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Law, Counterterrorism, and Intelligence Gathering: Recommendations for the Trump Administration

Elizabeth Grimm Arsenault

I had originally planned to focus my comments just on some reflections on the challenges of fighting terrorism in the years to come, on the difference of perception versus reality in how few Americans have actually been killed since 9/11 in jihadist attacks domestically (in fact, you are more likely to be killed in the United States by an armed toddler than a terrorist), and some recommendations for how intelligence practitioners can best convey the value of their work in this new Administration.

But then Wednesday happened.

I don’t know about you all, but I have found it difficult to simply keep pace with press conferences, speeches, and executive orders of the past week. I have found that it is in fact essential to take all of Donald Trump’s campaign promises literally. When The Washington Post\(^1\) and The New York Times\(^2\) revealed a draft Executive Order that calls for a policy review that could authorize the CIA to reopen “black site” prisons overseas and potentially restart an interrogation program that was dismantled in 2009, I knew that I needed to shift the focus of my comments.

So, I would like to open with three broad harms that I see emerging from a dysfunctional relationship between the commander-in-chief and those charged with narrowing his windows of uncertainty about national security issues before addressing specifically what I see as a dangerous national security decision at the intersection of intelligence gathering and counterterrorism: the possible reopening of the black sites and a possible return to coercive practices.

I would describe President Trump’s views toward intelligence and the Intelligence Community (IC) as at best dismissive and at worst denigrating and combative. From his transition team mocking the IC for getting it wrong on Iraq’s weapons of mass destruction, to disputing conclusions about Russian hacking, to his disinterest in the President’s Daily Brief (PDB), to even his initial choice of General Michael Flynn as his national security advisor, a man who accused the Agency of being a political tool of the Administration, to his weekend speech in

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front of the Memorial Wall, Trump’s election has posed particular concerns about his national security leadership. He is certainly not the first policymaker to be dismissive or even the first to be suspicious about intelligence. The ideal relationship between intelligence and policy is symbiotic: policymakers communicate their areas of priority to the IC and subsequently rely on the community for advice.

However, the IC and policymakers exist in a power imbalance. Presidents can function without IC. The IC, however, cannot function without the president. He or she is customer number one for them. Intelligence activities depend on having a customer to serve. But certainly policymakers enter office with their own worldviews, ideologies, cognitive biases, as well as friends and advisors who provide them information. So, while others have shared this suspicion of intelligence and the community—Nixon also did not take PDBs during his transition and believed that the CIA conspired against him in 1960—I believe this depth of hostility is unusual.

To that end, I see three broad harms emerging from this hostility: politicization, neglect, and erosion of public faith. The first two I believe are short-term harms and the last one is a longer-term issue.

Danger #1: Politicization. This is not a new problem. Politicization refers to “the deliberate distortion of analysis or distortion of judgment to favor a preferred line of thinking irrespective of evidence.”3 Many people think this manifests as direct orders to tailor intelligence to policy, but it is more often much more subtle: policymakers sending repeated tacit signals about what they expect to hear. In a recent Washington Post piece, General Hayden (former director of the National Security Agency and Central Intelligence Agency) warned against this possibility.4 It skews analysis in the short term and in the longer term contributes to mutual mistrust.5

Danger #2: Neglect. If we take Trump literally—which as I said earlier, I think we need to—it appears that this danger is also likely: simply ignoring IC products. On one hand, neglect removes from policy deliberations an important source of evidence, to perhaps provide warning

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or check assumptions or clarifying something previously unknown. On the other hand, neglect also significantly diminishes the morale of the Americans working in the IC. What is the value of their work if no one is reading it?

Danger #3: Erosion of public faith. Both of these dangers taken together contribute in my mind to the longer term—and more serious—issue of undermining public faith, public confidence in institutions broadly, and in intelligence institutions more specifically. Discourse about the IC matters. Having the most powerful man in the world compare the IC’s handling of unverified reports on Russian intelligence to Nazi Germany matters. It matters to the US public’s view of the community and it matters to who will join that community in the future. I have had countless conversations since the election with students and they have almost all asked this question: should I still work for the Intelligence Community? These are talented young women and men who want this career—despite the fact that they would make more at a bank and would certainly have an easier path to employment. What should we tell them? How can we restore public faith in the IC and consequently ensure that it will attract the best personnel?

With those questions and broad harms in mind, I would like to use the rest of my time to talk about the specific area that most alarms me: the review of whether prisons outside the United States should be reopened.

Questions like the one before us—whether coercive practices should be employed when you need information to save American lives—is one of the most critical ones facing our generation. It is not a simplistic question. Mr. Trump believes that it is. In a recent ABC News interview, Mr. Trump said that he wants to do everything that is within the bounds of what you are allowed to do legally. However, we did not end up in this place because of lawlessness. We ended up in this place because of law. The treatment was scrutinized and authorized by law. By lawyers. The extent to which both the DOD and CIA interrogators’ conduct breached America’s international legal obligations—even its domestic legal obligations—it did so precisely because it was following the interpretations of the law that were developed after 9/11. In this recent interview, Trump reiterated his claim that he believes torture works. In November, Donald Trump told The New York Times that his nominee for Secretary of Defense, James Mattis, had

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changed his thinking on the efficacy of torture. He said that Mattis had told him, “give me a pack of cigarettes and a couple of beers and I do better with that than I do with torture.” This was seen to be a shift away from the campaign promise to bring back “a hell of a lot worse than waterboarding.” However, Wednesday's interview seemed to revert back to this idea of torture “working.”

Asking whether it works is the wrong question. Virtually all interrogators agree that the best intelligence comes from non-coercive means. Those who use conventional non-coercive approaches believe them optimal. However, some who use coercive approaches believe them optimal. There has been surprisingly little scientific study of different modes of interrogation.

Did it produce intelligence? Of course. Of the three people waterboarded: Abu Zubaydah, one of the first high value detainees captured who was believed to be central to al-Qa’ida leadership, gave information about Khalid Shaikh Muhammad. Abu Zubaydah gave info that led to the capture of Ramzi bin al-Shibh, whose information led to Khalid Shaikh Muhammad. Khalid Shaikh Muhammad was the overall director or operational planner of al-Qa’ida. He was well versed with the organizational structure of al-Qa’ida and its plan for many future attacks. He saw himself as a warrior and a martyr and was initially non-cooperative during coercive interrogations. In fact, I believe he tapped his fingers during waterboarding. Khalid Shaikh Muhammad’s information led to the capture of Hambali, who was responsible for 2002 Bali nightclub bombing, and his brother as well. Khalid Shaikh Muhammad gave critical information on al-Qa’ida’s attempts to develop bio weapons. It is ultimately unknowable whether intelligence obtained from detainees who were subjected to torture could have been obtained through other means or from other individuals. Former CIA Director John Brennan has claimed that we don’t know if the intelligence gained could have been gotten any other way. We also don’t know if more information could have been obtained through non-coercive means.

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Torture is not against the law because it doesn’t work. On the contrary, it is against the law because it is a moral abomination.

We cannot return to those intelligence gathering measures of the early years of the Bush Administration. The draft Executive Order stated a revocation of the 2009 EO 13491\(^\text{13}\) and EO 13492\(^\text{14}\) as well as a reinstatement of 2007 EO 13440.\(^\text{15}\) Of the two orders to be revoked: one closed down the detention center at Guantánamo Bay, the other ended CIA “black site” prisons, limited interrogations to methods in the Army Field Manual, and granted the Red Cross access to detainees.\(^\text{16}\) The 2007 EO 13440 enabled the agency to continue a revised form of the program to that extent that it detailed which prisoner abuses counted as war crimes, thus allowing tactics that were not on the list, such as sleep deprivation.\(^\text{17}\) Mr. Obama revoked that order as part of his 2009 overhaul of detention legal policy. The proposal also focuses on the military detention center at Guantánamo Bay, Cuba, saying it should be used for newly captured prisoners. No detainee has been sent there since Obama took office in 2009. Any new Executive Order such as the draft one we have seen from Mr. Trump would challenge the legislation passed as part of the 2016 National Defense Authorization Act which mandates that detainees under the control of any US personnel, including the CIA, should not be subjected to techniques other than those allowed in the field manual.\(^\text{18}\)

But it is important to stress now—we cannot allow our country to return to the intelligence gathering methods of the early years of the Bush Administration in the war on terror. The harms from this program were profound. At its essence: torture is unacceptable. We should not let an adversary decide who we are and what we will do. Among other impacts, the torture decisions eroded legal regimes, weakened US alliances, and damaged US operational capability in the field. We need to talk—in forums such as these—about the harms of politicization, neglect, and the erosion of faith in intelligence and the IC. We further need to

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\(^{17}\) Ibid.

address that legal gymnastics that happened before to allow torture in the name of US national security. We cannot allow that to happen again.

**About the Author**

Professor Elizabeth Grimm Arsenault is an Assistant Professor of Teaching in the Security Studies Program at Georgetown University. Professor Arsenault teaches courses on international relations, intelligence, international security, international law, and terrorism and counterterrorism. She was presented with the Dorothy Brown Award in 2012 by the Georgetown University Student Association on behalf of the undergraduate student body and received the School of Foreign Service Faculty of the Year Award in 2012. She received her Ph.D. in Government from Georgetown University, M.A. in Security Policy Studies from the George Washington University, and B.A. in Government and History from The College of William & Mary. She has also worked in the defense and security sectors of the US government.