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Executive Power and the War on Terror

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ABSTRACT

Two important paradigm shifts have occurred in the war on terror. First, the United States has treated terrorism as a military issue, not a law enforcement problem. Second, the United States has centralized its intelligence apparatus under the direction of the newly-created Director of National Intelligence and lowered the wall that separated external security or foreign intelligence activity from internal security or domestic law enforcement. In tandem, these changes are of historic dimension. They also occur against a backdrop in modern times in which the executive branch has steadily accumulated power. In pursuit of the war on terror, we have begun to blur traditional lines meant to protect civil liberty from the danger of excessive executive power: the line between the military and domestic law enforcement on the one hand, and between domestic law enforcement and foreign intelligence on the other. This blurring of lines already has led to difficult questions regarding the limits of executive prerogative and will undoubtedly lead to more. The cumulative effect of both paradigm shifts is to enlarge executive authority and to increase the risk of civil liberty abuses.

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INTRODUCTION

An examination of post-9/11 governmental action inevitably raises the question of how to balance civil liberty interests against national security concerns in times of crises. This question is not a new one, either

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for the United States or for any other nation. More than 2000 years ago, Cicero, the Roman statesman, lawyer, and philosopher, coined the maxim, "*Inter arma silent leges.*"[1] (In time of war, the law is silent.) Then, of course, there is the oft-quoted admonition attributed to Benjamin Franklin, "Those, who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety."[2] Falling somewhere between Cicero's observation and Franklin's admonition is a more recent appraisal by Chief Justice William H. Rehnquist:

> It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.[3]

Whether in time of war the law should have no voice, a somewhat different voice, or the same voice, is a question that not only may profoundly affect individual rights but the constitutional structure of government itself. In measuring the extent of the law's voice during times of crisis, the focus is often on the impact of national security-related measures on individual rights.[4] But post-9/11 governmental action may also

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1. Cicero, *Pro Milone, quoted in* QUINCY WRIGHT, A STUDY OF WAR 863 (1965) (citation omitted). In recent times, this maxim has been widely cited. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting); WILLIAM REHNQUIST, ALL THE LAWS BUT ONE 224 (1998); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 150 (2002); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 767 (2002).

There is, of course, a certain irony in its authorship. After Julius Caesar was murdered, political turmoil ensued in Rome. *See* ANTHONY EVERITT, CICERO 272–319 (2001). Cicero sought to restore the Roman Republic and opposed Marc Antony in a series of speeches in the Senate known as the Philippics. *Id.* Antony later came to power with Octavian and Lepidus in the Second Triumvirate and had Cicero killed, along with Cicero's brother and nephew. *Id.* At Antony's order, Cicero's head and hands were cut off and nailed to the rostrum in the Senate. *Id.*

2. BENJAMIN FRANKLIN, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA (1759), *reprinted in* 3 THE WORKS OF BENJAMIN FRANKLIN 107 (Jared Sparks ed., Boston, Hilliard, Gray, and Co. 1836). Different, if not corrupted, versions of this quote appear on any number of websites. It is not clear if Franklin authored the quote, or if it was published under his direction and with his approval. Sparks asserts that Franklin "was not in fact the author [of AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA] although it was written under his direction, and doubtless from copious materials furnished by him." *Id.* at 108–09. *See also* Richard Minsky, *Franklin Quoted by Minsky*, http://www.futureofthebook.com/stories/storyReader$605 (asserting that "Franklin may well have composed this particular quote.").

3. REHNQUIST, *supra* note 1, at 224–25. Not surprisingly, 9/11 has stimulated a considerable body of scholarship in this area. For a small sampling of recent scholarship, *see* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) [hereinafter Ackerman, *Emergency Constitution*]; David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004); Bruce Ackerman, Response, *This Is Not a* War, 113 YALE L.J. 1871 (2004). *See also* Lee Epstein, et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 (2004).

4. A profusion of scholarship has already focused on the impact of post-9/11 governmental action on individual rights. For a sampling of such literature, *see* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM (Richard C. Leone & Greg Anrig, Jr., eds., 2003);

affect the distribution of power among the three branches of the federal government, as well as the distribution of power between the federal government and the states. Those structural consequences implicate, in the aggregate and over the long term, liberty concerns that may be more subtle and difficult to discern, though no less important.[5] Moreover, any examination of separation of powers issues raised by post-9/11 governmental action must be placed in its historical context, against a backdrop in modern times of the steady accumulation of power in the executive branch.

This article asserts that two paradigm shifts have occurred as a result of the government's war on terror[6] and that each implicates structural

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DAVID COLE, ENEMY ALIENS (2003); DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2002).

5. For an examination of this point, *see* Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Approach to Rights During Wartime*, *in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 161 (Mark Tushnet ed., 2005); Lobel, *supra* note 1.

6. For purposes of this article, the term "war on terror" is used to describe the government's post–9/11 efforts to combat terrorism. Left unexplored is whether the "war on terror" is a true war. A number of scholars have argued that it is not. *See* RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 247 (2004) ("It is debatable, of course, whether the war on terrorism is really a war at all."); PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 21 (2003) (on policy grounds rejecting the metaphor of "war" as "dangerous in the longer run"); Jordan J. Paust, *Post 9/11 Overreactions and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1340–43 (2004) (arguing that as a matter of international law, the U.S. cannot be at war with al Qaeda); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326–28 (2003) (same); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 140 (2004) ("Although using the language of war and describing the September 11th attacks as war crimes may be a convenient rhetorical device to describe the struggle to cripple international terrorist organizations, it is not consonant with existing and well–established principles of international law.").

Other scholars have argued the contrary. *See* RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 186 (2005) ("In wartime the interest in security soars and so civil liberties are diminished; and our current struggle with international terrorism is, like the Cold War, plausibly described as war."); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2070 (2005) ("When, as here, both political branches have treated a conflict as a 'war,' and that characterization is plausible, there is no basis for the courts to second–guess that determination based on some metaphysical conception of the true meaning of war."); Eric A. Posner, *Terrorism and the Laws of War*, 5 CHI. J. INT'L L. 423, 424 (2005) (arguing that "[t]he laws of war might sensibly be applied to conflicts between states and international terrorist organizations, though most likely in a highly modified form"); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 213 (2003) (asserting that conflict with al Qaeda qualifies as war and that it does not make sense to treat 9/11 "as a massive crime, rather than an act of war").

For a thoughtful and provocative critique of both positions, *see* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004). Professor Brooks argues that the law of armed conflict provides "no clear guidance" for determining whether al Qaeda is a criminal enterprise or a belligerent armed force. *Id.* at 718.

> [T]he Bush administration's arguments for viewing the September 11 attacks as 'armed conflict' are–from a legal perspective–at least as persuasive as the arguments for viewing the September 11 attacks as crimes . . . . There is no longer any basis for asserting a clearly discernable line between crime and conflict.

Id. *See also* Ackerman, *Emergency Constitution*, *supra* note 3, at 1032 ("Our legal tradition provides us with two fundamental concepts–war and crime–to deal with our present predicament. Neither fits.").

constitutional issues. The first shift has been to militarize the United States' response to terrorism. In general, prior to 9/11, the United States dealt with terrorism through the criminal justice system. After 9/11, the United States began to treat terrorism as a military issue. One manifestation of this paradigm shift has been the indefinite detention of citizens as enemy combatants. In *Hamdi v. Rumsfeld*,[7] the Supreme Court rejected the broadest assertion of an unreviewable executive power to detain.[8] There is now some guidance on the outer limits of executive power in the war on terror, at least with respect to the detention of citizens by the military. Nevertheless, *Hamdi* hardly represents a sweeping vindication of civil rights, and, indeed, may be viewed as an affirmation of executive branch power. Moreover, many questions remain unanswered in the wake of *Hamdi*, and the military response to terrorism will continue to pose difficult line drawing questions on the bounds of executive prerogative in matters once primarily handled through the courts and by civilian authorities.

The second paradigm shift has involved a centralization of foreign and domestic intelligence activities under the newly created National Intelligence Directorate. This centralization, which was authorized by the Intelligence Reform and Terrorism Prevention Act of 2004,[9] lowers the proverbial wall between foreign intelligence gathering and domestic law enforcement—a wall carefully erected and maintained for more than half a century by the National Security Act of 1947.[10] In addition, various provisions of the Patriot Act dismantle the wall between foreign and domestic intelligence.[11] Unlike the issue of citizen enemy combatants, we have no guidance from the Supreme Court on the centralization of intelligence functions, and, for reasons to be explained, are unlikely to receive any. In both instances, however, post-9/11 governmental action raises important structural constitutional issues. And in both instances, a recurring theme is the accumulation of power in the executive branch.

In tandem, the paradigm shifts are of historic dimension, and should not pass unobserved. Important and long-standing lines have been blurred between the military and domestic law enforcement on the one

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Some in the Bush administration, but not the President, appear to be questioning the use of the phrase "war on terror." General Richard B. Myers, the Chairman of the Joint Chiefs of Staff, recently said that he had "objected to the use of the term 'war on terrorism' before, because if you call it a war, then you think of people in uniform as being the solution." Richard W. Stevenson, *President Makes It Clear; Phrase Is 'War on Terror'*, N.Y. TIMES, Aug. 4, 2005, at A12. Defense Secretary Donald Rumsfeld and other officials had also used the phrase "global struggle against violent extremism." *Id.* President Bush, however, rejected that formulation and has continued to call the conflict a war. *Id.*

7. 542 U.S. 507 (2004).

8. *Hamdi*, 542 U.S. at 535.

9. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, § 1011, 118 Stat. 3638 (2004) [hereinafter IRTPA].

10. National Security Act of 1947 § 103(d)(1), 50 U.S.C.A. § 403–3(d)(1) (West 2003).

11. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

hand, and between domestic law enforcement and foreign intelligence on the other—lines that were drawn to protect civil liberty from the danger of excessive executive power. While some scholarship has noted the military response to terrorism,[12] and other scholarship has commented on recent laws that have centralized intelligence functions and lowered the wall between foreign intelligence and domestic law enforcement,[13] this article comments on both changes, places them in a historical context, and evaluates their cumulative impact and the way in which they enlarge executive authority.

This article proceeds in three parts. Part I provides a brief explanation of the theory underlying the separation of powers doctrine and a framework for analyzing separation of powers claims involving the executive branch. Part II places an assessment of executive power in a historical context and discusses its growth in modern times. Some powers are less obvious than others and were not contemplated by the Framers. Part III examines the paradigm shifts that have occurred as a result of the government's war on terror: a militarized response to terrorism and a centralization of intelligence functions. Not surprisingly, perhaps, this article concludes that one result of the war on terror has been to expand the power of the executive branch, an expansion that is part of a broader and problematic historical trend.

I. ANALYTICAL FRAMEWORK

The Framers imposed structural limits on the power of government in order to better secure liberty. Part of the limitation occurs on a vertical plane; part occurs on a horizontal plane. On the vertical plane, the Constitution establishes a political structure in which there is a federal government and state governments. Within that structure, there are lim-

12. For examples of such scholarship, *see* HEYMANN, *supra* note 6, at 19–33, 91–98; Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 34–39 (2005); John S. Baker, Jr., *Competing Paradigms of Constitutional Power in "The War on Terrorism,"* 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5 (2005); Richard H. Kohn, *Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT'L L. 165 (2003); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307 (2003); Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217 (2002).

13. For scholarship that discusses the Intelligence Reform and Terrorism Prevention Act of 2004 and its creation of a Director of National Intelligence, *see* POSNER, *supra* note 6; Grant T. Harris, Note, *The CIA Mandate and the War on Terror*, 23 YALE L. & POL'Y REV. 529 (2005). To date, there has been far more scholarship on provisions of the Patriot Act that dismantle the wall between foreign intelligence and domestic law enforcement, *see* COLE & DEMPSEY, *supra* note 4, at 162–65; STEPHEN J. SCHULHOFER, THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11 43–48 (2002); Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319 (2005); Lobel, *supra* note 1, at 787–90; Kathleen M. Sullivan, *Under a Watchful Eye: Incursions on Personal Privacy*, *in* THE WAR ON OUR FREEDOMS, *supra* note 4, at 133–43; Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306 (2004); Nola K. Breglio, Note, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179 (2003); George P. Varghese, Comment, *A Sense of Purpose: The Role of Law Enforcement in Foreign Intelligence Surveillance*, 152 U. PA. L. REV. 385 (2003).

its on the power of each government. The federal government is a government of enumerated powers.[14] It can act only if the Constitution allows it to do so. Moreover, under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[15] The States, then, serve as a counterweight to the federal government.

On the horizontal plane, the federal government is divided into three branches: the legislative, executive, and judicial branches. Implicit in that division is a separation of powers among the three branches. The purpose of the separation is to establish an internal system of checks and balances that prevents any one branch from becoming overly powerful.[16] As James Madison explained in *The Federalist, No. 51*, "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others."[17]

In combination, Madison wrote, the vertical and horizontal distribution of power was intended to check the exercise of arbitrary power and to safeguard civil liberty:

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controulled by itself.[18]

Thus, as Justice Brandeis later elaborated, the doctrine of separation of powers was not intended to promote efficiency, "but to preclude the exercise of arbitrary power."[19] "The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the gov-

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14. In *McCulloch v. Maryland*, Chief Justice John Marshall wrote:
> This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.

17 U.S. (4 Wheat.) 316, 405 (1819).

15. U.S. CONST. amend. X.

16. *See* United States v. Nixon, 418 U.S. 683, 706–07 (1974).

17. THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 1961).

18. *Id.* at 320. *See also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 87 (15th ed. 2004) ("To the drafters of 1787, protection against excessive concentrations of power lay less in explicit limits such as the 'shall nots' of the Bill of Rights than in diffusions of power among a variety of governmental units.").

19. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

ernmental powers among three departments, to save the people from autocracy."[20]

The branches of government, however, are not hermetically sealed from each other. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[21] Congress enacts legislation,[22] for example, but the President wields the veto power.[23] In the area of foreign affairs, the President has the power to make treaties and to appoint ambassadors, subject to the advice and consent of the Senate.[24] With respect to military affairs, the President is the Commander-in-Chief,[25] but Congress has the power to declare war, to raise and support the armed forces, and to make rules regulating the armed forces.[26]

Whether one branch has overstepped its constitutional bounds and violated the separation of powers doctrine raises difficult and nuanced questions of constitutional law.[27] For claims of executive branch overreaching, the most influential and widely cited test comes from Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[28] In

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20. *Myers*, 272 U.S. at 293. For recent scholarship that questions the extent to which the principle of separation of powers protects civil liberties, *see* Tushnet, *supra* note 5, at 2677.

21. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

22. U.S. CONST. art. I, § 1.

23. *Id.* at art. I, § 7, cl. 2.

24. *Id.* at art. II, § 2, cl. 2.

25. *Id.* at art. II, § 2, cl. 1.

26. *Id.* at art. I, § 8, cl. 11–14.

27. It is beyond the scope of this article to explore in greater detail the varying analytical approaches to separation of powers questions. Suffice it to say that the Supreme Court has relied on two tests, one known as "formalism" and the other as "functionalism." *See generally* FALLON, *supra* note 6, 174–77; Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 11 (1998); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Burt Neuborne, *Formalism, Functionalism, and the Separation of Powers*, 22 HARV. J.L. & PUB. POL'Y 45 (1998); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

28. *Youngstown*, 343 U.S. at 635–60 (Jackson, J., concurring). The Supreme Court has noted that Justice Jackson's analytical framework "brings together as much combination of analysis and common sense as there is in this area." Dames & Moore v. Regan, 453 U.S. 654, 661 (1981). *See also* Bradley & Goldsmith, *supra* note 6, at 2050 (calling Justice Jackson's categorization of presidential power "widely accepted"); Epstein, et al., *supra* note 3, at 110 (based on quantitative analysis of Supreme Court precedent arguing that in war-related cases, the Court uses an "institutional process" approach that "looks towards Congress"); Issacharoff & Pildes, *supra* note 5, at 194 (noting that "where both legislature and executive endorse a particular tradeoff of liberty and security, the courts have accepted that judgment"); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2002) (describing Justice Jackson's analytical framework as creating "three now-canonical categories that guide modern analysis of separation of powers"); Sunstein, *supra* note 3, at 82 (noting that Justice Jackson's concurrence "explored in some detail the central importance of a grant of authority from Congress"). An interesting critique of Justice Jackson's test is that "[b]y emphasizing fluid constitutional arrangements between Congress and President instead of the fixed liberal dichotomies bounding executive power, the legal realist approach to the Constitution and foreign affairs has effectively supported the extension of executive emergency authority." Lobel, *supra* note 1, at 775.

Youngstown, President Truman seized the nation's steel mills to avert a strike during the Korean War.[29] In doing so, he relied upon his power under Article II of the Constitution, including his authority as the Commander-in-Chief.[30] The steel companies challenged Truman's action, alleging a violation of separation of powers.[31] The Supreme Court agreed.[32] In his concurrence, Justice Jackson explained that executive action could be divided into three zones of analysis.[33]

In the first zone, the President acts pursuant to an express or implied authorization from Congress.[34] In such a situation, the President's authority is at a maximum for it includes all of his constitutional power plus all that Congress can delegate.[35] "If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power."[36] Presidential action in this category is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."[37]

In the second zone, the President acts in the face of congressional silence.[38] Congress has neither granted nor denied authorization.[39] In this situation, Justice Jackson explained, the President can rely only upon his own independent power.[40] There is a "zone of twilight," however, in which the President and Congress may have concurrent authority or in which the distribution of authority is uncertain.[41] "Therefore, congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[42] Evaluating the constitutionality of executive action in such circumstances "is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[43]

In the third zone, the President acts contrary to express or implied congressional intent.[44] In this situation, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[45] To sus-

29. *Youngstown*, 343 U.S. at 582.
30. *Id.*
31. *Id.* at 583–84.
32. *Id.* at 589.
33. *Id.* at 635–38 (Jackson, J., concurring).
34. *Id.* at 636.
35. *Id.* at 636–37.
36. *Id.*
37. *Id.* at 637.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

tain executive action, courts must essentially reject Congress's authority to act upon the subject.[46] This cannot be done lightly. "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[47]

As a matter of constitutional theory, the excessive concentration of power in one branch of government can have serious consequences. First, on a horizontal plane, an undue concentration of power in one branch of the federal government throws off the checks and balances inherent in a system of separated powers. An imbalance of power may occur. To paraphrase Madison, the ambition of one branch may no longer be able to counteract the ambition of another.[48] Moreover, on a vertical plane, to the extent that this growth of power in one branch of government results in an enlarged federal authority, it may also affect the distribution of power between the federal government and the states.[49] In other words, the theory underlying the constitutional structure—that the horizontal and vertical distribution of power will result in a "double security"[50] to safeguard the rights of the people—may be called into question.

II. GROWTH OF EXECUTIVE POWER

An examination of separation of powers issues raised by post-9/11 governmental conduct cannot occur in a vacuum. It is widely accepted that executive power enlarges in time of crisis, whether that crisis is caused by civil war, economic collapse, or international armed conflict.[51] Beyond that, executive power must be viewed from a historical perspective. Madison believed that in a representative republic, Congress, not

46. *Id.* at 637–38.
47. *Id.*
48. THE FEDERALIST NO. 51 (James Madison), *supra* note 17, at 319.
49. It is beyond the scope of this article to examine federalism issues implicated by the war on terror. Suffice it to say that some have already arisen and more are likely to come. As an example, in the immediate aftermath of 9/11, Attorney General John Ashcroft asked local police to assist the Federal Bureau of Investigation in interviewing 5000 young Middle Eastern men nationwide. Fox Butterfield, *A Nation Challenged: The Interviews; A Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7. The police in Portland, Oregon, refused to assist federal agents based on racial profiling concerns. *Id.* Similarly, the REAL ID Act of 2005 establishes uniform standards for state driver's licenses and requires states to verify that a license applicant is lawfully present in the U.S. REAL ID Act of 2005, Pub. L. No. 109–13, § 202, 119 Stat. 311, 312–15 (2005). The nation's governors have predicted that the law will impose an enormous burden upon the states. Michael Janofsky, *Governors Warn of High Costs Arising from New ID Law*, N.Y. TIMES, July 19, 2005, at A18. *See also* Printz v. United States, 521 U.S. 898, 935 (1997) (invalidating federal law on 10th Amendment grounds that "commandeered" state officials, by requiring them to perform background checks on prospective gun buyers).
50. THE FEDERALIST NO. 51 (James Madison), *supra* note 17, at 320.
51. *See generally* REHNQUIST, *supra* note 1, at 224 ("Quite apart from the added authority that the law itself may give the President in time of war, presidents may act in ways that push their legal authority to its outer limits, if not beyond."); Gross, *supra* note 3, at 1029 ("When an extreme exigency arises it almost invariably leads to the strengthening of the executive branch not only at the expense of the other two branches, but also at the expense of individual rights, liberties, and freedoms."); Lobel, *supra* note 1, at 770 ("[s]ince September 11, there has been a dramatic, and in some respects unprecedented, expansion of Executive power").

the Presidency, would be the most powerful branch: "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."[52] Nevertheless, in modern times, the Supreme Court, Congress, and scholars alike have observed the steady accumulation of power in the executive branch since the founding of the Republic.[53]

At the outset, one must acknowledge the President's formidable powers under Article II of the Constitution. The executive power of the United States is vested in the President.[54] The President has the constitutional duty to "take Care that the Laws be faithfully executed."[55] Among other powers, the President is Commander-in-Chief of the armed forces,[56] receives and appoints ambassadors,[57] and makes treaties with the advice and consent of the Senate.[58] The President is sworn to "preserve, protect, and defend the Constitution."[59] Thus, the President is vested with great power in the area of foreign affairs and national security.[60]

But, as Justice Jackson famously observed more than half a century ago, the modern President has powers not apparent from the text of the Constitution.[61] A "gap . . . exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of

52. THE FEDERALIST NO. 48, at 306 (James Madison) (Clinton Rossiter ed., 1961).

53. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., FINAL REPORT ON INTELLIGENCE ACTIVITIES AND RIGHTS OF AMERICANS, Book I, 10 (1976) [hereinafter 1 CHURCH FINAL REP.] ("[T]he executive branch generally and the President in particular have become paramount within the federal system, primarily through the retention of powers accrued during the emergency of World War II."); FALLON, *supra* note 6, at 173 ("Over the sweep of American history, power has almost steadily flowed to the President."); THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED 1–7 (1985) (describing growth of executive power); Sunstein, *supra* note 3, at 68–69 ("Undoubtedly the increasing power of the President is largely a product of functional considerations having to do with the rise of the United States as an international power and the growing need for energy and dispatch."); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 731 (2005) (noting "the radical expansion of presidential power during the post–World War II era").

54. U.S. CONST. art. II, § 1, cl. 1.

55. *Id.* § 3.

56. *Id.* § 2, cl. 1.

57. *Id.* § 2, cl. 2 & § 3.

58. *Id.* § 2, cl. 2.

59. *Id.* § 1, cl. 7.

60. United States v. Curtiss–Wright Export Corp., 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation."). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 240 (7th ed. 2004) ("Thus, by constitutional exegesis, practical experience, and Congressional acquiescence, the executive has usually predominated the foreign affairs sphere, but this expansive international relations power is not plenary, nor may it be exercised contrary to restrictions in the Constitution such as the Bill of Rights."); LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 638 (3d ed. 2000) ("these constitutional provisions have come to be regarded as explicit textual manifestations of the inherent presidential power to administer, if not necessarily to formulate in any autonomous sense, the foreign policy of the United States"); Sunstein, *supra* note 3, at 66, 69 (recognizing that the President has "considerable power" with respect to national security, but calling it "tendentious to contend that when the nation is at risk, the President must be in charge of the apparatus of government.").

61. *Youngstown*, 343 U.S. at 653 (Jackson, J., concurring).

the actual controls wielded by the modern presidential office."[62] The President commands the public's attention in a way no other political figure can. Modern methods of communication, including radio and television, have only served to expand the President's ability to shape public opinion. Justice Jackson explained:

> Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.[63]

Moreover, the modern President is not only the head of government, but the head of a political party as well. According to Justice Jackson, the "rise of the party system has made a significant extraconstitutional supplement to real executive power."[64] The Framers associated political parties with "factions" that often acted contrary to the public interest,[65] and no political parties were present at the Constitutional Convention in 1787.[66] Yet, for the modern President, "[p]arty loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution."[67] The President, for example, usually commands the loyalty of legislators from his own party. This, of course, means that if his party controls Congress, he will often be able to get his way, and, as a practical matter, Congress's check on his power reduced.[68]

Furthermore, "[v]ast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity."[69] Modern American history has seen the rise of the regulatory state and administrative agencies with delegated lawmaking powers.[70] In the

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62. *Id.*
63. *Id.* at 653–54.
64. *Id.* at 654.
65. THE FEDERALIST NO. 10, at 71 (James Madison) (Clinton Rossiter ed., 1961) ("Among the numerous advantages promised by a well–constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.").
66. FALLON, *supra* note 6, at 5.
67. *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring).
68. Tushnet, *supra* note 5, at 2679 ("The separation–of–powers mechanism weakened with the advent of political parties that linked national officials, especially the President, to the local political coalitions that selected candidates for Congress.").
69. *Youngstown*, 343 U.S. at 653 (Jackson, J., concurring).
70. *See* Federal Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 755 (2002) ("The Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state."); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 544 n.10 (1985) ("Most of the Federal Government's current regulatory activity originated less than 50

last century, federal laws have created new departments and a myriad of agencies.[71] Congress has delegated rulemaking authority to those agencies, which are often executive, not independent, in nature. The President has the appointment power with respect to executive agencies and establishes their policy as well. Rules promulgated by the agencies extend the reach of executive power, and an agency's construction of statutes within its jurisdiction to administer is given deference under the *Chevron* doctrine.[72] "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute . . . ."[73] In combination, administrative agencies reach into virtually every aspect of modern American life.

More than the rise of the modern regulatory state, in the last few decades the number of federal criminal laws has increased sharply.[74] Federal criminal laws now reach into areas once thought to be "local crimes," which were the traditional province of the states. Examples include drug trafficking,[75] loan sharking,[76] domestic violence,[77] and the unlawful possession of firearms.[78] Under certain circumstances, the government can also detain individuals not charged with a crime. Material witnesses in a criminal matter may be detained "if it is shown that it may become impracticable to secure the presence of the person by sub-

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years ago with the New Deal, and a good portion of it has developed within the past two decades."); FALLON, *supra* note 6, at 178–79; LOWI, *supra* note 53, at 52–58.

71. *See generally* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 30–35 (3d ed. 1999).

72. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2699 (2005).

73. *Nat'l Cable & Telecomms. Ass'n*, 125 S. Ct. at 2699.

74. There were few federal crimes prior to the Civil War; today, there are more than 3,000. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40–44 (1996). The American Bar Association's Task Force on the Federalization of Criminal Law has reported that "of all federal criminal provisions enacted since the Civil War [1865], over forty percent [were] created since 1970." ABA TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998). Chief Justice Rehnquist has warned that the trend to federalize crimes traditionally handled by the states threatens to overwhelm the federal courts. *The 1998 Year–End Report of the Federal Judiciary*, THE THIRD BRANCH (Administrative Office of the U.S. Courts, Washington, D.C.), Jan. 1999, at 3, *available at* http://www.uscourts.gov//ttb/jan99ttb/january1999.html. *See also* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1172 (1995) (noting that Congress has "placed federal criminal law on an evolutionary collision course with state criminal law."); John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1125 (1995) ("For all practical purposes, most crime has been 'federalized' for some time, and the recent additions to the federal criminal code are merely the latest in a long trend. Whether desirable or not, the federalization of the substantive criminal law is largely an accomplished fact."); Sanford H. Kadish, Comment, *The Folly Over Federalization*, 46 HASTINGS L.J. 1247, 1248 (1995) ("[R]ecent years have witnessed a considerable expansion of federal authority, particularly in the last decade, with the increasing effect of turning traditional state offenses into federal ones, raising some serious cause for concern.").

75. Drug Abuse Prevention and Control Act, 21 U.S.C.A. §§ 801–971 (West 1999 & West Supp. 2005).

76. 18 U.S.C.A. §§ 891–96 (West 2000) (extortionate credit transactions).

77. 18 U.S.C.A. §§ 2261–66 (West 2000 & West Supp. 2005) (domestic violence and stalking).

78. 18 U.S.C.A. §§ 921–30 (West 2000 & West Supp. 2005) (firearms); 26 U.S.C.A. §§ 5801–72 (West 2002) (machine guns, destructive devices, and certain other firearms).

poena."[79] Similarly, under a provision of the Patriot Act, with reasonable cause, the government can detain an alien suspected of being a terrorist for up to seven days and then for renewable periods of up to six months "if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[80] Under Article II of the Constitution, it is the duty of the President to enforce those laws.[81] This, too, expands the scope of executive discretion.

That discretion, in turn, permeates each step of the criminal justice process: from the interpretation of statutes, to the investigation and prosecution of crimes, and the granting of pardons if a conviction obtains. The Attorney General, for example, has the implicit power to interpret federal criminal statutes in such a way so as to all but preclude prosecution. First, his interpretation of statutes will be accorded conclusive weight by federal prosecutors in the Department of Justice.[82] Moreover, the interpretation, even if erroneous, will likely establish a mistake of law defense by any individual who reasonably relies upon it.[83] Simi-

79. 18 U.S.C.A. § 3144 (West 2000). Human Rights Watch and the American Civil Liberties Union have criticized the Bush administration's use of this law to detain terror suspects not charged with a crime. *See* HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11 (2005), *available at* http://hrw.org/reports/2005/us0605/; Eric Lichtblau, *Two Groups Charge Abuse of Witness Law*, N.Y. TIMES, June 27, 2005, at A10. For an explanation of the material witness statute, *see* Roberto Iraolo, *Terrorism, Grand Juries, and the Federal Material Witness Statute*, 34 ST. MARY'S L.J. 401 (2003). For a critique of the government's use of the material witness statute to detain individuals in the absence of criminal charges, *see* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post–9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 685–87 (2005) (critiquing government's use of material witness statute to detain an individual for alleged terrorist ties); Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1221 (2002) ("The War on Terrorism also has made a fundamental change in the use of material witness laws. Under the material witness laws, individuals who have not committed any crime themselves may nonetheless be detained for extended periods of time."); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1211–13 (2004) (same). For scholarship that questions the utility of material witness detention in cases involving "sleeper" terrorists, *see* Chesney, *supra* note 12, at 34–38 (noting that detention under the material witness statute is "quite temporary" and "not a long-term solution to the problem posed by potential sleepers").

80. Patriot Act, Pub. L. No. 107–56, § 412, 115 Stat. 272, 350–52 (2001). For scholarship that critiques the effect of 9/11 on immigration law, *see* Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5, 5 (2005) ("[federal immigration] agencies, in fact, replaced standard immigration procedures with a law enforcement process intended to incapacitate those arrested for as long as possible while they are investigated and interrogated, with immigration enforcement merely as a secondary goal."); Akram & Karmely, *supra* note 79, at 645 (post–9/11 government policies "have exacerbated a trend toward criminalizing immigration law, expanding the categories of mandatory detainees, reducing administrative discretion in determining release, and curtailing the immigration and federal courts from review of detention decisions."); Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 351 (2005) (arguing that "the post–September 11th immigration reforms . . . followed the radical Republican modus operandi of leveraging national security and terrorism to implement an anti–immigrant agenda"); Tumlin, *supra* note 79, at 1177 ("U.S. terrorism policy is profoundly reshaping our national immigration and immigrant policy.").

81. U.S. CONST. art. II, § 3.

82. *See, e.g., infra* note 83.

83. *See* MODEL PENAL CODE § 2.04(3)(b) (mistake of law defense when an individual "acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense."). A recent example of the President's power to define criminal statutes narrowly occurred

larly, if investigators choose not to investigate an alleged criminal violation, or if prosecutors decline to bring charges, those decisions are all but unreviewable on separation of powers grounds as an exercise of executive discretion.[84]

Even if an individual is investigated, prosecuted, and convicted of a federal crime, the President may issue a pardon.[85] There is ample precedent for such pardons in cases involving national security. In 1988, the Independent Counsel charged 14 individuals in the Iran-Contra Affair.[86] Eleven were convicted, but two convictions were overturned on appeal.[87] One case was dismissed after the Attorney General refused to declassify documents ruled relevant to the defense.[88] On Christmas Eve, 1992, shortly before leaving office, President George H. W. Bush pardoned the former Secretary of Defense Caspar Weinberger and five other government officials.[89] Two of the individuals, including Weinberger, were awaiting trial at the time of the pardon.[90] In pardoning those individuals, President Bush characterized the prosecution as representing "the criminalization of policy differences,"[91] a characterization rejected by the Independent Counsel.[92]

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when the Department of Justice advised that the federal torture statute, 18 U.S.C.A. § 2340A (2005), required a showing of specific intent to inflict severe pain or suffering – "the infliction of such pain must be the defendant's precise objective" – and defined torture, in part, as pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Memorandum from the U.S. Department of Justice to Alberto R. Gonzales, Counsel to the President, Regarding Standards of Conduct for Interrogation under 18 U.S.C.A. §§ 2340–2340A 1, 3, 13 (Aug. 1, 2002), http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html. As a practical matter, this interpretation made it difficult to establish the elements of the offense by creating a high threshold for "torture" and a restrictive mens rea standard. Even if allegedly torturous conduct were prosecuted, the wrongdoer would likely assert reasonable reliance on an official interpretation of law. The Department of Justice subsequently retracted its August 2002 Memorandum. *See* Memorandum from the U.S. Department of Justice to James B. Comey, Deputy Attorney General, Regarding Legal Standards Applicable Under 18 U.S.C.A. §§ 2340–2340A 2 (Dec. 30, 2004), http://www.usdoj.gov/olc/dagmemo.pdf.

84. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (recognizing broad prosecutorial discretion because prosecutors "are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'") (quoting U.S. Const. Art. II, § 3); Wayte v. United States, 470 U.S. 598, 607 (1985) ("'[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'") (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality,* 2004 WIS. L. REV. 837, 837–38 (2004) ("Few decisions prosecutors make are subject to legal restraints or judicial review.").

85. U.S. CONST. art. 2, § 2, cl. 1 (President has the "Power to grant Reprieves and Pardons for Offenses against the United States").

86. LAWRENCE E. WALSH, INDEPENDENT COUNSEL, 2 FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 1–3 (Aug. 4, 1993) [hereinafter 2 FINAL REP. OF THE INDEP. COUNSEL].

87. *Id.* at 1–2.

88. *Id.* at 2–3.

89. Proclamation No. 6518, Grant of Executive Clemency, 57 Fed. Reg. 62,145 (Dec. 24, 1992) [hereinafter Proclamation No. 6518].

90. 2 FINAL REP. OF THE INDEP. COUNSEL, *supra* note 86, at 2.

91. Proclamation No. 6518, *supra* note 89.

92. LAWRENCE E. WALSH, FOURTH INTERIM REPORT TO CONGRESS 82 (Feb. 8, 1993), *reprinted in* 2 FINAL REP. OF THE INDEP. COUNSEL, *supra* note 86, at 666.

As a historical matter, executive power also increased after World War II. In response to the Cold War, the government, for the first time in American history, founded a permanent and powerful peacetime military establishment to which a substantial portion of the nation's budget was devoted.[93] In 1940, the United States spent an amount equal to 1.7 percent of its gross domestic product on national defense.[94] Military spending rose dramatically during World War II and subsided in the demobilization that followed.[95] With the start of the Cold War, however, defense spending once again began to rise. From 1952 to 1959, it was at least ten percent of gross domestic product each year.[96] By 1961, three days before leaving office, President Eisenhower observed that "[o]ur military organization today bears little relation to that known by any of my predecessors in peacetime" and warned of the rise of "the military industrial complex."[97] "This conjunction of an immense military establishment and a large arms industry is new in the American experience."[98]

Just as important as the development of a powerful peacetime military establishment, the Cold War also witnessed the creation of standing agencies devoted to the collection and analysis of intelligence.[99] In this regard, the work of the Church Committee is instructive. The Church Committee, named after the Senator who chaired it, was asked in the wake of Watergate to investigate allegations of wrongdoing committed by U.S. intelligence agencies.[100] According to the Church Committee, before World War II, the U.S. intelligence effort was *ad hoc* and sporadic.[101] After World War II, however, Congress created agencies that institutionalized the collection of intelligence.[102] "The significant new facets of the post-war system are the great size, technological capacity and bureaucratic momentum of the intelligence apparatus, and, more

93. MICHAEL J. HOGAN, A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE 264 (1998) ("The nation had established a permanent peacetime military establishment for the first time in its history and the armed forces enjoyed an unparalleled degree of autonomy.").

94. 2005 PRESIDENT'S ECON. REP. 304, *available at* http://a257.g.akamaitech.net/7/257/2422/17fed20051700/www.gpoaccess.gov/eop/2005/B79.xls. *See also* Robert Higgs, *U.S. Military Spending in the Cold War Era: Opportunity Costs, Foreign Crises, and Domestic Constraints*, CATO POLICY ANALYSIS NO. 114 11 (Nov. 30, 1988), *available at* http://www.cato.org/cgi-bin/scripts/printtech.cgi/pubs/pas/pa114.html.

95. *See* 2005 PRESIDENT'S ECON. REP., *supra* note 94, at 304; Higgs, *supra* note 94, at 11.

96. *Id.*

97. Dwight D. Eisenhower, Military-Industrial Complex Speech 3 (1961), *available at* http://www.yale.edu/lawweb/avalon/presiden/speeches/eisenhower001.htm.

98. *Id.* From 1948 to 1986, military purchases averaged about $162 billion a year, or 7.6 percent of gross national product. Higgs, *supra* note 94, at 11. Prior to World War II and the Cold War, peacetime spending on defense was generally no more than 1 percent of gross national product. *Id.*

99. 1 CHURCH FINAL REP., *supra* note 53, at 10.

100. Douglas Jehl, *Judging Intelligence: The Report; Senators Assail C.I.A.'s Judgments on Iraq's Arms as Deeply Flawed*, N.Y. TIMES, June 10, 2004, at A1.

101. *Id.*; AMY B. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 163–84 (1999).

102. Themes Karalis, *Foreign Policy and Separation of Powers Jurisprudence: Executive Orders Regarding Export Administrative Act Extension of Times of Lapse as a Political Question*, 12 CARDOZO J. INT'L & COMP. L. 109, 121 (2004).

importantly, the public's acceptance of the necessity for a substantial permanent intelligence system."[103] This development was "alien to the previous American experience."[104]

The power, influence, and importance of the intelligence agencies, in turn, enhance executive power. The intelligence community consists of fifteen different agencies[105] with an estimated budget of $44 billion.[106] While the Central Intelligence Agency (CIA) is an independent agency, its Director is appointed by the President subject to Senate confirmation.[107] The remaining fourteen agencies are all located within the executive branch.[108] The National Security Agency and Defense Intelligence Agency, for example, are part of the Department of Defense; similarly, the Federal Bureau of Investigation (FBI) is a component of the Department of Justice.[109] The Church Committee concluded that "[t]he intelligence agencies are generally responsible directly to the President and because of their capabilities and because they have often operated out of the spotlight, and often in secret, they have also contributed to the growth of executive power."[110]

Technological changes also occurred that amplified the agencies' ability to gather information. As a result, they possessed greater power to monitor the lives of citizens than in the past. According to the Church Committee, in the decades following World War II, "unparalleled" technological advances had occurred.[111] Those advances "markedly increased the agencies' intelligence collection capabilities, a circumstance which has greatly enlarged the potential for abuses of personal liberties."[112] In the decades since the Church Committee issued its report, technological advances have only increased the government's ability to watch over the lives of its citizens.[113] Those advances will likely con-

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103. 1 CHURCH FINAL REP., *supra* note 53, at 9–10.

104. *Id.* at 10.

105. COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 579 (2005) [hereinafter WMD COMM'N REP.]. Appendix C to the Report contains a useful "primer" on the intelligence community. *Id.* at 579–89. *See also* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 86–87 (2004) [hereinafter 9/11 COMM'N REP.]; POSNER, *supra* note 6, at 43–44 (describing agencies within the intelligence community).

106. Scott Shane, *Official Reveals Budget for U.S. Intelligence Agencies*, N.Y. TIMES, Nov. 8, 2005, at A24. Earlier estimates pegged the intelligence budget at $40 billion. *See* POSNER, *supra* note 6, at 129; Douglas Jehl, *Disclosing Intelligence Budgets Might Be Easiest of 9/11 Panel's Recommendations*, N.Y. TIMES, July 29, 2004, at A15.

107. 50 U.S.C.A. § 403–4a(a) (West 2005).

108. WMD COMM'N REP., *supra* note 105, at 580.

109. *Id.* For an overview of the NSA, *see* Michael V. Hayden, *Balancing Security and Liberty: The Challenge of Sharing Foreign Signals Intelligence,* 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 247 (2005).

110. 1 CHURCH FINAL REP., *supra* note 53, at 10.

111. *Id.*

112. *Id.*

113. Justice Brandeis once warned that:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire–tapping. Ways may some day be developed by which the Gov-

tinue. Indeed, the Supreme Court recently noted the "power of technology to shrink the realm of guaranteed privacy."[114]

The development of institutions devoted entirely to national security also led to the need to classify their work. This, too, is an important though subtle power that the President possesses. Under federal law, the executive branch has broad latitude to decide if a document contains classified material.[115] Once classified, it is a federal crime to mishandle or to disclose the information in an unauthorized fashion.[116] The classified status of a document renders it all but impervious to a request for disclosure under the Freedom of Information Act, which explicitly excludes classified information from its ambit.[117] Once classified, it is often a laborious process for information to be de-classified, and courts will often defer to executive claims that national security requires the non-disclosure of material.[118]

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ernment, without removing papers from secret drawers, can reproduce them in court, and . . . expose . . . the most intimate occurrences of the home.

Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting). For a discussion of different types of electronic surveillance, *see* Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1350–56 (2002) (providing examples of "new technologies . . . likely to erode privacy even further"); Ronald D. Lee & Paul M. Schwartz, *Beyond the "War" on Terrorism: Towards the New Intelligence Network*, 103 MICH. L. REV. 1446, 1465–72 (2005) (discussing intelligence collection through data mining); Peter G. Madrinan, *Devil in the Details: Constitutional Problems Inherent in the Internet Surveillance Provisions of the USA PATRIOT Act of 2001*, 64 U. PITT. L. REV. 783, 784–88 (2003) (arguing that "[s]eventy–four years after Justice Brandeis' premonition [in *Olmstead*], the ambiguities latent in the terms of PATRIOT's pen register and trap devices . . . make it possible for the government to literally 'see' those pages of information an individual has viewed on the Internet without physically inspecting the personal computer."); Ric Simmons, *Technology–Enhanced Surveillance by Law Enforcement Officials*, 60 N.Y.U. ANN. SURV. AM. L. 711, 712–13 (2005) (describing technology that results in "virtual surveillance," "hyper–intrusive searches," and "high volume collection."); Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1293 (2004) ("Electronic surveillance law has not kept pace with the staggering growth of technology.").

114. Kyllo v. United States, 533 U.S. 27, 34 (2001). In *Kyllo*, the Court held that the police use of a thermal imaging device requires a search warrant. *Kyllo*, 533 U.S. at 40. The Court took into account more sophisticated systems already in use or development and noted that "[t]he ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development." *Id.* at 36 n.3.

115. *See* Leslie Gielow Jacobs, *A Troubling Equation in Contracts for Government Funded Scientific Research: "Sensitive But Unclassified" = Secret But Unconstitutional*, 1 J. NAT'L SECURITY L. & POL'Y 113, 118–23 (2005). For a history of executive orders that established the classification system, *see* NATHAN BROOKS, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 1–5 (2004), http://www.fas.org/sgp/crs/RS21900.pdf; Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U.L. REV. 451, 452–61 (2004).

116. 18 U.S.C.A. § 793(f) (West 2000) (criminalizing gross negligence in the handling of information relating to the national defense); § 798 (felony to knowingly and willfully disclose classified information to an unauthorized person).

117. 5 U.S.C.A. § 552 (West 1996 and West Supp. 2005).

118. *See* CIA v. Sims, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence–gathering process."); Center for Nat'l Security Studies v. United States Dep't of Justice, 331 F.3d 918, 927 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004) (acknowledging deference to executive branch with respect to claims that information must be protected on national security grounds); Jacobs, *supra* note 115, at 119–20.

Thus, the classification power, while essential to protecting national security, is also susceptible to abuse.[119] In the hands of overly protective officials, it can be used to shield the executive branch from outside scrutiny. It can also be used to stifle the flow of information so essential in a democracy, for only an informed electorate is available to hold its leaders politically accountable. Nor can Congress perform its oversight function if it is unable to discern the activities of the executive branch. The executive branch itself may become less efficient as excessive secrecy and the compartmentalization of information prevent agencies from sharing information and cooperating.[120] Almost thirty years ago, the Church Committee feared that "a series of secret practices . . . have eroded the processes of open democratic government. Secrecy, even what would be agreed by reasonable men to be necessary secrecy, has, by a subtle and barely perceptible accretive process, placed constraints upon the liberties of the American people."[121]

III. TWO PARADIGM SHIFTS

The United States' war on terror has involved two paradigm shifts. The first shift is the treatment of terrorism as a military issue, not as a law enforcement problem. Following 9/11 and the invasion of Afghanistan, the Bush administration created a military detention facility at Guantanamo Bay, Cuba, and held two United States citizens without criminal charges at naval brigs in the United States. One United States citizen, Yaser Hamdi, was captured on a battlefield in Afghanistan;[122] the other citizen, Jose Padilla, was seized after stepping off a plane at Chicago's O'Hare Airport.[123] In the case of *Hamdi*, the Supreme Court has spoken, and we now have some guidance on this issue. The Court re-

119. It has been reported that, by several measures, government secrecy has reached an all–time high, "with federal departments classifying documents at the rate of 125 a minute as they create new categories of semi–secrets bearing vague labels like 'sensitive security information.'" Scott Shane, *Sharp Increase in the Number of Documents Classified by the Government*, N.Y. TIMES, July 3, 2005, at § 1, 14. The record number of documents classified in 2004 – 15.6 million – was nearly double the number in 2001. *Id.* For commentary and scholarship critical of the Bush administration's use of its power to restrict the flow of information, *see* John Podesta, *Need to Know: Governing in Secret*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM, *supra* note 4, at 226 ("what's troubling about this administration's approach to secrecy is its conversion of the legitimate desire for operational security into an excuse for sweeping policies that deny public access to information and public understanding of policymaking"); Jacobs, *supra* note 115, at 113–16 (critique of government's post–9/11 decision to prevent disclosure of information described as "sensitive but unclassified"); Wells, *supra* note 115, at 493 (concluding that "[t]he Bush administration's actions with respect to secrecy are of great concern."); Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post–9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 266 (2003) ("FOIA developments in the aftermath of September 11, 2001 have created a climate of nondisclosure, and that the 'war against terrorism' does not justify the magnitude of recent data restrictions imposed by the U.S. government.").

120. 9/11 COMM'N REP., *supra* note 105, at 417 ("Current security requirements nurture overclassification and excessive compartmentation of information among agencies.").

121. 1 CHURCH FINAL REP., *supra* note 53, at 9.

122. Thomas E. Ricks & Jerry Markon, *U.S. Nears Deal to Free Enemy Combatant Hamdi; American Citizen Who Has Been Held Since 2001 Without Being Charged*, WASH. POST, Aug. 12, 2004, at A2.

123. *Id.*

jected the broadest assertion of executive prerogative, but the case nevertheless can be viewed as an affirmation of executive power.

The second paradigm shift involves the wall between foreign intelligence and domestic intelligence that had been carefully erected in 1947. Post-9/11, that wall has been lowered through legislation that creates a Director of National Intelligence and that encourages the sharing of foreign and domestic intelligence, as well as closer cooperation between the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI). One shift blurs the line between the military and domestic law enforcement. The other blurs the line between domestic law enforcement and foreign intelligence. Both result in expanded executive power.

A. Military Response to Terrorism

The phrase "war on terrorism" is not a new one and was used by policymakers and Presidents prior to 9/11.[124] In 1984, President Reagan delivered a message to Congress in which he described a "war against terrorism."[125] The following year, in addressing the American Bar Association, he characterized terrorism as "an act of war."[126] In May 1995, President Clinton used the phrase "war against terrorism" in a radio address, and it appeared in the 1996 Democratic Party platform.[127] Similarly, United States' policy has long recognized that terrorism posed a threat to national security. In 1986, President Reagan signed National Security Decision Directive 207, "The National Program for Combatting Terrorism."[128] This document recognized that in some cases terrorism was a law enforcement issue; in others it called for a military response.[129] In 1995, President Clinton issued Presidential Decision Directive 39 that called terrorism both a matter of national security and a crime.[130] In this directive, for the first time, policymakers recognized the threat to the United States from terrorists who acquired weapons of mass destruction.[131]

Nevertheless, before 9/11, the United States largely dealt with terrorists through the criminal justice system.[132] There were, of course,

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124. Robert M. Chesney, *Careful Thinking About Counterterrorism Policy*, 1 J. NAT'L SECURITY L. & POL'Y 169, 171–77 (2005) (describing history of phrase).

125. *Id.* at 173.

126. 9/11 COMM'N REP., *supra* note 105, at 99.

127. Chesney, *supra* note 124, at 174–75.

128. STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001, 140 (2004).

129. 9/11 COMM'N REP., *supra* note 105, at 113; COLL, *supra* note 128, at 141.

130. 9/11 COMM'N REP., *supra* note 105, at 101.

131. COLL, *supra* note 128, at 318.

132. 9/11 COMM'N REP., *supra* note 105, at 73 ("Legal processes were the primary method for responding to these early manifestations of a new type of terrorism."); COLL, *supra* note 128, at 254 ("Americans were still much more likely to die from bee stings than from terrorist strikes during the early 1990s. In that respect it made more sense to treat terrorism as a law enforcement problem."); Sievert, *supra* note 12, at 312 ("[W]ith rare exception, before September 11, 2001, we had developed

some notable exceptions. After the bombing of a German nightclub in 1986 that killed and wounded several U.S. soldiers, President Reagan sent planes to bomb targets in Libya.[133] In 1993, President Clinton launched a limited strike on Baghdad after learning of an Iraqi plot to kill former President Bush.[134] In 1998, in response to the al Qaeda bombings of United States' embassies in Kenya and Tanzania, the United States launched cruise missiles against targets in the Sudan and Afghanistan and sought indictments as well.[135]

In the past, the use of force in response to an international terrorist attack was an exception, not the rule. For the most part, the United States responded to such attacks by seeking indictments against the alleged perpetrators. This occurred after the bombing of Pan Am Flight 103 over Lockerbie, Scotland, in December 1988,[136] the shooting of five CIA employees in their cars as they were stopped in traffic outside CIA headquarters in Virginia in January 1993,[137] the first World Trade Center bombing in February 1993,[138] the subsequent plot to bomb New York City landmarks in the summer of 1993,[139] the Manila air plot to place bombs aboard a dozen trans-Pacific U.S. airliners in the winter of 1995,[140] the bombing of Khobar Towers in Al-Khobar, Saudi Arabia in

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the habit of classifying all attacks, regardless of target, as criminal acts of terrorism to be dealt with by civilian courts under U.S. criminal law."); Note, *Responding to Terrorism: Crime, Punishment, and War*, *supra* note 12, at 1224 ("[T]he United States has traditionally treated terrorism as a crime.").

133. BARRY E. CARTER ET AL., INTERNATIONAL LAW 1016 (2003); George C. Wilson & David Hoffman, *U.S. Warplanes Bomb Targets in Libya as "Self-Defense" Against Terrorism*, WASH. POST, Apr. 18, 1986, at A1. In 1996, German investigators arrested five suspects in the bombings. Steven Erlanger, *4 Guilty in Fatal 1986 Berlin Disco Bombing Linked to Libya*, N.Y. TIMES, Nov. 14, 2001, at A7. Four were later convicted in Berlin. *Id.*

134. CARTER ET AL., *supra* note 133, at 997; David Von Drehle & R. Jeffrey Smith, *U.S. Strikes Iraq for Plot to Kill Bush*, WASH. POST, June 27, 1993, at A1.

135. CARTER ET AL., *supra* note 133, at 1022; Barton Gellman & Dana Priest, *U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan*, WASH. POST, Aug. 21, 1998, at A1.

136. A Scottish court sitting in the Netherlands ultimately tried two Libyan defendants. Donald G. McNeil Jr., *The Lockerbie Verdict: The Overview; Libyan Convicted by Scottish Court in '88 Pan Am Blast*, N.Y. TIMES, Feb. 1, 2001, at A1. One was convicted, and the other acquitted. *Id.*

137. Kasi v. Commonwealth, 508 S.E.2d 57, 59 (Va. 1998). Two of the shooting victims died. *Kasi*, 508 S.E.2d at 59. The gunman, later identified as Mir Aimal Kasi, fled to Pakistan, where he was arrested nearly four-and-a-half years later. *Id.* He was tried in Virginia state court, convicted, and sentenced to death. *Id.* at 59–60; *Threats and Responses: An Earlier Killing; Virginia Executes Pakistani Who Killed 2 at the C.I.A.*, N.Y. TIMES, Nov. 15, 2002, at A20.

138. 9/11 COMM'N REP., *supra* note 105, at 71–73; United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) (per curiam); United States v. Yousef, 327 F.3d 56 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003). The initial indictment in this case charged six individuals: Mohammed A. Salameh, Nidal Ayyad, Mahmoud Abouhalima, Ahmad Mohammad Ajaj, Ramzi Ahmed Yousef, and Bilal Alkaisi. *Salameh*, 152 F.3d at 108. Yousef, Abouhalima, and Yasin fled the United States immediately after the bombing. *Id.* Abouhalima was caught in Egypt and returned to the U.S. to stand trial. *Id.* The first four defendants to stand trial were convicted on a variety of charges and sentenced to 240 years imprisonment each. *Id.* Yousef was captured in Pakistan in 1995. *Id.* at n.2. Another co-conspirator, Eyad Ismoil, was indicted for his involvement in the bombing. *Yousef*, 327 F.3d at 79. Ismoil was arrested in Jordan two years after the attack. *Id.* Both were convicted at trial in the Southern District of New York. *Id.* at 79–80. Yasin remains a fugitive. *Salameh*, 152 F.3d at 108 n.2.

139. 9/11 COMM'N REP., *supra* note 105, at 71–73; United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) (per curiam).

140. 9/11 COMM'N REP., *supra* note 105, at 73. Ramzi Yousef was the mastermind of this plot. *Yousef*, 327 F.3d at 78. He, Abdul Hakim Murad, and Wali Khan Amin Shah were charged with various crimes for their conspiracy to bomb U.S. airliners and convicted at trial. *Id.* at 79–80.

June 1996 in which 19 Americans died and 372 were wounded,[141] the August 1998 embassy bombings in Kenya and Tanzania which killed 12 Americans and 212 others, mostly Kenyan, and which wounded thousands,[142] the foiled January 1, 2000 millennium bomb plot,[143] and the October 2000 attack on the U.S.S. Cole in Aden, Yemen, which killed 17 sailors and wounded at least 40.[144]

There were advantages and disadvantages to using the criminal justice system in response to terrorist attacks.[145] The advantages included an affirmation of important process values. The accused were given the full panoply of rights attendant to a criminal prosecution in federal court. This includes the appointment of counsel, a public trial, and the right to

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141. 9/11 COMM'N REP., *supra* note 105, at 60. A federal grand jury in the Eastern District of Virginia returned a 46–count indictment that charged 14 individuals for the bombing. David Johnston, *14 Indicted by U.S. in '96 Saudi Blast; Iran Link Cited*, N.Y. TIMES, June 22, 2001, at A1. No individuals have been tried for the offense in the United States, but Saudi Arabia has apparently prosecuted and punished some of them. *Saudi Militants Are Sentenced in '96 Bombing*, N.Y. TIMES, June 2, 2002, at § 1, 10.

142. 9/11 COMM'N REP., *supra* note 105, at 68–70. Although more than a dozen individuals including Usama bin Laden were charged for the bombings, only a few have stood trial to date. Benjamin Weiser, *A Nation Challenged: The Courts; 4 are Sentenced to Life in Prison in 1998 U.S. Embassy Bombings*, N.Y. TIMES, Oct. 19, 2001, at A1.

143. 9/11 COMM'N REP., *supra* note 105, at 174–80. Ahmed Ressam, who planned to bomb Los Angeles International Airport, was convicted at trial. Eli Sanders, *Judge Delays Terrorist's Sentencing, Hoping for Cooperation*, N.Y. TIMES, Apr. 28, 2005, at A20.

144. 9/11 COMM'N REP., *supra* note 105, at 190–97. An indictment was returned against two Yemeni men in May 2003. Eric Lichtblau, *Aftereffects: The Cole Bombing; U.S. Indicts 2 Men for Attack on American Ship in Yemen*, N.Y. TIMES, May 16, 2003, at A17. Subsequently, a Yemeni judge sentenced two men to death and four to long prison terms for their involvement in the bombing. Neil MacFarquhar & David Johnston, *Death Sentences in Attack on Cole*, N.Y. TIMES, Sept. 30, 2004, at A1.

145. The debate over the use of force in response to terrorism is not a new one. For examples of pre–9/11 scholarship on the subject, *see* Mark B. Baker, *Terrorism and the Inherent Right of Self–Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 48 (1987) ("Article 51 needs to be re–written, or its terms specifically defined so as to allow for the use of self–defense in response to terrorism."); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 539–41 (1999) (critique of U.S. missile attack on Afghanistan and Sudan); Timothy F. Malloy, Reporter, *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287, 288–320 (1987) (debate on 1987 use of force against Libya); Abraham D. Sofaer, *Terrorism, the Law, and the National Defense,* 126 MIL. L. REV. 89, 90 (1989) (critique of international and domestic law that impede the fight against terrorism).

Post–9/11, a renewed debate has emerged on the appropriate response to terrorism. In general, scholars tend to fall into one of two camps. They either emphasize the use of the criminal justice system or the use of force. For examples of scholars who advocate the use of domestic or international criminal law, *see* M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy–Oriented* Assessment, 43 HARV. INT'L L.J. 83, 103 (2002) (calling for "an effective international legal regime with enforcement capabilities"); Sadat, *supra* note 6, at 136 ("by characterizing the September 11th attacks as acts of war rather than as terrorism or crimes against humanity, the United States has lost what could have been an extraordinary opportunity to strengthen international legal norms and combat international terrorism."); Anne–Marie Slaughter, *Rogue Regimes and the Individualization of International Law*, 36 NEW ENG. L. REV. 815, 819 (2002) ("Over the longer term, however, the best strategy would bill itself not as a global war but as a global criminal justice campaign. From this perspective, the 'war against terrorism' is an all–out fight against a particularly frightening and deadly form of global organized crime.").

Other scholars argue that criminal law is insufficient to address the problem of terrorism and that military force is necessary. *See* Sievert, *supra* note 12, at 352 ("It is now time, in the early stages of this conflict, to reconsider the philosophy that dominated the last decade and to recognize that we are not chasing domestic criminals but are fighting a war."); Abraham D. Sofaer, *Playing Games with Terrorists*, 36 NEW ENG. L. REV. 903, 907 (2002) (critiquing use of criminal justice system to respond to terrorists and arguing that "[w]hen all else fails, force is the essential method of protection.").

present a defense, to confront their accusers and to cross-examine adverse witnesses, and to a presumption of innocence that could only be overcome by a jury finding of guilt beyond a reasonable doubt. All of those procedural and constitutional safeguards reduced the risk of error and of an arbitrary deprivation of liberty. The trials comported, in other words, with principles of basic fairness and fundamental human rights.[146] There was no question that they upheld the rule of law. This, in turn, helped preserve the moral legitimacy of the United States, encouraged cooperation from other nations, and fostered the development of international legal norms against terrorism.[147] More than that, the Department of Justice's record in major terrorism cases was remarkably successful. In case after case, the United States obtained convictions.[148]

But there were disadvantages to a criminal prosecution. The process was costly and cumbersome. Assembling the evidence to present the case in federal court and to establish guilt beyond a reasonable doubt was no small task. It involved the work of teams of FBI agents and federal prosecutors. The process was resource intensive, and this imposed opportunity costs.[149] Law enforcement resources devoted to one matter were unavailable for others. Treating the scene of a terrorist attack as a crime scene meant that potential evidence had to be carefully collected and handled.[150] In many cases, the perpetrators were not in the United States but overseas. Trying to locate them could take years of painstaking effort.[151] Then they had to be apprehended and extradited to the United States. Some perpetrators, including Usama bin Laden, hid in

146. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 9 & 10, 999 U.N.T.S. 171; Universal Declaration of Human Rights, Dec. 10, 1948, arts. 9 – 11, U.N. G.A. Res. 217.

147. *See generally* COLE, *supra* note 4, at 9–10 (noting critical importance of legitimacy at the international level in order to gain cooperation from other nations); HEYMANN, *supra* note 6, at 95 (arguing that use of military commissions "deprives the United States of its historic claim of moral leadership among the world's nations in matters of fairness to individuals charged with a crime," "makes even more difficult future efforts at military coalition–building and will deny us the benefits of legal cooperation with our closest allies in the forms of extradition and mutual legal assistance," and "will leave lasting doubts about the honesty of convictions in the wake of secret trials with secret evidence"); Bassiouni, *supra* note 145, at 103 ("If we want to put an end to the forms of violence that we call terrorism, then we need an effective international legal regime with enforcement capabilities that can, as Aristotle once said, apply the same law in Athens as in Rome."); Lobel, *supra* note 145, at 555 (asserting that use of military force in response to terrorism is "suspect" and that "[m]any experts note that these attacks do not deter terrorism, but result in an escalation of terrorist violence and a spiraling cycle of retaliation."); Kenneth Roth, *The Law of War in the War on Terror,* 83 FOREIGN AFF. 1, 4 (2004) ("Put simply, using war rules when law–enforcement rules could reasonably be followed is dangerous."); Sadat, *supra* note 6, at 148 (contending that the "attacks of September 11th . . . presented the world with yet another opportunity to further strengthen the enforcement of international criminal law norms, and fill the gap in enforcement that has plagued efforts to control international terrorists.").

148. *See supra* notes 137–44. Each of the defendants who stood trial in the U.S. was convicted and sentenced to extremely long periods of incarceration.

149. *Cf.* Harris, *supra* note 13, at 560 (discussing opportunity costs when intelligence agencies respond to discovery requests in criminal cases).

150. Sievert, *supra* note 12, at 327–30.

151. *See supra* notes 137, 138.

uncooperative states that refused to extradite.[152] Often times, only the lower-level operatives were caught, not the masterminds.[153]

International terrorism cases also posed the risk that classified information, sources for classified information, and techniques for obtaining classified information would have to be disclosed to the defense.[154] A defendant has the ability to seek access to other high-level terrorists who have been captured and who allegedly possess exculpatory information.[155] Such access, of course, could disrupt the government's on-going efforts to question the captured terrorists. The trials themselves, given the factual complexity of the cases and the number of charges and defendants, often lasted months.[156] Justice was neither swift nor sure, two of

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152. 9/11 COMM'N REP., *supra* note 105, at 121–26; COLL, *supra* note 128 *passim*; Sofaer, *supra* note 145, at 906.

153. Sofaer, *supra* note 145, at 906; Craig Whitlock, *Terror Probes Find 'the Hands, but Not the Brains': Attackers Often Caught as Masterminds Flee*, WASH. POST, July 11, 2005, at A10.

154. *See generally* Stewart A. Baker, *Should Spies Be Cops?*, 97 FOREIGN POL'Y 36, 44–48 (1994) (describing security issues arising from disclosure); Harris, *supra* note 13, at 559 ("The ever–closer relationship between intelligence and law enforcement poses problems in protecting sources and methods of intelligence information. Specifically, close cooperation between intelligence and law enforcement agencies can expose intelligence information to Brady requests in criminal trials."). The Classified Information Protection Act (CIPA) can help prevent the disclosure of classified information if the government devises a substitute for the information that "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." 18 U.S.C.A. app. 3 § 6(c)(1) (West 2000). "[B]ut the substitute must be just as good as the original for the defendant's purposes. If it is not, the government must reveal its secrets or drop the prosecution." Baker, *supra* at 46. For commentary on CIPA, *see* A. John Radsan, *The Moussaoui Case: The Mess from Minnesota*, 31 WM. MITCHELL L. REV. 1417, 1433–34 (2005) (discussing limits of CIPA); Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1964–66 (2005) (providing overview of CIPA); Rachel S. Holzer, Note, *National Security Versus Defense Counsel's "Need to Know": An Objective Standard for Resolving the Tension*, 73 FORDHAM L. REV. 1941, 1966 (2005) (arguing that "although CIPA was not originally intended to favor prosecutors or defendants in any way, the government has gained substantial control over proceedings involving classified information since its enactment.").

155. As an example, *see* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (2005). Moussaoui sought access to three al Qaeda members captured by the U.S. who possessed evidence material to his defense. *Moussaoui*, 382 F.3d at 456. The government refused to produce the witnesses, arguing that doing so would interfere its efforts to combat terrorism. *Id.* at 470. The district court imposed sanctions on the government that the Fourth Circuit later vacated. *Id.* at 482. For a critique of *Moussaoui*, *see* Roberto Iraolo, *Compulsory Process, Separation of Powers, and the Prosecution of Zacarias Moussaoui*, 35 U. MEM. L. REV. 15 (2004); Radsan, *supra* note 154, at 1447–48; Keith S. Alexander, Note, *In the Wake of September 11th: The Use of Military Tribunals to Try Terrorists*, 78 NOTRE DAME L. REV. 885, 913–14 (2003).

156. The trial in the first World Trade Center bombing case lasted six months and involved over 1,000 exhibits and the testimony of more than 200 witnesses. *Salameh*, 152 F.3d at 108. The trial in the "landmarks plot" case lasted almost ten months. *Rahman*, 189 F.3d at 111. The government had to try the World Trade Center case a second time after Ramzi Yousef was arrested. This trial lasted almost four months. *Yousef*, 327 F.3d at 80. Yousef's trial for the Manila airline bomb plot lasted more than three months. *Id.* For the trial in the embassy bombings case the government flew in more than 100 witnesses from six countries. Benjamin Weiser, *Going on Trial: U.S. Accusations of a Global Plot; in Embassy Bombings Case, the Specter of a Mastermind*, N.Y. TIMES, Feb. 4, 2001, at § 1, 27. The trial lasted five months. United States v. Bin Laden, No. S7R 98CR1023KTD, 2005 WL 287404, at *1 (S.D.N.Y. Feb. 7, 2005).

Of course, complex criminal litigation is often time and resource intensive, whether the charges involve securities fraud, organized crime, or other serious charges. The trial of John Gotti, the "Teflon Don," for example, took ten weeks. Arnold H. Lubasch, *Gotti Guilty of Murder and Racketeering*, N.Y. TIMES, Apr. 3, 1992, at A1. The more recent trial of Bernard Ebbers, the former chief of WorldCom, on fraud charges, lasted eight weeks. Ken Belson, *A Guilty Verdict: The Overview; Ex-Chief of WorldCom Is Found Guilty in $11 Billion Fraud*, N.Y. TIMES, Mar. 16, 2005, at A1. The first trial of L. Dennis Kozlowski, the former chief executive of Tyco International, lasted around six months and ended in a mistrial. Andrew Ross Sorkin, *Ex-Chief and Aide Guilty of Loot-*

the hallmarks for criminal punishment to have the greatest deterrent effect.[157]

More fundamentally, criminal prosecution is generally reactive, not proactive, in nature. The prosecutor can act only after a crime has been committed. Even then, once a crime has been committed, under Department of Justice guidelines, the prosecutor should only seek an indictment if there is sufficient admissible evidence for a jury to find the accused guilty beyond a reasonable doubt.[158] If an indictment has been returned, the prosecutor must focus on the task at hand—on preparing the case for trial—not on trying to devise counter-terrorism strategies. Of necessity, a prosecutor must proceed on a case-by-case, defendant-by-defendant basis. While law enforcement can disrupt organized crime, it does so with great difficulty even when the organizations are domestic in nature, let alone when the organization involves foreign nationals located outside the United States.[159] The 9/11 Commission concluded:

> The law enforcement process is concerned with proving the guilt of persons apprehended and charged . . . . The process was meant, by its nature, to mark for the public the events as finished – case solved, justice done. It was not designed to ask if the events might be harbingers of worse to come. Nor did it allow for aggregating and analyzing facts to see if they could provide clues to terrorist tactics more generally – methods of entry and finance, and mode of operation inside the United States.[160]

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ing Millions at Tyco, N.Y. TIMES, June 18, 2005, at A1. His retrial was almost as long. *Id.* Richard Scrushy, the former chief executive of HealthSouth, was acquitted after a six-month trial. Simon Romero & Kyle Whitmire, *Corporate Conduct: The Overview; Former Chief of HealthSouth Acquitted in $2.7 Billion Fraud*, N.Y. TIMES, June 29, 2005, at A1.

157. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 n.12 (3d ed. 2001) ("In general, . . . an increase in the *likelihood* of punishment will deter more effectively than an increase in the *severity* of punishment."); WAYNE R. LAFAVE, CRIMINAL LAW 28–29 (4th ed. 2003) ("It does seem fair to assume, however, that the deterrent efficacy of punishment varies considerably, depending upon a number of factors . . . . The magnitude of the threatened punishment is clearly a factor, but perhaps not as important a consideration as the probability of discovery and punishment.").

158. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9–27.220 (Aug. 2002) ("both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.").

159. Despite more than half a century of law enforcement effort, organized crime is here to stay. *See* Brian Goodwin, Note, *Civil Versus Criminal Rico and the "Eradication" of La Cosa Nostra*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279, 326–33 (2002) (discussing difficulty of eradicating La Cosa Nostra). Indeed, new groups have emerged in the United States, including groups with ties to Russia, Asia, Mexico, and Latin and South America. Dorean Marguerite Koenig, *The Criminal Justice System Facing the Challenge of Organized Crime*, 44 WAYNE L. REV. 1351, 1354 (1998). *See also* Joseph E. Ritch, Comment, *They'll Make You an Offer You Can't Refuse: A Comparative Analysis of International Organized Crime*, 9 TULSA J. COMP. & INT'L L. 569, 571 (2002).

160. 9/11 COMM'N REP., *supra* note 105, at 73.

Indeed, the 9/11 Commission theorized that the government's very success in terrorism prosecutions "contributed to widespread underestimation of the threat."[161]

One can also question on policy grounds whether the criminal justice system provides an adequate response to terrorism on the magnitude of that committed by al Qaeda against the United States. In February 1998, Usama bin Laden, declared war against the United States and issued a *fatwa* in which he urged all Muslims to murder U.S. citizens wherever they could be found.[162] "We do not have to differentiate between military or civilian," he declared.[163] "As far as we are concerned, they are all targets."[164] His followers are dedicated *jihadists*, who are willing to sacrifice their lives in furtherance of his cause.[165] The threat of criminal prosecution may hold little deterrent effect for such an individual. Unlike other criminal organizations, al Qaeda also has a political agenda.[166] In pursuit of that agenda, al Qaeda has deliberately targeted civilians and embassies. It has also tried to acquire or make weapons of mass destruction for at least the past ten years.[167] From that perspective, a strict reliance on the criminal justice system appears to be inadequate—incongruous even—given the demonstrated severity of the threat.[168]

Perhaps for all those reasons and more, post-9/11 the Bush administration shifted from the criminal justice model to a military response to terrorism.[169] Al Qaeda was at war with the United States,[170] and the

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161. *Id. See also* Sofaer, *supra* note 145, at 904 ("[T]he anti–terrorism policy of the Bush and Clinton administrations, based principally on criminal prosecution, created the misleading impression that the U.S. government was providing the American people with meaningful protection.").

162. 9/11 COMM'N REP., *supra* note 105, at 47.

163. *Id.*

164. *Id.*

165. Milt Bearden, *The Nation: Twists of Terror; You Cut the Head, But the Body Still Moves*, N.Y. TIMES, Mar. 21, 2004, § 4, at 1.

166. 9/11 COMM'N REP., *supra* note 105 at 47.

167. WMD COMM'N REP., *supra* note 105, at 267.

168. 9/11 COMM'N REP., *supra* note 105, at 363–64 (finding that long–term success against terrorism "demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense"); William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 93 (2001) ("While arrest, prosecution, and incarceration serve well to help prevent most crimes . . . , the risk of . . . terrorist attacks forces us to consider other means of prevention. Moreover, traditional Fourth Amendment requirements may thwart many investigations of terrorism, which depend on stealth to prevent terrorist plans before they are carried out.").

169. To a remarkable extent, the issue of how to respond to terrorism has become politicized in the United States. A recent controversy arose when Karl Rove, a senior White House adviser, stated, "Conservatives saw the savagery of 9/11 in the attacks and prepared for war; liberals saw the savagery of the 9/11 attacks and wanted to prepare indictments and offer therapy and understanding for our attackers." Patrick D. Healy, *Rove Criticizes Liberals on 9/11*, N.Y. TIMES, June 23, 2005, at A13. *See also* Ackerman, *Emergency Constitution*, *supra* note 3, at 1032 ("The 'war on terrorism' has paid enormous political dividends for President Bush, but that does not make it a compelling legal concept."); Stephen J. Schulhofer, *No Checks, No Balances: Discarding Bedrock Constitutional Principles*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERORISM 75 (Richard C. Leone & Greg Anrig, Jr., eds. 2003) ("Predictably, [in the wake of 9/11] there has been overreaction and political grandstanding.").

170. For scholarship that debates this issue, *see supra* note 6.

United States was part of the battleground.[171] "[T]ransnational terrorists have blurred the traditional distinction between national security and international law enforcement."[172] In a speech to the American Bar Association Standing Committee on Law and National Security, then-White House Counsel Alberto Gonzales argued:

> [T]he brutal attacks of September 11th – which killed nearly three thousand people from more than ninety countries – were not only crimes but acts of war. Since at least that day, the United States has been at war with al Qaeda. While al Qaeda may not be the traditional armed force of a single nation state, al Qaeda is clearly a foreign enemy force. It has central direction, training, and financing and has members in dozens of countries around the world who are committed to taking up arms against us. It has political goals in mind. Al Qaeda has attacked not only one of our largest cities, killing thousands of civilians, but also has attacked our embassies, our warships, and our government buildings. While different in some respects from traditional conflicts with nation states, our conflict with al Qaeda is clearly a war.[173]

Calling the conflict a war had important consequences. One was that "all instruments of national power" would be used, including military force.[174] A second involved the treatment of captured terrorists. "To suggest that an al Qaeda member must be tried in a civilian court because he happens to be an American citizen—or to suggest that hundreds of individuals captured in battle in Afghanistan should be extradited, given lawyers, and tried in civilian courts—is to apply the wrong legal paradigm. The law applicable in this context is the law of war—those conventions and customs that govern armed conflict."[175]

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171. DEPARTMENT OF DEFENSE, STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT 1 (2005) [hereinafter STRATEGY FOR HOMELAND DEFENSE], *available at* http://www.defenselink.mil/news/Jun2005/d20050630homeland.pdf ("Our adversaries consider US territory an integral part of a global theater of combat."); Appellant's Opening Brief at 17, Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (No. 05–6396) ("In the war against terrorists of global reach, as the Nation learned all too well on Sept. 11, 2001, the territory of the United States is part of the battlefield.").

172. STRATEGY FOR HOMELAND DEFENSE, *supra* note 171, at 23.

173. Alberto R. Gonzales, Remarks at the Meeting of the American Bar Association Standing Committee on Law and National Security 5 (Feb. 24, 2004), http://www.fas.org/irp/news/2004/02/gonzales.pdf. *See also* Chesney, *supra* note 12, at 22. Similarly, Viet Dinh, a former Assistant Attorney General in the Bush Justice Department, has argued that:

> An enemy activity may be both a violation of the laws of war and of domestic law. The president may choose to deal with it as law enforcement officer or as commander in chief. The decision is his, and the commander in chief has a significant function even in the United States, because Al–Qaeda has made the U.S. a target.

Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom*, *in* THE WAR ON OUR FREEDOMS, *supra* note 4, at 65.

174. Gonzales, *supra* note 173, at 5. The administration's national security strategy states that, given the danger of weapons of mass destruction, the U.S. will, "if necessary, act preemptively" with military force against both rogue states and terrorists, "even if uncertainty remains as to the time and place of the enemy's attack." GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), http://www.whitehouse.gov/nsc/nss.pdf.

175. Gonzales, *supra* note 173, at 5–6.

Thus, the administration asserted the prerogative to detain both citizens and non-citizens alike as enemy combatants, regardless of where they were captured. In November 2001, President Bush issued an order that directed the Secretary of Defense to establish military commissions to try non-citizens believed to be terrorists or harborers of terrorists.[176] No similar order was issued with respect to citizens. Nevertheless, even citizens captured in the United States as suspected terrorists could be designated an enemy combatant.[177] Based on the "totality of circumstances," agencies in the executive branch would assess the potential for criminal prosecution, material witness detention, or enemy combatant detention.[178] This assessment would take into account a number of factors, including whether an individual posed a potential threat or had value as an intelligence source, whether prosecution would compromise an intelligence source, and whether the individual met the legal standard for enemy combatant status.[179]

Whether or not a result of its "totality of circumstances" test, the administration has not been consistent in its treatment of suspected terrorists or captured Taliban. Many have faced criminal charges in federal court, rather than military detention. John Walker Lindh, a citizen captured in Afghanistan while fighting with the Taliban,[180] Zacariah Moussaoui, a conspirator in the 9/11 plot,[181] and Richard Reid, the "shoe-icide bomber," have all been prosecuted federally.[182] Other alleged terrorists have as well.[183] Yet hundreds of non-citizens at Guantanamo Bay and two citizens—Yaser Hamdi and Jose Padilla—were not. Hamdi was

176. Detention, Treatment, and Trial of Certain Non–Citizens in the War Against Terrorism §§ 2, 4, 66 Fed. Reg. 57,833 (Nov. 13, 2001). For an analysis of the constitutionality of military commissions, *compare* Katyal & Tribe, *supra* note 28, at 1260 (arguing that "the President's Order establishing military tribunals for the trial of terrorists is flatly unconstitutional."), *with* Bradley & Goldsmith, *supra* note 6, at 2055 (contending that "Congress has authorized the use of military commissions to try individuals covered by the AUMF [Authorization for Use of Military Force] . . . but . . . such commissions cannot be used to try individuals who fall outside the scope of the AUMF unless the President has independent constitutional authority to wage war against such individuals."). A district court invalidated the commissions, but was then reversed on appeal. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F.3d 33, 42–43 (D.C. Cir. 2005), *cert. granted* 2005 WL 2922488 (Nov. 7, 2005).

177. Gonzales, *supra* note 173, at 13.

178. *Id.*

179. *Id.* at 13–14. *See also* Appellant's Opening Brief, *supra* note 171, at 12 n.2 (further describing the process by which a citizen is designated an enemy combatant as "the culmination of an extensive deliberative process within the Executive Branch involving several layers of review.").

180. Neil A. Lewis, *Traces of Terror: The Captive; Admitting He Fought in Taliban, American Agrees to 20–Year Term*, N.Y. TIMES, July 16, 2002, at A1.

181. Neil A. Lewis, *Moussaoui Tells Court He's Guilty of a Terror Plot,* N.Y. TIMES, Apr. 23, 2005, at A1.

182. Pam Belluck, *Threats and Responses: The Bomb Plot; Unrepentant Shoe Bomber Is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. TIMES, Jan. 31, 2003, at A13.

183. Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A1 (reporting that after 9/11 only 39 individuals have been convicted of crimes related to terrorism or national security).

captured on a battlefield in Afghanistan;[184] Padilla was detained as he stepped off a plane at Chicago's O'Hare Airport.[185]

Hamdi and Padilla were held in military facilities, at first incommunicado, without legal counsel.[186] No charges were filed against them, and they faced the prospect of indefinite detention.[187] The government opposed the appointment of counsel.[188] When counsel was allowed to represent them and challenged their detention in separate federal district court proceedings, the government asserted that the President, acting as Commander-in-Chief, had the unreviewable constitutional power to detain both individuals.[189] There was, in other words, no place for federal court review of this executive action—the indefinite detention of citizens—during a time of war. It was, perhaps, the boldest assertion of executive authority since Truman's seizure of the steel mills more than half a century earlier.[190]

In *Hamdi v. Rumsfeld*,[191] the Court addressed two questions: (1) whether the Executive has the authority to detain citizens who are enemy combatants;[192] and (2) if so, what process is due a citizen who disputes his enemy-combatant status.[193] On the first question, five Justices—Thomas, plus the plurality of O'Connor, Rehnquist, Kennedy, and Breyer—agreed that Hamdi could be detained as an enemy combatant.[194] Although the government argued that the executive branch possesses inherent authority to detain enemy combatants under Article II of the Constitution, neither the plurality nor Justice Thomas reached the question because they found that Congress had authorized Hamdi's detention through the Authorization for Use of Military Force Resolution (AUMF).[195] This resolution, passed one week after September 11, 2001, enabled the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international

184. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).
185. Neil A. Lewis, *Court Gives Bush Right to Detain U.S. Combatant*, N.Y. TIMES, Sept. 10, 2005, at A1.
186. Padilla v. Bush, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002), *motion to reconsider granted*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *motion to certify appeal granted*, 256 F. Supp. 2d (S.D.N.Y. 2003), *aff'd in part, rev'd in part*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004); Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated by* 124 S. Ct. 2633 (2004).
187. *Padilla*, 233 F. Supp. 2d at 569; *Hamdi*, 243 F. Supp. 2d at 528.
188. *Padilla*, 233 F. Supp. 2d at 569; *Hamdi*, 243 F. Supp. 2d at 528.
189. Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002).
190. *Padilla*, 352 F.3d at 711.
191. 542 U.S. 507 (2004).
192. *Hamdi*, 542 U.S. at 516. For a clear and concise analysis of *Hamdi*, *see* Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT'L SECURITY L. & POL'Y 73, 76–78 (2005).
193. *Hamdi*, 542 U.S. at 542.
194. *Id.* at 509.
195. *Id.* at 510.

terrorism against the United States."[196] The plurality reasoned that "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."[197]

Four Justices, however, disagreed. For Justices Souter and Ginsburg, the Non-Detention Act, 18 U.S.C. § 4001(a), precluded Hamdi's detention.[198] Section 4001(a) bars detention of a citizen "except pursuant to an Act of Congress."[199] Justices Souter and Ginsburg read the law to require a "clear statement of authorization to detain," and the AUMF, in their view, failed to provide one.[200] Justices Scalia and Stevens, on the other hand, rested their analysis on the Suspension Clause of the Constitution, which allows Congress to suspend the writ of habeas corpus.[201] In their view, the Constitution required the government to charge Hamdi with a crime or to release him.[202] He could only be detained without charges if the writ had been suspended. The AUMF was not such a suspension.[203] Therefore, unless the Executive promptly filed charges or Congress suspended the writ, Hamdi was entitled to be released.[204]

Having decided that the Executive had the authority to detain Hamdi, the Court then addressed the second issue of how much process was due Hamdi in challenging his enemy-combatant status.[205] The government argued for extremely limited habeas review based on "'[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict.'"[206] The courts would be restricted to investigating only whether legal authorization existed for the broader detention scheme.[207] At most, courts should review an enemy-combatant designation under a

196. *Id.* at 510 (quoting 115 Stat. 224).

197. *Id.* at 519. Thus, under Justice Jackson's analytical framework, the President's authority was coupled with that of Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1852) (Jackson, J., concurring). Under such circumstances, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635. For a lively debate on the AUMF and the scope of presidential power, *see* Bradley & Goldsmith, *supra* note 6 at 2050–54; Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2664–65 (2005); Mark Tushnet, *supra* note 5, at 2673–77; Ryan Goodman & Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2653–54 (2005); Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2683–84 (2005).

198. *Hamdi*, 542 U.S. at 541 (Souter J., concurring in part, dissenting in part, and concurring in the judgment)

199. 18 U.S.C.A. § 4001 (West 2005).

200. *Hamdi*, 542 U.S. at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

201. *Id.* at 554 (Scalia, J., dissenting).

202. *Id.* at 554.

203. *Id.* at 554.

204. *Id.* at 555.

205. *Id.* at 524.

206. *Id.* at 527 (quoting Brief for Respondents at 26, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03–6696), 2004 WL 724020).

207. *Id.*

highly deferential "some evidence" standard in which the court would assume the accuracy of the government's articulated basis for the detention and assess only whether that basis was a legitimate one.[208]

The Court rejected the government's position based on a balancing of interests under *Mathews v. Eldridge*.[209] A citizen-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.[210] The "some evidence" standard was inadequate to satisfy the requirements of due process.[211] To alleviate the burden upon the government in a time of war, however, the Court allowed the use of hearsay evidence and a rebuttable presumption in favor of the government's evidence,[212] and acknowledged that a properly constituted military tribunal might suffice.[213] Separation of powers principles did not mandate "a heavily circumscribed role" for the courts.[214] "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[215]

In practical terms, with the exception of Justice Thomas, eight of the nine Justices rejected the broadest claim of executive power—i.e., that the President has the all but unreviewable discretion to detain a citizen indefinitely as an enemy combatant.[216] Four Justices (Souter, Ginsburg, Scalia, and Stevens) said that the President lacks such authority.[217] Another four Justices (the plurality) concluded that the President could detain an individual like Hamdi, but that he was entitled to a certain amount of process—more than the government had been willing to provide—to challenge his enemy combatant designation.[218] Absent a suspension of the writ of habeas corpus, the courts do have a say in reviewing the detention of citizens.[219]

But *Hamdi* is hardly a sweeping vindication of civil rights, and there are important limitations on its holding.[220] First, on its facts, it ap-

208. *Id.*
209. *Id.* at 530 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).
210. *Id.* at 533.
211. *Id.* at 537.
212. *Id.* at 533–34
213. *Id.* at 537.
214. *Id.* at 535–36.
215. *Id.* at 536.
216. *Id.* at 521 (majority opinon), 541 (Souter J., concurring in part, dissenting in part, and concurring in the judgment), 554 (Scalia, J., dissenting).
217. *Id.* at 540 (Souter J., concurring in part, dissenting in part, and concurring in the judgment), 554 (Scalia, J., dissenting).
218. *Id.* at 519–20, 526 (majority opinion).
219. *Id.* at 526.
220. For critical commentary of *Hamdi*, *see* Chemerinsky, *supra* note 192, at 73, 80 (noting that in *Hamdi* "the Supreme Court emphatically upheld the rule of law and the right of those being detained as part of the war on terrorism to have access to the courts" but that the government also scored a "significant victor[y]"); Frederic Block, *Civil Liberties During National Emergencies: the Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 523 (2005) ("While preserving the basic concept of judicial review . . . the plurality accorded far–reaching deference . . . to the Execu-

plies only to citizens detained within the territorial jurisdiction of a United States court.[221] In his dissent, Justice Scalia noted that the constitutional requirements may differ for a citizen who is captured abroad and held outside the United States,[222] and *Hamdi* did not address that issue. Moreover, at present, it is unclear if non-citizens detained as enemy combatants are entitled to the same due process rights as citizens, even if held within the territorial jurisdiction of a federal court. In *Rasul v. Bush*,[223] decided the same day as *Hamdi*, the Supreme Court held that non-citizen detainees at Guantanamo Bay, Cuba, are entitled to file habeas claims in federal court.[224] The Court stressed the special status of Guantanamo Bay; it was "territory over which the United States exercises exclusive jurisdiction and control."[225] The question now being litigated in federal court in the District of Columbia is whether non-citizen detainees at Guantanamo Bay are protected by the Due Process Clause of the Fifth Amendment.[226] Two district courts in the District of Columbia have reached opposite conclusions.[227]

Beyond its limitations, however, in important respects *Hamdi* represents a victory for the executive branch. The Supreme Court accepted the President's authority to detain a citizen combatant captured on a foreign battlefield.[228] The detention could be indefinite without a criminal trial, subject only to the principle that detention last no longer than active hostilities.[229] A citizen-detainee who wished to challenge his designation

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tive Branch."); Brooks, *supra* note 6, at 701 (noting that the Supreme Court has left open the possibility that "Hamdi might be entitled only to a sort of 'due process lite.'"); David D. Coron & Jenny S. Martinez, eds., *International Decision: Availability of U.S. Courts to Review Decision to Hold U.S. Citizens as Enemy Combatants – Executive Power in War on Terror*, 98 AM. J. INT'L L. 782, 785 (2004) (calling *Hamdi* "a sharp and much needed rebuke to the U.S. government's position" but critical of the Court's "ambiguous mingling of domestic and international law"); Daniel Moeckli, *The U.S. Supreme Court's 'Enemy Combatant' Decisions: A 'Major Victory for the Rule of Law'?*, 10 J. CONFLICT & SECURITY L., Spring, 2005, at 75, 76 ("The suggestion that the court has inflicted a decisive defeat on the government that will forever change the legal parameters of the 'war on terror' is, however, misleading."); John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579, 585 (2005) ("No Justice saw *Hamdi* as raising an issue of international law that the Court needed to resolve."); Jared Perkins, Note and Comment, *Habeas Corpus in the War Against Terrorism: Hamdi v. Rumsfeld and Citizen Enemy Combatants*, 19 BYU J. PUB. L. 437, 456–57 (2005) (critiquing *Hamdi* for not going far enough to ensure separation of powers).

221. *Hamdi*, 542 U.S. at 577 (Scalia, J., dissenting).

222. *Id.*

223. 542 U.S. 466 (2004).

224. *Rasul*, 542 U.S. at 481.

225. *Id.* at 476.

226. *See* In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 452 (D.D.C. 2005), *appeal docketed*, No. 05–8003 (D.C. Cir. Mar. 10, 2005); Khalid v. Bush, 355 F. Supp. 2d 311, 320 (D.D.C. 2005), *appeal docketed sub nom.* Boumediene v. Bush, No. 05–5062 (D.C. Cir. Mar. 10, 2005).

227. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 281; *Khalid*, 355 F. Supp. 2d at 323. Both cases are on appeal to the D.C. Circuit.

228. *Hamdi*, 542 U.S. at 518.

229. *Id.* at 520.

as an enemy combatant was given basic, but limited, process, and there was fairly deferential judicial review of that designation.[230]

Other cases are being litigated that may provide additional guidance on the separation of powers issues raised by the government's detention of enemy combatants.[231] In particular, the case of Jose Padilla raises issues similar to those of *Hamdi*, with the exception that Padilla, unlike Hamdi, was not captured on a distant battlefield, but on U.S. soil as he stepped off an airplane.[232] Much like *Hamdi*, the government has made broad claims of executive power to detain even citizens as enemy combatants.[233] And much like *Hamdi*, the courts have struggled to resolve the issues. The district court denied Padilla's habeas petition and accepted the government's claim that the President has the authority to detain citizens captured on U.S. soil as enemy combatants in a time of war;[234] the Second Circuit reversed.[235] The Supreme Court reversed the Second Circuit on jurisdictional grounds, holding that under the habeas statute the case was improperly filed against the Secretary of Defense in the Southern District of New York.[236] Padilla's claim was dismissed without prejudice.[237]

Padilla then filed his habeas petition in the District of South Carolina, where a district court granted the petition.[238] First, the court held that the AUMF did not authorize Padilla's detention and that detention was contrary to the requirements of the Non-Detention Act, which "forbids *any* kind of detention of an United States citizen, except that which is specifically allowed by Congress."[239] The critical distinction between this case and *Hamdi* was that Padilla was not captured on a distant battlefield, but in the United States.[240] No language in the AUMF explicitly or implicitly gave the President the authority to hold Padilla as an enemy combatant or that overcame the terms of the Non-Detention Act.[241]

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230. *See* David B. Rivkin & Lee A. Casey, *Bush's Good Day in Court*, WASH. POST, Aug. 4, 2004, at A19. (arguing that *Hamdi* was a victory for the government); Chemerinksy, *supra* note 192, at 80 (calling *Hamdi* "significant" victory for the government).

231. *Al–Marri v. Hanft* raises the issue of whether a non–citizen may be detained as an enemy combatant, when he is captured on U.S. soil. Al–Marri v. Hanft, 378 F. Supp. 2d 673 (D.S.C. 2005). Al–Marri was initially arrested in Peoria, Illinois, and charged with various federal crimes. *Al–Marri*, 378 F. Supp. 2d at 674. A month before his scheduled trial date, the government designated him an enemy combatant and transferred him to military custody. *Id.* A district court recently upheld Al–Marri's detention as an enemy combatant. *Id.* at 675.

232. Padilla v. Rumsfeld, 352 F.3d 695, 699 (2d Cir. 2003).

233. *Padilla*, 352 F.3d at 711.

234. Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

235. *Padilla*, 352 F.3d at 695.

236. Padilla v. Rumsfeld, 542 U.S. 426 (2004).

237. *Id.* at 451.

238. Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005).

239. *Padilla*, 389 F. Supp. 2d at 688-89.

240. *Id.* at 688.

241. *Id.*

Second, the court rejected the assertion that the President had the inherent authority to detain Padilla as an enemy combatant.[242] Citing *Youngstown*, the court held that the President had taken steps inconsistent with the will of Congress.[243] Thus, the President's authority was at its lowest ebb. "'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.'"[244] To accept the President's claim of inherent authority "would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties."[245]

A theme throughout the district court's opinion was its concern that the executive have the power to order the indefinite and unreviewable detention by the military of a citizen arrested on U.S. soil.[246] In the absence of, and indeed contrary to, congressional authorization, the President was handling through military means a situation that could be handled through the courts. "Simply stated, this is a law enforcement matter, not a military matter."[247] Criminal laws also allowed for the prosecution and punishment of terrorists. Unlike the President's claim of inherent authority, however, the criminal process allowed for accountability and helped prevent arbitrary government action.[248]

On appeal, however, the Fourth Circuit reversed the district court.[249] The Fourth Circuit held that just as the AUMF authorized Hamdi's detention, it authorized Padilla's detention as well. There was "no difference in principle between Hamdi and Padilla."[250] The locus of capture was irrelevant, as was the availability of criminal prosecution.[251] According to the Fourth Circuit, the district court had been insufficiently deferential to the President's determination that detention was necessary and appropriate in the interest of national security.[252]

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242. *Id.* at 689.
243. *Id.*
244. *Id.* at 690 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 691.
249. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).
250. *Padilla*, 423 F.3d at 391.
251. *Id.* at 393-95.
252. *Id.* at 395. The United States recently indicted Padilla on criminal charges and moved to transfer him to civilian custody. Neil A. Lewis, *Terror Trial Hits Obstacles, Unexpectedly*, N.Y. TIMES, Dec. 1, 2005, A30. The Fourth Circuit has requested briefing on whether it should vacate its opinion in the case. *Id.* If the Fourth Circuit opinion stands, absent a change of views, it is likely that the Supreme Court will grant certiorari and reverse the Fourth Circuit. In *Padilla*, 542 U.S. at 465, Justice Stevens, joined by Justices Breyer, Souter, and Ginsburg, dissented from the dismissal of the habeas petition on jurisdictional grounds. On the merits, the dissent argued "that the Non-Detention Act . . . prohibits – and the Authorization for Use of Military Force Joint Resolution . . . does not authorize – the protracted, incommunicado detention of American citizens arrested in the United States." *Id.* at 464 n.8. If those Justices hold fast, the fifth vote would come from Justice Scalia based on his view that the Executive cannot detain a citizen as an enemy combatant unless the writ of habeas corpus has been suspended. *Hamdi*, 542 U.S. at 553. The swing vote may be Justice

Thus, some markers have begun to emerge with respect to the executive's power to detain citizens as enemy combatants. The Court has rejected the broadest assertion of unreviewable executive prerogative to detain enemy combatants.[253] It is clear that the courts can review a detention as long as the detainee is being held in an area subject to the jurisdiction of a federal court.[254] It is also clear that the executive must produce evidence, however modest, to establish the basis for the enemy combatant designation.[255] In analyzing claims of executive authority, courts will explicitly or implicitly rely upon Justice Jackson's analytical framework to determine if the President is acting with congressional authorization, in the absence of congressional authorization, or contrary to congressional authorization.[256] Perhaps yet another theme to emerge from the litigation is that the further events of September 11, 2001 recede without an additional major terrorist attack on the United States, the easier it may be for courts to reject far reaching claims of executive authority without apparent fear of compromising national security.[257]

Yet many difficult questions remain, some of which are currently being litigated in federal court, often times with disparate results. Non-citizens held in a territory subject to the jurisdiction of federal court can seek habeas review of their detention. But, do they have cognizable constitutional rights? As for citizens, what is the scope of their rights if they are captured and detained overseas? If an individual is acquitted in federal court on terrorism-related charges, can the President simply move to detain the individual militarily as an enemy combatant in spite of the acquittal? In the absence of the AUMF, what is the extent of the President's Article II power to detain individuals as enemy combatants? If Congress explicitly overrides the provisions of the Non-Detention Act and gives the President the authority to militarily detain alleged terrorists, both citizens and non-citizens alike wherever they are found, would such a measure—a national security detention act—be upheld?

The upshot of this may ultimately be to expand, not contract, the parameters of executive power. From this perspective, the President asked

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Breyer, as he joined the dissent in *Padilla* and the plurality in *Hamdi*. Perhaps, then, the critical distinction for Justice Breyer may be that Padilla was arrested in the United States, and not on a distant battlefield.

253. *Id.* at 553.

254. *Id.* at 693.

255. *Hamdi*, 542 U.S. at 534.

256. *Padilla*, 389 F. Supp. 2d at 690.

257. Justice Davis expressed a similar sentiment in *Ex parte* Milligan, when he stated:

> During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.

71 U.S. (4 Wall.) 2, 109 (1866) (emphasis added). *See also* REHNQUIST, *supra* note 1, at 222 ("A court may also decide an issue in favor of the government during a war, when it would not have done so had the decision come after the war was over.").

for a yard, and ended up with a foot or two. More than that, however, the President shifted the parameters of the debate so that there is no longer any question that, as long as the AUMF applies, the President can detain a citizen captured abroad as an enemy combatant.[258] The government may also be able to proceed against the citizen detainee in a properly constituted military tribunal, where it may rely upon hearsay evidence and a rebuttable presumption in favor of its evidence.[259]

Most important, characterizing terrorism as a military issue, rather than a law enforcement problem, has the inexorable consequence of expanding the scope of executive discretion, unfettered from the judicial oversight inherent in the criminal justice system and the need to prove guilt beyond a reasonable doubt. For reasons grounded in separation of powers and institutional competency,[260] courts are apt to be more deferential to the President when he acts as Commander-in-Chief, than when he acts as a prosecutor.

Legitimizing a military response to terrorism will inevitably increase the military's role at home, especially when the United States is viewed as part of the battleground in the war on terror. Indeed, this has already begun to happen. The Department of Defense has created an Assistant Secretary for Homeland Defense and a Northern Command dedicated to homeland defense and civil support.[261] "When directed by the President, the Department will execute land-based military operations to detect, deter, and defeat foreign terrorist attack within the United States."[262] It has also announced its plan to develop "a cadre" of specialized terrorism intelligence analysts and to deploy them to interagency

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258. Chemerinsky, *supra* note 192, at 80 ("The Court ruled in *Hamdi* that American citizens apprehended in foreign countries can be detained as enemy combatants.").

259. *Id.* at 78.

260. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) ("[P]olicies in regard to the conduct of foreign relations [and] the war power . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."). *See also* Justice Jackson's opinion in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*:

> The President, both as Commander–in–Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

333 U.S. 103, 111 (1948).

261. STRATEGY FOR HOMELAND DEFENSE, *supra* note 171, at 7–8; Kohn, *supra* note 12, at 176; Bradley Graham, *War Plans Drafted To Counter Terror Attacks in U.S.*, WASH. POST, Aug. 8, 2005, at A1 (noting the Pentagon has drawn up classified plans for responding to terrorist attacks in the United States).

262. STRATEGY FOR HOMELAND DEFENSE, *supra* note 171, at 26.

centers for homeland defense and counterterrorism.[263] As a policy matter, in certain circumstances, the military should provide support to civil authorities, by, for example, sharing intelligence that may help prevent a terrorist attack, responding to an on-going attack, or offering assistance in the aftermath of an attack, especially one that is catastrophic.

Nevertheless, there is a tension here: an undue military involvement in domestic matters flies in the face of American tradition. The Framers had a general mistrust of military power permanently at the President's disposal.[264] As Justice Scalia noted in *Hamdi*:

> In the Founders' view, the "blessings of liberty" were threatened by "those military establishments which must gradually poison its very fountain." No fewer than 10 issues of the Federalist were devoted in whole or in part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime.[265]

The Constitution reflects the Framers' concerns.[266] The President is the Commander-in-Chief, but Congress has the power to declare war[267] and "[t]o make Rules for the . . . Regulation of the land and naval Forces."[268] Congress also has the power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."[269] More than the constitutional checks, there is a general statutory prohibition on military involvement in domestic law enforcement. Despite important exceptions, the Posse Comitatus Act makes it a crime to use the armed forces as "a posse comitatus or otherwise to execute the laws."[270]

Domestic military involvement in the war on terror raises serious concerns. Some have argued that military resources will be depleted and the military's effectiveness in fighting overseas impaired.[271] Others

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263. *Id.* at 21.
264. *See Hamdi*, 542 U.S. at 568–89 (Scalia, J., dissenting).
265. *Id.* at 569 (quoting THE FEDERALIST NO. 45, at 285 (James Madison) (Clinton Rossiter ed., 1961)).
266. *Id.*
267. U.S. CONST. art. I, § 8, cl. 11.
268. *Id.* at cl. 14.
269. *Id.* at cl. 12.
270. Posse Comitatus Act of 1878, 18 U.S.C.A. § 1385 (West 2000). "[S]everal statutory exceptions to the Posse Comitatus Act, especially the Insurrection statutes, 10 U.S.C.A. §§ 331–335 (West 1998), give the President wide latitude to use troops for almost any purpose, including law enforcement, in the aftermath of a terrorist attack." STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 781 (3d ed. 2002). For an overview of the exceptions to the Posse Comitatus Act, *see also* Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99, 116 (2003) ("Especially since the end of World War II, the dramatic growth of federal powers, and the extensive delegation of legislative authority to the President, has resulted in a series of significant exceptions to the [Act]"); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 398 (2003) (arguing that "over the last 30 years, the protections offered by the [Posse Comitatus Act] have been significantly eroded.").
271. *See* Kealy, *supra* note 270, at 430; Kohn, *supra* note 12, at 177.

voice civil liberties concerns.[272] There are important cultural differences between the military and civilian law enforcement. A soldier, unlike a peace officer, is not trained in the requirements of the Fourth and Fifth Amendments.[273] Due process is a concept that has little relevance on the battlefield. The concern is that "mission creep" will result in which the military becomes adjuncts of internal security agencies including law enforcement, prosecutors, and domestic intelligence, that had been entirely civilian in nature.[274] "This has happened before—during almost every war since the mid-19th century, with harm to American civil liberties and to the relationship between the armed forces and the American people."[275]

Thus, as the executive continues to blur the line between a military and law enforcement response to terrorism, difficult line drawing issues will undoubtedly continue to emerge in which the courts will be asked to determine the bounds of executive authority. Of necessity, such a determination will raise questions that go to the heart of separation of powers, including an assessment of executive power and the limits on it in time of war. In a sense, then, *Hamdi* and *Padilla* may be a harbinger of things to come, as the courts struggle to reconcile conflicts between the demands of national security and civil liberty.

B. Centralization of Intelligence Functions

Beyond a shift from the criminal justice system to a military response to terrorism, a second paradigm shift has occurred as well: the centralization of intelligence functions, both civilian and military, within a single bureaucratic structure in the executive branch. This centralization does not pose a conventional separation of powers issue, because, with the exception of the CIA, which is statutorily designated an inde-

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272. *See* Canestaro, *supra* note 270, at 100 ("The founding fathers feared the involvement of the Army in the nation's affairs for good reason. History has demonstrated that employing soldiers to enforce the law is inherently dangerous to the rights of people."); Kealy, *supra* note 270, at 430 (arguing that post–9/11 "[c]ongress should resist any call for greater domestic involvement of the military," because "[s]uch operations have too great a capacity to lead to civil rights violations, disproportionate uses of force, a depletion of military resources, and the militarization of the police."); Kohn, *supra* note 12, at 177:

> The danger posed by the use of the regular military forces internally is dual: on the one hand, impairing military effectiveness in the primary task of the regulars today, war-fighting overseas; and on the other hand, undermining civil liberty (as has happened in past wars) by using regular troops for law enforcement, to try or incarcerate American citizens, to gather intelligence, or to suppress dissent or antiwar protest.

273. *See* Judge Arnold's opinion in *Bissonette v. Haig*:

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.

776 F.2d 1384, 1387 (8th Cir. 1985); Canestaro, *supra* note 270, at 140–41.

274. Kohn, *supra* note 12, at 188.

275. *Id.*

pendent agency, the other fourteen agencies that comprise the intelligence community have always been situated within the executive branch. Moreover, the centralization has occurred not by presidential fiat, but by legislative enactment followed by executive implementation.

This unprecedented centralization lowers the wall that has separated external and internal security or foreign and domestic intelligence for more than half a century.[276] Other laws passed in the wake of 9/11, particularly the Patriot Act, further this centralization by fostering closer cooperation between the foreign and domestic intelligence gathering agencies.[277] In the long run, this may help prevent a future catastrophic terrorist attack on U.S. soil; certainly, that was the intent of the 9/11 Commission, which recommended the creation of a National Intelligence Directorate, as well as the hope of Congress, which enacted the recommendation into law in December 2004.[278] It is important to recognize, however, that this measure may have costs as well: much like the military response to terrorism, the centralization of intelligence functions will enhance the authority of the executive branch and increase the potential for an abuse of power.

In the aftermath of World War II, the architects of our national security apparatus sought intentionally to diffuse power among different intelligence agencies by creating a wall within the executive branch between foreign intelligence and domestic law enforcement. The National Security Act of 1947, which chartered the CIA, specifically provided that the CIA "shall have no police, subpoena, or law enforcement powers or internal security functions."[279] The CIA, in other words, was intended to combat the foreign enemies of the United States, not its domestic wrongdoers.[280] That task fell upon the FBI, as well as other federal law enforcement agencies, which had statutory police powers and an internal security function, even with respect to counter-espionage investigations.

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276. For purposes of this article, "the wall" is used in a broad sense to refer to more than the restrictions on sharing information gathered under the Foreign Surveillance Intelligence Act, but to the historical separation of the CIA and FBI, and their respective functions. *See* Eleanor Hill's Joint Inquiry Staff Statement:

> The walls in question include those that separated foreign activities from domestic activities, foreign intelligence operations from law enforcement operations, the FBI from the CIA, communications intelligence from other types of intelligence, Intelligence Community agencies from other federal agencies, classified national security information from other forms of evidentiary information, and information derived from electronic surveillance for foreign intelligence or criminal purpose from those who are not directly involved in its collection.

Joint Inquiry Staff Statement: Hearing on the Intelligence Community's Response to Past Terrorist Attacks Against the United States from February 1993 to September 2001, 22 (Oct. 8, 2002) (statement of Eleanor Hill, Staff Director, Joint Inquiry Staff) [hereinafter Joint Inquiry Staff Statement], http://intelligence.senate.gov/0210hrg/021008/hill.pdf.

277. *See id.* at 26

278. 50 U.S.C.A. § 401 (West 2005).

279. 50 U.S.C.A. § 403–3(d)(1) (West 2005).

280. Baker, *supra* note 154, at 36.

The legislative history of the National Security Act of 1947 shows that one overriding concern was to avoid giving the CIA too much power.[281] Part of the objection was based on protecting bureaucratic turf, particularly on the part of J. Edgar Hoover's FBI.[282] Yet the framers of the Act did not want the CIA to become a centralized national security apparatus with control over both foreign and domestic intelligence functions.[283] Truman emphasized that "this country wanted no Gestapo under any guise or for any reason."[284] Stuart Baker, former General Counsel to the NSA, has explained that "American intelligence agencies were shaped by individuals who understood the mechanics of totalitarianism and wanted none of it here. They knew that the Gestapo and Soviet KGB had in common a sweeping authority to conduct internal and external security and intelligence gathering."[285] Richard Posner notes that "democratic nations, including the United States . . . , have shied away from placing the same official in charge of both foreign and domestic intelligence, lest the rough methods used by intelligence services on foreigners in foreign, often hostile countries be turned on its citizens."[286] In effect, notwithstanding any potential costs to efficiency, the 1947 Act established a decentralized intelligence apparatus with a separation of powers between the CIA and FBI.

The separation between foreign intelligence or external security and law enforcement or internal security was maintained for more than half a century after the CIA's creation. During the Cold War, intelligence agencies faced a threat that was almost entirely foreign; law enforcement dealt with problems that were largely domestic.[287] With the exception of counterespionage matters, there was little overlap between the work of the intelligence agencies and law enforcement.[288] When such overlap occurred, it was often on an ad hoc basis in specific cases. In limited instances, personnel from one agency were detailed to the other. For

281. 9/11 COMM'N REP., *supra* note 105, at 82.

282. *Id.* ("Lobbying by the FBI, combined with fears of creating a U.S. Gestapo, led to the FBI's being assigned responsibility for internal security functions and counterespionage."); Joint Inquiry Staff Statement, *supra* note 276, at 22 ("Two fundamental considerations shaped [the National Security Act of 1947]: that the United States not enable a Gestapo–like organization that coupled foreign intelligence and domestic intelligence functions; and that the domestic organization of the Federal Bureau of Investigation be preserved."); ZEGART, *supra* note 101, at 163–84 (describing political maneuvering that led to creation of CIA).

283. 1 CHURCH FINAL REP., *supra* note 53, at 136 n.31 ("It was frequently remarked that the [Central Intelligence] Agency was not to be permitted to act as a domestic police or 'Gestapo.'"); COLL, *supra* note 128, at 254–55 ("[I]n the aftermath of a catastrophic war against Nazism, Congress also sought to protect the American people from the rise of anything like Hitler's Gestapo, a secret force that combined spying and police methods.").

284. HARRY S. TRUMAN, 1 MEMOIRS: YEAR OF DECISIONS 117 (1955). Truman repeats that he was "very much against building up a Gestapo." *Id.* at 253. For Truman's recollections on the intelligence reorganization following World War II, *see* HARRY S. TRUMAN, 2 MEMOIRS: YEARS OF TRIAL AND HOPE 73–79 (1956).

285. Baker, *supra* note 154, at 36. Baker most recently served as General Counsel to the WMD Commission. WMD COMM'N REP., *supra* note 105, at 597–98.

286. POSNER, *supra* note 6, at 65.

287. Baker, *supra* note 154, at 37; STRATEGY FOR HOMELAND DEFENSE, *supra* note 171, at 23.

288. Baker, *supra* note 154, at 37.

example, in the mid-1980's, the Director of Central Intelligence created a Counterterrorist Center within the CIA that included representatives from the FBI and other agencies.[289]

The segregation of spies and cops began to change with the demise of the Soviet Union and the end of the Cold War. Intelligence resources were used on other foreign targets, including international drug trafficking and organized crime, terrorists, and alien smuggling.[290] Those targets had both an international and a domestic element; they could also be viewed as presenting a challenge to both national security and to law enforcement. At the same time, globalization allowed terrorists and other foreign wrongdoers to travel, gather and exchange information, communicate, network, and transfer funds more easily.[291] From a laptop computer thousands of miles from the United States, a wrongdoer could send an e-mail to followers around the world with instructions on launching an attack within the U.S. or on U.S. interests overseas. The potential for overlap between foreign intelligence investigation and domestic law enforcement is particularly high in counterterrorism matters.[292] In the 1990's, the intelligence community and domestic law enforcement began to collaborate more often. Cooperation was institutionalized. Senior FBI and CIA officials met regularly to plan joint operations, exchange personnel and technology, and coordinate activities on sensitive investigations.[293]

Nevertheless, pre-9/11 the intelligence community remained decentralized. The Director of Central Intelligence (DCI) was the Director of the CIA as well as the head of the U.S. intelligence community. Despite an impressive title, the DCI had limited authority over the intelligence community. The DCI stated the community's priorities and coordinated development of its budget, but lacked line authority over the heads of other agencies, as well as the power to shift or allocate resources within the community.[294]

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289. 9/11 COMM'N REP., *supra* note 105, at 85.

290. Baker, *supra* note 154, at 37.

291. Bassiouni, *supra* note 145, at 87–88. *See also* 9/11 COMM'N REP., *supra* note 105, at 88 ("The emergence of the World Wide Web has given terrorists a much easier means of acquiring information and exercising command and control over their operations."); Steve Coll & Susan B. Glasser, *Jihadists Turn the Web Into Base of Operations*, WASH. POST, Aug. 7, 2005, at A1 ("the 'global jihad movement,' sometimes led by al Qaeda fugitives but increasingly made up of diverse 'groups and ad hoc cells,' has become a 'Web-directed' phenomenon").

292. DYCUS ET AL., *supra* note 270, at 688. *See also* STRATEGY FOR HOMELAND DEFENSE, *supra* note 166, at 23 ("[T]ransnational terrorists have blurred the traditional distinction between national security and international law enforcement."); Chesney, *supra* note 12, at 2 (asking whether terrorists are "criminals who should be incapacitated through the civilian law enforcement process" or "enemy belligerents engaged in war crimes who should be incapacitated through military detention, even when operating within the United States"); Harris, *supra* note 13, at 554 ("It is conventional wisdom that previous distinctions between 'foreign' and 'domestic' are archaic and counterproductive when addressing modern national security threats.").

293. Benjamin Wittes, *Blurring the Line Between Cops and Spies*, LEGAL TIMES, Sept. 9, 1996, at 1.

294. 9/11 COMM'N REP., *supra* note 105, at 79–80, 372.

To remedy the failure to "connect the dots" that led to 9/11, the 9/11 Commission recommended the creation of a powerful Director of National Intelligence (DNI) who would oversee and coordinate the efforts of the intelligence community, both foreign and domestic.[295] Based on that recommendation, Congress enacted the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).[296] This Act has several important features: (1) it creates a Senate-confirmed DNI, popularly known as the "intelligence czar," who is the head of the intelligence community and principal adviser to the President on intelligence matters related to national security;[297] (2) gives the DNI budgetary authority over the intelligence community;[298] (3) allows the DNI to exercise authority over the hiring of key officials in the intelligence community, including the Director of the CIA and the Director of the NSA;[299] and (4) empowers the DNI to establish personnel policies for the intelligence community.[300] For the first time, the foreign and domestic intelligence communities are united under the direction of an official who has actual authority over them.

More changes, however, were to follow that consolidated the DNI's authority over the FBI. On March 31, 2005, the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (WMD Commission) issued its report.[301] The WMD Commission issued seventy-four recommendations to strengthen U.S. intelligence capabilities.[302] Among other things, the Commission noted that the DNI's authority over the FBI was "troublingly vague."[303] In response to the WMD Commission's recommendations, on June 29, 2005, President Bush clarified and centralized the DNI's authority over the FBI's intelligence program.[304] The President ordered the creation of a National Security Service within the FBI that combines the FBI's counterterrorism, counterintelligence, and intelligence elements.[305] The DNI has authority to approve the hiring of the head of the National Security Service,

295. *Id.* at 373–74.

296. IRTPA, *supra* note 9. *See generally* SENATE COMM. ON GOVERNMENTAL AFFAIRS, SUMMARY OF INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004 (2004), http://www.senate.gov/~govt-aff/_files/ConferenceReportSummary.doc; POSNER, *supra* note 6, at 62–69.

297. IRTPA, *supra* note 9, at § 1011(a), 118 Stat. 3643–44.

298. *Id.* at § 1011(c) & (d), 118 Stat. 3644–47.

299. *Id.* at § 1014, 118 Stat. 3663–64.

300. *Id.* at § 1011(f), 118 Stat. 3648–50.

301. WMD COMM'N REP., *supra* note 105.

302. *Id.*

303. *Id.* at 457.

304. Memorandum from George W. Bush to Vice President, Sec'y of State, Sec'y of Def., Attorney Gen., Sec'y of Homeland Sec., Dir. of OMB, Dir. of Nat'l Intelligence, Assistant to the President for Nat'l Sec. Affairs, and Assistant to the President for Homeland Sec. and Counterterrorism (June 29, 2005) [hereinafter Memorandum from George W. Bush], http://www.whitehouse.gov/news/releases/2005/06/print/20050629–1.html. *See also* Dan Eggen & Walter Pincus, *Bush Approves Spy Agency Changes*, WASH. POST, June 30, 2005, at A1; Douglas Jehl, *Bush to Create New Unit in F.B.I. for Intelligence*, N.Y. TIMES, June 30, 2005, at A1.

305. Memorandum from George W. Bush, *supra* note 304.

who will report to both the Director of the FBI and to the DNI.[306] Moreover, the DNI was given authority over the FBI's three billion dollar intelligence budget.[307]

In and of itself, the creation of the DNI would be a significant step in lowering the wall between foreign intelligence and domestic law enforcement. The provisions of IRTPA, however, cannot be viewed in isolation. Congress has passed other laws, most notably in the Patriot Act, that further dismantled the wall.[308] Several provisions of the Patriot Act make it easier for foreign intelligence to be used for domestic law enforcement purposes.

This occurs, for example, in the area of electronic surveillance. To obtain a domestic wiretap for criminal investigations, a federal agent must meet the requirements of Title III.[309] A judge must find probable cause to believe that "an individual is committing, has committed, or is about to commit" an enumerated predicate offense and that "particular communications concerning such offense will be obtained through . . . interception."[310] Thus, the essential inquiry focuses on the conduct of the target of the surveillance and whether the surveillance will uncover evidence of crime.

In contrast, under the Foreign Surveillance Intelligence Act (FISA), to obtain an order for electronic surveillance or for a physical search, the agent must establish probable cause that the target of the surveillance is a "foreign power" or the "agent of a foreign power."[311] "Foreign power" is defined to include, among other things, "a group engaged in international terrorism."[312] "Agent of a foreign power" includes "any person who . . . knowingly engages in . . . international terrorism . . . for or on behalf of a foreign power."[313] When the target of surveillance is a citizen or resident

306. *Id.*
307. *Id.*; Eggen & Pincus, *supra* note 304.
308. This, too, has resulted in a profusion of scholarship. *See generally* SCHULHOFER, *supra* note 13, at 43–48 (critique of Patriot Act amendments to FISA based on civil liberty concerns); Sullivan, *supra* note 13, at 133–43 (same). A debate has also emerged on the extent to which the wall has been torn down. *See* Seamon & Gardner, *supra* note 13, at 321–22 (disagreeing with assertion that Patriot Act "tore down 'the wall'" and urging Congress to "truly tear down the wall"); Swire, *supra* note 13, at 1308 ("The Patriot Act made significant changes to FISA, notably by tearing down the 'wall' that had largely separated foreign intelligence activities from the usual prosecution of domestic crimes."); Breglio, *supra* note 13, at 196 ("The wall has been torn down."); Harris, *supra* note 13, at 554 ("The law enforcement prohibition in the National Security Act may make part of the destruction of 'the wall' somewhat theoretical, despite the expansion of coordination and information sharing between the FBI and CIA."). The key point is that the Patriot Act makes it easier for the government to use foreign intelligence for domestic law enforcement purposes. General Michael V. Hayden, until recently the head of the NSA and now the Deputy Director of National Intelligence, has noted that "[m]ore information is flowing between NSA and law enforcement agencies." Hayden, *supra* note 109, at 259.
309. 18 U.S.C.A. § 2518 (West 2005).
310. 18 U.S.C.A. § 2518(3)(a)–(b) (West 2005).
311. 50 U.S.C.A. § 1805(a)(3)(A) (West 2005).
312. *Id.* § 1801(a)(4).
313. *Id.* § 1801(b)(2)(C).

alien, "agent of a foreign power" generally requires criminal activity.[314] The inquiry under FISA focuses on a target's status as a "foreign power" or "agent of a foreign power," and there need not be probable cause to believe that the surveillance will uncover evidence of crime.[315] FISA surveillance, then, does not require a showing that comports with the traditional criminal standard of probable cause.[316]

There are other significant advantages to the government in obtaining a FISA order, instead of one under Title III. One advantage is duration. Surveillance of foreign agents under FISA may last ninety days for U.S. persons;[317] surveillance under Title III is limited to thirty.[318] Extensions of surveillance are also easier to obtain under FISA, than under Title III.[319] Another advantage is secrecy. Under Title III, the government must provide notice to the target of the surveillance "[w]ithin a reasonable time";[320] under FISA, no notice is necessary unless evidence derived from the surveillance is used in a criminal prosecution.[321] Title III also requires the government "to minimize the interception of communications not otherwise subject to interception under this chapter."[322] In general, minimization must occur contemporaneously with the surveillance.[323] Under FISA, "in practice . . . surveillance devices are normally left on continuously, and the minimization occurs in the process of indexing and logging the pertinent communications."[324]

To avoid the misuse of FISA surveillance or searches, and to prevent agents from obtaining a FISA order when they would be unable to obtain a warrant under Title III, prior to the Patriot Act, FISA required

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314. *Id.* § 1801(b)(2); *In re* Sealed Case, 310 F.3d 717, 738 (FISA Ct. Rev. 2002); Lee & Schwartz, *supra* note 113, at 1459 ("[I]t should be noted that FISA's definition of an 'agent of foreign power' who is a United States person requires criminal acts"). *But see* Varghese, *supra* note 13, at 421 (arguing that FISA investigations are not necessarily grounded in criminal activity).

315. SCHULHOFER, *supra* note 13, at 38.

316. *See In re* Sealed Case:

> [W]hile Title III contains some protections that are not in FISA, in many significant respects the two statutes are equivalent, and in some, FISA contains additional protections. Still, to the extent the two statutes diverge in constitutionally relevant areas – in particular, in their probable cause and particularity showings – a FISA order may not be a 'warrant' contemplated by the Fourth Amendment.

310 F.3d at 741; Baker, *supra* note 154, at 42 (noting that FISA surveillance "saves [law enforcement officials] much of the hassle of meeting Title III standards for the wiretap."); Schulhofer, *supra* note 169, at 79 ("FISA surveillance is permitted after showing only a diluted form of suspicion not equivalent to the traditional criminal standard of probable cause."); Sullivan, *supra* note 13, at 136 ("Crucially, FISA warrants do not require a showing of probable cause of criminal activity.").

317. 50 U.S.C.A. § 1805(e)(1) (West 2005).

318. 18 U.S.C.A. § 2518(5).

319. SCHULHOFER, *supra* note 13, at 44.

320. 18 U.S.C.A. § 2518(8)(d).

321. *See also* Varghese, *supra* note 13, at 411 (comparing powers granted through FISA and Title III). *Compare* 18 U.S.C.A. § 2518(8)(d) *with* 50 U.S.C.A. § 1806(c) & 50 U.S.C.A. § 1825(b). For a comparison of the differences between FISA and Title III, *see* the lower court opinion in *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 616–17 (FISA Ct. 2002), as well as the appellate decision that reversed it. *In re* Sealed Case, 310 F.3d at 737–41.

322. 18 U.S.C.A. § 2518(5).

323. *Id.*

324. *In re* Sealed Case, 310 F.3d at 740.

that "the purpose" of the order be to obtain foreign intelligence information.[325] Courts, in turn, construed "the purpose" test to require the government to establish that "the primary purpose" was to obtain foreign intelligence information, and not to further a domestic criminal investigation.[326] This issue arose in criminal cases in which the government sought to introduce evidence at trial that had been collected pursuant to a FISA order.

The Patriot Act relaxed the rules separating foreign intelligence investigations from criminal investigations, based on concern that the rules had become overly restrictive.[327] One amendment to FISA, for example, provides that the collection of foreign intelligence need only be "a significant" purpose, and not "the purpose" of the investigation.[328] As a result, the "primary purpose" test has been legislatively set aside.[329] The "significant purpose" test is not difficult to meet. The Foreign Intelligence Surveillance Court of Review has concluded that the government's "sole objective" cannot be to gather evidence for prosecution purposes.[330] Thus, the government may use FISA surveillance when its primary, but not exclusive, purpose is to gather evidence to prosecute a foreign intelligence crime or ordinary crime "inextricably intertwined" with foreign intelligence crime, "[s]o long as . . . [it] entertains a realistic option of dealing with the agent other than through criminal prosecution."[331]

Similarly, the Patriot Act facilitates the two-way flow of information between the intelligence and law enforcement communities. The Act makes clear that:

> Notwithstanding any other provision of law . . . foreign intelligence or counterintelligence . . . information obtained as part of a criminal investigation . . . [may] be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.[332]

Grand jury information, which ordinarily must be kept confidential, may be shared by criminal investigators with other government officials for counterterrorism purposes.[333] Information gathered under Title III may also be shared "to the extent that such contents include foreign intel-

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325. *Id.* at 723.
326. *Id.* at 725–27 (describing origin of "primary purpose" test).
327. Jeffrey Rosen, *Security Check*, THE NEW REPUBLIC, Dec. 16, 2002, at 11.
328. Patriot Act, *supra* note 11, at § 218, 50 U.S.C.A. §§ 1804(a)(7)(B), 1823(a)(7)(B) (West 2005).
329. *See In re* Sealed Case, 310 F.3d at 736.
330. *Id.* at 735.
331. *Id.* at 735–36.
332. The Homeland Security Act broadened the disclosures to state, local, and foreign government officials. Homeland Security Act of 2002 § 897, 50 U.S.C.A. 403–5d(1) (West 2005).
333. Patriot Act, *supra* note 11, at § 203(a)(1). The Intelligence Reform and Terrorism Prevention Act of 2004 also allows federal authorities to share grand jury information about terrorist threats with state, local, tribal, and foreign government officials. IRTPA, *supra* note 9, at § 6501.

ligence or counterintelligence."[334] Similarly, officials who collect foreign intelligence information are allowed "to consult with Federal law enforcement officers to coordinate efforts to investigate or protect against . . . sabotage or international terrorism by a foreign power or an agent of a foreign power."[335]

The centralization of intelligence functions through the creation of the DNI, as well as the dismantling of the wall between foreign intelligence and domestic law enforcement, does not appear to raise a constitutional objection on separation of powers grounds. Under Justice Jackson's analysis, the President's action would be afforded the greatest degree of deference; when he appoints a DNI under IRTPA or implements the provisions of the Patriot Act, he acts with the constitutional authority of Congress as well as his own.[336] The President's authority, then, would be at its zenith, "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[337]

Policy arguments can be made for and against the centralization of intelligence functions. On the one hand, there are persuasive arguments in favor of dismantling the wall between foreign intelligence and domestic law enforcement. First, with respect to international terrorism directed at the U.S., the distinction between foreign intelligence and domestic law enforcement is largely illusory,[338] and the law should take into account that reality. Second, as the 9/11 Commission noted, "The importance of integrated, all-source analysis cannot be overstated. Without it, it is not possible to 'connect the dots.' No one component holds all the relevant information."[339] In other words, information should be shared if it will help prevent a terrorist attack. Pre-Patriot Act, the wall blocked the exchange of information between the intelligence community and law enforcement.[340] Worse yet, the pre-9/11 rules were complex, often misinterpreted, and applied in an overly restrictive manner.[341] Indeed, a misunderstanding of the rules hindered the FBI's at-

334. Patriot Act, *supra* note 11, at § 203(b)(1).
335. *Id.* § 504(a)–(b).
336. *See Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring).
337. *Id.* at 637. Kathleen Sullivan notes that "the Constitution may require separation of powers, but within the executive branch it is a voluntary decision to separate knowledge among the FBI, INS, and CIA." Sullivan, *supra* note 13, at 142. Richard Posner suggests that a separation of powers issue could arise if the President tries to resist the centralization required by IRTPA. POSNER, *supra* note 6, at 61–62.
338. *In re* Sealed Case, 310 F.3d at 726 (citing United States v. Sarkissian, 841 F.2d 959, 964 (9th Cir. 1988) with approval, which noted that under FISA "'[i]nternational terrorism,' by definition, requires the investigation of activities that constitute crimes."); Harris, *supra* note 13, at 549–50, 554 (arguing that "the fight against terrorism blurs the border between law enforcement and intelligence," a "strict bifurcation between law enforcement and intelligence activities . . . no longer exists," and "the foreign/domestic divide is oftentimes a distinction without a difference in the fight against terrorism and other transboundary threats.").
339. 9/11 COMM'N REP., *supra* note 105, at 408.
340. *Id.* at 79.
341. *Id.* at 79–80; *In re* Sealed Case, 310 F.3d at 722–28 (criticizing development of "primary purpose" test under pre–Patriot Act FISA).

tempt to locate one of the participants in the 9/11 plot.[342] As a policy matter, the executive branch ought to be able to use the information it has, however collected, to prevent terrorist attacks. This is especially so given the magnitude of the threat.

Moreover, one can argue that IRTPA and the Patriot Act include structural checks that will help prevent civil rights abuses. IRTPA provides that the DNI is not located within the Executive Office of the President.[343] The Act creates a Privacy and Civil Liberties Oversight Board within the Executive Office of the President that is required to provide advice and oversight on privacy and civil liberties concerns raised by "the implementation of laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism."[344] The DNI must appoint a civil liberties protection officer.[345] The DNI and the DNI's Principal Deputy cannot both be active military officers.[346] IRTPA also reiterates the mantra that the CIA is to have "no police, subpoena, or law enforcement powers or internal security functions."[347] Similarly, under the Patriot Act, the CIA Director is to "have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to [FISA] unless otherwise authorized by statute or executive order."[348]

On the other hand, there may be considerable costs associated with centralizing intelligence functions. Some have questioned whether creating a DNI will prove to be effective. Richard Posner has argued forcefully that it will not.[349] But, more important, dismantling the wall that

342. 9/11 COMM'N REP., *supra* note 105, at 269–71.

343. IRTPA, *supra* note 9, at § 1011(a).

344. *Id.* § 1061(c)(3). This Board is advisory and reports to the President. Martha Neil, *Members of Privacy and Civil Liberties Board Named*, 4 NO. 24 A.B.A. J. E–REP. 4 (2005). President Bush appointed members to the panel in June 2005. *Id.* Richard Ben–Veniste, a member of the 9/11 Commission, has criticized it as "a very watered–down board without the kinds of powers which I believe are necessary to provide credibility and authority, such as independent subpoena power . . . and a bipartisan selection process." Caroline Drees, *Civil Liberties Panel Is Off to a Sluggish Start*, WASH. POST, Aug. 8, 2005, at A13.

345. IRTPA, *supra* note 9, at § 1011(a), 50 U.S.C.A. § 403–3d(a)(1) (West 2005).

346. *Id.* 50 U.S.C.A. § 403–3a(c)(1)–(2).

347. *Id.* 50 U.S.C.A. § 403–4a(d)(1).

348. Patriot Act, *supra* note 11, at § 901. The Patriot Act also has a sunset provision. *Id.* § 224.

349. *See* POSNER, *supra* note 6. Among other things, Posner argues that the intelligence reform may be inefficient and costly. First, the reform proposed a structural solution to a management problem. *Id.* at 127. "A reorganization is a questionable response to a problem that is not a problem of organization." *Id.* Second, reorganization imposes substantial transition costs, as the agencies in the intelligence community adapt to the new management structure. This can lead to "transition–induced dysfunction." *Id.* at 129. "[A]doption of the proposals was bound to usher in a protracted period of increased vulnerability to attack by dislocating the intelligence system." *Id.* at 130. Third, greater centralization of intelligence activities may result in diseconomies of scale. *Id.* at 141. Added layers of bureaucracy may result in delay and prevent information from reaching key policymakers. *Id.* "[C]entralizing intelligence . . . given the sheer size of the U.S. intelligence system . . . overload[s] the top of the intelligence hierarchy." *Id.* at 150. Centralization may also stifle diversity of views and competition among the intelligence agencies. Diversity or pluralism, unlike centralization, may result in "more and better information." *Id.* at 153–54. In sum, the intelligence reform resulted in "a bureaucratic reorganization that is more likely to be a recipe for bureaucratic infighting, impacted communication, diminished performance, tangled lines of command, and lowered

was erected so carefully almost 60 years ago may give rise to one of the very problems that the framers of the 1947 National Security Act sought to avoid: civil rights abuses caused by the excessive concentration of power within a centralized intelligence apparatus.[350]

First, centralization creates a greater risk that intelligence will be politicized to suit a President's agenda.[351] The decentralized system that existed prior to IRTPA made it more difficult for the President to pressure or manipulate the entire intelligence community; the voice of the CIA Director, for example, was one among many.[352] Whatever its faults, decentralization encouraged a diversity of views, competition in the gathering and analysis of intelligence, and independent thinking.[353] As an institutional matter, this may be particularly important for agencies largely shielded from public scrutiny that serve top officials in the executive branch. Even without centralization, "[n]o other part of the government has so narrow an audience—or responds so enthusiastically to guidance from above."[354] Centralization and the creation of a DNI who oversees the intelligence community means that "the President will have only one mind in the intelligence community to bend to his will."[355] This is so, even if as a technical matter, the DNI is not located within Executive Office of the President.[356] The reality is that the DNI is appointed by the President and reports to the President.

Second, lowering the wall between foreign and domestic intelligence creates the risk that foreign intelligence and methods used to acquire foreign intelligence will be used for domestic law enforcement purposes in an effort to circumvent legal safeguards that would otherwise apply, even in cases unrelated to international terrorism. Baker observes that "[i]ntelligence- gathering tolerates a degree of intrusiveness, harshness, and deceit that Americans do not want applied against themselves."[357] Very different legal regimes apply to government action with

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morale than an improvement on the previous system." *Id.* at 207–08. Worse yet, it may "induce complacenc[y] about our 'reformed' intelligence system and by doing so deflect attention from graver threats than a repetition of 9/11." *Id.* at 208. More fundamentally, Posner argues that "the prevention of surprise attacks may pose problems that even the best intelligence system could not overcome. Recognition of this fact is the beginning of realism in the redesign of the system." *Id.* at 204.

350. For that reason, the American Civil Liberties Union opposed giving the Director of National Intelligence certain powers. *See* Timothy H. Edgar, Legislative Counsel, American Civil Liberties Union, ACLU Analysis of the 9–11 Commission's Recommendations for Intelligence Reform (July 30, 2004), http://www.aclu.org/news/NewsPrint.cfm?ID=16181&c=111; *Civil Liberties and the Recommendations of the 9/11 Commission, Before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security*, Aug. 23, 2004 (testimony of Gregory T. Nojeim, Associate Director & Chief Legislative Counsel for the ACLU), http://www.aclu.org/news/NewsPrint.cfm?ID=16280&c=206.

351. POSNER, *supra* note 6, at 116.

352. *Id.*

353. *Id.* at 7, 43. *See id.* at 84. *See generally id.* at 99–162 (discussing principles of intelligence and organization).

354. Baker, *supra* note 154, at 40.

355. POSNER, *supra* note 6, at 116.

356. 50 U.S.C.A. § 403(a)(2) (West 2005).

357. Baker, *supra* note 154, at 40.

respect to internal or external security. As a matter of constitutional criminal procedure, for example, the Fourth Amendment does not apply to extraterritorial searches of non-resident aliens absent a substantial connection between the alien and the United States.[358] Nor are aliens entitled to Fifth Amendment due process rights outside the sovereign territory of the United States.[359] As previously noted, different statutory regimes apply to electronic surveillance and physical searches that relate to foreign intelligence or to domestic law enforcement. Prior to the Patriot Act, agents may have been tempted to use a FISA order or information derived from a FISA order when they were unable to meet the requirements of Title III. That temptation, however, was checked by the "primary purpose" test then in place.[360] The new test—one that requires only "a significant purpose" —will have the opposite effect.[361] It creates an incentive to seek a FISA order instead of one under the more onerous requirements of Title III. The information sharing provisions of the Patriot Act create a similar risk that an agent will be able to access information otherwise inaccessible under the laws that constrain domestic law enforcement activity.

Third, there are important cultural differences between the worlds of cops and spies, and they approach their work differently. According to Admiral Stansfield Turner, a former Director of the CIA, "The FBI agent's first reaction when given a job is, 'How do I do this within the law?' The CIA agent's first reaction when given a job is, 'How do I do this regardless of the law of the country in which I am operating?'"[362] Similarly, Stewart Baker has noted that "[c]ombining domestic and foreign intelligence functions creates the possibility that domestic law enforcement will be infected by the secrecy, deception, and ruthlessness that international espionage requires."[363] Or, as Richard Posner adds, "The idea that the CIA would engage in domestic intelligence gives even conservatives the creeps; yet the Intelligence Reform Act takes a step in that direction by placing the Director of National Intelligence over both the CIA and the domestic intelligence activity of the FBI."[364]

This is not to impugn the integrity, idealism, or good faith of the many dedicated members of the intelligence and law enforcement communities.[365] Almost thirty years ago, the Church Committee sought to

358. United States v. Verdugo–Urquidez, 494 U.S. 259, 274–75 (1990). *See generally* FALLON, *supra* note 6, at 249 ("The Constitution affords few if any rights that extend outside the territory of the United States to citizens of other countries.").

359. *Verdugo–Urquidez*, 494 U.S. at 269 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)).

360. *In re* Sealed Case, 310 F.3d at 723.

361. *See id.*

362. Wittes, *supra* note 293, at 20.

363. Baker, *supra* note 154, at 36–37.

364. POSNER, *supra* note 6, at 57.

365. *See* Baker, *supra* note 154, at 40 (noting "the depth of the . . . [NSA's] commitment to obeying the legal limits on gathering intelligence relating to American citizens."); Hayden, *supra*

understand how officials in intelligence agencies had committed unlawful acts in the mistaken pursuit of the public good. Quoting Justice Brandeis, the Committee observed:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[366]

Furthermore, for institutional reasons, the executive branch and its members may not be well situated to analyze any trade-off between civil liberty and national security. The executive branch's foremost concern will not necessarily be civil liberty; rather, it will be preservation of the state itself. In *Hamdi,* Justice Souter explained:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of Government asked to counter serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch . . . .[367]

From that perspective, it is possible to see how officials within the executive branch may become the well meaning but misguided individu-

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note 109, at 260 ("The process of reporting to legislative, executive, and judicial bodies has created a culture at NSA that respects the law and the need to protect U.S. privacy rights.").

366. 1 CHURCH FINAL REP., *supra* note 53, at 2 (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928)).

367. *Hamdi*, 542 U.S. at 545 (Souter, J., concurring in part, dissenting in part). Justice Douglas made a similar point in *Katz v. United States*:

> Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases . . . . I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary–and–prosecutor and disinterested, neutral magistrate.

389 U.S. 347, 359–60 (1967) (Douglas, J., concurring). *See* Sunstein, *supra* note 3, at 52–53:

> [U]nder many circumstances the executive branch is most unlikely to strike the right balance between security and liberty. A primary task of the President is to keep the citizenry safe, and any error on that count is likely to produce extremely high political sanctions. For this reason, the President has a strong incentive to take precautions even if they are excessive and even unconstitutional.

als against whom Justice Brandeis once warned. Even pre-9/11, the CIA and FBI were occasionally involved in serious violations of civil rights and illegal activity.[368] Those violations occurred despite the diffusion of power between them. The question that arises is whether the possibility for such violations will increase now that the walls separating foreign intelligence and domestic law enforcement have been dismantled and are unlikely ever to be rebuilt. This may be especially so since neither the threat of WMDs nor the "war on terror" is likely to end anytime soon. Indeed, in *Hamdi* the government conceded that "'given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.'"[369] In other litigation, the government has allowed that "the war could last several generations."[370] According to the Department of Defense, "the United States has become a nation at war, a war whose length and scope may be unprecedented."[371]

Hamilton once warned that "[t]he 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."[372] Will the intelligence reforms of today give rise to the civil rights abuses of tomorrow? Are we witnessing the build up of a national security state that relies upon foundations laid during the Cold War?[373] As an institutional matter, great power coupled with secrecy, little public accountability, limited or deferential judicial review, "dysfunctional" congressional oversight,[374] and a mandate to act for the imperatives of national security in a never ending war on terror, would seem to create the preconditions for the next Church Committee Report.

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368. *See generally* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., FINAL REPORT ON INTELLIGENCE ACTIVITIES AND RIGHTS OF AMERICANS, Book II (1976) (describing abuses committed by FBI and intelligence agencies); MORTON H. HALPERIN ET AL., THE LAWLESS STATE: THE CRIMES OF THE U.S. INTELLIGENCE AGENCIES (1976); Harris, *supra* note 13, at 540 (describing abuses committed by the CIA, some of which "were committed at the direction of the highest levels of the nation's political leadership."); Swire, *supra* note 13, at 1316–20 (listing abuses committed by FBI and intelligence agencies).

369. *Hamdi*, 542 U.S. at 520.

370. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 465.

371. STRATEGY FOR HOMELAND DEFENSE, *supra* note 171, at 1.

372. THE FEDERALIST NO. 8, at 62 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

373. Professor Heymann, a former Deputy Attorney General in the Department of Justice, uses the term "intelligence state" and warns of "drifting into an 'intelligence state.'" HEYMANN, *supra* note 6, at 133–57. Scholars have used the term "national security state" in the past to describe the U.S. response to the Cold War. *See* HOGAN, *supra* note 93; DANIEL YERGIN, SHATTERED PEACE: THE ORIGINS OF THE COLD WAR (rev. & updated ed. 1990). General Hayden, the Deputy Director of National Intelligence, has said that "the United States no longer ha[s] the luxury of maintaining divisions between its foreign and domestic intelligence structures, because 'our enemy does not recognize that distinction.'" Jehl, *supra* note 304. Timothy Edgar, national security counsel for the ACLU, has warned, "[s]pies and cops play different roles and operate under different rules for a reason . . . . The FBI is effectively being taken over by a spymaster who reports directly to the White House . . . . It's alarming that the same person who oversees foreign spying will now oversee domestic spying, too." Eggen & Pincus, *supra* note 304.

374. 9/11 COMM'N REP., *supra* note 105, at 420 (calling for improved congressional oversight).

CONCLUSION

Post-9/11, the executive branch has made an aggressive assertion of power, often with either congressional approval or acquiescence. The government's response has reduced the distinction between external and internal security. In part, this has occurred because of the nature of the threat; international terrorism can be viewed as both a national security and law enforcement problem. For policy reasons as well, no doubt the President and Congress believed the measures they took were essential to protect the United States.

This has resulted in two paradigm shifts. One has been the militarization of the response to terrorism and a concomitant de-emphasis on criminal prosecution. The military's indefinite detention of citizens captured in the war on terror was a manifestation of that response. In *Hamdi*, the Supreme Court held that the executive branch had gone too far. The government's most extreme position—its claim to be able to detain citizens indefinitely and unreviewably on grounds of military necessity—has been rejected. Many questions remain unanswered, however, and the case is not an unqualified vindication of civil rights. In the meantime, despite traditional American concerns about military involvement in domestic affairs, the military will continue to play an ever larger role in homeland security.

A second shift has been the centralization of intelligence functions and a lowering of the wall that had historically separated foreign intelligence and domestic law enforcement. This has occurred through the creation of a Director of National Intelligence who oversees both foreign and domestic intelligence collection and provisions of the Patriot Act that make it easier for FISA orders to be used in connection with criminal investigations and that facilitate the exchange of information between the foreign intelligence community and domestic law enforcement. All of this goes a long way toward creating a powerful, centralized intelligence apparatus under the President's control with responsibility for both external and internal security.

Both paradigm shifts must be viewed in their historical context. The power of the presidency has continued to grow in modern times. Crisis only fuels the growth of that power. This is especially so when the war on terror is all but endless and the threat involves weapons of mass destruction. Moreover, power, by its nature, is not easily relinquished once obtained, nor are rights, once lost, easily restored.[375] Whatever the

375. *See* Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (opinion upholding military exclusion order creates a principle that "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need"); Ackerman, *supra* note 3, at 1030 ("Unless careful precautions are taken, emergency measures have a habit of continuing well beyond their time of necessity."); Barak, *supra* note 1, at 149 ("I must take human rights seriously during times of both peace and conflict. I must not make do with the mistaken belief that, at the end of the conflict, I can turn back the clock."); Gross, *supra* note 3, at 1073 ("Emer-

consequences of 9/11, the enlargement of executive authority is one of them. 9/11, in that sense, represents a continuation and an acceleration of a modern trend.

Perhaps this is as it should be; we live in troubled times.[376] Chief Justice Rehnquist poses the question of "whether occasional presidential excesses and judicial restraint in wartime are desirable or undesirable."[377] The answer to that question, he writes as a legal realist, is "very largely academic."[378] "There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently from their predecessors."[379] Nevertheless, as the lines blur between the military and domestic law enforcement on the one hand and between domestic law enforcement and foreign intelligence on the other, we find ourselves in uncharted territory having set aside traditional concerns in pursuit of the war on terror. As in *Hamdi* and *Padilla*, this blurring of lines will undoubtedly lead to difficult questions regarding the limits of executive prerogative. This article, then, sounds a cautionary note. In reviewing post-9/11 governmental action, it is impossible not to be concerned with the enlargement of executive power during the war on terror and its long-term potential effect on our constitutional structure.

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gency regimes tend to perpetuate themselves, regardless of the intentions of those who originally invoked them. Once brought to life, they are not so easily terminable."). *But see* Epstein et al., *supra* note 3, at 81, 95 (based on quantitative analysis of Supreme Court precedent, arguing that "[c]ontrary to widespread fear and speculation that doctrine created during wartime 'lingers' on in peace time, the rights jurisprudence appears to 'bounce back' during peacetime," but suggesting that "as long as the war on terror continues in a severity comparable to previous wars, we should see a sharp turn to the right in ordinary civil rights and liberties decisions of the Court."); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 610 (2003) ("critiqu[ing] accounts of emergency that posit a ratchet effect, in which a succession of emergencies produce a unidirectional, and irreversible, increase in some legal or political variable.").

376. The last few years have witnessed a slew of terrorist attacks around the world. In October 2002, nightclub bombings in Bali, Indonesia, killed 202 people. *Cleric Convicted of Conspiring in Bali Bombings*, N.Y. TIMES, Mar. 3, 2005, at A5. That same month more than 100 hostages died in a Moscow theater that had been seized by Chechen guerillas. Steven Lee Myers, *Hostage Drama in Moscow: Russia Responds; Putin Vows Hunt for Terror Cells Around the World*, N.Y. TIMES, Oct. 29, 2002, at A1. In May 2003, suicide bombers killed 45 in Casablanca, Morocco. Whitlock, *supra* note 153, at A10. In November 2003, bombs killed 57 and wounded more than 700 in Istanbul, Turkey. *Id.* In March 2004, bombs set off in commuter trains in Madrid, Spain, killed 191 and wounded more than 1800. *Id.* In September 2004, 331 died, including 186 children, in Beslan, Russia, after their school was seized by Chechen guerillas. C.J. Chivers, *11 Months Later, Russian School Siege Claims New Victim*, N.Y. TIMES, Aug. 3, 2005, at A4. In October 2004, a series of bombings killed 34 at or near the resort town of Taba, Egypt. Greg Myre & Mona El-Naggar, *Attacks in Egypt: Terrorism; Death Toll Rises in Egyptian Bombings*, N.Y. TIMES, July 24, 2005, § 1, at 1. On July 23, 2005, three bombs in the Red Sea resort of Sharm El Sheik, Egypt, killed 64. Greg Myre & Mona El-Naggar, *It's Too Soon to Assign Responsibility for Bombings, Authorities in Egypt Contend*, N.Y. TIMES, July 25, 2005, at A9. Bombings have also occurred in London, England. On July 7, 2005, four suicide bombers killed 52 in London. Elaine Sciolino, *Bombings in London: Intelligence; Europe Confronts Changing Face of Terrorism*, N.Y. TIMES, Aug. 1, 2005, at A1. Two weeks later, on July 21, 2005, there was a second attack in which the bombs did not explode. *Id.*

377. REHNQUIST, *supra* note 1, at 224.

378. *Id.*

379. *Id.*