Global Anti-Terrorism Law and Policy

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United States responses to September 11

WILLIAM C. BANKS

> The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.[1]

The September 11 attacks profoundly affected the United States. Apart from the destruction of so many lives and the damage done to two of our most symbolically important buildings, the visual images of the attacks inflicted a level of trauma unknown to many Americans. The collective sense of fear and dread created by September 11, along with an understandable and palpable collective determination to rise up and 'do something' about terrorism, precipitated changes in laws and policies designed to counter the terrorist threat.

Acknowledging the risks of making judgments about the longer term from a perspective of three years from the event, the law and policy changes that are still being made by the United States may be part of what many inside and outside government now refer to as the 'new normal'. In short, a longer term permanent realignment of the relative importance of security among our government's objectives may be taking place, perhaps at the expense of a thoughtful examination of terrorism and its antidotes. The new measures have emerged from virtually all quarters of government in the United States, and many of the reforms have significant if not profound implications for our nation's law and governance. A range of civil liberties protections have been called into question, compromised or, some would say, undermined by new investigative and criminal authorities, along with programmes to detain and interrogate those captured in the 'war on terrorism'. The largest overhaul of government structure since World War II resulted in the creation of a new executive branch department to oversee the nation's homeland security.

I thank Helen Fenwick, Kent Roach, and George Williams for helpful comments on an earlier draft.

[1] Clinton Rossiter (ed.), *The Federalist No. 8* (Alexander Hamilton, New York, 1961), at 50.

The traditional distaste for a military role in domestic affairs is being replaced with a domestic command structure and an invigorated role for the military in homeland defence. In the international sphere the war against terrorism spilled over when President Bush launched a war against Iraq, justified at the time on the grounds that Saddam Hussein had weapons of mass destruction poised to strike the United States, and that Saddam had ties to the al Qaeda terrorist network and thus actively supported the terrorists' war against America. The Congress was an active partner with the executive in these initiatives early on, and has been largely quiet since authorizing the use of force against Iraq in October 2002. The courts are being tested, and the record so far is mixed. In critically important matters recently decided by the US Supreme Court, decisions were made that may limit principles of the new normal in the name of due process. It is equally possible, however, that the rebuke to our government delivered by the Supreme Court in June 2004 will only provide legal cover for the unlimited detention and coercive interrogation techniques already practised by the Administration. Only time will tell.

It may well be that the war on terrorism is not our gravest crisis. Our nation was born through the cauldron of violent revolution, and the Civil War was the contemporary equivalent of an all-out nuclear attack on the nation. In their time, the war with France soon after the founding and the two World Wars were potentially more calamitous for us. In each of these wars, the judicial branch was an active participant, sometimes generously deferent to the government's expansive interpretation of its wartime constitutional prerogatives, other times especially attentive to what have been viewed as unchanging constitutional values. Despite these historical parallels, there is evidence that our government has begun to realign our institutions, laws, and policies toward security in a way that is unprecedented.

Part I of this chapter will assess selected important law changes, beginning with statutory and executive rule-based reforms, some designed to enhance authorities to prevent terrorist attacks and others crafted to facilitate detention and trial of accused terrorists. The critical role of the courts in monitoring the legal developments will also be considered. Part II will examine policy shifts by our government, in national and homeland security strategy and in civilian/military relations, which upset long-standing models for governance by the United States. A brief conclusion will critique both sets of reforms.

I. The post-September 11 legal landscape

Within a few days of the World Trade Center and Pentagon attacks, Congress passed a joint resolution authorizing the President to 'use all necessary and appropriate force' against those responsible for September 11 'in order to prevent any future acts of international terrorism against the United States by

such ... persons'.[2] No geographic or time limit was placed on the authority granted by the Authorization for the Use of Force, and the authorization to 'prevent any future acts' raises the possibility that military activities and other actions short of the use of force could take place against an unidentified enemy inside and outside the United States for the foreseeable future. In short, the scope of the discretion given to the Commander-in-Chief is unprecedented in United States history. In addition, for the first time since the Civil War, our Government recognized that the battlefield in the war on terrorism could include our cities. The breadth of the Resolution was underscored when the Supreme Court found in June 2004 that it empowered the President to detain as an enemy combatant an American citizen allegedly captured on the battlefield in Afghanistan.[3]

The USA PATRIOT Act

A few weeks after September 11, after minimal hearings and scant debate, Congress enacted the USA PATRIOT Act.[4] Perhaps more than any other legal development, the Patriot Act has become a magnet for galvanizing supporters and defenders of the Bush Administration response to September 11. Anyone who has taken the time to read the 352-page Act must wonder just where to find the magnetism. The Patriot Act is hardly a code for fighting the war on terrorism, nor one for saving the United States homeland from another attack. Instead, it is an amalgam of often unrelated pieces of authority, most of which simply amend existing laws, and the larger share of which are unremarkable complements to existing authority.

That is not to say that the Patriot Act lacks importance. The few really significant changes in investigative authorities and criminal law were made subject to a three-year sunset provision, and controversy really surrounds only several pages of the 352. An entire subtitle of the Act that would have authorized lengthy detention of any alien immigrant on the say-so of the Attorney General[5] has not been utilized, because existing immigration statutes and regulations conferred equally expansive authority.

One change wrought by the Patriot Act permits the FBI secretly to gain access to the personal information of Americans – including library, medical, education, internet, telephone and financial records – without having to show that the target of the investigation has any involvement in espionage or terrorism. Prior to the Patriot Act, the FBI could seek an order for

[2] Authorization for the Use of Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).
[3] See discussion of *Hamdi* v. *Rumsfeld*, below.
[4] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107–56, 115 Stat. 272 (2001).
[5] Ibid. §§ 411–18, 8 U.S.C. § 1226a ff.

production of certain transactional records from third-party custodians, such as banks and telephone companies, if the government certified that it had 'reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power'.[6] As the authority was broadened by the Patriot Act, commercial vendors may be compelled to produce the requested records following a statement from the FBI that the information is for an investigation 'to protect against international terrorism or clandestine intelligence activities'. No showing is required that the target has anything to do with terrorism. The same provision then makes it a crime for the vendor to reveal that the FBI has obtained the requested information.[7] Provisions requiring a limited judicial approval before exercising this expanded authority to examine business records were later eliminated, when Congress in 2003 amended the law again to permit the Attorney General to issue administrative subpoenas (with no judicial role) in these investigations, and expanded the categories of those subject to the subpoenas to include securities dealers, currency exchanges, car dealers, travel agencies, post offices, casinos and pawnbrokers, among others.[8]

Since the Patriot Act, the volume of administrative subpoenas, known as national security letters, has increased dramatically, although the government has resisted Freedom of Information Act requests for the relevant data.[9] The American Civil Liberties Union (ACLU) sued the Justice Department in April 2004, challenging the constitutionality of the expansion of this authority to obtain personal records as it applies to electronic service providers. The ACLU claims that the FBI can obtain information from traditional Internet service providers, as well as universities, businesses, public interest organizations and libraries. The principal arguments by the ACLU are that the expanded authority chills protected expression, that it invades personal privacy, and that it constitutes a search that should be attended by a probable cause determination and warrant procedure to meet constitutional Fourth Amendment requirements.[10]

A second controversial Patriot Act provision amended the Foreign Intelligence Surveillance Act,[11] the authority that has, since 1978, allowed intelligence investigators to bypass the regular law enforcement warrant process by obtaining authorization for electronic surveillance or (since 1994) a physical search from a special secret court. Instead of having to

[6] 50 U.S.C. § 1862. [7] Ibid. § 215, 115 Stat. 287.
[8] Intelligence Authorization Act for FY 2004, Pub. L. No. 108–77, § 374, 117 Stat. 2599, 2628 (2003).
[9] Dan Eggen and Robert O'Harrow, Jr., 'US Steps Up Secret Surveillance', *Washington Post*, 24 March 2003, A1.
[10] *American Civil Liberties Union* v. *Ashcroft*, No. 04 Civ. 2614 (S. D. N. Y. filed April 2004).
[11] 50 U.S.C. §§ 1801 ff.

demonstrate to a magistrate probable cause to believe that a crime is being or has been committed before being given permission to conduct electronic surveillance or a physical search, the judge of the secret court has merely to find probable cause that the requested surveillance is to obtain 'foreign intelligence' from an 'agent of a foreign power'. In other words, there should be a reasonable belief that the target is connected to an international terrorist organization.

Of course, intelligence and law enforcement investigations often overlap, utilize the same methods, and may concern the same targets. Because of the importance attached to personal privacy as enshrined in our Fourth Amendment requirements for probable cause of a criminal act and a warrant issued by a neutral magistrate, law enforcement and intelligence officials have historically walked a fine line. To gather foreign intelligence, agents could forego the traditional Fourth Amendment processes, but if they were intending to build a criminal case against the target, the probable cause and warrant requirements had to be followed. Until amended by the Patriot Act, to avoid tainting a criminal prosecution, investigators who found criminal activity in the course of a FISA investigation effectively had to show that the primary purpose of the surveillance approved by the secret FISA court was to obtain foreign intelligence. Once that showing was made, the fact that evidence turned up that could be used in building a criminal case would not undermine the rights of the accused.

This 'wall' between law enforcement and intelligence investigations permitted parallel law enforcement and intelligence investigations to coexist and protected the constitutional rights of the potential accused, but the government argued that the various procedures designed to insure the integrity of the wall stood in the way of effective cooperation and information sharing between the law enforcement and intelligence investigators. The Patriot Act thus changed FISA to permit an investigation to proceed by means of the secretive and less burdensome FISA procedure so long as a 'significant purpose' of the investigation is to gather foreign intelligence.[12] Thus, a terrorism investigation that is seeking to build a criminal case from the beginning may bypass the traditional law enforcement warrant process and attendant Fourth Amendment protections for individuals[13] through use of the FISA procedures, so long as some foreign intelligence is also sought.[14]

[12] Patriot Act, § 218, 115 Stat. 291.

[13] The Fourth Amendment provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'. US Const., Am. IV.

[14] See *In re: Sealed Case*, 310 F. 3d 717 (Foreign Intelligence Surveillance Court of Review 2002).

This 'significant purpose' amendment, along with provisions in the Act to authorize broader sharing of law enforcement and intelligence information, are regularly touted as cornerstones of the investigative portion of the paradigm of prevention in the war on terrorism proclaimed by Attorney General John Ashcroft.

Detention and trial by military commission

In those same sombre weeks after September 11, the Bush Administration crafted a legal scheme for detaining and then trying suspected al Qaeda and Taliban operatives captured in the war on terrorism. Perceiving that it would have far more latitude to detain, interrogate, and decide the fate of suspected terrorists or their sympathizers or financiers if it fashioned a military-type regime for holding and trying those it then characterized as 'enemy combatants', the Bush Administration promulgated a Military Order and there claimed the authority to detain without time limit any non-citizen whom the President has 'reason to believe' is a member of al Qaeda, is involved in international terrorism, or has knowingly harboured such members or terrorists.[15] The same Order authorized trials of suspected non-citizens accused of committing 'violations of the laws of war and other applicable laws' by military commissions, outside the traditional civilian and military justice systems. By early 2002 the United States military removed several hundred persons from Afghanistan to the United States Naval Base at Guantanamo Bay, Cuba. In July 2003, the Defense Department announced that six current detainees at Guantanamo had become eligible for trial by military commission. In February 2004, the Department of Defense announced that two Guantanamo Bay detainees, one from Yemen and one from Sudan, had been charged with conspiracy to commit war crimes and that each would be tried by military commission.[16]

Several of the detainees at Guantanamo Bay and their representatives sought to petition courts in the United States for habeas corpus, on grounds that the detentions violated a range of protections in the Bill of Rights of the United States Constitution. They asked for release from custody, access to legal counsel, and freedom from interrogation. The federal statute providing for habeas corpus relief states that federal district courts may entertain habeas petitions 'within their respective jurisdictions'.[17] The government argued that detainees at Guantanamo could not sue in any federal court because

[15] Military Order of 13 November 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (2001).

[16] 'First Charges Filed Against Guantanamo Detainees', http://www.defenselink.mil/releases/2004/nr20040224-0363.html.

[17] 28 U.S.C. § 2241.

no federal court can have jurisdiction where the United States is not sovereign. Lower courts reached inconsistent results on the petitions,[18] prompting the Supreme Court to grant review. Arguments were heard in April 2004, and in late June the Supreme Court held that the habeas corpus petitions could be brought in a federal court in the United States.[19] According to the Court, 'respective jurisdiction' refers to the place where the responsible detaining officials may be found. When the government holds detainees in foreign territory over which it exercises effective and permanent control but not otherwise within the jurisdiction of any federal court, a petition for habeas corpus may be brought in any federal court that has jurisdiction over the President. United States control over Guantanamo was based on an effectively permanent lease granted by Cuba in 1915. Writing in dissent for three members of the Court, Justice Scalia warned that the decision would have disastrous consequences because prisoners held by the Americans anywhere in the world under the effective 'jurisdiction and control' of the United States, including those in Iraq and Afghanistan, could take advantage of domestic laws and sue the United States in its courts.

The Administration also acted in 2002 to detain indefinitely two American citizens it labelled as enemy combatants, without charges and without access to counsel. Unable to rely for authority on the Military Order, the Administration justified the citizen detentions on the basis of the September 2001 Use of Force Resolution and on the President's authority as Commander-in-Chief. Yaser Hamdi was allegedly captured on the battlefield in Afghanistan, transferred to Guantanamo Bay, and then to a military brig in South Carolina once his United States citizenship was determined. Jose Padilla was detained as he stepped off a commercial flight in Chicago. At first Padilla was held in civilian confinement in New York City as a material witness to the September 11 attacks, but then he was declared an enemy combatant and was transferred to the same military facility as Hamdi.

On the same day it announced the ruling permitting the Guantanamo Bay detainees to sue in federal court, the Supreme Court ruled on the appeals of Yaser Hamdi and Jose Padilla. Hamdi's father brought a habeas corpus petition on his son's behalf and alleged that Hamdi was not fighting with the Taliban against the United States, but had travelled to Afghanistan as a relief worker. The government answered with an affidavit signed by a Department of Defense official that Hamdi was with a Taliban unit and had a Kalashnikov rifle in his possession when his unit surrendered to the

[18] See *Odah* v. *United States*, 321 F. 3d 1134 (D.C. Cir. 2003) (non-resident aliens cannot appeal to the protection of the Constitution or laws of the United States); *Gherebi* v. *Bush*, 352 F. 3d 1278 (9th Cir. 2003) (habeas corpus may be available because the detention facility at Guantanamo Bay is effectively subject to US jurisdiction and control).

[19] *Rasul* v. *Bush*, 124 S. Ct 2686 (2004).

Northern Alliance. Hamdi's father then asked either that his son be released or that the government substantiate its claims in support of the affidavit. Although the lower federal court agreed with Hamdi, the court of appeals ruled that the Constitution empowers the President to detain any person captured in a theatre of military operations and that no court could review the President's designation of such an enemy combatant.

The Supreme Court reversed the decision of the court of appeals and ordered new proceedings in the district court.[20] According to the controlling plurality opinion of Justice O'Connor, Congress had authorized the detention of enemy forces captured in battle in its September 2001 Use of Force Resolution. The question was not one of the President's authority then, but whether the detention of American citizens without judicial review violates the Fifth Amendment command that no 'life, liberty, or property' be taken without 'due process of law'. After balancing the competing interests of Hamdi and the government, Justice O'Connor found that the detainee 'must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker'.[21] Hamdi has the right of access to counsel for his further proceedings and because the only legitimate purpose of detention without trial is to prevent an enemy from fighting again, the citizen may not be detained when hostilities have ended in the place he allegedly fought.

The case of Jose Padilla was more difficult for the government to defend and for the Court to decide because Padilla was not captured on a battlefield and, once detained, never presented a security danger to the United States. After he was transferred from civilian detention as a material witness in New York to the same military detention facility as Hamdi in South Carolina, his lawyer filed a habeas corpus petition in the federal court in New York, naming Secretary of Defense Rumsfeld as defendant. In contrast to the Hamdi proceedings, the district court ruled that the President has unreviewable discretion to detain enemy combatants, while the court of appeals reversed and held that the government could not detain Padilla without charging him with a crime.

The Supreme Court reversed in a 5–4 decision and held that Padilla's lawyer sued the wrong person in the wrong court.[22] Based on the majority's reading of the habeas corpus statute, Padilla had to sue his immediate custodian, the commander of the naval brig in South Carolina, in the federal court in South Carolina. Although the four dissenters accused the Court of using an unnecessarily rigid reading of the statute to effectively decide 'questions of profound importance to the nation', the Court was able to decide

[20] *Hamdi* v. *Rumsfeld*, 124 S. Ct 2633 (2004). [21] Ibid.

[22] *Rumsfeld* v. *Padilla*, 124 S. Ct 2711 (2004).

Hamdi, the case with facts more favourable to the government, by mildly rebuking the government, and then duck the harder case on a technicality.

II. Changes in policy

Organizing for Homeland Security

September 11 also produced an almost immediate policy response, in the form of creating a White House Office of Homeland Security, charged 'to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorists' threats or attacks'.[23] Within a few months, the difficulties associated with a subordinate White House official attempting to influence the activities and spending in a range of federal agencies led the President to agree to propose that the Congress approve a new cabinet-level department with a Secretary subject to approval by the Senate. In November 2002 the Department of Homeland Security (DHS) was created,[24] in the largest restructuring of government functions and agencies since the creation of the Department of Defense in 1947. The Act merges all or part of 22 agencies and 170,000 employees into the DHS, and it charges the Department with analyzing terrorist threats, guarding borders and airports, protecting critical infrastructure, and coordinating the response to future emergencies.

After nearly two years, DHS has little to show for its efforts beyond a maddening colour-coded threat advisory scheme,[25] an ill-advised mention by DHS officials that Americans should stock up on duct tape,[26] and a massive agenda. More than $6 billion has been spent on airline security since September 11, although it is commonplace to criticize policies like those of the Transportation Safety Administration as 'fighting the last war'. The technological centrepiece of the plans for enhanced airline security – the Computer Assisted Passenger Pre-Screening or CAPPS II programme – suffered a serious setback when privacy concerns and technical problems persuaded the agency not to implement the programme and to consider other security options. The CAPPS II programme would utilize data mining

[23] Office of the Press Secretary, The White House, President Establishes Office of Homeland Security, 8 Oct. 2001, summarizing Exec. Order 13,228, 66 Fed. Reg. 51,812.

[24] Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002).

[25] *See* Edward N. Luttwak, 'Damage from the Alert System is Alarming', *Los Angeles Times*, 19 Jan. 2004, B.13; Dan Eggen, 'GOP Lawmaker Urges Reform of Terror Alert System; Rep. Cox Backs Legislation That Would Mandate a More Regional Approach', *Washington Post*, 29 December 2003, A07.

[26] John Mintz, 'Terror Attack Steps Urged; Officials Suggest Water, Other Supplies,' *Washington Post*, 11 February 2003, A01; Kenneth Chang and Judith Miller, 'Threats and Responses: Protective Devices; Duct Tape and Plastic Sheeting Can Offer Solace, if not Real Security', *New York Times*, 13 February 2003, A21.

technology to scan passenger lists against a wide array of threat information and, through the high-speed screening, identify passengers who should undergo additional scrutiny before they are allowed to fly.[27] The Fourth Amendment may not protect passengers against inappropriate government mining of personal information from private databases because individuals have no reasonable expectation of privacy in information voluntarily submitted to third parties. Nonetheless, the spectre of sweeping up millions of innocent airline passengers in a data mining exercise designed to identify a few security risks caused officials to revisit the programme in search of more finely tuned measures.[28]

The Department's efforts to centralize the coordination of homeland security intelligence information have faltered due to the continuing presence of independent intelligence missions in the FBI and CIA, which are not tasked with reporting to DHS. The DHS Directorate for Information Analysis and Infrastructure Protection (IAIP) collects intelligence from agencies throughout the government, analyses it, and disseminates it for use in counter-terrorism.[29] Its objective is to 'connect the dots' in ways that avoid the intelligence failures that preceded September 11. However, the Terrorist Threat Integration Center (TTIC), managed by the Director of Central Intelligence, was created by the Bush Administration in 2003 to perform largely the same tasks, although the TTIC mission extends to threats to the United States abroad.[30] Later in 2003, the President ordered the creation of a third counter-terrorism intelligence entity – the Terrorist Screening Center, administered by the FBI.[31] There is considerable overlap in function among the three agencies, and confusion within federal and state government about their roles.

One of the principal roles for DHS is to provide a systematic and unified federal response to a terrorist attack. The Department absorbed the Federal Emergency Management Agency (FEMA), along with other agencies that have specialized roles in crises. With the creation of DHS, the Department supplies centralized communications and guidance toward coordinating the work of other federal, state and local agencies. A series of Presidential

[27] Ricardo Alonso-Zaldivar, 'US Rethinks Air Travel Screening', *Los Angeles Times*, 16 July 2004.

[28] Jeremy Torobin, 'TSA Grounds Controversial Passenger-Screening System Due to Privacy Concerns', *Cong. Qtly. Daily*, 15 July 2004.

[29] Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002), §§ 201(d); 202(b)(2).

[30] White House News Release, Fact Sheet: Strengthening Intelligence to Better Protect America, 28 January 2003.

[31] Homeland Security Presidential Directive/HSPD-6, Integration and Use of Screening Information, 16 September 2003.

directives have begun to spell out roles and missions for the important players in responding to a terrorist incident. However, to date no clear guidance has been given to make clear the specific lines of responsibility of federal, state, and local agencies and officials.[32] In addition, the effort to interdict or minimize the effects of a domestic terrorist attack with weapons of mass destruction has been complicated by the assignment of a domestic combatant command for the military, without further elaboration of its roles and missions, and by the structural difficulties posed by our federal system, where authority to respond to domestic emergencies resides primarily with the states and cities.

Pre-emption and the Iraq war

During the consideration of the new Department in Congress, the National Security Strategy of the United States and National Strategy for Homeland Security[33] were announced by President Bush, both of which emphasized the increasingly important role for the military in protecting the United States from terrorism. The National Security Strategy proclaims for the first time in the history of the United States the doctrine of pre-emption – striking terrorists before they strike.

> The United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first ... Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness ... The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.[34]

Arguably, pre-emption is only the next step in the gradual metamorphosis of the customary doctrine of self-defence. Classically, self-defence by nations was permitted only when the need was immediate, when there was

[32] In February 2003, the White House published Homeland Security Presidential Directive/HSPD-5, *Management of Local Incidents*. HSPD-5 announces the development of a *National Response Plan* (NRP). A draft plan, 30 September 2003, is available at http://www.dhs.gov/interweb/assetlibrary/Initial_NRP_100903.pdf.

[33] Both available at http://www.whitehouse.gov/homeland. [34] Ibid., at 9–10.

no moment for deliberation.[35] Yet the speed and lethality of modern weaponry and the lack of warning associated with a covert attack render the traditional doctrine unworkable in a world of terrorists with weapons of mass destruction.[36] However, if not anchored by some standard of proof, to link the pre-emptive strike to a reasonably likely provocation, and some indication of the imminence of an attack, or the repetition of an attack that has already occurred, pre-emption as a defensive strategy against terrorism is too blunt an instrument and risks merely escalating cycles of violence.[37]

The 2003 war with Iraq is illustrative. Unlike the 1991 Gulf war, the 2003 war was not conducted with the approval of the United Nations Security Council. Although the Security Council 'deplored' Iraq's failure to disclose fully or grant United Nations inspectors unconditional access to its programmes and sites for weapons of mass destruction, and found Iraq to be in 'material breach' of its various earlier resolutions, Iraq was given one 'final opportunity to comply' in November 2002.[38] However, on 16 October 2002, Congress approved a joint resolution that authorized the President to use military force against Iraq 'as he determines to be necessary and appropriate in order ... to defend the national security interests of the United States against the continuing threat posed by Iraq'.[39] Thus, when the President launched the war in March 2003, he likely had all the domestic law authority he needed.

It was generally agreed, however, that the war was initiated by the United States in violation of international law. There was no imminent threat to the United States from Iraq in March 2003. The factual predicates for a defensive use of force – a serious, imminent, and continuing threat of a lethal attack – were simply not present. Although the congressional resolution cited such a threat and the President described Iraq in such terms in his 2003 State of the Union message, the threat was neither serious nor imminent. No weapons of mass destruction have been found in Iraq, and the Senate Select Committee on Intelligence has found that most of the information available in the October 2002 National Intelligence Estimate concerning Iraq's weapons programme was 'overstated' or 'not supported by' the underlying

[35] See, VI *The Works of Daniel Webster* 261 (1851), quoted in Stephen Dycus, Arthur L. Berney, William C. Banks, and Peter Raven-Hansen, *National Security Law* (New York, Aspen Publishers, 2002), at 355.

[36] Ruth Wedgwood, 'Responding to Terrorism: The Strikes Against bin Laden' (1999) *24 Yale J. Int'l L.* 559.

[37] Jules Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' (1999) *24 Yale J. Int'l L.* 537.

[38] S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002).

[39] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, 116 Stat. 1498 (2002).

intelligence.[40] In a similar vein, before the war the President also asserted ties between the government of Iraq and al Qaeda, and some members of his Administration claimed links between Saddam and September 11. After an exhaustive study, the 9/11 Commission found 'no evidence [of] a collaborative operational relationship' between Iraq and al Qaeda.[41] Still, President Bush continued to maintain that the war was justified: 'We removed a declared enemy of America who had the capability of producing weapons of mass murder and could have passed that capability to terrorists bent on acquiring them. In the world after September the 11th, that was a risk we could not afford to take.'[42] Whether the Iraq war foreshadows a longer term policy change toward pre-emptive uses of force by the United States remains to be seen.

An enhanced domestic role for the military

Fundamental changes have also been made in the organization of the military in relation to domestic security. After September 11, the military presence in the homeland increased literally overnight. The President approved orders for the Air Force to shoot down civilian airliners in the event of a hijacking, National Guard troops were deployed at the nation's airports, and more United States forces were deployed for security at the Salt Lake City Olympic Games in February 2002 than were then deployed fighting the Taliban in Afghanistan.[43]

The 30 September 2001 Qaudrennial Defense Review Report 'restores the defence of the United States as the Department's primary mission',[44] and the National Strategy for Homeland Security in July 2002 called for 'a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur'.[45] On 1 October 2002 a new combatant command, the United States Northern Command (NORTHCOM) became the first military entity with responsibility for military activities inside the United States since the Civil War.[46] NORTHCOM will provide support to civilian

[40] Report on the US Intelligence Community's Prewar Intelligence Assessments on Iraq, 9 July 2004, at 14, available at: http://intelligence.senate.gov/iraqreport2/pdf.
[41] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 335 (22 July 2004).
[42] Richard W. Stevenson and Jodi Wilgorin, 'Bush Forcefully Defends War, Citing Safety of US and World', *New York Times*, 11 July 2004.
[43] Gene Healy,'Deployed in the USA – The Creeping Militarization of the Home Front Policy' No. 503, The Cato Institute, 17 Dec. 2003, 1 at 5.
[44] Quoted in *Operational Law Handbook* (Charlottsville, VA, International and Operational Law Department, The Judge Advocate General's Legal Center and School, 2004), 355.
[45] Available at http://www.whitehouse.gov/homeland. [46] See www.northcom.mil.

authorities for managing the consequences of natural and terrorism-related disasters, but it will also 'deter, prevent and defeat external threats against the American homeland'.[47] It remains unclear what forces will be assigned to NORTHCOM, and what roles NORTHCOM will play in homeland security. Still, a recent Judge Advocate's Corps Operations Law Handbook states that the 'role of the military in domestic operations has changed drastically'[48] since September 11. But just what *is* that military role? Will uniformed military be patrolling our streets, conducting surveillance and detaining citizens?

Among the nations of the world, the United States has been proudly unique in entrusting law enforcement to civilian forces, managed and controlled by civilians. Our federal system has helped cement control over and, thus, accountability for law enforcement activities and decisions at the lowest levels of government, closest to the operations being conducted. At the same time, our revolutionary and constitutional heritage, fed by experiences in England and with English military in the colonies, led to the creation of a sharp separation of civilian and military spheres in government, and to the unequivocal subordination of the military to civilian authority.

For more than 200 years, our laws and traditions have made military presence in the homeland exceptional. Still, the domestic use of troops has been a feature of government in this country since President Washington called out the militia to put down the Whiskey Rebellion in 1794. Since then, federal troops have been activated a number of times to help keep the peace, to aid local governments in natural disasters, and to enforce federal and state laws. State militia has been deployed even more often, especially in the first three decades of the twentieth century. Yet current concerns about the ongoing threat of terrorist attacks in the homeland, worsened by the spectre of weapons of mass destruction (WMD) threats, cause civilian authorities to consider what once would have been unthinkable – uniformed military enforcing the laws and undertaking military operations on our streets and in our neighbourhoods. To be sure, no other government entity has the training, equipment, and resources to bring force to bear when an attack occurs. Likewise, if the National Guard is counted, no other part of government is so widely dispersed to be available throughout the nation if its services are needed. But are military personnel capable of refining their role to be engaged in law enforcement at home, among the people they are charged to protect?

Express constitutional authority for such use is found in Article I, § 8, which provides, 'The Congress shall have the power ... to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and

[47] Ibid. [48] *Operational Law Handbook*, at 355.

repel Invasions'.[49] Additional authority may be drawn from Article IV, § 4, which imposes on the federal government the obligation to protect each of the states 'against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence'.[50] The President may also have authority to deploy troops in defence of the homeland from his Article II powers to faithfully execute the laws[51] and to act as Commander-in-Chief of the armed forces.[52] However, the Framers intended that part-time state-based militias would principally perform the homeland defence tasks. Experience with the militias has been uneven, but these small professional and state-governed forces largely sufficed except for wartime build-ups until the Cold War led to the development of a sizeable peacetime military establishment.

The most concrete manifestation of the American tradition of keeping the military out of domestic civilian affairs lies in the Posse Comitatus Act of 1878, which in its current form states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.[53]

Although the Posse Comitatus Act (PCA) supplies a general statutory prohibition against domestic use of troops to enforce the laws, the constitutional authorities of the President and a number of statutory exceptions undercut or at least counterbalance the rule. Some of the exceptions specifically apply to various forms of WMD attacks by terrorists, and, following appropriate inter-agency coordination, permit Defense Department personnel and equipment to be engaged in containing, disabling, or disposing of the weapons involved in an attack. In certain emergency circumstances, military personnel are permitted to perform law enforcement functions, where civilian authorities are not capable of taking appropriate action. Other statutes anticipate civil disorder or other emergencies and permit deployment of military units in various circumstances, certainly including in response to a terrorist attack. In addition, the President arguably may deploy military personnel to perform civilian law enforcement pursuant to his constitutional authorities.

The PCA remains as much a symbol of our nation's subordination of military to civilian control, and to the distaste for military involvement in domestic law enforcement, as it is a set of legal strictures. As conditions and threats have changed, however, so has the principle of posse comitatus. Construed literally, the PCA could compromise homeland defence or hinder a response to widespread disorder in society. Interpreted too generously, the

[49] US Const., Art. I, § 8, cl. 15. [50] Ibid., Art. IV, § 4. [51] Ibid., Art. II, § 3.
[52] Ibid., Art. II, § 2, cl. 1. [53] 18 U.S.C. § 1385 (2000).

exceptions can give rise to regrettable excesses, such as those documented at Kent State University in 1970.[54]

III. Conclusions

> They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.[55]

The rule of law in general and the United States Constitution in particular have served as societal anchors during national security crises. Our independent and life-tenured judiciary has been asked before, as it is being asked now, to uphold rule of law principles and core constitutional protections in challenges to central pieces of the post-September 11 legal regime. The Military Order and the military commissions, the Guantanamo Bay detention camp, and the detention as enemy combatants of United States citizens taken together constitute an argument for a separate track, outside the rule of law and constitutional protections, for those adjudged by the administration not to be worthy of the protections our system otherwise provides. The extent to which the Supreme Court decisions in late June 2004 are interpreted as a partial acquiescence in the separate track will establish an important cornerstone of the new normal.

Did the Court affirm or at least acquiesce in the separate track? In an apparent response to the warning voiced by Justice Scalia in the *Rasul* Guantanamo Bay cases that the ruling will open the floodgates to enemies captured in battles around the world, the Pentagon announced that it was creating a Combatant Status Review Tribunal, staffed by military officers, where detainees could challenge their combatant status. Although detainees could have the assistance of a 'personal representative' assigned by the government, they would not be entitled to a lawyer and they would have to overcome a 'rebuttable presumption in favor of the government's evidence'.[56] At least in the Pentagon's view, these proceedings comply with the

[54] Following President Nixon's announcement on 30 April 1970, that US combat forces had been deployed in Cambodia, student anti-war protests erupted on a number of college campuses. The Governor of Ohio called out Ohio National Guard troops equipped with loaded weapons to keep order at Kent State University. When a large group of students gathered for a rally there on 4 May, the Guard troops tried to disperse them, at one point firing into the crowd, killing four students and wounding nine others. See *Gilligan* v. *Morgan*, 413 US 1 (1973) (dismissing a suit, on political question grounds, that sought to restrain a state governor and National Guard leaders from future violations of students' rights of free speech, assembly and due process).

[55] Benjamin Franklin, Letter to Josiah Quincy, 11 Sept. 1773, John Bartlett, *Familiar Quotations* No. 3929 (10th ed., Boston, Little, Brown, 1919).

[56] Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy, *Order Establishing Combatant Status Review Tribunal*, available at http://www.defenselink.mil/news/July2004/d20040707review/pdf.

rules the Supreme Court said are required for detaining citizens in the United States, and thus also satisfy any obligations to foreign detainees. According to the Supreme Court's *Rasul* decision, however, the Guantanamo detainees met the requirement of the habeas corpus statute of being in 'custody in violation of the Constitution or laws or treaties of the United States' because they are detained in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel, and without being charged with any wrongdoing.[57] The Defense Department has thus sought to sustain the separate track, even in the face of apparently inconsistent commands from the Supreme Court. Additional litigation will be required to ascertain the scope of the right to counsel prescribed by the Court in *Rasul*.

Similarly, the apparent victory for Yaser Hamdi may be more symbolic than real. The neutral decision-maker prescribed by Justice O'Connor's plurality opinion in *Hamdi* could be a military commission rather than a civilian court. In addition, hearsay evidence and other evidentiary rules favourable to the government might be permitted, including the affidavit initially relied on to justify holding Hamdi, and the reversal of the normal presumption requiring Hamdi to prove that he is not an enemy combatant. Thus, Hamdi is allowed to see the evidence against him, but that may consist only of the sketchy and uncorroborated affidavit originally filed. And Hamdi has to prove that those allegations are false, even though finding witnesses to support his story under current circumstances in Afghanistan may be next to impossible. Although he must be released when the fighting there is over, the government may claim that the 'war on terrorism' is fought on many fronts simultaneously, including Afghanistan, for the foreseeable future.

Even the procedural ruling in the *Padilla* case portends an easing of the government's practical burdens in dealing with detainees in the war on terrorism. The effect of the Court's decision is to permit the government to 'forum shop' – to choose its forum by detaining persons where it can expect favourable conditions for litigation. Jose Padilla should expect less favourable outcomes from the court of appeals that includes South Carolina than the one in New York. Similarly, the government will likely either stop sending detainees to Cuba or will have such success with its Combatant Review tribunals that forum shopping will not be necessary. If the panels do not work out favourably for the government, the *Rasul* decision will afford those detainees the right to sue in any district court in the United States.

Since the November 2001 Military Order creating the military commissions for non-citizens, the Department of Defense has issued more detailed rules prescribing commission procedures. To a large extent the procedures improve the prospects for justice for those subject to trial by military

[57] *Rasul* v. *Bush*, 2693.

commission, although the commissions still provide considerably lesser protections for the accused than either United States civilian or regular military courts. Proceedings may be closed to outside scrutiny in the interest of 'national security', defence counsel will have their client consultations subject to government monitoring, and defence counsel may be denied access to potentially exculpatory evidence if the government asserts that it is 'necessary to protect the interests of the United States'.[58]

It remains to be seen whether the Supreme Court's decisions in June 2004 will limit significantly the government's detention and treatment of prisoners in the war on terrorism. It is as likely as not that the limited judicial role required by the *Rasul* and *Hamdi* decision will be played out as outlined here with little if any inconvenience to the government. The alternative possibility is that the due process balancing that Justice O'Connor invoked to limit the government's detention of Yaser Hamdi will be extended to other detainees, including non-citizens, and to conditions of confinement as well as the detention decision itself. The Iraqi prisoner abuse scandal first reported early in 2004 and the graphic images of torture and humiliation of prisoners by United States military and civilian personnel at Abu Ghraib prison near Baghdad has become the proverbial tip of an iceberg of detainee abuse in a range of locations around the world, including Guantanamo. In the face of shockingly candid efforts by government lawyers to construe narrowly legal proscriptions against torture (to constitute torture, 'physical pain must be equivalent in intensity to ... organ failure';[59] interrogation activities 'may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity'[60] to violate the law), ongoing investigations concerning the responsibility for abusive treatment may produce criminal charges and civil cases against those responsible. It is also possible that the due process protections applied for Yaser Hamdi could be extended to others, including non-citizens, detained and subject to coercive interrogation by United States officials.

Surely one aspect of the balancing employed by the Court in *Hamdi* – the harm to the detainee who is not in fact an enemy combatant – remains constant across citizens and non-citizens. The government's interests in *Hamdi*, preventing captured detainees from returning to the battlefield, is the same interest that produced the rules set out in the Geneva Conventions that permit tribunals to sort facts to determine which persons may be treated

[58] Department of Defense, *Military Commission Order No. 1* (21 March 2002).

[59] Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzeles, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, 1 Aug. 2002, at 1, available at: http://www.gwu.edu/~nsarchiv/NSAEBB127/02.08.01.pdf.

[60] Ibid.

as prisoners of war. In other settings, then, including those of Jose Padilla and non-citizens similarly detained, due process may require some meaningful and impartial assessment of each detainee's guilt or innocence as a combatant. The standard by which a tribunal will assess the evidence for and against the classification of a detainee as a combatant may well be the most important determinant of the outcomes of individual cases. If the 'some evidence' standard urged by the government in the *Hamdi* case is not acceptable, but the more protective 'beyond a reasonable doubt' standard of the United States criminal law is not required, fashioning the substitute standard will be of critical importance for future challenges brought by detainees.

The fifth and final annual report of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction (the Gilmore Commission)[61] recognized alternative visions of America's future relative to the threat of terrorism. Ranging from a version of do-nothing complacence at one extreme, to a 'fortress America' at the other extreme, the Gilmore Commission rejected the extremes and a reactive strategy in favour of what it calls 'the New Normalcy'.[62] The essence of this strategy is to plan so effectively for terrorism that the fear is dispelled. Terrorism is treated primarily as a criminal action.[63] However, while the panel opines that 'America's New Normalcy in January of 2009 should reflect ... empowerment of individual freedoms',[64] the New Normalcy also includes sharing information and intelligence 'to the broadest possible audience rapidly' and it calls for strengthened roles for military domestically. According to the Commission, this win/win outcome may be achievable by overcoming the traditional assumption that security and civil liberties are in tension.[65] Assuming the classically conservative view that security is the most fundamental civil liberty, the Commission reminds us that our constitutional Framers chose to devolve governmental power and protect civil liberties, based on their experience that 'civil liberties and security are mutually reinforcing'.[66]

Explaining away the threat to liberty simply by defining security as the first liberty fails to confront a looming crisis in constitutional values. The Gilmore Commission views our common security as serving the inalienable rights of life, liberty, and the pursuit of happiness. While those are well and good, that list comes from the Declaration of Independence, an unenforceable prelude to the rights protections of the Constitution. The First Amendment expressive freedoms, Fourth Amendment privacy, and Fifth and Fourteenth Amendment due process and equal protection are enforceable rights, and steps taken by government to enhance our security must not violate those protections. To be sure, terrorism can threaten the most fundamental

[61] Available at http://www.rand.org. [62] Ibid., at 13. [63] Ibid. [64] Ibid., at iv.
[65] Ibid., at 22. [66] Ibid.

liberty – the right to life, and government must be afforded considerable discretion to take measures reasonably determined to protect our lives. At the same time, measures taken in furtherance of security must be assessed, like other laws, in light of their effects on other fundamental protected liberties.

To its credit, the Gilmore Commission acknowledges that broadening investigative and law enforcement powers in the service of security have the potential to chill freedom of speech and to invade personal privacy. The Commission also recognizes the dangers to liberty implicit in expanding a military presence domestically, and it recommends creation of an independent civil liberties oversight board to advise Congress and the President concerning changes to legal rules for fighting terrorism that are likely to have civil liberties implications, whether or not intended.[67]

Against the backdrop of the war on terrorism and the war against Iraq, President Bush has made reauthorization of the Patriot Act and removal or extension of its sunset provisions a regular theme in his campaign. President Bush made his Patriot Act appeal in Buffalo, New York, where the so-called Lackawanna Six were arrested and convicted last year for providing 'material support' to terrorism.[68] The President claimed that successes in the war on terrorism like that represented by the Lackawanna Six could not have occurred without the Patriot Act and its expanded investigative authorities. Although it is true that the above described amendments to FISA in the Patriot Act made it easier for investigators to obtain secret orders to listen in on the suspects' phone and email conversations, the break that made local investigators aware of these Yemeni-Americans came in the old fashioned way – from an anonymous letter left at a local FBI office. The 'material support' crime that carries such lengthy prison sentences that the six indicted suspects each took guilty pleas in return for slightly lesser prison sentences was not part of the Patriot Act, and was enacted in 1996, after the first World Trade Center and Oklahoma City bombings. Ironically, the Patriot Act amendment to 'material support', adding a crime for 'expert advice or assistance', was struck down as unconstitutional by a California federal court in January 2004, based on the court's conclusion that the prohibition was unconstitutionally vague.[69] Similarly, a material support prosecution of a Saudi student in Idaho for maintaining a website that urges '*jihad*' against the

[67] Ibid., at 23.
[68] Matthew Purdy and Lowell Bergman, 'Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case', *New York Times*, 12 October 2003, sec. 1, 1.
[69] *Humanitarian Law Project* v. *Ashcroft*, 2004 WL 112760 (C.D. Cal. 22 Jan. 2004); see also Timothy Egan, 'Computer Student on Trial Over Muslim Web Site Work: Case Hinges on Use of Antiterrorism Law', *New York Times*, 27 April 2004, A16.

United States failed when a jury acquitted the student, finding insufficient evidence that the student intended to aid al Qaeda.[70]

Just as measures to enhance investigative authorities may have compromised civil liberties, the doctrine of pre-emption is potentially a recipe for disaster. If every nation practised military pre-emption of its enemies, war would become the norm across much of the globe. The United States war on Iraq is merely an example of how misguided the application of the doctrine of pre-emption can be. The continuing insurgency in Iraq and the resurgence of the Taliban in Afghanistan suggest that the military response may inspire more terrorists while it disrupts others. Continuing rumblings about the threat to the United States posed by nuclear weapons programmes in Iran and North Korea render the possibility of further pre-emptive military action more than merely hypothetical. The fact that Congress asked so few questions about the evidence to back up the Administration's claims and then voted such a sweeping authorization for war against Iraq in October 2002 does not reflect positively on the Congress. The fact that the pre-emption approach permits a sort of shoot first, talk later approach is all the more reason to consider alternative schemes for responding to the threats of terrorism.

Similarly, the merging of national security and law enforcement spheres of governance in the United States is serving to inculcate in the citizenry the idea that emergency conditions that arose on September 11 have become routine, and that adding the national security emblem to terrorism-related law enforcement renders extraordinary measures legitimate. Unlike emergencies with a known duration, the unknowable boundaries of the war on terrorism supply licence to institutionalize these changes in governance. We all should pause before making that commitment.

[70] Patrick Orr, 'Sami Al-Hussayen Not Guilty of Aiding Terrorist Groups', *Idaho Statesman*, 11 June 2004.

23

Canada's response to terrorism

KENT ROACH

Canada's response to terrorism has been dramatically affected by 9/11. Canadians died in the horrific attacks on the World Trade Center, but so did the citizens of many other countries. What was unique about Canada's response to 9/11 was the border it shares with the United States. The border meant that Canada felt the repercussions of the swift American response to the attacks in an immediate and profound manner. For example, when the United States closed its air space that terrible day, it was Canada that accepted over 200 airplanes destined for the United States, including one plane that was erroneously believed to have been hijacked. Canada also was affected by erroneous claims that some of the terrorists had entered the United States through Canada, as indeed had occurred before and may likely occur again given the millions who cross the border each day.[1] Canada was also singled out in the USA Patriot Act[2] which contained a whole section entitled 'Defending the Northern Border' providing for increased border guards and scrutiny of those entering the United States. Important components of Canada's anti-terrorism and immigration policies have been established in border agreements with the United States. Canada has drafted broad new anti-terrorism laws and developed a new public safety department of government with an eye to American perceptions that Canada might provide a safe haven for terrorists.

Canada was not immune from terrorism before 9/11. In response to kidnappings by two cells of the Front de Liberation du Québec in 1970 (known as the 1970 October crisis), it invoked extraordinary emergency

[1] See my *September 11: Consequences for Canada* (Montreal, McGill-Queens University Press, 2003), ch. 1 for a fuller account of the dramatic consequences of the September 11 terrorist attacks for Canada.

[2] Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 H. R. 3162 Title 4 Subsection A 'Protecting the Northern Border'. Even while recognizing that 500 million people cross its borders every year, the 9/11 Commission has more recently recommended increased border controls that would require Canadians and Americans alike to be subject to biometric identification at the border: The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (New York, St Martins, 2004), at 12.4.