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SYMPOSIUM 2011: UNSETTLED FOUNDATIONS, UNCERTAIN RESULTS: 9/11 AND THE LAW, TEN YEARS AFTER

INTRODUCTION:

AWAITING “THE AUTHORITIES”: 9/11 AND NATIONAL SECURITY DOCTRINE AFTER TEN YEARS

*John J. Farmer, Jr.**

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- I. UNSETTLED FOUNDATIONS: THE DOCTRINAL CHALLENGES OF 9/11,
2001-2008

The challenge that the 9/11 conspiracy and attacks would pose to the United States’ body of national security doctrine became apparent with the first reported hijacking. At 8:38 a.m., the Northeast Air Defense Sector (“NEADS”) in Rome, New York, received a call from the Federal Aviation Administration’s (“FAA”)

* Dean, Rutgers School of Law–Newark; Team Leader and Senior Counsel for the National Commission on Terrorist Attacks Upon the United States (“9/11 Commission”) (2002-2003); Attorney General of the State of New Jersey (1999-2002).

Boston Regional Center ("Boston Center"), advising that American 11 had been hijacked and requesting that fighter jets be scrambled from Otis Air Force Base to intercept the plane.¹

Both the request and the manner in which it was received violated Standard Operating Procedures ("SOP") for hijackings that had been developed over decades.² Under the SOP in place on 9/11, the FAA controller, upon learning of a hijacking, was supposed to pass the word up his chain of command to FAA headquarters; the FAA Administrator, or her designee, known as the Hijack Coordinator, was then supposed to work with the Department of Defense to request that jets be scrambled.³ At the Department of Defense, as North American Aerospace Defense Command ("NORAD") General Larry Arnold explained to the 9/11 Commission, "the [procedure], if you follow the book, is [civilian authorities] go to the duty officer of the [N]ational [M]ilitary [Command C]enter, who in turn makes an inquiry to NORAD for the availability of fighters, who then gets permission from someone representing the [S]ecretary of Defense."⁴ If approved by the Secretary of Defense, the order to scramble would be passed to NORAD headquarters in Colorado, then to NORAD's continental United States command in Florida, then to NEADS, then to the relevant alert site, and finally to the pilots.⁵ By calling NEADS directly, Boston Center had bypassed the entire FAA command structure.⁶

The response of the military commanders to this request was no less unorthodox. The NEADS commander, Colonel Robert Marr, relayed the notice and request to his superior, Major General Larry Arnold.⁷ General Arnold's decision was immediate: "go ahead and scramble [the airplanes]," he ordered.⁸ They would "[seek the] authorities later."⁹

These decisions, made in the immediacy of the crisis, were completely sound given the nature of the emerging threat. Seen in the perspective of ten years, they also signaled the complete unraveling of the structure and substance of the web of laws, legal

1. 9/11 COMM'N REPORT, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 20-21, 459 n.121 (2004) [hereinafter 9/11 COMMISSION REPORT].

2. *Id.* at 20.

3. *Id.* at 17, 458 n.102.

4. *Day 2, Civil Aviation Security: Hearing on the Nat'l Comm'n on Terrorist Attacks Upon the U.S.*, 108th Cong. (2003) (statement of Major General Larry Arnold (Ret.), commander on the day of the attacks), available at http://govinfo.library.unt.edu/911/archive/hearing2/9-11Commission_Hearing_2003-05-23.pdf.

5. *See id.*

6. *See id.*

7. 9/11 COMMISSION REPORT, *supra* note 1, at 20.

8. *Id.*

9. *Id.*

opinions, rules of engagement, and standard operating procedures that had struck the balance between preserving liberty and protecting national security for over fifty years. It is appropriate, therefore, to begin this discussion on 9/11 and the law after ten years by recalling the decisions made that morning in the compression of an existential emergency. During my work on the 9/11 Commission, our team, which was responsible for writing the account of the day of 9/11 itself, prepared an audio monograph, a narrative of the day interspersed with the audio transmissions of the people responding to the attacks in real time.¹⁰ Because of the difficulty in declassifying the different sound bites in time for the release of the report, that monograph remained unpublished. Now, however, as the National Archives has declassified the primary source material and the text of the monograph, it has become possible for the public to experience the attacks as they were lived by those whose jobs it became to respond to them, and thus to understand the sense of urgency that informed our nation's response not only that day, but in the succeeding days, weeks, months, and years.¹¹

To appreciate the sense of urgency that animated government officials, the best place to begin is just after 10:00 a.m. on 9/11, when the sense of urgency reached its highest intensity that morning. Within an hour of the first fighter scramble, as NORAD fighters were searching the skies for potentially hijacked aircraft while the Twin Towers burned in New York, the question arose of what the fighter pilots should do when they intercepted hijacked aircraft. The operational commander at NEADS in Rome, New York, raised a previously unthinkable proposition—shooting down a civilian commercial airliner: “My recommendation, if we have to take anybody out, large aircraft, we use AIM-9s in the face.”¹² By 10:00 a.m., the situation had become desperate. The first tower in New York had collapsed.¹³ The FAA was attempting to land 4,000 planes without further incident. The Pentagon was burning.¹⁴ President Bush was airborne, but his destination was unclear.

10. See generally John J. Farmer, Jr. et al., *A New Type of War: The Story of the FAA and NORAD Response to the September 11, 2001 Attacks*, RUTGERS LAW REVIEW (Sept. 7, 2011) [hereinafter *A New Type of War*], <http://www.rutgerslawreview.com/2011/a-new-type-of-war/>.

11. Press Release, Nat'l Archives, Release of 9/11 Commission Staff Monograph After Second Review (Sept. 13, 2005), available at <http://www.archives.gov/press/press-releases/2005/nr05-114.html>; Press Release, Nat'l Archives, National Archives to Open 9/11 Commission Textual Materials (Jan. 8, 2009), available at <http://www.archives.gov/press/press-releases/2009/nr09-41.html>.

12. Philip Shenon, *New Tapes Disclose Confusion Within the Military on Sept. 11*, N.Y. TIMES, Aug. 3, 2006, at A18.

13. 9/11 COMMISSION REPORT, *supra* note 1, at 305.

14. *Id.* at 45.

Communications were spotty with Vice President Cheney, who was underground in the emergency operations center.¹⁵

Just after ten o'clock in the morning, fighters were patrolling the skies over Washington but having difficulty communicating with the military controllers in Rome, New York. As a consequence, some fighters flew high so that they could communicate more easily, while others flew low. The high-flying fighters began tracking an airplane over the White House—a plane that turned out to be another fighter—and asked for rules of engagement.¹⁶ The NEADS commander again demanded to know how to instruct the pilots; there had not been sufficient time, however, to modify the rules of engagement for hijackings, which called for a fighter escort.¹⁷ At the moment of highest tension, with a plane reported over the White House and the first report of the fourth hijacking, United 93, occurring simultaneously, the NEADS commanders relayed the order: “Negative. Negative clearance to shoot. . . . Goddamnit! . . . Negative clearance to fire. ID. Type. Tail. . . . Do whatever you need to divert. They are not cleared to fire.”¹⁸

The decision-making process that occurred in the compressed time frame of the morning of 9/11—taking action based on the exigencies of the situation and straining to adapt antiquated protocols to emergent situations, while pledging to establish the legitimacy of the action, to “get the authorities,” later—has been replicated over the past ten years in virtually every aspect of national security doctrine. The events of that morning caused the most comprehensive reconsideration of national security law and policy since the close of World War II. The difference, however, is that for all of the doctrinal introspection, many fundamental issues remain unresolved. Hence the need for this Issue.

The relative lack of resolution was not for lack of trying. Indeed, in the succeeding weeks and months after 9/11, with the magnitude of the destruction fresh in everyone’s mind and the threat of further attacks looming, it is no exaggeration to state that a revolution occurred in national security law and doctrine. On the domestic front, the authority to shoot down commercial aircraft devolved from President Bush to a much lower level in the chain of command.¹⁹ The absence of reliable intelligence caused federal authorities to err on the side of suspicion; as a consequence, the federal material

15. *See id.* at 39-40.

16. *Id.* at 36-37.

17. *See* Michael Bronner, *9/11 Live: The NORAD Tapes*, VANITY FAIR, Aug. 2006, available at <http://www.vanityfair.com/politics/features/2006/08/norad200608>.

18. *Id.* (online version contains transcript of NORAD tapes).

19. *Compare* 9/11 COMMISSION REPORT, *supra* note 1, at 305, *with* Spencer S. Hsu, *Airspace Authority Changes Weighed*, WASH. POST, July 22, 2005, at A10.

witness statute and immigration statute were employed to detain and deport thousands.²⁰ The USA Patriot Act dismantled the pre-existing “wall” prohibiting law enforcement and intelligence agents from sharing information and expanded the surveillance capabilities of the government.²¹

Most significantly, in a series of legal memoranda produced in the immediate aftermath of 9/11, the Bush administration took the position that the President had virtually unchecked authority to act in an emergency. The presidency created by the Constitution, the memos concluded, amounted to a “sweeping grant” of “unenumerated ‘executive power.’”²² As a consequence, “[i]n wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. . . . One of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy.”²³

U.S. intelligence and military officers could employ unprecedentedly aggressive interrogation techniques in questioning captured individuals, the memoranda concluded, because the Geneva Conventions did not apply and the President’s inherent power trumped any existing statute. Furthermore, the memos concluded the President could “deploy the military against international or foreign terrorists operating within the United States.”²⁴ The longstanding prohibition of military participation in law enforcement, embodied in the Posse Comitatus Act, did not apply, the authors concluded, because counterterrorism is a military, not a law enforcement activity.²⁵ For the same reason, “the Fourth Amendment would *not* apply Thus, for example, we do not think that a military commander carrying out a raid on a terrorist cell would be required to demonstrate probable cause or to obtain a warrant.”²⁶

Despite the liberalization of surveillance afforded by the Patriot Act, the administration launched a program of domestic surveillance that bypassed completely the legal mechanisms in place to assure

20. See generally Bo Cooper, *Immigration Law and National Security*, in MOORE AND TURNER, NATIONAL SECURITY LAW 1141-78 (2d ed. 2005).

21. 9/11 COMMISSION REPORT, *supra* note 1, at 328.

22. See Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, at 37 (Aug. 1, 2002).

23. *Id.* at 38.

24. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, on Authority for Use of Military Force to Combat Terrorist Activities Within the United States, at 1 (Oct. 23, 2001).

25. See *id.* at 14-15.

26. *Id.* at 2.

that the proper balance is struck between liberty and privacy.²⁷ Again, this was premised on the assertion of the President's inherent power.²⁸ Jack Goldsmith, who reviewed the early memoranda justifying the President's actions commented, "After 9/11 . . . top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations."²⁹

Overseas, the Bush administration invaded Afghanistan and, later, Iraq, finding in both instances that the existing laws, rules, and procedures governing armed conflict abroad were inadequate to current realities. The administration opened a detention camp at Guantánamo Bay, Cuba, and took the legal position that, by virtue of its location outside the territorial United States, the federal courts had no jurisdiction over the prison or its inmates, a position later rejected by the U.S. Supreme Court.³⁰ The administration formed military commissions to try the detainees, and it took the positions that the President did not need congressional authorization to form or structure those commissions and that the detainees could be held indefinitely without process or representation.³¹ Both of these positions were also rejected by the U.S. Supreme Court.³²

Indeed, beginning with the Court's rejection of Guantánamo Bay as an outpost outside of its jurisdiction, the national security revolution launched in the immediate aftermath of 9/11 was scaled back dramatically during President Bush's second term. The extra-judicial surveillance program was disrupted in 2005 when Justice Department lawyers, having taken a fresh look at the legal opinions underpinning the program, determined that there was "no legal basis" to proceed.³³ Many of the legal opinions justifying interrogation tactics bordering on torture were withdrawn. President Bush himself declared his intention to close the prison at Guantánamo Bay, and both presidential candidates in the 2008 election campaign pledged to close the facility. After a searching

27. U.S. DEP'T OF JUSTICE, Memorandum on the Legal Authorities Supporting the Activities of the National Security Agency Described by the President 1, 4-5 (Jan. 19, 2006).

28. *See id.* at 6-10.

29. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 181 (2007).

30. *See* Leonard Cutler, *Bush vs. Obama Detainee Policy Post—9/11: An Assessment*, 2010 STRATEGIC STUD. Q. 63, 65, available at <http://www.au.af.mil/au/ssq/2010/summer/cutler.pdf>.

31. *See id.*

32. *See id.* at 71.

33. *See* DAVID K. SHIPER, THE RIGHTS OF THE PEOPLE: HOW OVER SEARCH FOR SAFETY INVADES OUR LIBERTY 216-17 (2011).

reexamination of the effort in Iraq, the U.S. Army issued a Counterinsurgency Manual in 2006, written at the direction of General David Petraeus, that amounted to a complete repudiation of the war effort to date.³⁴ By the end of the Bush administration, it was clear from the administration's own actions that the aggressiveness of the immediate response to the 9/11 attacks had been excessive; it was unclear, however, just how the unsettled foundations of American national security doctrine would be reconstituted.

II. UNCERTAIN RESULTS: DOCTRINAL CHALLENGES, 2008-PRESENT

President Obama took office pledging to reestablish the rule of law in the struggle against al-Qaeda. In short order, he issued executive orders forbidding the use of torture in interrogations and requiring that interrogations be conducted in accordance with the U.S. Army Field Manual.³⁵ The President ordered the Guantánamo Bay prison to be closed by the end of 2009.³⁶ The President also ordered the closure of the CIA's so-called "black sites," secret facilities that amounted to prisons in which suspected terrorists were held incommunicado and interrogated.³⁷ In November 2009, Attorney General Holder announced that Khalid Shiekh Muhammed and the other 9/11 alleged co-conspirators would be tried in federal court in New York City, thus reinforcing the view that the Obama administration was returning to an emphasis on law enforcement as a principal enforcement tool against terrorism.³⁸ More fundamentally, the administration made clear that the President's actions would not be based on a view of the Constitution as having granted him "un-enumerated" powers and unchecked inherent executive authority to act in an emergency.³⁹

On Christmas Day of 2009, the near-calamitous attempted bombing of a commercial airliner as it neared Detroit, Michigan,

34. See generally DEP'T. OF THE ARMY, COUNTERINSURGENCY FIELD MANUAL, NO. 3-24 (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf>.

35. See Exec. Order No. 13,491, 74 Fed. Reg. 4893-94 (Jan. 22, 2009).

36. See Exec. Order No. 13,492, 74 Fed. Reg. 4898 (Jan. 22, 2009).

37. See *id.*

38. See Peter Finn & Carrie Johnson, *Alleged Sept. 11 Planner Will Be Tried in New York; A Shift to Civilian Court Four Co-Conspirators Also Will Be Transferred*, WASH. POST, Nov. 14, 2009, at A01.

39. The inherent powers approach followed by President Bush was an anathema to many of President Obama's most influential national security law advisors. See, e.g., HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION 75-76 (1990) ("Although the Framers . . . vested the 'executive power' in the president, they expressly incorporated within that nebulous grant neither an exclusive power in foreign affairs nor a general war-making power. Nor, despite expansive claims later asserted by more recent advocates of presidential power, did the Framers intend apparently by that grant to bestow upon the president an unenumerated inherent authority to take external actions.").

marked a turning point in the administration's counterterrorism policy.⁴⁰ Since then, the administration has determined that Guantánamo Bay will remain open indefinitely;⁴¹ that some detainees will be held preventively without charges or a trial;⁴² and that the 9/11 conspirators will be tried at Guantánamo Bay.⁴³ Furthermore, the administration has supported the reauthorization of the Patriot Act's surveillance provisions.⁴⁴ The administration also has resorted to lethal force abroad, through drone strikes, in areas and on a scale never approached by the Bush administration.⁴⁵

In short, the foundations of U.S. national security doctrine remain unsettled, the outcomes produced profoundly uncertain. Questions as fundamental as the scope of presidential power, the propriety of preventive detention, the proper legal forum in which to try terrorists, and the legality of law enforcement's actions in the immediate aftermath of 9/11 remain hotly debated. In an effort to foster the kind of dialogue that may eventually yield solutions to some of the dilemmas of national security policy, *Rutgers Law Review* sponsored a symposium in February 2011. It was a remarkable assemblage of experts from across the spectrum of ideology and experience, ranging from former Guantánamo U.S. Army Muslim chaplain and detainee James Yee, to former Homeland Security Secretary Michael Chertoff, to military, civil liberties, law enforcement, and academic experts.

This Issue of *Rutgers Law Review* is the result of that Symposium. It features provocative views on cutting-edge issues such as the role of the judiciary, where former Third Circuit Judge and Homeland Security Secretary Michael Chertoff's view contrasts with those of former Third Circuit Chief Judge John Gibbons, who argued the early Guantánamo detention cases before the U.S.

40. See Anahad O'Connor et. al., *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES (Dec. 26, 2009), available at <http://www.nytimes.com/2009/12/26/us/26plane.html>.

41. Scott Shane et al., *Obama in Reversal, Clears Way for Guantanamo Trials to Resume*, N.Y. TIMES, Mar. 8, 2011, at A19 (detailing President Obama's decision to keep Guantánamo open).

42. *Id.* (discussing the possibility of indefinite detention).

43. Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1 (reporting the Obama administration's decision to try alleged 9/11 conspirators in a military trial).

44. Michael D. Shear, *Making Legislative History, With Nod from Obama and Stroke of an Autopen*, N.Y. TIMES, May 28, 2011, at A3 (subsequently, President Obama's signed legislation extending the Patriot Act).

45. It is now clear that the administration will use armed drones to kill suspected al-Qaeda operatives who are American citizens and who are located outside the "hot" conflict zones of Iraq and Afghanistan. See Mark Mazzetti, Eric Schmitt & Robert F. Worth, *CIA Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

Supreme Court; the tension between the projection of force and the rule of law, discussed by Jeff Mustin and Harvey Rishikof; the targeted killing of suspected terrorists, discussed by Nicholas Rostow; the persistent challenge that detention at Guantánamo Bay poses to our notions of due process, discussed by Gary Thompson; the troubling issues surrounding the blurring of the lines between combatants and civilians, discussed by Alec Walen; and the conceptual difficulties involved in adapting law of war detention concepts to post-9/11 realities, discussed by Laurie Blank. This Issue of *Rutgers Law Review* is published in the belief that only through the kinds of frank exchanges contained in these pages will a consensus be reached, and the rule of law restated, in the context of the struggle against terrorism. It is also published in the belief that the best way to move forward is not to forget.

So let us return to 9/11 itself, and begin our consideration of the way forward by reliving that day the way the people charged with defending the nation that morning lived it.⁴⁶ That will allow us to consider the thoughtful presentations contained in this Issue in a real and proper context. A persistent theme running through the presentations in this Issue is the struggle to adapt pre-existing legal concepts to changed realities. That theme emerged first—and most urgently—on 9/11 itself; it persists to this day, and the stakes involved in reaching consensus have never been higher.

46. See *A New Type of War*, *supra* note 10. Rutgers Law Review's website—www.rutgerslawreview.com—received 4 million hits within 36 hours of publishing the monograph, an indication of the intense interest that these issues continue to generate.