Egypt, Syria, or Iran, each of these significant foreign policy developments resulted in a regular back-and-forth over the course of the past year between the two ends of Pennsylvania Avenue about how new or existing laws might apply to U.S. foreign policy decisions.

For example, in Egypt, the Obama Administration ultimately determined it would operate “consistent” with a prior legal prohibition on funding to coup governments by limiting certain U.S. funding, while avoiding making a formal determination on whether in fact a coup had taken place.<sup>32</sup> At the same time, after a lengthy

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<sup>32</sup> See Josh Gerstein, *Barack Obama's Egypt Coup Conundrum*, POLITICO (Oct. 20, 2013), <http://www.politico.com/story/2013/10/barack-obamas-egypt-coup-conundrum-98552.html>. As *Politico* reported:

The United States is treating Egypt's summer revolution as a coup—even if the White House won't call it that. It's the only-a-lawyer-could-love approach the Obama administration has settled on taking toward the thorny question of whether some aid to the country must be cut off by law because of the military's role in toppling elected President Mohamed Morsi in July. “Consistent with the law, we will only provide assistance to Egypt that could be provided regardless of whether the military coup restriction has been triggered,” said National Security Council spokeswoman Bernadette Meehan. . . . In meetings on Capitol Hill in recent weeks, administration officials said they have decided not to disburse aid subject to a rider in the State Department Appropriations bill that seeks to halt aid after a coup.

*Id.* See also Margaret Talev & David Lerman, *White House Shields Aid to Egypt by Avoiding Talk of Coup*, BLOOMBERG (Jul. 26, 2013), <http://www.bloomberg.com/>

process and with little fanfare, the White House sought relief from Congress from the coup restrictions in order to provide more robust funding.<sup>33</sup> In Syria, on the other hand, press reports suggested serious debates within the current administration about whether and how to support the Syrian opposition,<sup>34</sup> but when Congress sought to provide overt military assistance and training to the opposition (along with funding for humanitarian assistance), the White House remained fairly aloof.<sup>35</sup>

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news/2013-07-26/white-house-shields-aid-to-egypt-by-avoiding-talk-of-coup.html. As *Bloomberg* reported:

The Obama administration, in a move that may protect U.S. aid to Egypt, has concluded that it doesn't have to make a formal determination on whether the ouster of President Mohamed Mursi was a coup, a State Department official said. . . . "Our national security interests influence our policy as it relates to aid with Egypt," [State Department spokeswoman Jennifer] Psaki told reporters at a State Department briefing. "We reviewed the legal obligations and determined we did not need to make a determination one way or the other."

*Id.*

<sup>33</sup> See Gerstein, *supra* note 32. As *Politico* reported:

Congressional aides said this week that the administration is quietly lobbying lawmakers to provide Obama waiver authority to allow direct economic aid to Egypt to continue. Executive branch officials hoped that such a waiver would be part of the continuing resolution passed to end the government shutdown, but that did not occur, the aides said. . . . "Nothing has changed in terms of approaching what you called the coup restriction; didn't make a determination, haven't made a determination, don't think we need to make a determination, are acting consistent with the provisions of the law and we'll continue to do so," a senior administration official said last week in a press briefing announcing the withholding of some U.S. aid to Egypt.

*Id.*

<sup>34</sup> See Mark Mazzetti, *Obama's Uncertain Path Amid Syria Bloodshed*, N.Y. TIMES (Oct. 22, 2013), <http://www.nytimes.com/2013/10/23/world/middleeast/obamas-uncertain-path-amid-syria-bloodshed.html>. As *The New York Times* reported:

Yet after hours of debate in which top advisers considered a range of options, including military strikes and increased support to the rebels, the meeting ended the way so many attempts to define a Syrian strategy had ended in the past, with the president's aides deeply divided over how to respond to a civil war that had already claimed 100,000 lives.

*Id.*

<sup>35</sup> See Patricia Zengerle, *Key U.S. Senators Strongly Criticize Obama's Syria Policy*, REUTERS (Oct. 31, 2013), <http://www.reuters.com/article/2013/10/31/syria-crisis-usa-idUSL1N0IL1OG20131031>; see also Josh Rogin, *Senate Moves Toward Arming the Syrian Rebels*, DAILY BEAST (May 22, 2013), <http://www.thedailybeast.com/articles/2013/05/22/senate-moves-toward-arming-the-syrian-rebels.html>; Josh

The response to the Syrian government's use of chemical weapons was even more tangled. On August 31, 2013, the President announced from the Rose Garden that as Commander-in-Chief, he had determined that a limited military strike on Syria was an appropriate response to the Syrian regime's use of chemical weapons on its own people and that, even though he could ostensibly take action on his own, he would seek congressional approval to conduct such a strike.<sup>36</sup> In response to the President's call to action, the Senate Foreign Relations Committee, in short order, drafted and approved an authorization for the limited use of military force in Syria, reporting it to the Senate floor on September 6, 2013.<sup>37</sup> The very next day, in his weekly radio address, the President made the case for military action and once again called on the full Congress to swiftly pass an authorization for the use of force.<sup>38</sup> Yet, on September

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Rogin, *Democrats and Republicans Unite around Calls for More Aggressive Syria Policy*, CABLE (Mar. 21, 2013), [http://thecable.foreignpolicy.com/posts/2013/03/21/democrats\\_and\\_republicans\\_unite\\_around\\_criticism\\_of\\_obama\\_s\\_syria\\_policy](http://thecable.foreignpolicy.com/posts/2013/03/21/democrats_and_republicans_unite_around_criticism_of_obama_s_syria_policy).

<sup>36</sup> See Press Release, White House, Statement by the President on Syria (Aug. 31, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>. The statement reads, in part:

Now, after careful deliberation, I have decided that the United States should take military action against Syrian regime targets. . . . [O]ur action would be designed to be limited in duration and scope. . . . But having made my decision as Commander-in-Chief based on what I am convinced is our national security interests, I'm also mindful that I'm the President of the world's oldest constitutional democracy. I've long believed that our power is rooted not just in our military might, but in our example as a government of the people, by the people, and for the people. And that's why I've made a second decision: I will seek authorization for the use of force from the American people's representatives in Congress. . . . Yet, while I believe I have the authority to carry out this military action without specific congressional authorization, I know that the country will be stronger if we take this course, and our actions will be even more effective. We should have this debate, because the issues are too big for business as usual.

*Id.*

<sup>37</sup> Authorization for the Use of Military Force Against the Government of Syria to Respond to Use of Chemical Weapons, S.J. Res. 21, 113th Cong. (as reported as an original bill, Sept. 6, 2013); Anne Gearan, et al., *Senate Committee Approves Resolution Authorizing U.S. Strike on Syria*, WASH. POST (Sept. 4, 2013), [http://www.washingtonpost.com/world/national-security/officials-press-lawmakers-to-approve-syria-strike-obama-invokes-congress-credibility/2013/09/04/4c93a858-155c-11e3-804b-d3a1a3a18f2c\\_story.html](http://www.washingtonpost.com/world/national-security/officials-press-lawmakers-to-approve-syria-strike-obama-invokes-congress-credibility/2013/09/04/4c93a858-155c-11e3-804b-d3a1a3a18f2c_story.html).

<sup>38</sup> Press Release, White House, Weekly Address: Calling for Limited Military Action in Syria (Sept. 7, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/07/>

10, 2013, in a prime-time speech to the nation—during which, until a day or so earlier, it was expected the President would make a final, aggressive press for Congress to approve the authorization to use military force—the President instead called on Congress to “postpone” its consideration of the authorization in order to provide the Obama Administration time to work on a Russian offer to assist in removing Syria’s chemical weapons.<sup>39</sup> Congress ultimately acceded to the President’s request and did not act on the Foreign Relations Committee-approved authorization. Whether Congress would have actually voted to authorize military action remains uncertain. And the wisdom (and necessity) of the President’s decision to go to Congress, as well as the motivation behind his abrupt change of direction—despite his claim of constitutional authority to act on his own—will continue to be debated.

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weekly-address-calling-limited-military-action-syria. As the President stated:

That’s why, last weekend, I announced that, as Commander in Chief, I decided that the United States should take military action against the Syrian regime. This is not a decision I made lightly. Deciding to use military force is the most solemn decision we can make as a nation. As the leader of the world’s oldest Constitutional democracy, I also know that our country will be stronger if we act together, and our actions will be more effective. That’s why I asked Members of Congress to debate this issue and vote on authorizing the use of force. . . . [W]e can’t ignore chemical weapons attacks like this one—even if they happen halfway around the world.

*Id.*

<sup>39</sup> Press Release, White House, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>. The statement reads, in part:

[A]fter careful deliberation, I determined that it is in the national security interests of the United States to respond to the Assad regime’s use of chemical weapons through a targeted military strike. . . . That’s my judgment as Commander-in-Chief. But I’m also the President of the world’s oldest constitutional democracy. So even though I possess the authority to order military strikes, I believed it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress. [O]ver the last few days, we’ve seen some encouraging signs. In part because of the credible threat of U.S. military action, as well as constructive talks that I had with President Putin, the Russian government has indicated a willingness to join with the international community in pushing Assad to give up his chemical weapons. . . . I have, therefore, asked the leaders of Congress to postpone a vote to authorize the use of force while we pursue this diplomatic path.

*Id.*

And finally, in late November, the Obama Administration announced the outlines of a nuclear deal with Iran. The announcement followed many months of both clandestine and overt negotiations between Iran and the United States, in partnership with the four other permanent members of the U.N. Security Council and Germany. The interim agreement with Iran, embodied in a brief “Joint Plan of Action” (“JPOA”), provides Iran with limited relief from economic sanctions in exchange for particular concessions and limitations on Iran’s nuclear program.<sup>40</sup>

This agreement was greeted with significant skepticism on Capitol Hill. Even prior to the announcement of the interim deal, leaders from both parties had been mobilizing support for a further tightening of sanctions on Iran and imposing new limits on the President’s ability to alleviate sanctions in the absence of particular final deal parameters.<sup>41</sup> Indeed, prior to the conclusion of the JPOA, the House of Representatives cleared legislation by a significant bipartisan margin to further tighten sanctions on Iran.<sup>42</sup> In the

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<sup>40</sup> Press Release, White House, Statement by the President on First Step Agreement on Iran’s Nuclear Program (Nov. 24, 2013), <http://www.whitehouse.gov/the-press-office/2013/11/23/statement-president-first-step-agreement-irans-nuclear-program>; White House, *Joint Plan of Action [agreed to by the P5+1 and Iran in Geneva, Switzerland, on November 24, 2013]*, Preamble, available at <http://www.whitehouse.gov/sites/default/files/foreign/jointplanofaction24november2013thefinal.pdf>.

<sup>41</sup> See, e.g., *Capitol Hill Skepticism Over Iran Nuclear Deal Results in Sanctions Threat*, FOXNEWS.COM (Nov. 25, 2013), <http://www.foxnews.com/politics/2013/11/25/capitol-hill-skepticism-over-iran-nuclear-deal-results-in-bipartisan-call-for/>; see also Bernie Becker, *Top Democrats, Republicans Blast Obama’s Nuclear Deal with Iran*, HILL (Nov. 24, 2013), <http://thehill.com/blogs/global-affairs/middle-eastnorth-africa/191286-bipartisan-skepticism-meets-iran-deal>; Howard Lafranchi, *Senators, Defying White House, Push a New Iran Sanctions Bill*, CHRISTIAN SCI. MONITOR (Dec. 19, 2013), <http://www.csmonitor.com/USA/Foreign-Policy/2013/1219/Senators-defying-White-House-push-a-new-Iran-sanctions-bill>; Jordain Carney, *Corker Rolls Out Sanctions Legislation*, NAT’L J. (Nov. 21, 2013), <http://www.nationaljournal.com/defense/corker-rolls-out-sanctions-legislation-20131121>.

<sup>42</sup> Nuclear Iran Prevention Act of 2013, H.R. 850, 113th Cong. (2013); see also, e.g., Timothy Gardner, *U.S. House Passes Iran Sanctions Bill to Slash Oil Exports*, REUTERS (Aug. 31, 2013), <http://www.reuters.com/article/2013/08/01/us-usa-iran-sanctions-idUSBRE96U1GK20130801>.

Senate, legislation was introduced on both issues but was never marked up in committee.<sup>43</sup>

To date, Congress has been unable to either further tighten sanctions or limit the President's authority to relieve sanctions. At the same time, in implementing the JPOA, the President has provided Iran with some measure of relief from key sanctions using existing statutory waivers.<sup>44</sup> As the process of reaching a further agreement (or renewing the interim agreement) proceeds forward, the question of whether additional sanctions ought be relieved—and whether they can be lifted on a permanent (or semi-permanent) basis under a long-term deal without further Congressional action—will continue to be actively debated.

So the second volume of this journal appears when key debates on law and national security are broadening and intensifying. The second volume's combination of articles, book reviews, and student comments likewise span a broad range of national security law matters.

In Heeyoung Daniel Jang's article, *The Lawfulness of and Case for Combat Drones in the Fight Against Terrorism*,<sup>45</sup> this former South Korean army soldier and U.N. peacekeeper (who counts a Yale law degree amongst his credentials) argues that not only does the use of armed unmanned aerial vehicles to combat terrorism comply with the principles of the laws of armed conflict, the use of such technologies—if properly supervised—can actually achieve critically important policy objectives in an era marked by asymmetric

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<sup>43</sup> Burgess Everett, *Tim Johnson Won't Consider Iran Bill During Talks*, POLITICO (Jan. 6, 2014), <http://www.politico.com/story/2014/01/iran-sanctions-bill-tim-johnson-101812.html>.

<sup>44</sup> Press Release, U.S. Dep't of State, Overview of Temporary Suspension of Certain U.S. Sanctions Pursuant to the Initial Understanding Between the P5+1 and Iran (Jan. 20, 2014), <http://www.state.gov/r/pa/prs/ps/2014/01/220046.htm> (“To implement this limited sanctions relief, the U.S. government has executed temporary, partial waivers of certain statutory sanctions and has issued guidance regarding the suspension of sanctions under relevant Executive Orders and regulations.”).

<sup>45</sup> Heeyoung Daniel Jang, *The Lawfulness of and Case for Combat Drones in the Fight Against Terrorism*, 2 NAT'L SEC. L.J. 1 (2013).

conflict.<sup>46</sup> The article walks through the difference between *jus ad bellum* and *jus in bello*, noting the error of many scholars and policymakers in conflating the two. Jang points out that this conflation can often lead to misunderstandings about the application of the laws of war to particular policy decisions—including the use of specific tactics—and can therefore incorrectly shape policy outcomes.<sup>47</sup> This problem of legal misconceptions affecting national security decisionmaking is not new. Indeed, a similar issue was described by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. The Commission’s final report discussed the detrimental and corrosive effect that the proliferation of “legal myths” and confusion about legal requirements can have on the national security apparatus of our government.<sup>48</sup>

Jang goes on and argues that—contrary to the popular narrative of combat drones being an “unfair” weapon—such platforms can actually serve to meet and exceed international law requirements by limiting civilian and other non-combatant casualties.<sup>49</sup> Jang suggests that, if used appropriately, these weapons can significantly contribute to efforts to meet the core law of armed conflict requirements of distinction, proportionality, necessity, and humanity based on the precision and efficiency they offer.<sup>50</sup> Jang is

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<sup>46</sup> *Id.* at 4.

<sup>47</sup> *Id.* at 4-7.

<sup>48</sup> FINAL REPORT OF THE COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, 335 (Mar. 31, 2005), <http://www.gpo.gov/fdsys/pkg/GPO-WMD/pdf/GPO-WMD.pdf>. As the Commission reported:

Throughout our work we came across Intelligence Community leaders, operators, and analysts who claimed that they couldn’t do their jobs because of a ‘legal issue.’ . . . And although there are, of course, very real (and necessary) legal restrictions on the Intelligence Community, quite often the cited legal impediments ended up being either myths that overcautious lawyers had never debunked or policy choices swathed in pseudo-legal justifications. Needless to say, such confusion about what the law actually requires can seriously hinder the Intelligence Community’s ability to be proactive and innovative. Moreover, over time, it can breed uncertainty about real legal prohibitions.

*Id.*

<sup>49</sup> Jang, *supra* note 45, at 8-10, 39-40.

<sup>50</sup> *Id.* at 10-22.

cautious in his assessment of these weapons platforms, repeatedly noting that *how* these tools are used—from an arming, targeting, and oversight perspective—is just as, if not more, important than the tools themselves and their capabilities, particularly when it comes to legal compliance.<sup>51</sup> Finally, Jang argues that armed unmanned aerial vehicles are not only lawful, but are actually the right weapon of choice for use against armed terrorist groups, in part because of the deterrence benefits they offer.<sup>52</sup>

In *An Imperfect Balance: ITAR Exceptions, National Security, and U.S. Competitiveness*,<sup>53</sup> Clinton Long discusses the ways in which we balance our national security interests with our commercial interests in the export control arena. In evaluating U.S. arms export controls, Long argues that even though these export control laws and regulations—particularly as currently structured—have a significantly negative effect on the competitiveness of the U.S. defense sector, the importance of the national security interests at stake make the current model of providing certain exemptions a reasonable, yet sometimes imperfect, compromise.<sup>54</sup> Long further contends that this compromise can be improved through the provision of export control exemptions to additional countries beyond the three that enjoy them today, provided we can be assured that these countries will appropriately protect the advanced technologies provided.<sup>55</sup> In many ways, Long’s argument mirrors the current debate surrounding the controversy over the Section 215 program—how to balance U.S. national security interests against others that the nation holds close.

In *Taking Confusion Out of Crisis: Making Sense of the Legal Framework for Federal Agencies to Provide Law Enforcement Support to State and Local Governments in Emergencies*,<sup>56</sup> Alexander Yesnik, a

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<sup>51</sup> *E.g., id.* at 12-15, 22, 26.

<sup>52</sup> *Id.* at 23-34.

<sup>53</sup> Clinton Long, *An Imperfect Balance: ITAR Exemptions, National Security, and U.S. Competitiveness*, 2 NAT’L SEC. L.J. 43 (2013).

<sup>54</sup> *Id.* at 44-46, 51-55, 60-62.

<sup>55</sup> *Id.* at 62-63.

<sup>56</sup> Alexander J. Yesnik, Comment, *Taking Confusion Out of Crisis: Making Sense of the Legal Framework for Federal Agencies to Provide Law Enforcement Support to State and Local Governments in Emergencies*, 2 NAT’L SEC. L.J. 111 (2013).



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senior FEMA emergency management official (and current George Mason University law student), seeks to bring some measure of coherence—if such can even be imagined possible—to the chaotic structure of federal support to state and local entities in crisis situations. Yesnik spends a significant portion of his piece sorting through the various laws and government bureaucracies that bear on such support,<sup>57</sup> and for good reason: the catalog of laws, processes, and entities that have evolved to address these issues and how they interact is convoluted and complex at best, and represents a Rube Goldberg-like federal machine at worst. The examples that Yesnik discusses—Hurricanes Katrina, Gustav, and Ike—simply highlight the major dysfunction of the federal response in crisis situations.<sup>58</sup> While, undoubtedly, the response in the latter two scenarios was somewhat better—perhaps in part because a handful of lessons were learned and because the later incidents were of relatively smaller magnitude—the reality is that legal issues still remained and drove significant challenges in the timely and appropriate delivery of federal assistance.<sup>59</sup> Yesnik suggests some basic fixes, in an effort to rationalize federal delivery of assistance, including the consistent use of one set of authorities and the use of enhanced coordinating mechanisms, while also acknowledging the practical challenges—including funding—of actually implementing such reform absent statutory fixes by Congress.<sup>60</sup>

The problems Yesnik raises—of coordination and cooperation between our state and local agencies and the relevant federal entities—are far from limited to the disaster response function of the U.S. national security community. The article should be seen as a broader call for the federal government to anticipate such challenges, rather than responding in hastily improvised ways after each disaster.

*In Nonjudicial Punishment in the Military: Why a Lower Burden of Proof Across All Branches is Unnecessary*,<sup>61</sup> Kathrine Gorski

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<sup>57</sup> *Id.* at 114-27.

<sup>58</sup> *Id.* at 127-38.

<sup>59</sup> *Id.* at 138-39.

<sup>60</sup> *Id.* at 139-43.

<sup>61</sup> Katherine Gorski, Comment, *Nonjudicial Punishment in the Military: Why a*

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discusses the burden of proof requirement for nonjudicial punishment in the military. Gorski argues that the particular circumstances aboard a naval vessel counsel in favor of permitting a lower burden of proof for nonjudicial punishment on Navy ships, and that absent such circumstances elsewhere, such a lower burden is not necessarily appropriate in other branches.

In particular, Gorski discusses the important and historic role of nonjudicial punishment in maintaining discipline and good order in the military ranks.<sup>62</sup> She describes the flexibility that such procedures provide by offering a menu of limited punishments for minor offenses, as well a lower burden of proof.<sup>63</sup> Gorski notes that such procedures still adhere to basic principals to ensure due process is provided and only appropriate levels of punishment are employed.<sup>64</sup> Some readers might be surprised to learn that the nonjudicial punishments available under such procedures include, among other things, for officers, measures including restriction for up to sixty days (or, in certain cases, arrest in quarters for up to thirty days), limitation or loss of pay, reduction in pay grades, and for enlisted members, confinement on bread and water for no more than three consecutive days, further correctional confinement within limits, and significant reductions in rank.<sup>65</sup> Even though some of these punishments may seem at first blush somewhat harsh for a nonjudicial proceeding marked by a relatively low burden of proof, Gorski argues that a higher burden of proof is unnecessary and, in the particular case of a naval vessel, choosing not to apply a higher burden is an appropriate use of the discretion afforded by the Uniform Code of Military Justice.<sup>66</sup>

Finally, the two book reviews in this issue present important issues of note for the national security community. The authors of the two books reviewed—Juan Zarate and Michael Allen—are both

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*Lower Burden of Proof Across All Branches is Unnecessary*, 2 NAT'L SEC. L.J. 83 (2013).

<sup>62</sup> *Id.* at 88-89.

<sup>63</sup> *Id.* at 89-99.

<sup>64</sup> *Id.* at 86-93.

<sup>65</sup> *Id.* at 92-95.

<sup>66</sup> *Id.* at 89-91, 109-10.

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former senior government officials who served in key national security positions in the prior Bush Administration. Both remain substantially engaged in the public debate over our national security policy even though each has now left the government. Zarate, for example, remains engaged as a senior advisor at the Center for Strategic and International Studies, a visiting lecturer at Harvard Law School, and a regular contributor on CBS, as well as on the board of advisors at the National Counterterrorism Center. Allen also remains engaged in the national security debate, having only recently left his post on Capitol Hill as staff director for the House Intelligence Committee to found a national security strategic consulting firm and having previously served as the intelligence team lead for the nascent Romney for President transition team.

These authors present a unique perspective, with Zarate having served as a key advisor to the President and in a senior role at the Treasury Department and Allen as a legislative advisor to the President and later as a key Capitol Hill insider. Indeed, in writing their books, both authors employ their experience working in the government and seek to evaluate the policy processes in which they played key roles. Zarate focuses on what he describes as the new era of financial warfare undertaken by the Bush and Obama Administrations, while Allen focuses on the politics, agendas, personalities, and policies at issue in enacting the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), the major intelligence reform of the last decade.<sup>67</sup>

The reviewers—esteemed in their own right—provide helpful summaries of the books and raise questions to help readers distinguish between the objective and subjective arguments and assessments made by the authors. For example, Amit Kumar, in reviewing Zarate’s *Treasury’s War*,<sup>68</sup> wonders whether the claims about financial warfare can truly be supported by measurable

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<sup>67</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of 50 U.S.C.).

<sup>68</sup> Amit Kumar, *Counter-Threat Finance and National Security: Treasury’s Inimitable and Indispensable Role*, 2 NAT’L SEC. L.J. 72 (2013) (book review) (reviewing *Treasury’s War: The Unleashing of a New Era of Financial Warfare* by Juan C. Zarate).

outcomes, and whether the benefits of such efforts outweigh the costs.<sup>69</sup> Kumar also questions whether the United States ought to do more in the international arena and raises specific issues about our existing sanctions regime, from asset freezes to terrorism-related measures.<sup>70</sup> These are, of course, issues very much at stake today, perhaps nowhere more so than in the debate over the Iranian nuclear program and the U.S. negotiating strategy.

Similarly, Genevieve Lester, in reviewing Allen's *Blinking Red*,<sup>71</sup> argues that a more explicit conceptual framework for the book would have been useful and, without explicitly saying so, seems to suggest that perhaps a more dispassionate assessment of the intelligence reform Allen discusses might have provided additional value.<sup>72</sup> Of course, as Congress once again looks at the potential for major intelligence reform in the aftermath of the NSA disclosures, building a rational framework for analysis, taking a dispassionate view of the issues at stake, and remembering the lessons of the drag down fight that Allen describes surrounding IRTPA, will be valuable lessons for policymakers to keep in mind.

In sum, volume two of the *National Security Law Journal* comes to fruition in a turbulent and interesting time for our field and provides a series of articles, book reviews, and student comments that engage the reader on a wide range of topics that all have significant import for ongoing legal and policy debates. Enjoy the reading.



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<sup>69</sup> *Id.* at 79-80.

<sup>70</sup> *Id.* at 80-81.

<sup>71</sup> Genevieve Lester, *Symbolism and Security: The Politics of Post-9/11 Intelligence Reform*, 2 NAT'L SEC. L.J. 65 (2013) (book review) (reviewing *Blinking Red: Crisis and Compromise in American Intelligence After 9/11* by Michael Allen).

<sup>72</sup> *See id.* at 70-71.