

Journal of Civil Rights and Economic Development

Volume 23
Issue 4 *Volume 23, Spring 2009, Issue 4*

Article 4

March 2009

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Margaret Stock

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EMERGING ISSUES IN UNITED STATES NATIONAL SECURITY POLICY

MARGARET STOCK*

Thank you. I too have been told by the Judge Advocate General people that I have to tell you that everything I say today is my personal opinion only and not the opinion of any government agency—or not *necessarily* the opinion of any government agency.

The Symposium organizers said that I could have my choice of emerging issues. I have chosen to talk about immigration and national security, which has been the focus of much of my research and work in the last seven or eight years. In fact, it has been a bit amusing being an immigration lawyer and listening to the dialogue earlier today because immigration lawyers have been dealing with a lot of these issues for more than twelve years now. We have faced issues such as deprivation of the right to counsel, secret evidence, indefinite detentions, strong distinctions between the rights of citizens and non-citizens, special courts for terrorists, denial of habeas corpus rights, and even Guantánamo Bay detention since at least 1996. In the immigration lawyer's world, Guantánamo Bay is the U.S. Government's favorite place to put aliens (non-citizens) that it doesn't want to bring to the United States. If the Government is not quite sure what to do with someone, there is a long history in the immigration world of sending people to Guantánamo Bay.

Everyone is pretty well aware of a little bit of our immigration history post 9-11. Many think that vulnerability in our immigration system contributed in large measure to the success of the attack. The terrorists, it is said, were able to exploit these vulnerabilities to raise havoc in America; there has been a public perception that weaknesses in the law contributed to their success. It is also said that our laws were somehow faulty. I disagree with that and actually think our immigration laws are about the toughest in the world. In fact, our immigration laws are so tough that they have contributed in large part to the fact that we currently have so many illegal or undocumented immigrants in the United States. The laws have back-fired. As lawyers, we are used to thinking that tough laws are a deterrent.

But in the immigration world, rather than being a deterrent, our laws have contributed to creating a larger and larger population of illegal and undocumented immigrants. Paradoxically, this makes it is harder and harder for the U.S. Government to find people who might harm us because we have created a bigger and bigger haystack full of relatively harmless people. We have to search that haystack to find the really bad people, and that haystack has gotten bigger in recent years.

Post 9-11 the impression has also been that the threat was almost exclusively foreign. Accordingly, immediately after 9-11, government authorities looked at immigration laws as a possible way to deal with perceived inadequacies of the criminal justice system or other legal systems. Our present immigration laws are so tough that they became a pretty good tool to be used right away to go after people who were perceived to be dangerous. The government decided that maximum enforcement of immigration laws was the way to deal with the threat. You heard statements from government officials to the effect that if a suspected terrorist spits on the sidewalk, then he's going to be deported.¹ We also saw profiling take place, with government aiming its immigration enforcement at certain groups who were perceived to be the source of the terrorist threat. In doing so, it was easy for the government to find immigration violations because our immigration laws are so tough.

Let me give you an example: I tried an experiment at a conference where there were a lot of professors from foreign countries. I asked them all, "How many of you have filed a change of address form within ten days of moving? You are required to do so by law; if you don't do that then you've committed a deportable offense."² Most of the professors in the room looked a bit surprised and guilty; most had violated this law.

So our immigration laws are extremely tough. I will list a few more

* Margaret D. Stock is an attorney admitted in Alaska and also a Lieutenant Colonel, Military Police, U.S. Army Reserve, assigned as a Drilling Individual Mobilization Augmentee (Associate Professor) at the United States Military Academy, West Point, New York. The opinions expressed in this article are her own, and do not necessarily reflect the views of the U.S. Military Academy, the Department of the Army, the Department of Defense, or any other government agency.

¹ Anne Gearan, *U.S. Terror Arrest Tactics Detailed*, ASSOCIATED PRESS ONLINE, Feb. 1, 2002, <http://www.highbeam.com/doc/1P1-49929565.html> (last visited Feb. 1, 2009). "People the government suspects of terrorist involvement will be arrested on the most minor of crimes – spitting on the sidewalk or petty credit card swindles – just to get them off the street, a senior Bush administration lawyer said Friday." *Id.*

² See 8 U.S.C. § 1305(a) (requiring aliens to "notify the Attorney General in writing of each change of address and new address within ten days from the date of such change"); 8 U.S.C. § 1227(a)(3)(A) (mandating an alien "who has failed to comply with the provisions of section 265 [8 U.S.C. § 1305] is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.").

things that make immigration law a quick way to deal with a perceived foreign threat. We have very relaxed due process in the immigration field. Rendition is easy to complete — it is very, very easy to expedite the removal from the United States of people who arrive at an airport and whom you want to get rid of quickly. Non-citizens have lesser Constitutional protections. In immigration cases, there is a more limited right to counsel; a non-citizen won't get a lawyer in immigration court unless he or she can afford one, and many people — most people — don't have one unless they maybe can find a pro bono attorney. Immigration authorities have an enhanced ability to detain people; we have had indefinite detention in immigration law for a very long time. Thanks to a recent decision by the United States Supreme Court,³ a detained non-citizen now gets a custody review every six months; but still, many people are detained for very, very long periods of time. We even have U.S. citizens being detained for long periods of time.⁴ The courts have said that if the government does not think that you are a U.S. citizen, they can put you in an immigration detention center. You can attempt to find an attorney who will file a habeas petition for you, but you may not get habeas review until you have exhausted your administrative remedies.⁵ As a result, we have citizens sitting in immigration detention for very long periods of time, until they can prove that they are U.S. citizens and get out of detention.

Post 9-11, the government decided that a good way to deal with the threat was to enforce immigration laws to the maximum. The government also developed new ways to apply immigration laws, such as the National Security Entry Exit Registration System (NSEERS), which was targeted at specific groups.⁶ These efforts, however, did not always help our security.

³ *Zadvydas v. Davis*, 533 U.S. 678 (2001). “[T]he statute, read in light of the Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States.” *Id.* at 689. “[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.” *Id.* at 698.

⁴ *Immigration & Customs Interrogation, Detention and Removal: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Rachel E. Rosenbloom, Human Rights Fellow, Center for Human Rights and International Justice, Boston College). “Many United States citizens who ultimately prevail in removal proceedings languish in detention for weeks, months, or even years before their citizenship claims are recognized.” *Id.*

⁵ *See, e.g., Said v. Eddy*, 87 F.Supp. 2d 937, 940 (D. Alaska 2000). “Without such a finding [that plaintiff is not a U.S. citizen], there is no final administrative denial of the right or privilege of U.S. citizenship. And without that denial, there is no basis for [further relief].” *Id.*

⁶ *See* Abed Ayoub, *End the Shame of NSEERS*, THE ARAB AMERICAN NEWS, Mar. 21, 2008, <http://www.arabamericannews.com/news/index.php?mod=article&cat=OtherOpinions&article=805> (last visited Feb. 1, 2009). “The most controversial part of this program required men from twenty-five predominantly Muslim and Arab countries to report to immigration offices around the country for

In many cases and in many ways, these efforts significantly harmed our security because we did not use immigration laws strategically. We looked at them in a pretty simplistic manner. We looked at immigration laws as a tool for keeping people out, rather than looking at them as a tool for letting the right people in. Immigration law became a very blunt instrument. In many ways, our application of these laws alienated certain communities from whom we needed cooperation and assistance in order to fight the global war on terrorism. We also didn't use immigration law as a tool to enhance our intelligence capabilities. Earlier today we talked about human intelligence capabilities. Immigration laws offer a tremendous opportunity to enhance our human intelligence capability, but post 9-11, we tended to overlook that possibility.

I find this oversight particularly startling because there was an example right here in New York of a huge success in stopping a terrorist attack — an example that nobody ever mentions — where human intelligence was used to thwart a horrific attack. In 1997, two suicide bombers plotted to attack the New York City subway, scheming to blow themselves up during morning rush hour in a train under the East River. Shortly before the planned attack, their plot was uncovered and stopped because an Egyptian-Muslim male immigrant, who had just arrived in the United States and had inadvertently seen the terrorists preparing their attack, decided to come forward and uncover the imminent attack to the New York Police Department. NYPD scrambled to stop the plot and captured the bad guys. The suicide bombers were then tried and convicted.⁷ The disruption of their plot was purely a human intelligence success. And yet, post 9-11, we seem to forget success like this.

We have tended to abandon the human intelligence approach in favor of relying on new technology; the theory being that if we just spend enough money, and build enough databases, we can catch people. So now we have new identity documents, such as REAL I.D. and the Western Hemisphere Travel Initiative. We have more databases and plans to link all the databases. Shortly, we are starting a new program so that anyone coming and going from the United States will be asked to provide his or her fingerprints — all ten fingerprints — so that we can try to match those prints to latent prints that we have picked up at terrorist safe houses. We

fingerprints, photographs, and lengthy questioning by officers." *Id.*

⁷ See generally, SAMUEL M. KATZ, *JIHAD IN BROOKLYN: THE NYPD RAID THAT STOPPED AMERICA'S FIRST SUICIDE BOMBERS* (2005) (documenting the story of an Egyptian immigrant dishwasher who told police about the plan of two of his roommates who had constructed bomb belts that they planned to detonate on packed rush-hour subway trains).

are pushing the benefits of more information sharing technology and more high technology border fences. Throughout all of this, though, there has been very little cost-benefit analysis. We rely on technology because we are enamored with it, not necessarily because it is more cost-effective.

Another “emerging trend” is the bleed over and application of immigration law enforcement and law practices to more and more U.S. citizens. Earlier I mentioned that U.S. citizens are increasingly being detained under immigration law authorities, but I will mention some other similar trends.

First, the relaxed rules that have often applied to immigration inspections at the border have been expanded to cover U.S. citizens. There is a border exception to the Fourth Amendment: As a government agent at the border, you don’t have to have reasonable suspicion; you don’t have to have probable cause to conduct a search. If somebody comes to the border, they are subject to search regardless of the level of suspicion. At John F. Kennedy International Airport, for example, if you get off an international flight, you are subject to search. The Customs and Border Protection Agents claim the right to search not only you without any suspicion, but also your laptop. They may tell you to turn on your laptop, and they may conduct an electronic search of your laptop.⁸ They may look at all your files — all without any warrant. In some reported cases, they have not only searched laptop files of citizens and non-citizens alike, but they have also asked people to log onto their Yahoo! or America Online e-mail accounts to read your e-mail. They do this because they are looking for threats, saying that al Qaeda members like to use e-mail, and, therefore, there is a national security reason why they want to look at your e-mail. Information on your laptop or information in your email might be useful for determining whether it is appropriate to let you enter the United States. This new type of search is an emerging trend. The case law is unsettled on this issue, and there are cases being litigated right now where American citizens have been upset that their laptops are being searched without a warrant or without any kind of suspicion.

We have also seen “bleed over” in terms of immigration raids. Raids are conducted inside the United States, and yet the immigration authorities take

⁸ See, e.g., *Laptop Search and Privacy Violations Faced by Returning Travelers: Hearing on H.R. 4611 Before the Subcomm. on Constitution, Civil Rights and Property Rights and the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Farhana Y. Khera, President and Executive Director, Muslim Advocates) (describing “a number of complaints from U.S. citizens and legal residents in the Muslim, Arab, and South Asian American communities who have experienced invasive questioning, searches and seizures at airports or land crossings upon their return to the U.S. after international travel. . . . includ[ing] searches and seizures of laptops, cell phones, and digital cameras . . .”).

the position that illegal immigration is linked to terrorism. The authorities will say that they do not need a normal warrant to arrest a foreigner, even a foreigner who is inside their home. Consequently, we have been seeing raids conducted here in New York in which some of the procedures used in the raids would startle many Americans. The agents have surrounded homes in the early morning hours, with some agents allegedly wearing cowboy hats⁹ and using strategies that are reminiscent of the tactics, techniques, and procedures used to kick in doors in Baghdad. Some of the people arrested in these raids turned out to not be unauthorized foreigners at all — they have been American citizens or legal immigrants.¹⁰

We can expect more of this sort of “bleed over” as the immigration authority continues to expand. This expansion represents a challenge to the National Security Constitution that we were talking about earlier today. Immigration law will continue to expand its coverage. We tend to look at this law as a useful tool in our fight in the global war on terrorism. What concerns me, however, is that we do not pay a lot of attention to possible second and third order effects. We do not pay attention to the new vulnerabilities that we are creating by the new approaches. We do not consider that when you increasingly share information and create more databases, you often create more security vulnerabilities, as more and more people have access to valuable information. You can create vulnerability when bad-intentioned insiders misuse the information to which you have given them access. We are currently having this problem in immigration.

We also have created a new vulnerability because sometimes when you rely upon technology, people get lazy and forget common sense. They want to follow the rules that they have been told to follow, even when it makes no sense to follow those rules. Consider the fact that Massachusetts Democratic Senator Ted Kennedy has been told that he cannot get on an airplane because his name is on the terrorist watch list.¹¹ Now whatever

⁹ William Murphy, *Cops: Feds Acted Like ‘Cowboys,’* NEWSDAY (NEW YORK), Oct. 3, 2007, at A08. “Federal agents acted like ‘cowboys’ – even wearing cowboy hats and mistakenly pulling their weapons on Nassau Police officers – during immigration raids in Nassau County last week, the county police commissioner charged yesterday.” *Id.*

¹⁰ Alicia A. Caldwell, *Civil Rights Groups Sue County Over Impromptu Immigration Raids,* VALLEY MORNING STAR, Oct. 17, 2007, available at http://www.valleymorningstar.com/news/deputies_11928___article.html/county_immigration.html (reporting on law suits filed against law enforcement agents in New Mexico, Florida, and New York, alleging that arrest, questioning and search tactics employed by the agents violated the rights of U.S. citizens and legal residents who were the target of their tactics).

¹¹ Ben Evans, *Congressman Still Faces Airport Screening Problem,* USATODAY.COM, July 18, 2008, http://www.usatoday.com/news/washington/2008-07-18-627676968_x.htm (last visited Feb. 1, 2009) (noting that Senator Kennedy, like Representative John Lewis, has had difficulty boarding planes post- Sept. 11, 2001, likely because “airlines are misinterpreting security lists”).

you think of Senator Kennedy's politics, by no means does anybody in America seriously think that Ted Kennedy is a terrorist, or that he is a threat to aviation security. And yet, he has been told that he cannot get on an airplane because his name is on the list. Unfortunately, this has not been an isolated incident. Cat Stevens, the famous British rock star, author of songs such as "Morning Has Broken" and "It's a Wild World," is also on the watch list and was kicked out of the United States.¹² No one thinks he is a threat to aviation security, either, but he has been unable to fly as a result of his name being on the list. Apparently his name was still on the list several years later, and as result, the wife of Senator Ted Stevens of Alaska, whose first name happens to be Catherine, has had trouble getting on airplanes up in Alaska.¹³ The government cannot figure out that a male British rock star formally known as Cat Stevens is not the same person as the female Catherine Stevens, who is married to Senator Ted Stevens.

With those examples and that little bit of amusement, I will stop, so that you can ask us all questions.

Professor Movsesian:

Great. Thank you very much. Well, because we've gone a little over I'd like to maybe just open it up for questions from the audience. Well, I guess I could ask from the panelists. Oh yes, Professor Gregory.

Q & A PART

Professor Gregory:

When Tommy Franks was the Chairman of Joint Chiefs he said when — not if — when there is another terrorist incident in the United States, we will have martial law. With this assertion, a Yale Law School Professor — who is, shall we say, about as premier liberal as there is — has built much of his book around the hypothetical of a 2009 nuclear weapon detonated in Washington D.C. and taking out much of our government. Across that

¹² Audrey Hudson, *30,000 Fliers Seek Watch-list Removal*, WASH. TIMES, Dec. 8, 2005, at A11. "Yusuf Islam, the singer formerly known as Cat Stevens, is on the no-fly list and was deported last year after his London flight landed at Washington Dulles International Airport." *Id.*

¹³ Karin Zeitvogel, *What Do A Nun, Pilot, Cat Stevens Have in Common? US Terror List*, AGENCY FRANCE PRESS, July 22, 2008, <http://afp.google.com/article/ALeqM5hRSEmQEGVUQzLE94u8SBWbhfcQLw> (last visited Feb. 1, 2009) (explaining that Catherine Stevens, wife of Alaska Senator Ted Stevens, has had difficulty boarding planes because her nickname, Cat Stevens, is the same as the singer formerly known as Cat Stevens, and Cat Stevens is on terror watch lists).

spectrum of possibilities, if we were to reconvene in ten years, do you realistically think that this sort of threat will come to pass? If not, why not? If so, what will the new rules be that we will be operating under in 2018?

Margaret Stock:

It will depend on who carries out the attack. If it is some kind of domestic terrorist, the reaction is probably completely different than if it is some Al-Qa'ida or other foreign threat. It will also depend on what type of threat it is. There would be different reactions to a bio-terrorism incident or conventional explosive incident.

Professor Movsesian:

Professor Barrett?

Professor Barrett:

This maybe a question from a side angle, but this panel uniquely has a majority. So I am wondering about military service. Without getting into the prediction of the politics, I am just wondering, as a normative matter, whether it would be preferable for this country to have some universal military service? Moreover, whether that would inform our thinking about these issues and maybe this sort of democratic responsiveness of our government to majority viewpoints on war-waging issues? I ask this because three of you are military, but also because I spent a lot of time and have done a lot of research with "Greatest Generation" types. I know this is a generalization, but a strong one in my sense, that the military experience that those men had in the 1940s and 1950s has informed — in a very socially constructive way — their citizenship for the rest of their lives. So leaving aside the politics, I am wondering about the substance and how you feel about a draft?

Margaret Stock:

I'll answer that one. First, consider that some 70% of the American public right now can't qualify for the military.¹⁴ They have been

¹⁴ Otto Kreisher, *Military Officers Say Their Recruiting Goals Are Being Met*, NATIONALJOURNAL.COM CONGRESS DAILY, Jan. 31, 2008, http://www.nationaljournal.com/congress/daily/dj_20080131_4.php?related=true&story1=dj_20080131_4&story2=null&story3=null (last visited Feb. 1, 2009) ("The recruiting commanders for the four armed services told a Senate panel today they are meeting their recruiting goals, despite an increasingly difficult environment where 70 percent of

disqualified for health reasons, medical issues, mental problems, “don’t ask don’t tell” issues, taking too many drugs. So, while the concept of the draft has some appeal in terms of equality issues, the reality might be that if we actually instituted a draft, we would essentially end up with the same group of people that we now see. A draft wouldn’t necessarily add much to the mix. I wasn’t in the military under the draft, but I’ve heard all the horror stories from senior leaders about what the military was like when the draft was in place; it was hard to get a quality force. Today, we do have an extremely high-quality force, despite what you might hear in the newspapers. I worry that a return to a draft might reduce that quality and might not accomplish our equality goals as most people can’t qualify for the military anyway. If 70% are excluded, how would the draft be fair? But national service is a different idea, and I do find the concept of some sort of national service to be appealing.¹⁵

Today’s military requires people who are very well trained and highly skilled. Bringing large numbers of untrained people into the military for short periods of times is not optimal for modern warfare. It’s not possible to train people in the complexities of modern combined arms warfare in a few weeks. A drafted, short-term force is not going to be an effective force.

Professor Movsesian:

Yes, in the front here.

Unknown speaker:

My question is largely about the expanding use of private contractors in the military. One of the issues most interesting to me is this idea of how we figure out what should be contracted out and what shouldn’t be — this concept of inherent governmental functions. At one level, as far as I can tell, there is this obscure and relatively low-level bureaucratic determination made by the Comptroller General in the issuance of contracts: What can be sent out as a request for proposals versus what can’t be contracted out because it is an inherent governmental function. There is a list of criterion, but, to me, that determination is made at an amazingly obscure administrative level. On the other hand, people will say that

young Americans are disqualified for military service . . .”).

¹⁵ See generally, RICHARD DANZIG & PETER SZANTON, NATIONAL SERVICE: WHAT WOULD IT MEAN? (1986) (proposing a national service system that would assess a 5% surtax on non-participants).

commanders in the field have some discretion over whether they are going to sign-off on having contractors imported into their operation. I am under the impression that this discretion may be more on paper than real. Thus, my question for the panelist is complicated. Where should the determination be made? What is contract-able and what is not? Is it because it so impacts the development of poor structure generally? Is it a determination that gets made at a very macro level by Congress in annual defense authorization spending? Is it something that we need to define more flexibly? If that is the case, then what should the criteria be? How do we determine what functions are solely for government officials and what functions, such as food preparation and the like, are we willing to contract out and pay for?

Margaret Stock:

There is also the political piece. Once you have all these companies in operation they have a tendency to want to continue to sell things to the government. They could make political contributions, and you have the whole specter of the famed military-industrial complex. We are seeing that in the immigration field now where Boeing and other big companies are really eager to provide all kinds of new technology to the Department of Homeland Security. They promise all sorts of security benefits if the government will invest in their technology, but typically, you have to invest billions and you have to invest for a very long time. It might be cheaper to keep a function inside the government, but there is a push to outsource many functions. Along with outsourcing, we build a constituency that wants to continue to sell high-priced technology to the government. That constituency translates into a politically influential interest group.¹⁶

¹⁶ For example, Corrections Corporation of America [hereinafter CCA] provides privatized corrections services to federal and state governments. CCA also lobbies for legislation that would impose longer prison terms. CCA benefits when criminals serve longer sentences because CCA runs and profits from the facilities in which they are housed.