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THE RHETORICAL PRESIDENCY MEETS THE DRONE PRESIDENCY

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## **The Rhetorical Presidency Meets the Drone Presidency**

By DAVID POZEN

Review of *SPEAKING THE LAW: The Obama Administration's Addresses on National Security Law*, by Kenneth Anderson and Benjamin Wittes

Hoover Institution Press, 2015

A curious feature of the Obama administration's positions on national security law is that they have been disclosed, in significant part, through speeches at prestigious centers of learning. The President's counterterrorism adviser outlined the administration's approach to drone killings in addresses at Harvard University and the Woodrow Wilson Center. The Defense Department's general counsel laid out the legal basis for military actions against al Qaeda and associated forces to students at Yale and Oxford. The Attorney General defended the legality of targeting U.S. citizens at Northwestern. Elite academic status, in the early twenty-first century, is apparently signaled not only by erecting lavish new gyms and dorms but also by hosting grim disquisitions on how the government deals with terrorist threats.

In *Speaking the Law*, Kenneth Anderson and Benjamin Wittes seek to assemble these various speeches into a cohesive whole. They identify sixteen speeches by high-level officials (reproduced in a 235-page appendix) as "canonical" (pp. 6-14) articulations of the administration's views. From this canonical corpus, they then derive an "aggregate legal policy framework" (p. 6) that has emerged to govern the counterterrorism operations of this presidency and, quite possibly, of presidencies to come. Taken together, Anderson and Wittes propose, the speeches constitute "a major part of the Obama administration's legacy in the national security area" (p. 10).

*Speaking the Law* advances a modest claim about the value of such national security speeches, in general, along with a bolder claim about the value of the Obama framework. The working assumption is that the latter can be deduced from the former: If you want to know how the executive branch has been developing and applying law to the challenges of counterterrorism, then pay close attention to its oratory. I will suggest that this assumption is flawed, or at least seriously incomplete, and that in consequence Anderson and Wittes misconceive the nature of the legal system they are analyzing. It is not a system that speeches are likely to reveal, or restrain, in a satisfying way.

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But first, it is necessary to consider how the book portrays the relationship between law and rhetoric in this domain. *Speaking the Law*'s most basic claim is that national security addresses demand respect and reward study as instruments of law articulation. On issues such as lethal drones or military detention, Anderson and Wittes emphasize the capacity of speeches to enrich public understanding and express *opinio juris* against a backdrop of widespread government secrecy. "In some of the most contested areas" of national security, they note, "the speeches represent the *only* mode—other than leaks—of articulation of law that largely takes the form of internal executive memoranda" (p. 8). The speeches undergo a process of interagency clearance, which makes them a reliable guide to the executive branch's views. And from the Monroe Doctrine to Woodrow Wilson's Fourteen Points, the use of high-level statements to convey the nation's positions on international law and policy has a long pedigree.

"It would be quite unfair," then, "to dismiss [these speeches] merely as clumsy public relations efforts by the administration's lawyers" (*id.*). Yes, the speeches have a public relations side, but so what? They might still do important work in furthering the development of international law, "facilitating domestic accountability," and "providing far greater openness than [would be] likely in their absence" (p. 90).

Anderson and Wittes's arguments on this score are sensible as far as they go, and the authors provide a useful service in calling attention to speechmaking as a distinctive, and seemingly ascendant, genre of national security legal discourse. But I think they fail to consider the case against such speechmaking in its strongest light. For one thing, it is not entirely clear that fewer speeches would in fact lead to less openness. Perhaps it would lead instead to a larger number of press conferences. Or to greater disclosure—whether through official or unofficial channels—of white papers, internal memoranda (partially redacted to hide sensitive details), and the like. Anderson and Wittes observe that the executive branch "has a variety of methods by which to communicate its legal views" (p. 85), and that each may serve different purposes. The concern, however, is that some of these methods may not so much complement as supplant one another; the question is not just whether speeches perform valuable social functions but *how well* they perform those functions relative to bypassed alternatives that would entail more rigorous analysis or structured pushback.

Moreover, there are reasons to be wary of the speech as a device for transmitting executive branch legal policies. In a classic book on *The Rhetorical Presidency*, Jeffrey Tulis argued that the modern presidential practice of appealing directly to the public, over the heads of Congress, "enhances the

tendency to define issues in terms of the needs of persuasion rather than to develop a discourse suitable for the illumination and exploration of real issues” (1987, p. 179). In a recent article on *Interpretation Catalysts*, Rebecca Ingber explored how executive branch lawyers may turn to speechmaking to trumpet successes and beat back criticisms in a favorable setting of their own choosing—say, an Ivy League lectern that lends an air of liberal legitimacy and intellectual seriousness to the affair. The Obama administration’s speeches are admirably low on demagoguery. Yet like all governmental presentations in public venues, they have a tendency to obscure or omit significant facts, complications, and objections, a tendency that is exacerbated in the national security field by the ready-made excuse of protecting classified information.

Elsewhere in the book, Anderson and Wittes criticize the Obama administration for failing to deliver on its promises of transformative transparency (pp. 79, 212-13) and for failing to engage with Congress in a comprehensive fashion (pp. 114-16). The latter omission, Anderson and Wittes write, is perhaps “the greatest flaw in the first-term speeches—and in the administration’s policy, more generally” (p. 114). These criticisms sit in some tension with the celebration of popular speechmaking as a mode of law articulation, as well as the admission that Congress “has offered little [that is] constructive” on issues of counterterrorism policy (*id.*). The particular advantage of the speech, from the perspective of a power-seeking executive, is the way in which it enables selective disclosure and bypasses the legislature. The Monroe Doctrine was announced in the President’s 1823 annual message to Congress. President Obama’s national security law doctrine has been communicated in an ad hoc series of mediagenic addresses to students, professors, and pundits.

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Or, at least, many different statements about national security law have been communicated: Do they add up to a doctrine? Anderson and Wittes insist that they do. The speeches, concededly, “just happened as the administration,” and the speaker, “perceived the need to address certain matters officially and in public” (p. 5). Even so, the speeches have continually echoed and enlarged on one another, to the point where a unifying set of themes and commitments has become manifest. Anderson and Wittes are the exegetes who would glean from these canonical texts an authoritative Obama creed.

That creed, as related by Anderson and Wittes, looks something like the following with regard to lethal drone strikes, the most controversial element of President Obama’s counterterrorism efforts:

- As a matter of domestic law, most if not all of the strikes that have been carried out by the Defense Department and the CIA fall within the terms

of the Authorization for Use of Military Force passed by Congress in the wake of 9/11, including in cases where the targeted group did not exist in 2001 but has subsequently emerged and either affiliated or associated itself with al Qaeda. These strikes also fall within the President's inherent constitutional powers. In the rare event that a U.S. citizen is targeted because he has joined an enemy force abroad, he will be assumed to retain Fifth Amendment due process protections, albeit of a non-judicially enforceable variety.

- As a matter of international law, the United States is engaged in a non-international (*i.e.*, not state-to-state) armed conflict with al Qaeda and its co-belligerents. Our engagement in this conflict was justified from the start by self-defense and remains subject to the laws of war, including the principles of necessity, distinction, and proportionality. The conflict is not limited geographically to “hot” battlefields or particular theaters. Before striking a non-state actor outside of conventional combat zones, however, the United States must either obtain the host state's consent or determine that the state is unwilling or unable to deal with the terrorist threat. At some point, this conflict will end, but it is too early to say exactly when or how.
- As a matter of policy, although the United States may lawfully strike members of enemy forces anywhere in the world, it will not use lethal force outside of conventional combat zones unless the targeted actor is determined, through careful review, to pose a continuing, imminent threat to U.S. persons. This imminence test mirrors the legal rule that applies outside of armed conflict. Captures are preferred, if feasible, to drone strikes. When a capture is made, criminal trial in federal court is preferred, if feasible, to trial by military commission (as reformed since 2009 to offer fairer procedures), which in turn is preferred to indefinite detention.

With a few quibbles at the margins, Anderson and Wittes vigorously defend this framework. (They are more critical of the administration's detention policy, which they view as counterproductively fixated on closing Guantánamo.) The framework is respectful of the international legal order yet sufficiently supple to meet the United States' counterterrorism needs. It fleshes out the broad standards of international humanitarian law in a practical, forward-looking manner. It gets “a tremendous amount right” and “moves the country considerably and constructively toward institutional settlement of contested questions” (p. 10). “Taken as a whole,” Anderson and Wittes contend, the Obama doctrine “is far more robust, as a matter of law, morality, and legitimacy, than the critics acknowledge”—and far superior to all of the alternatives that have been put forth (p. 216). Progressive proposals to rein in targeted killings outside of

conventional combat zones, for instance, place too much faith in traditional law enforcement tools and fail to account for “the problem of ungoverned spaces” (p. 228). Meanwhile, libertarian critiques on the Republican right trade in paranoid anxieties and offer no solutions for the terrorist threats we actually face (pp. 244-45).

Anderson and Wittes’s defense of the administration’s national security law model is wide-ranging, and I cannot do justice to it in this space. I am broadly sympathetic to their assessment of the model’s strengths. If anything, I believe they understate the virtues of some of the lines that have been drawn, in particular the categorical rejection of torture. My sympathies here are probably unsurprising, given that I worked under the State Department’s Legal Adviser (one of the canonical speech-givers) during part of the President’s first term.

I am far less confident, however, in Anderson and Wittes’s generous assessment of the model’s weaknesses. *Speaking the Law* has little to say on the many serious concerns that have been raised about the U.S. drone program’s compatibility with international law norms and ideals, its collateral consequences for innocent parties and local populations, its precedential significance for future aggressors, or the backlash it has engendered in numerous parts of the world. Alert to the potential unintended consequences of legal constraints—barring unmanned aerial vehicles might only result in *greater* violence and civilian casualties, they suggest (pp. 158-60)—Anderson and Wittes are not similarly attentive to the possibility that our use of drones has created more foreign affairs and national security problems than it has solved.

Readers interested in a smart, lucid reconstruction of the Obama administration’s legal policies will find it in this work. As a hornbook and apologia, *Speaking the Law* adds real value. Readers interested in a fuller appraisal of these policies—one that grapples with their myriad legal complexities as well as their human, strategic, and financial costs—will have to look elsewhere. They will not have to look far. Anderson and Wittes are writing against a large and growing critical literature, which makes their curatorial intervention more notable than it might seem.

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There is, though, a lurking conceptual difficulty with the book’s characterization of its subject. *Speaking the Law* proceeds on the premise that the speeches must be viewed holistically if one wishes to grasp the overarching legal policy framework that they embody. The notion of a “framework” is ubiquitous; an electronic search indicates that the book drops the f-bomb more than 100 times. Anderson and Wittes highlight how the speeches build on each other in a self-conscious and mostly consistent pattern. At this point, they “represent the

richest and most complete explication we have” of the administration’s legal thinking on counterterrorism (p. 7). You might not like every piece of the legal policy framework that has been articulated, Anderson and Wittes seem to suggest, but surely it *is* a framework.

I am not so sure. If all that a legal framework requires is a set of principles developed to rationalize and regularize a set of practices, then a framework there undeniably is. But if a legal framework is understood in somewhat thicker terms as a system of directives that meaningfully clarifies, coordinates, and guides the behaviors it governs, thereby enabling public accountability, then the status of these speeches becomes murkier.

Return for a moment to the sketch above of the Obama administration’s positions on targeted killing. The key legal claims turn out to be quite hard to pin down, because they are framed in the alternative. If the AUMF does not supply domestic law authority for any particular lethal strike, then Article II of the Constitution may suffice; if the strike is not covered under international law by an existing armed conflict, then it may be covered by the right of self-defense. All of the constraint is lodged in abstract descriptors. A group may be targeted if it is “affiliated” or “associated” with al Qaeda, making it a “co-belligerent.” Individuals may be targeted outside of Iraq and Afghanistan if a “careful” internal review indicates they pose a “continuing, imminent” threat to Americans. Other states’ sovereignty may be overridden if they prove “unwilling or unable” to resolve threats within their borders. Lethal force is not to be used if capture is “feasible.”

Some of these terms, like co-belligerency, have been lifted from different legal contexts. None has a well-settled meaning in law, or at least none that the administration has adopted. To the contrary, the administration has repeatedly construed its own limiting language in loose and counterintuitive ways. Legal scholar Shirin Sinnar describes the executive branch’s invocations of terms like “imminence” as “rule of law tropes”—rhetorical bids to demonstrate restraint by linking the executive’s policies to an established (if linguistically open-ended) legal standard, without committing to the conventional meaning of the standard. The internal protocols through which this language is elaborated and put to use, furthermore, barely figure in the speechifying. Most of their features remain undisclosed by the executive, as do basic facts concerning drone operations, including estimates of civilian deaths. Congressional oversight is weak. Courts have no role at the front or back end.

Anderson and Wittes nod to all of this. “[T]he term ‘imminent threat,’ in the administration’s use of it,” they remark, “is a bit of a term of art; . . . it does not mean quite what the common-sense understanding of the phrase might convey” (p. 50). So, too, in the administration’s idiom, “‘feasible’ is not a

standard easily or frequently met,” as it requires that the object be “accomplishable without undue harm to other interests—tactical, strategic, and political” (p. 166). Feasible, in other words, appears to mean something more like advantageous. As for how these terms are applied in particular cases, “[a]dministration officials balk at describing the processes” (p. 130). The speeches do “a better job stating that processes exist than . . . in describing the contours of those processes” (p. 103). Officials similarly balk at the prospect of increased congressional or judicial scrutiny, on the view that “targeting is inherently an executive function” (p. 102).

The executive branch’s substantive standards on targeting, in short, remain shrouded in mystery, while its decision-making procedures remain shrouded in secrecy. Vague norms and elastic interpretations are nothing new to public law, to be sure. But the content of these legal policies is especially opaque. The decline of al Qaeda only adds to the confusion. Anderson and Wittes spend numerous pages trying to decipher how the executive might be using “imminence”—a concept that will continue to grow in importance as the dangers posed by al Qaeda and its partners increasingly give way to novel, “extra-AUMF” threats.

In light of all the ambiguity and circuitry baked into the administration’s legal formulations, as well as the secrecy that surrounds their implementation, it seems to me that a very different reading of the speeches is available: that they amount not to a robust new master framework for resolving national security threats but rather to the *repudiation* of such a model in favor of a more adaptive, bottom-up methodology. Instead of clear commitments, we get vague precepts. Instead of *ex ante* discipline, ongoing discretion. As the President’s then-counterterrorism adviser opined at Harvard, the administration’s approach is resolutely “practical, flexible, [and] result-driven” (p. 464), designed to “address each threat and each circumstance in a way that best serves our national security interests” (p. 451). The sponginess of the legal constructs facilitates this brand of pragmatism. The ad hoc, informal character of the speeches reflects it.

Anderson and Wittes note that the “speeches consistently argue for a fact-specific, case-by-case judgment” with respect to individual prosecution decisions (p. 70). Within broad boundaries, the speeches argue similarly with respect to virtually all national security decisions. A regulatory framework that relies at every turn on fact-specific, case-by-case judgments made behind closed doors is not much of a framework, at least not if our paradigm looks anything like a reticulated statute. The executive branch’s approach to issues such as targeting might be better analogized, I suspect, to a common law system—a system of incremental legal development that is grounded in the adjudication of concrete cases, wary of abstract argument, and constrained by internal custom and precedent more than by external norms. As with all such systems, flexibility is a

great strength. This particular common law enclave, however, lacks both independent courts and regular published opinions, which raises questions about how much legal integrity it can ultimately have.

If this diagnosis is correct, then it may be necessary to reconsider the import of the canonical speeches. A high-level address is well suited to communicating high-level principles. But it is a poor medium for cataloguing the fact-specific, case-by-case reasoning that generates the real substance, and drives the evolution, of a common law system. There is something paradoxical, accordingly, about *Speaking the Law*'s attempt to extract from the speeches the deep structure of the executive branch's legal thought in this realm, for that structure is antithetical to the public address. Have the Obama administration's counterterrorism decisions been the product of consistent, principled, and disciplined modes of analysis that deserve legal and moral respect? The answers lie largely in the internal deliberations, and those are transcripts we cannot see.

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