The National Security Courts We Already Have

Author : Steve Vladeck

Date : September 23, 2013

Robert Timothy Reagan, Fed. Jud. Ctr., National Security Case Studies: Special Case-Management Challenges (2013).

One of the longer-lasting consequences of the "Summer of Snowden" may well be the increased attention paid to the Foreign Intelligence Surveillance Court (FISC)—the special, secrecy-laden tribunal created by Congress in 1978 to oversee the U.S. government's foreign intelligence activities. Among other things, greater public knowledge of the FISC's role in both approving and circumscribing the government's use of its secret surveillance authorities has rekindled the decade-old debate over the need for Congress to create special "national security courts."

The animating justification for such tribunals is that, like the FISC, they would be in a better position than the ordinary Article III district courts to reconcile the central tension in national security adjudication: Balancing the secrecy pervading most national security and counterterrorism policies with the need to provide victims of governmental overreaching a forum in which to vindicate their statutory and constitutional rights. Indeed, although they have varied (at times, dramatically) in their details, proposals for specialized national security courts often hold out the FISC as the model upon which such tribunals can—and should—be based. To similar effect, many of the proposed reforms spurred by Snowden's revelations have focused on *increasing* the volume and scope of litigation handled by the FISC, rather than shunting more of these issues into the federal district courts.

A quietly remarkable publication by the Federal Judicial Center's Robert Timothy Reagan, written on behalf of the FJC, provides a powerful counterweight (both figuratively and literally) to such efforts. Reagan's monograph is a case-by-case compilation of how different federal judges in regular Article III courts—87 in all—have resolved some of the unique and complex issues that arise in both criminal prosecutions and civil suits implicating national security. If a new case raises an issue concerning the admissibility of classified evidence, the guide provides 31 distinct examples summarizing how the issue arose previously and how it was resolved. So, too, for topics ranging from witness security to religious accommodations; from service of process on international terrorists to remote participation of witnesses; and from attorney-appointment questions to the usability *vel non* of evidence obtained under the Foreign Intelligence Surveillance Act (FISA). In short, for civil and criminal litigation alike, *Special Case-Management Challenges* is a comprehensive reference—a how-to guide for federal judges facing similar challenges in current and future cases.

In that regard, *National Security Case Studies: Special Case-Management Challenges*, is hardly typical fodder for a JOTWELL review. The new (fifth) edition, published in June, checks in at a super-dense 483 pages. It is exceedingly light on analysis, exceedingly heavy on footnotes (4294, if you're scoring at home), and hardly a page-turner for even the most devout students and scholars of the federal courts, given its organization as a case-by-case guide to how different federal courts have handled the national security issues to come before them. Thus, after presenting detailed summaries of the factual background in which each of these issues arose, the book then recaps the individual ruling—and, where applicable, how it fits into broader doctrinal patterns. Indeed, as Reagan writes in the brief introduction, "The purpose of this Federal Judicial Center resource is to assemble methods federal judges have employed to meet these challenges so that judges facing the challenges can learn from their colleagues' experiences." As Reagan explains, *Special Case-Management Challenges* is largely a descriptive guide—in contrast to a separate FJC publication also authored by Reagan, titled *National Security Case Management: An Annotated Guide*, which more specifically highlights the specific lessons that might be learned from the ever-increasing volume of such jurisprudence.

Yet the unstinting focus of *Special Case-Management Challenges* on comprehensively "assembl[ing] methods" used in prior cases—"based on a review of case files and news media accounts and on interviews with the judges"—is exactly what makes it so compelling. And although its target audience is the federal bench, its utility and appeal actually sweeps far more broadly. What Reagan has compiled is not just a comprehensive set of data points, but a body of evidence tending to validate the ability of the ordinary civilian courts effectively to grapple with some of the thorniest challenges to arise in national security litigation.

Special Case-Management Challenges provides a powerful rejoinder to the (usually unsubstantiated) claim that the ordinary federal courts lack the capacity and/or institutional wherewithal to handle criminal cases involving high-profile terrorism suspects, civil suits challenging secret governmental counterterrorism programs, or anything in between. A veritable bevy of commentators—including sitting federal judges, policymakers, and academics—have offered anecdotal arguments to this effect in recent years. Reagan's work fatally undermines that position, for it demonstrates how, in case after case, federal judges did what federal judges do—make accommodations where they were both necessary and appropriate (such as in the *Abu Ali* case, where Saudi intelligence officers were allowed to testify at a suppression hearing via a live, satellite link), and push back in cases in which they were not. Even a cursory scan of the work of the federal judiciary in this area suggests that, while national security litigation presents unique case-management challenges, those challenges are not uniquely beyond the competence of federal courts to resolve. In short, after reading through this monograph, it can no longer be said—at least not seriously—that Article III courts are unable to deal with such issues; the debate must shift to whether any of the proposed alternatives would do a better job.

Of course, reasonable people can—and always will—disagree over whether the federal courts are striking the *right* balance between the government's interests and individual liberties in civil and criminal cases raising challenges unique to national security litigation. But insofar as these challenges are likely to remain with us for generations, the most important upshot of Reagan's treatise is not just its account of *how* our federal judges have sought to resolve this fundamental tension, but *that* they have done so—and on an increasingly routine basis. Whatever else may be said about proposals for new national security courts, their biggest shortcoming is their failure to grapple with the national security courts that, as Reagan's work shows, we already have.

Cite as: Steve Vladeck, *The National Security Courts We Already Have*, JOTWELL (September 23, 2013) (reviewing Robert Timothy Reagan, Fed. Jud. Ctr., *National Security Case Studies: Special Case-Management Challenges* (2013)), https://courtslaw.jotwell.com/the-national-security-courts-we-already-have/.