

# Michigan Journal of Race and Law

---

Volume 3

---

1997

## Watching the Watchdog: Security Oversight Law in the New South Africa

Christopher A. Ford  
*Governmental Affairs Committee of the U.S. Senate*

Follow this and additional works at: <https://repository.law.umich.edu/mjrl>



Part of the [Comparative and Foreign Law Commons](#), [National Security Law Commons](#), and the [Rule of Law Commons](#)

---

### Recommended Citation

Christopher A. Ford, *Watching the Watchdog: Security Oversight Law in the New South Africa*, 3 MICH. J. RACE & L. 59 (1997).

Available at: <https://repository.law.umich.edu/mjrl/vol3/iss1/3>

This Symposium Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

WATCHING THE WATCHDOG:  
SECURITY OVERSIGHT LAW IN THE NEW SOUTH AFRICA

*Christopher A. Ford\**

*This Article attempts to assess the experiences of post-apartheid South Africa in the realm of national security law by examining key issues from constitutional, statutory, and policy perspectives. It observes that South Africans now have a great "window of opportunity" that allows them to establish the habits and mores necessary to a working security oversight regime, and argues that the way in which South Africa strikes a balance between the requirements of national security and the preservation of personal liberties is of enormous importance to the Republic's future. It further contends that South Africa's choices in this arena could have significant implications and/or hold important lessons for other democracies around the world. The Article concludes by making recommendations for the proper role of the legislative, executive, and judicial branches in South African security oversight law.*

INTRODUCTION .....	59
I. CHALLENGES AND OPPORTUNITIES.....	62
A. <i>A New South Africa</i> .....	62
1. Political System in Flux .....	62
2. An Ignominious Past .....	63
3. The Challenges of History.....	67
4. The "Core Tension" of National Security Law.....	71
5. The Peculiarities of National Security Law .....	74
a. <i>Specificity vs. Generality: The Problem of</i> <i>Shifting Equilibria</i> .....	74
b. <i>The Role of the Courts</i> .....	80
c. <i>Law as "Social Process?"</i> .....	82
d. <i>Finding the Balance</i> .....	83
B. <i>South Africa's Challenges</i> .....	85
1. Third World Problems.....	85
2. First World Problems.....	89
a. <i>Uncertain International Responsibilities</i> .....	90

---

\* The author served as Assistant Counsel to the Intelligence Oversight Board at the White House in 1996 and is presently Counsel for Special Investigations at the Governmental Affairs Committee of the U.S. Senate. He is grateful to his former colleagues at the law firm of Shea & Gardner for their support and encouragement. Above all, he is grateful to his wife Jennifer Davis-Ford for the boundless love, kindness, and patience she has shown him during the preparation of this Article. The views expressed herein are his own, and do not necessarily reflect those of the Board, the Committee, or any of their staff members.

b.	<i>Domestic Military Roles</i> .....	93
c.	<i>The SANDF's New Roles and Civil-Military Relations</i> .....	95
3.	<i>Uniquely South African Challenges</i> .....	100
a.	<i>Transforming the Military</i> .....	100
b.	<i>Problems in the Police Force</i> .....	106
c.	<i>The Entrenched Civil Service</i> .....	109
d.	<i>Domestic Political and Religious Groups</i> .....	110
e.	<i>Cross-border Problems: Aliens, Weapons, Drugs, and Theft</i> .....	115
f.	<i>A Continuing Internal Security Role for the Military</i> ...	116
C.	<i>Lessons from the U.S. Experience?</i> .....	118
D.	<i>The Challenges of Security Oversight</i> .....	121
1.	<i>A Taxonomy of Oversight Law and Policy</i> .....	121
2.	<i>Setting the Security-Oversight Mold: Now or Perhaps Never</i> .....	122
II.	<i>NATIONAL SECURITY LAW AND POLICY IN SOUTH AFRICA</i> .....	126
A.	<i>Executive Oversight</i> .....	126
B.	<i>Intra-Institutional Oversight</i> .....	135
C.	<i>Popular Accountability</i> .....	139
D.	<i>Legislative Oversight</i> .....	143
1.	<i>The Current Legislative Scheme</i> .....	144
2.	<i>The Structural Weakness of Legislative Oversight in South Africa</i> .....	146
3.	<i>The Power of the Purse</i> .....	152
4.	<i>The Legislature as an Oversight Organ</i> .....	155
E.	<i>Judicial Oversight</i> .....	157
1.	<i>A Tradition of Judicial Independence Squandered</i> .....	159
2.	<i>Reinventing the Judicial "Jealous Eye?"</i> .....	162
3.	<i>A Case Study: Domestic Intelligence Surveillance</i> .....	163
4.	<i>An Inevitable Judicial Role in Oversight Issues</i> .....	168
III.	<i>THE FUTURE OF SOUTH AFRICAN SECURITY OVERSIGHT?</i> .....	173
A.	<i>Recommendations</i> .....	173
1.	<i>Legislative Oversight Issues</i> .....	173
2.	<i>The Surveillance Court</i> .....	174
3.	<i>Other Oversight Organs</i> .....	176
4.	<i>The Role of the Judiciary</i> .....	177
a.	<i>A New Jurisprudence of "Warning?"</i> .....	177
b.	<i>A CIPA Analogue?</i> .....	180
c.	<i>The Concept of "National Security"</i> .....	181
	<i>CONCLUSION: A PARTING WORD</i> .....	182

*Madness in great ones must not unwatch'd go.*<sup>1</sup>

## INTRODUCTION

South Africa's tortuous journey to majority rule has long been a subject of enormous concern to scholars, public officials, and concerned citizens around the world. For years, perhaps no country symbolized the divisions and the controversies of the post-war world as much as did the Republic of South Africa. Indeed, a person's position with respect to the efforts of the South African people to overcome apartheid became, for observer and participant alike, a litmus test of that person's role in any number of broader struggles of enormous magnitude, struggles involving: racial equality, international communism, democratic self-rule, imperialism, liberalization and economic development, or class oppression. Most of all, however, South Africa grabbed the attention of the world because of race. In most of the other struggles that its tumultuous post-war history seemed to illustrate and embody, South Africa remained to foreign observers one arena among many. With respect to race relations, however, South Africa inhabited a symbolic and political plane entirely its own. For the severity of its racial polarization, for the enduring character of its struggle for majority rule, and for the audacity of the White government's claims to have found in apartheid's racial oppression a liberating ideal of race-autonomous "self-determination,"<sup>2</sup> South Africa was as compelling as it was appalling—an almost irresistible subject for the world's fascination and deep passions.

As the fruits of this dramatic journey, the Republic's present-day efforts to bring democracy, human rights, economic development, and civil order to its polarized society continue to fascinate much of the world. In the United States, however, the challenges and opportunities of the post-apartheid era are still seen almost exclusively through the lens of race, and are studied principally for the lessons about equality they may offer to other societies.<sup>3</sup> It is the assumption of this Article that while the bare facts

---

1. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

2. See generally Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 *UCLA L. REV.* 1953, 1991 (1996) [hereinafter Ford I] (discussing National Party's racial ideology of "separate development" or "separate freedoms" as being distinctive gloss upon traditional racial segregation, as well as leading to some of the worst abuses of the apartheid era).

3. This author has hitherto been no exception. See Christopher A. Ford, *Administering Identity: The Determination of 'Race' in Race-Conscious Law*, 82 *CAL. L. REV.* 1231, 1276-79 (1994) [hereinafter Ford II]; see also Ford I, *supra* note 2, at 1960.

of race—and the history of race relations in South Africa—provide a context without which that country's affairs cannot properly be understood, to keep such an exclusively race-based focus would be to forego an opportunity to learn from the post-apartheid state's experiences with other important issues and themes powerfully implicated in contemporary South African events.

Specifically, this Article attempts to assess the implications of post-apartheid South Africa's experiences in the realm of national security law by examining key issues in this arena from a constitutional, statutory, and policy perspective, and attempting to draw broader lessons therefrom. This is not to suggest that the challenges and opportunities of national security law and oversight are the only (or perhaps even the most important) issues facing contemporary South Africa beyond the obvious challenges of economic development and racial equality. What is clear, however, is that the way in which South Africa strikes its balance between the requirements of security and the preservation and advancement of liberty in a democratic and rights-governed society will be of enormous importance to the Republic's future—and may offer important lessons to those of us in other parts of the world keenly interested in achieving a proper balance in our own societies.

## I. CHALLENGES AND OPPORTUNITIES

### A. *A New South Africa*

#### 1. Political System in Flux

South Africa is, of course, in an extraordinary state of transition, having enjoyed its first fully democratic elections in history in April 1994, and having been ruled for the past three years by a coalition government headed by Nelson Mandela—once the world's most famous political prisoner—and his formerly outlawed African National Congress (“ANC”).<sup>4</sup> For most of this period, an “interim Constitution” adopted in 1994 has provided South Africa's basic governmental structure,<sup>5</sup> but the country's final constitutional document—the framework of ultimate law by which the post-apartheid

---

4. The ANC won 62.7% of the popular vote in the 1994 balloting, which gave it 252 seats in the 400-seat multi-racial National Assembly elected at that point. See generally Stephen Ellmann, *The New South African Constitution and Ethnic Division*, 26 COLUM. HUM. RTS. L. REV. 5, 6 n.2 (1994) (citing *Final Returns from South Africa*, N.Y. TIMES, May 7, 1994, at A8).

5. Kenneth B. Noble, *South African Parliament Adopts New Constitution*, N.Y. TIMES, Dec. 23, 1993, at A3 (recounting parliamentary vote of December 22, 1993).

state is to be governed—was adopted in May 1996 and took effect at the beginning of 1997.<sup>6</sup> South Africa, in other words, has only very recently acquired its fundamental law. It now faces the long process of developing a workable statutory and regulatory scheme to structure governance and order civil society within the new constitutional framework, and an even longer process of learning how to live with the dramatic changes recent years have brought.

## 2. An Ignominious Past

With respect to issues of national security law, one does not have to look far back into South African history to find powerful illustrations of the need for proper accountability and oversight of the security bureaucracy, particularly now that this bureaucracy must carry out its functions within a system of constitutional rights and democratic values. The last comprehensive attempt to structure South Africa's national security system—the White minority National Party government's establishment of a "National Security Management System" ("NSMS") under the supervision of a "State Security Council" ("SSC") to coordinate the operation of all facets of the security apparatus in its efforts to suppress anti-apartheid resistance<sup>7</sup>—amounted to little more than "a secret junta of military, police and government officials whose sweeping powers enabled it to bypass Parliament."<sup>8</sup> As Johan van der Vyver put it, the apartheid state thus almost "inevitably culminated in state absolutism because the law enforcement agencies of the state were entrusted with powers that were not made subject to the rule of law and furthermore disregarded the procedural directives of the due process of law."<sup>9</sup>

Lacking meaningful accountability or oversight, the White government's security bureaucracy ran wild, pursuing real and

---

6. S. AFR. CONST. § 244(1) ("This Act . . . comes into effect on a date set by the President by proclamation, but no later than 1 January 1997.").

7. See generally Kevin Fedarko & Peter Hawthorne, *The Silence Cracks*, TIME, Nov. 4, 1996, at 59; *Truth Commission Hears ANC on Camp Discipline*, "Legitimate Targets," BBC Summary of World Broadcasts, Aug. 24, 1996, available in LEXIS, World Library, BBCSWB File [hereinafter *Camp Discipline*] (discussing NSMS' anti-apartheid violence); James Selfe, *South Africa's National Security Management System* (1988) (unpublished monograph, on file with the author) (describing establishment of "parallel, militarized bureaucracy promoting the co-ordination of state security action").

8. Fedarko & Hawthorne, *supra* note 7, at 59.

9. Johan D. van der Vyver, *Comparative Constitutionalism: Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 751 (1991) (citing A. Mathews, *The South African Judiciary and the Security System*, 1 S. AFR. J. HUM. RTS. 199, 199–201 (1985)).

perceived opponents with deadly force both at home and abroad. As the findings of South Africa's former "Goldstone Commission"<sup>10</sup> and the ongoing proceedings of the Truth and Reconciliation Commission ("Truth Commission")<sup>11</sup> have made agonizingly clear, South African Police ("SAP") officials were deeply involved in all variety of "dirty tricks" against apartheid's domestic opponents that went far beyond their all-too-public role in the brutal suppression of domestic discontent in the country's impoverished Black<sup>12</sup>

---

10. The Goldstone Commission was a government commission, headed by Supreme Court Justice Richard Goldstone, that played a dramatic role in the early 1990s in uncovering involvement in intergroup violence by the South African security forces. See generally Bronwen Manby, *South Africa: Minority Conflict and the Legacy of Minority Rule*, FLETCHER F. WORLD AFF., Winter/Spring 1995, at 45.

11. The "Truth Commission" is a government body established principally as a fact-finding organ for the investigation of "gross violations of human rights" committed in South Africa between 1960 and 1993, and empowered to offer amnesty to perpetrators on the condition that they publicly acknowledge their crimes. See generally Truth and Reconciliation Commission, *South Africa; Tutu Issues Appeal for Amnesty Applications*, Africa News, Dec. 10, 1996, available in LEXIS, World Library, AFRNWS File; *All Things Considered* (Nat'l Pub. Radio Broadcast, Dec. 13, 1996).

12. Given the sensitivity of all racial labels in the context of South Africa's long history of *de jure* racial segregation enforced by means of race-classifying personal identity documents—the infamous "passes" that formed the documentary backbone of apartheid-era segregation, see generally ILLUSTRATED HISTORY OF SOUTH AFRICA: THE REAL STORY 377–78 (Dougie Oakes ed., 1988) [hereinafter HISTORY]—a terminological note is necessary here. Under the Population Registration Act of 1950, the apartheid regime formally classified individuals into one of four principal racial groups: Whites (the descendants principally of Dutch- and English-speaking European settlers), Africans (the descendants of those who made up South Africa's principal "tribes" before the coming of the Europeans), Coloureds (mixed-race individuals of varying ancestries), and Indians or Asians (descendants of South Asians who came to South Africa as laborers or merchants under British rule).

Post-apartheid racial terminology seems to be somewhat in flux. In reaction to the formal classifications of the Population Registration Act, it became popular among "[p]rogressive non-Whites in South Africa" to identify themselves merely as "Black," see Marshall S. Huebner, Note, *Who Decides? Restructuring Criminal Justice for a Democratic South Africa*, 102 YALE L.J. 961, 965 n.21 (1993); Charles R. Lawrence III, *Forward: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 827 (1995), a phenomenon which dates at least from Steve Biko's "Black Consciousness Movement" in the mid-1970s, see HISTORY, *supra*, at 443. More recently, a revived use of the more ethnically specific term "Africans" has come into vogue among those who some have otherwise termed "Black Blacks," as they seek to assert claims to government benefits against other South African "Blacks" of differing hue. See, e.g., *There's Black and Black*, ECONOMIST, Dec. 3, 1994, at 52; Ford II, *supra* note 2, at 1983–84.

Because of South Africa's long period of formal segregation and differentially invidious treatment under apartheid, the old classifications of the Population Registration Act have retained some real social and personal significance even after its repeal in 1991. Accordingly, with due apologies to "progressive non-Whites in South Africa," this Article will employ the terms "White," "African," "Coloured," and "Asian" where such a degree of specificity is required. Similarly, with apologies to those who find the term "non-White" to be "offensive," see, e.g., Huebner, *supra*, at 965

“townships.”<sup>13</sup> At their most extreme, these “tricks” involved organizing extra-judicial assassination squads to target ANC activists—not only “hit squads” made up of Zulus affiliated with the fiercely anti-ANC “Inkatha” organization and local police forces from the ethnic “homeland” of KwaZulu,<sup>14</sup> but also elite assassination teams made up of White SAP regulars.<sup>15</sup> Indeed, these police abuses were not limited to the government’s domestic opponents: the long arm of these extra-judicial assassins had an international reach as well.<sup>16</sup>

Nor was the apartheid-era South African Defence Force (“SADF”) establishment immune to such abuses. SADF units were apparently involved in training some of the Inkatha “death squads” at secret military encampments on the Caprivi Strip in northeastern Namibia,<sup>17</sup> military intelligence units were reportedly “associated” with the assassination and destabilization activities of so-called “Hammer Units” in certain particularly volatile areas of South

---

n.21, “non-White” will still be used herein in order to avoid confusing American readers unaccustomed to using the term “Black” to include all those persons who are not actually “White.” (The nearest U.S. analogue to the South African “Black” is the awkward neologism “persons of color,” which is inappropriate to use in discussing South Africa by virtue of its narrow Americanness.) “Black” will be generally used herein only to refer to the majority populations of other countries in sub-Saharan Africa, where fewer such terminological confusions arise.

13. Most infamously it was the police who fired upon anti-government demonstrators at Sharpeville in 1960, killing 69 people and wounding 180, and again in 1976 in Soweto, where hundreds of people died in the orgy of rioting and street clashes that followed the first clashes with police. *See, e.g.*, HISTORY, *supra* note 12, at 398–403 & 443–44.

14. *See generally* Manby, *supra* note 10, at 45.

15. *See, e.g.*, David Beresford, *Ex-Police Chief Points Finger at Botha*, GUARDIAN, Oct. 22, 1996, at 12 (recounting police general’s claim to the Truth Commission that he had been ordered by then-Minister of Law and Order Adriaan Vlok to bomb headquarters of South African Council of Churches); Alec Russell, *Assassin for Apartheid Gets Two Life Sentences*, DAILY TELEGRAPH, Oct. 31, 1996, at 21 (recounting that the elite SAP anti-terrorist unit operating until 1993 out of Vlakplaas farm outside Pretoria was actually employed as an assassination squad).

16. *See, e.g.*, Robert Block, *South African Security Link to Palme Murder*, SUNDAY TIMES, Oct. 20, 1996 (recounting former SAP informer’s claim to have had a role in bombing ANC headquarters in London and in notorious parcel-bomb murders of anti-apartheid activists). According to court testimony by the former head of the notorious Vlakplaas assassination team, Eugene de Kock, the South African security services were even involved in the murder of Swedish Prime Minister and former United Nations Secretary-General Olaf Palme in 1986 (though Swedish investigators apparently have not yet resolved the case). *Id.*

17. *See* Mark Ashurst, *Six Go Free in Malan Murder Trial*, FIN. TIMES, Oct. 11, 1996, at 3. A German colony since 1884, Namibia (then known as South-West Africa) was occupied by South Africa during the First World War. It was not given independence until 1990, after a protracted guerrilla war.



Africa,<sup>18</sup> and police testimony before the Truth Commission has suggested that SADF special forces and intelligence operatives helped police officials select targets for “elimination.”<sup>19</sup> Beyond South Africa’s borders, the SADF became notorious during the 1980s for mounting repeated cross-border raids to strike at ANC targets on the soil of the Republic’s Black-ruled neighbors.<sup>20</sup>

Moreover, as the proceedings of the Truth Commission have shown, even the ANC—which presently rules South Africa and seems likely to do so for the foreseeable future—became so intoxicated with its anti-apartheid goal that it allowed itself to commit abuses in its pursuit. For example, in a 100-page document submitted to the Commission written by Deputy President Thabo Mbeki, Minister of Transport Mac Maharaj, and Premier Mathews Phosa of Mpumlunga Province, the ANC admitted to a number of crimes, including the execution of thirty-four intra-ANC dissidents in the organization’s training camps in Angola and the use of indiscriminate car-bomb attacks against civilian targets in apartheid-era South Africa.<sup>21</sup>

---

18. See Shaun McCarthy, *South Africa’s Self-Defence Units*, JANE’S INTEL. REV., Nov. 1994, at 520, 521 [hereinafter McCarthy, SDUs] (linking units operating in Eastern Cape, Natal province, and East Rand areas to former Department of Military Intelligence’s “Directorate of Covert Collection”).

19. See Stefaans Brummer, “Arrogant” SADF Angers Minister, *Africa News*, Oct. 28, 1996, available in LEXIS, World Library, AFRNWS File.

20. See, e.g., HELMOED-ROMER HEITMAN, *THE SOUTH AFRICAN WAR MACHINE* 168–74 (1985) [hereinafter HEITMAN, WAR MACHINE] (describing invasion of Angola in 1975). As it was put at the time, the SADF’s mission was to “be able to take successful action at any time and at any place in Southern Africa” in order “to locate and destroy hostile terrorist bases, wherever they may be established.” Senate *Hansard* 16 Feb 1981 Col 1508–13. South Africa also supplied arms and assistance to anti-government guerrilla groups in neighboring countries, with the aim of weakening and preoccupying potentially hostile Black-ruled regional states with domestic unrest and making the costs of support for the ANC prohibitive. See, e.g., Rok Ajulu & Diana Cammack, *Lesotho, Botswana, Swaziland: Captive States*, in *DESTRUCTIVE ENGAGEMENT: SOUTHERN AFRICA AT WAR* 145–47 (David Martin & Phyllis Johnson, eds. 1986); David Martin & Phyllis Johnson, *Destabilization and Dependence*, in *APARTHEID IN CRISIS* 310 (Mark A. Uhlig, ed. 1986).

21. See *Camp Discipline*, *supra* note 7; *Tutu Panel Summons 2 in Anti-Apartheid Attack*, N.Y. TIMES, Apr. 4, 1997, at A11. In April 1997, the Truth Commission issued subpoenas to ANC activists Robert McBride and Greta Appelgren, who had detonated a car bomb outside a pub in Durban in 1985, killing three civilians. According to McBride, the car bomb attack was ordered by his superiors in the ANC; the Truth Commission apparently wished to know more about the ANC’s terror-bombing campaign.

This Article does not mean to suggest the moral equivalence of the abuses committed by both sides in the anti-apartheid struggle. The point is merely that *some* abuses *were* committed by both sides, and—as we will see—that this history presents some special challenges for national security oversight in South Africa today.

### 3. The Challenges of History

This history provides South Africans with a more compelling lesson about the need for accountability and oversight of the security apparatus than any textbook ever could. Not surprisingly, the lessons of the past have hung heavily over the South African government's attempts to craft oversight legislation for the post-apartheid era. As Senator James Selfe of the Democratic Party stated in parliamentary debates in 1994 over new intelligence legislation, it has proven "virtually impossible" to talk about restructuring the security apparatus "without referring to what transpired in the past. . . . [R]unning like a golden thread through the . . . [Intelligence] Bills is the recognition that only a fool does not learn from history."<sup>22</sup>

For their part, South African government officials claim to have learned well the lessons of their unhappy past. As Deputy Intelligence Minister of Intelligence Services Joe Nhlanhla proclaimed to the House of Assembly during the Intelligence Bills debate,

[m]indful of intelligence service practices that were motivated by internal political struggles that often saw them gripped in a life-and-death conflict, either in support of or in opposition to the apartheid system of government, these Intelligence Bills make a[n] . . . unambiguous statement to all South Africans. Never again shall intelligence be used to pursue the narrow interests of the political party in power. Never again shall intelligence sow conflict [and] destabilisation . . . . Never again shall intelligence be used as a means of control over the lives of the people of this land.<sup>23</sup>

According to another minister, "[t]he fatal flaw of the past, when the minority government maintained power by employing all

---

22. Senate *Hansard* 15 Nov 1994 Col 3019 (remarks of J. Selfe).

23. House of Assembly *Hansard* 15 Nov 1994 Col 4130; see also *id.* Col 4140 (remarks of Kader Asmal) ("[N]ever, I repeat, never will the intelligence agencies be allowed to influence the course of national events in a manner not compatible with democratic principles."); *id.* Col 4153 (remarks of L.T. Landers) ("Never again should the security forces, underpinned by our intelligence services, spawn the likes of [the police-run assassination squads]. Never again should a message emanate from a State Security Council calling for the permanent removal from society of a[n] [anti-government activist]. Never again should residents of our townships or our commuters be subjected to campaigns of . . . terror or . . . violence by *agents provocateurs*."). Kader Asmal, while also Minister of Water Affairs and Forestry, was a member of the Cabinet Subcommittee on Security and Intelligence Affairs (CSSIA) and chaired the National Conventional Arms Control Committee.

the instruments at its disposal, including intelligence, is now mercifully behind us.”<sup>24</sup>

What such dramatic historical illustrations of the pitfalls of security oversight failure do not so easily provide, however, is a clear blueprint of how to structure South Africa’s laws, institutions, and governmental processes in order to ensure national security accountability in the future—and of how to cultivate the personal and institutional mores upon which fidelity to such a system will depend. The object lessons of past abuses, in other words, tell South Africans that they require such things, but the post-apartheid state has had to look elsewhere for more specific guidance as to how to strike the difficult balance between liberty and security.

This sordid history presents a particular challenge in South Africa because many persons involved in abuses during the struggle for democratic rule remain—or have become—part of the security bureaucracy today. While some White (and non-White) members of elite military units such as the 1st Reconnaissance Commando, the 44th Parachute Battalion, and the 32nd Battalion appear to have found gainful private employment outside South Africa,<sup>25</sup> both the

---

24. *Id.* Col 4127 (remarks of Kader Asmal).

25. It has been repeatedly reported that many former members of such elite SADF units now work for a private mercenary organization called “Executive Outcomes,” a shadowy company with extensive international financial connections which has recently won itself some fame in combat against rebel forces in the service of the governments of both Angola and Sierra Leone; more recently they may have had some involvement in Zaire’s civil war and in Papua New Guinea. See generally Tom Cohen, *Mercenaries Battle Image*, WASH. TIMES, Apr. 7, 1997, at A14 (describing the complaints of human rights groups and defense analysts over Papua New Guinea’s use of mercenaries); Jim Hooper, *Peace in Sierra Leone: A Temporary Outcome?*, JANE’S INTEL. REV., Feb. 2, 1997, at 91 (tracing the conflict between the Liberian-backed Revolutionary United Front and the President of Sierra Leone); Herbert M. Howe, *Mercenaries in Africa: A Force for Good or Evil?*, ORLANDO SENTINEL, Apr. 7, 1996, at G1 (describing the rise of Executive Outcomes, a South African mercenary organization); Khareen Pech, *Mobilisation of Mercenaries*, JANE’S INTEL. REV., Mar. 1, 1997, at 11 (reporting on the influx of foreign military intervention in Central Africa); Khareen Pech, *South Africa Tries to Ban Mercenaries*, JANE’S INTEL. REV.-POINTER, Feb. 1, 1997, at 13 [hereinafter Pech I] (describing South Africa’s effort to prohibit the sale of military and intelligence services to foreign governments); *S. Africans Protect Sierra Leone Dam From Rebels*, Reuters World Service, Oct. 22, 1996, available in LEXIS, World Library, REUWLD File (reporting on a mercenary group guarding a dam against rebel attacks); *South Africans to Train Sierra Leone Army in Jungle Warfare*, Agence France Presse, June 7, 1995, available in LEXIS, World Library, AFP File (reporting on Sierra Leone’s use of a mercenary organization); Talifdeen, *Mercenaries “Capitalise on Mineral Resources”*, JANE’S DEF. WKLY., Nov. 13, 1996, at 5 (discussing the dealings of South African mercenaries); *The Mine-Strewn Paths to African Peace*, ECONOMIST, Oct. 22, 1994, at 49 (describing the difficult path to establishing a peace deal in Angola); see also Tony Buckingham, INTEL. NEWSL., Sept. 28, 1995, at 3 (describing Executive Outcomes’ international financial connections).

South Africa’s new Constitution, however, provides that no South African citizen may “participat[e] in armed conflict, nationally or internationally, except as

South African military and the police service retain great numbers of personnel who formerly served the White minority government. For its part, of course, the ANC now runs the South African government, placing its veterans of the armed struggle against apartheid in office as the civilian masters of the security establishment. Large numbers of former guerilla fighters from *Umkhonto we Sizwe* (or “MK,” the armed wing of the ANC) and the Azanian People’s Liberation Army (or “APLA,” the armed wing of the Pan-Africanist Congress) have also been brought into the military service—now rechristened the South African National Defence Force (“SANDF”)—putting on uniforms alongside the men they once fought.<sup>26</sup> Members of the ANC and PAC intelligence services and those of the former self-governing “homelands” of Transkei, Bophuthatswana, and Venda have also been integrated with the intelligence services of the former apartheid state.<sup>27</sup>

Both the former security forces of the White minority regime and the former guerrillas of MK and APLA have, independently, demonstrated a tendency to assume that a righteous end justifies any means employed in its pursuit. For the security forces, “national security” was an altar upon which could be sacrificed all notions of legality and propriety. During the 1980s they perceived themselves to be, as Brigadier Jack Cronje once put it, in a state of “war” against anti-apartheid guerrillas—convincing themselves in the process that extrajudicial killing was “the only way effective action [that] could be taken against activists in the war situation.” Detention pursuant to South Africa’s already-draconian security laws was apparently “not enough, seeing as it was limited and of short duration.” Actual prosecutions in a court of law, it was feared, would be even more cumbersome, however, leaving the security forces with what Cronje

---

provided for in terms of the Constitution or national legislation.” S. AFR. CONST. § 198(b). Such “national legislation” was proposed in early 1997 to forbid the offering or selling of military or intelligence services to foreigners without first obtaining permission from the National Conventional Arms Control Committee (“NCACC”). If passed, it might “force [Executive Outcome] to move out of South Africa and may hamper recruitment of South African personnel.” Pech I, *supra*, at 13.

The 1st Reconnaissance Commando (“Recce Commando” or the “Recces”) was an all-White commando and strategic reconnaissance unit modeled after Britain’s famous Special Air Service. The 44th Parachute Brigade (the “Parabats” or simply the “Bats”) was an elite airborne-capable light infantry unit within the SADF, while the 32 Battalion (sometimes called South Africa’s “Buffalo Soldiers”) was a special counter-insurgency unit led by White officers but with ranks filled by non-white soldiers. See generally HEITMAN, *WAR MACHINE*, *supra* note 20, at 96–108.

26. See, e.g., Bereng Mtimkulu, *Reluctant Peacekeeper*, 52 BULL. ATOM. SCIENTISTS 9 (1996).

27. See House of Assembly *Hansard* 11 Nov 1994 Col 4130–31 (remarks of J.H. Nhlanhla).

described as “no other choice than to take normal military action and eliminate activists.”<sup>28</sup>

For the ANC, the fundamental morality of the struggle against apartheid was similarly felt to make any conduct permissible. The ANC strongly resisted making any submission to the Truth Commission, reasoning that it had been fighting a “just war” that required no apology, and agreed finally to do so only after the Commission’s chairman, Anglican Bishop Desmond Tutu, threatened to resign.<sup>29</sup> Even in its submission to the Commission, the ANC declared that the “overwhelming majority” of its strikes against South African targets were legitimate. While the ANC apologized for the deaths of “innocent civilians” in such attacks, it defended the use of land mines against White farmers because they had received military training from the SADF.<sup>30</sup> Because South Africa then employed universal White male conscription to fill the ranks of the SADF, this reasoning would have made any White male a “legitimate target”—a logic even more brutally permissive than Brigadier Cronje’s rationalization for assassinating pro-ANC “activists.” Now that their struggle has ended, when reminded that the ANC, too, “permitted, indeed, encouraged its security arm to operate above the law, without any requirement of accountability whatsoever,”<sup>31</sup> government ministers grow angry and defensive, insisting that such activities were a regrettable but necessary side-effect of their “resistance to an immoral system.” In truth, they say, “we have nothing to be ashamed of.”<sup>32</sup>

Both components of the leadership of South Africa’s post-apartheid security apparatus, therefore, have demonstrated a dangerous susceptibility to wholly result-oriented varieties of operational ethics. This obviously poses a serious challenge in the arena of security oversight, for in constitutional democracies the belief that a worthy end automatically justifies any means is inevitably the sworn enemy of security accountability and the rule of law. Indeed, such a corrupted end/means rationality is the cardinal sin of the security-oversight world. It will thus be the challenge of South African national security law not only to create formal structures and procedures for security oversight, but also to

---

28. Tom Cohen, *Former Security Chief: Killing Anti-Apartheid Activists was Necessary*, AP, Oct. 22, 1996, available in LEXIS, News Library, AP File.

29. See David Beresford, *ANC and Tutu Heal Rift*, GUARDIAN, Nov. 11, 1996, at 10.

30. See *Camp Discipline*, *supra* note 7.

31. See House of Assembly *Hansard* 11 Nov 1994 Col 4154 (remarks of J.A. Jordaan) (quoting from report of the Douglas Commission).

32. *Id.* Col 4158 (remarks of Kader Asmal) (describing ANC misdeeds as “the pathology of guardians guarding the integrity of leadership against [pro-apartheid] hit squads committed to destroying the leadership”).

cultivate institutional mores conducive to such oversight. Given the relative novelty of these ideas to former SAP, SADF, and intelligence officials, and to the ANC itself, the creation of a new security culture—one that recognizes that “[j]ustice can never be adequately pursued only as a goal or an idea” but “is also reflected in the means employed”<sup>33</sup>—will have to be a high priority if South Africa’s young constitutional democracy is to remain a democracy in more than just name.

#### 4. The “Core Tension” of National Security Law

Though South Africa’s contemporary circumstances present, in many ways, special challenges to security oversight, the basic dilemma the Republic faces is one that it shares with any democracy which seeks to ensure that the actions it undertakes in self-preservation do not fundamentally traduce the values which make it worth preserving. Except, perhaps, in the most extraordinary circumstances of war or disaster,<sup>34</sup> constitutional democracies cannot

---

33. Jay Katz, *Human Sacrifice and Human Experimentation: Reflections at Nuremberg*, YALE LAW SCHOOL OCCASIONAL PAPERS, 2d. ser., no.2 (1997), at 17.

34. The U.S. Constitution, for example, recognizes an exception to the usual inviolability of the writ of *habeas corpus* “in cases of Rebellion or Invasion.” U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.”). Since this “suspension clause” appears in Article I of the Constitution, however—the article laying out the powers of the U.S. Congress—it seems to reserve the right to suspend *habeas corpus* for the legislature. Nevertheless, President Abraham Lincoln took it upon himself to suspend the writ upon the outbreak of the U.S. Civil War in 1861, deeming that particular liberty worth infringing in the broader interest of preserving the constitutional scheme in its entirety.

Many authors otherwise supportive of a robust system of security oversight similarly still accept the need for an executive dispensation to respond to emergency situations. John Hart Ely, for instance, admits to the existence of at least some implicit presidential power to respond to emergencies by the commitment of U.S. troops to combat without restriction either by the constitutional reservation to Congress of the power to “declare war” or by the statutory limitations of the War Powers Resolution. See JOHN HART ELY, *WAR AND RESPONSIBILITY* 65 (1993). Loch Johnson, in examining the murky ethical world of “covert action” by intelligence services, suggests an even more dramatic scenario: “[i]f . . . a nation’s leaders believe that a major city was about to be vaporized by a nuclear device stolen by terrorists, they would no doubt use every means available to avoid this calamity. Constitutional safeguards would be thrown out the window. Even the assassination of the suspected terrorists would be an option if the nation’s leaders were persuaded that murder would prevent the nuclear annihilation of millions—a consequentialist’s imperative.” LOCH K. JOHNSON, *SECRET AGENCIES* 75 (1996) [hereinafter JOHNSON I]; see also *id.* at 76 (“In times of overt warfare, almost anything goes when it comes to supportive intelligence options.”).

Many scholars of civil-military relations have noted the tension that exists between security and liberty, especially in times of crisis. See, e.g., David R. Segal, *U.S.*

permit themselves to go so far: we may not destroy our constitutional community in order to save it. But, of course, save it we must.

National security issues force the politician, legislator, judge, and citizen to confront this dilemma quite starkly. In a constitutional democracy, national security law serves two often incompatible masters, liberty and security. In attempting to strike a balance between the two, it can find itself in some very awkward situations. As the above illustrations of apartheid-era abuses suggest, “[i]t is not unusual for legal principles to be at variance with perceptions of national security needs.”<sup>35</sup> There exists a “basic tension in democratic polities between the need for openness as a way of assuring power sharing and the need for secrecy as a way of assuring efficiency.”<sup>36</sup>

Scholars of civil-military relations have long addressed themselves to similar tensions in discussing what Peter Feaver has called “the problem . . . [of] how to keep the military from taking over the government.”<sup>37</sup> In David Segal’s words,

[o]ne of the cultural contradictions of the modern democratic state is that its defense almost invariably requires either that the ideals it embodies must be compromised or that its means of defense must be constrained by those ideals, rendering the defense less effective. A democracy either must prepare for and fight its wars with one hand tied behind its back, or it must become a bit less democratic in the interest of effectively defending itself.<sup>38</sup>

The dilemma of national security law is closely related to this tension, but broader. It is concerned not only with preventing a coup (that is, with keeping the uniformed services from coming to control

---

*Civil-Military Relations in the Twenty-first Century: A Sociologist's View*, in U.S. CIVIL-MILITARY RELATIONS: IN CRISIS OR TRANSITION? 185, 195 (Don M. Snider & Miranda A. Carlton-Carew eds., 1995) [hereinafter CIVIL-MILITARY RELATIONS] (noting “the tension between democracy and the rule of law, particularly in wartime”); see also *infra* note 247 (discussing tensions between rule of law and command authority in wartime).

35. CIVIL-MILITARY RELATIONS, *supra* note 34, at 195.

36. W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 131 (1992).

37. Peter D. Feaver, *Civil-Military Conflict and the Use of Force*, in CIVIL-MILITARY RELATIONS, *supra* note 34, at 113.

38. Segal, *supra* note 34, at 194; see also Feaver, *supra* note 37, at 115 (“[W]hat makes the problem interesting however, is that [the] goals [of civil-military relations] can sometimes be in conflict. For example, in seeking to insure that the military will not dominate civilian politics it is possible to adopt methods that weaken or destroy the military institution itself. Or, in protecting military institutions from mismanagement, it is possible to free them to act out of consonance with national policy. In short, civil-military relations embody a tension, if not an outright conflict, between at least partially contradictory goals.”).

the civilian leadership), but also more generally with keeping the conduct of the security bureaucracy within bounds set by law and ensuring that bureaucracy's accountability both to its civilian masters and (ultimately) to the public. To the "ghost of Cromwell" that may be said to loom over issues of civil-military relations—a reminder of the perils of allowing the military to assume the reigns of power<sup>39</sup>—we may therefore add the "ghost of Cronje."

The fundamental challenge, therefore, is how to strike this balance: how to make national security law serve both security and liberty in ways appropriate to the circumstances of the time and the values this balance is undertaken in order to protect. It is an inherently difficult process, and failure to find the right equilibrium can be disastrous. This challenge, however, is one that no constitutional democracy can entirely escape.<sup>40</sup> After all, perhaps the only thing more dangerous than having an overpowering security apparatus is not having one at all.

At the margin, of course, the tension between security efficiency and liberty—a sibling of the more famous tension between order and justice—that necessarily characterizes much of security oversight law is not a tension at all. As Thomas Hobbes recognized long ago, it is the fundamental contribution of political life to secure members of the body politic against the ever-present fear of violent death.<sup>41</sup> In national security affairs, a balance drawn radically in favor of liberty is no balance, and will provide no liberty. The subtleties and difficult choices of security oversight arise, however, as a society moves away from this extreme: after the point at which some basic "floor" of security has been achieved. Given this inescapable fact—and bearing always in mind that it is the purpose of security to *serve* liberty—the key question becomes one of how to

---

39. The "ghost of Cromwell" metaphor is that of Lt. Gen. (ret.) Dave Palmer, USA. See, e.g., DAVE R. PALMER, 1794: AMERICA, ITS ARMY, AND THE BIRTH OF THE NATION 94 (1994). In his characterization, the Framers of the U.S. Constitution—acutely aware of Britain's history of civil war and military dictatorship in the previous century—found this "ghost of Cromwell" a "presence [they] could hardly ignore." *Id.* The history of Cromwellian dictatorship, Palmer writes, illustrated the perils of having too large a standing professional army, and was powerfully in the minds of the drafters of both the U.S. Declaration of Independence and the U.S. Constitution. *Id.* at 96, 99–101, 103. The Framers, therefore, faced the classic dilemma of civil-military relations: how to square the needs of defense with the requirements of freedom.

40. Reisman and Baker have discussed this challenge with respect to U.S. intelligence law, see, e.g., REISMAN & BAKER, *supra* note 36, at 131 ("The urgent policy question is which emerging legal and administrative arrangements best equip the United States for its world role while preserving its democratic values."), but all constitutional democracies face it to one degree or another.

41. See, e.g., THOMAS HOBBS, LEVIATHAN 379 (C.B. Macpherson ed., Pelican Books 1981) (1651).



maintain control: "How [can] such a force be kept loyal to the republic? Who [will] watch it with a jealous eye?"<sup>42</sup>

## 5. The Peculiarities of National Security Law

### a. *Specificity vs. Generality: The Problem of Shifting Equilibria*

The difficulty of achieving this necessary balance tends to give national security law a structure and function unfamiliar to those accustomed to more conventional varieties of domestic jurisprudence. If, for example, it is the job of national security law to mediate between the values of liberty and security, drawing a line appropriate to the society it serves and the threats that society faces, then there is little reason to believe that the same line will be appropriate for all circumstances. Precisely because the particulars of this equilibrium will depend to some non-trivial extent upon the particular threats a society faces, it is very difficult to arrive at "bright-line" rules for the regulation of security affairs. At least to some extent, therefore, this leaves the proper functioning of national security law less to the formal determinations of conventional domestic legality (i.e., binary decisions of "legal" or "illegal") than to more informal bargaining process between various participants in the governmental system—a process not always conducive to comprehensive codification or simple *yea/nea* decision-making thereafter fixed into precedential stone. One cannot escape the need to set legal restraints and oversight institutions into a fixed form, but neither can one expect an extremely specific textual embodiment to work particularly well.

The elaborate American corpus of intelligence oversight law, for example, has struggled with this tension between specificity and generality since the mid-1970s, and over the years of its development has swung back and forth between more and less restrictive texts. In reaction to the highly publicized hearings of a congressional committee in the mid-1970s on involvement by the Central Intelligence Agency ("CIA") in a number of (unsuccessful) past assassination plots against foreign leaders,<sup>43</sup> the U.S. Congress

---

42. PALMER, *supra* note 39, at 108.

43. The modern-day apparatus of congressional oversight of the U.S. intelligence apparatus largely dates from the series of scandals—involving not just foreign assassination plotting but widespread domestic spying against antiwar activists and civil rights leaders, and drug experiments on unsuspecting victims—revealed during this period. See generally REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES (1975) (the "Rockefeller Commission" report); JOHNSON I, *supra* note 34, at 44–46; RHODRI JEFFREYS-JONES, THE CIA AND AMERICAN DEMOCRACY 194–208 (1989); JOHN RANELAGH, THE AGENCY: THE RISE AND DECLINE

passed its first law specifically requiring reports to the legislature on the conduct of “covert operations”<sup>44</sup> undertaken by U.S. intelligence agencies. This was the so-called Hughes-Ryan Amendment of 1974.<sup>45</sup> It was not the intent of Congress to *prohibit* such activities, of course, but merely to interpose a layer of legislative oversight and thereby force the executive branch to behave with the circumspection born of the knowledge that someone else was keeping an eye on its activities.<sup>46</sup>

Even Congress, however, soon came to believe that Hughes-Ryan—which seemed to require that covert action reports be submitted to as many as eight different congressional committees—was too restrictive and too likely to lead to breaches of operational security.<sup>47</sup> As

---

OF THE CIA 584–99 (rev. ed. 1987). Prior to the mid-1970s, the predominant congressional reaction to the activities of U.S. intelligence was “I don’t want to know!” JOHNSON I, *supra* note 34, at 44 (quoting Senator John Stennis of the Senate Armed Services Committee in 1973).

44. The term “covert operations” has no precise definition, but has always been understood to include a range of clandestine influence activities undertaken abroad without public acknowledgment of the acting government’s involvement, from “black” (i.e., unattributable) propaganda operations to secret efforts to destabilize foreign governments or assassinate troublesome foreign leaders. Under current U.S. law, the term encompassing such activities is “covert action,” which is defined to mean “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly . . .” 50 U.S.C. § 413b(e) (1995).

45. See 22 U.S.C. § 2422 (1983) (repealed 1991).

46. This circumspection, of course, is hardly a new phenomenon. As Shakespeare’s Sextus Pompeius told his loyal captain upon the latter’s request for permission to kill his lord’s enemies by treachery, “[T]his thou shouldst have done, / And not have spoken on’t! In me ‘tis villainy, / In thee ‘t had been good service. Thou must know, / ‘Tis not my profit that does lead mine honour, / Mine honour it. Repent that e’er thy tongue / Hath so betray’d thine act. Being done unknown, / I should have found it afterwards well done; / But must condemn it now. Desist, and drink.” WILLIAM SHAKESPEARE, ANTONY AND CLEOPATRA act. II, sc. VII. Thus did the Bard suggest both the doctrine of “plausible deniability” and the rationale for its repudiation some three centuries before the founding of the Central Intelligence Agency.

47. According to Senator Barry Goldwater, the Hughes-Ryan amendment required that the CIA reveal its covert operations plans to 50 Senators and 120 members of the House of Representatives. Goldwater believed that the “leak” of information in 1975 about CIA activities in support of Holden Roberto’s FNLA guerrillas in Angola could be directly traced to this over-zealous reporting regime. JEFFREYS-JONES, *supra* note 45, at 198. See also, e.g., S. REP. NO. 96-730, at 2–4 (1980), reprinted in 1980 U.S.C.C.A.N. 4192, 4193–94 (discussing reasons for changes in intelligence reporting law as embodied in Bill S. 2284, from which was derived the Intelligence Authorization Act of 1980). The leak to the *Village Voice* newspaper of the highly classified final report of a House committee headed by Otis Pike investigating CIA abuses in 1975 also served to sour executive officials and legislators alike on the idea of a reporting regime involving more than a small number of congressmen. See JOHNSON I, *supra* note 34, at 91. Indeed, by the end of the 1970s, Congress was so widely regarded as likely to “leak” sensitive information that the Canadian government refused to allow its

a result, Congress repealed the amendment's multiple-committee reporting rules in 1980, in favor of a reporting scheme requiring Congress to provide information on "all intelligence activities,"<sup>48</sup> but only to the two congressional committees specifically concerned with intelligence matters.<sup>49</sup> Backing away from the legislature's initial instinct rigidly to "statutize" intelligence law in response to the scandals of the 1970s, the 1980 law claimed to do little more than to "place in statute the oversight process that has been in effect since 1976"<sup>50</sup>—that is, to codify general intelligence reporting practice as it had developed through the process of congressional-executive bargaining. In the wake of the revelation of the Reagan Administration's secret arms sales to Iran and the diversion of profits gained therefrom to assist the U.S.-supported Nicaraguan *contra* rebels, however, Congress again amended the intelligence oversight statute in 1991, establishing a more detailed reporting scheme that dealt specifically and independently both with conventional "intelligence activities" and with statutorily defined "covert actions."<sup>51</sup>

---

embassy to be used in connection with President Jimmy Carter's abortive attempt in 1980 to rescue Americans held hostage at the U.S. embassy in Teheran unless Carter guaranteed that Congress would only be informed *after* the operation. *Id.* at 134.

48. The statute did not specifically mention "covert operations," but rather treated them as a subset of "significant anticipated intelligence activities" of which the president was to keep the intelligence committees generally informed. *See* Pub. L. No. 96-450, Title IV, § 407(b)(1), 94 Stat. 1981 (amending National Security Act of 1947 to insert § 501(a)(1) requiring the president to keep committees "fully and currently informed of all intelligence activities . . . including any significant anticipated intelligence activity"); SEN. REP. NO. 96-730, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4192, 4194 (indicating that "significant anticipated intelligence activity" includes those "covert operations" formerly governed by Hughes-Ryan Amendment). The 1980 legislation did not wholly repeal the Hughes-Ryan Amendment, however, keeping in place its requirement that covert operations be undertaken only pursuant to explicitly presidential "findings." *See* 22 U.S.C. § 2242. The covert operations rules were revised and consolidated in the 1991 intelligence legislation, appearing today in 50 U.S.C. § 413b. *See* SEN. REP. NO. 102-85 (1990), *reprinted in* 1991 U.S.C.C.A.N. 193, 222 (discussing repeal of Hughes-Ryan); SEN. REP. NO. 96-730, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4192, 4195-96 (discussing modification of Hughes-Ryan).

49. *See* Pub. L. No. 96-450, Title IV, § 407(b)(1), 94 Stat. 1981. Even before this statutory change, however, intelligence practice had shifted away from the multi-committee scheme apparently envisioned by Hughes-Ryan. The Hughes-Ryan Amendment had required reporting merely to all "appropriate committees" of Congress, and while initially this had been understood to require disclosures to all the various committees involved with foreign affairs and defense issues, after the establishment of Senate and House oversight committees specifically for intelligence matters the intelligence services and Congress alike came to agree that reporting only to these two committees was "appropriate." *See* JOHNSON I, *supra* note 34, at 89.

50. SEN. REP. NO. 96-730, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4192, 4194.

51. 50 U.S.C. §§ 413-413b.

After two decades of pendulum-like adjustment, the United States has acquired a highly developed statutory system of congressional intelligence oversight. Indeed, so unique is U.S. intelligence law in its complexity and in the degree of restraint it places upon the executive branch that one former Director of Central Intelligence has claimed it to be a “crude and often shortsighted approach to making foreign policy . . . [that] complicate[s] decision-making and . . . contribute[s] to the ‘criminalizing’ of political differences between the Congress and the executive.”<sup>52</sup>

That said, however, U.S. intelligence law has acquired nowhere near the specificity and status as “hard” legal obligation enjoyed by most domestic legislation. For one, the oversight statute leaves many vital terms and requirements to processes of definition no more formalized than the development of norms of inter-institutional and inter-branch cooperation. The current oversight legislation, for example, requires that the president keep Congress “fully and currently informed of all intelligence activities” undertaken by the U.S. government, as well as of “any significant anticipated intelligence activity and any significant intelligence failure.”<sup>53</sup> Congress can hardly have intended that the “fully and currently informed of *all* intelligence activities” requirement be taken literally, of course, for oversight amidst such a blizzard of detail would be no oversight at all. Nor is the concept of a “significant” activity or failure anywhere defined in the statute. The meaning of these requirements can only be assessed by reference to past

---

52. ROBERT M. GATES, FROM THE SHADOWS 559 (1996). Irrespective of the broader merits of such a scheme, however, one might expect a professional intelligence officer such as Gates to be at least somewhat put off by a system that requires that so much arduously obtained and jealously guarded information be shared with legislators:

[i]n 1993, for example, 1512 meetings took place between legislators and the CIA legislative liaison staff, as well as 154 one-on-one or small-group meetings between legislators and the [Director of Central Intelligence]; 26 congressional hearings with the DCI as a witness; 128 hearings with other CIA witnesses; 317 other contacts with legislators, and 887 meetings and contacts with legislative staff—a 29 percent increase over 1992. This does not even take into consideration liaison contacts between the other intelligence agencies and the Congress. In 1993, the CIA alone provided 4,976 classified documents to legislators, along with 4,668 unclassified documents and 233 responses to constituency inquiries.

JOHNSON I, *supra* note 34, at 54. The number of CIA briefings given specifically to the Senate and House intelligence committees (or their staffs) from 1987 through 1990 reportedly averaged about 1000 per year. *Id.* at 115. As these statistics show, whether or not Gates’ accusation hits its mark, the present system of congressional oversight imposes significant information-provision burdens upon the U.S. intelligence services.

53. 50 U.S.C. § 413a(1).

congressional-executive practice<sup>54</sup> and through an ongoing process of norm-development as lived out over time between the branches of government.<sup>55</sup>

Moreover, even had the statute been more specific, the principal enforcement mechanism for these statutes is itself a bargaining process. Since the U.S. federal courts have apparently never had (let alone accepted) the opportunity to decide a case interpreting the intelligence oversight statute,<sup>56</sup> adjudicating disputes over such terms has so far been left entirely to bargaining relationships between the principal congressional and executive actors.<sup>57</sup> It is not a

---

54. As noted above, the 1980 legislation—which provides the basic skeleton of current U.S. intelligence oversight law—aimed to codify intelligence reporting practice as it had developed in practice since 1976. See SEN. REP. NO. 96-730, at 3–4 (1980), reprinted in 1980 U.S.C.C.A.N. 4192, 4194; *id.* at 5, 1980 U.S.C.C.A.N. at 4195 (“The executive branch and the intelligence oversight committees have developed over the last four years a practical relationship based on comity and mutual understanding, without confrontation. The purpose of [this legislation] is to carry this working relationship forward into statute.”).

55. Interestingly, Congress in the Intelligence Authorization Act of 1980 also seemed to contemplate that the meaning of key terms would be subject to development over time according to *future* practice between the legislative and executive branches. In discussing another key provision of the statute left undefined by its text—the provision noting that reporting should be undertaken with due concern for the protection of intelligence “sources and methods,” see, e.g., Pub. L. No. 96-450, Title IV, § 407(b)(1), 94 Stat. 1981—the House Conference Report on the 1980 legislation seemed to contemplate leaving the specific requirements of the text at least in some degree to future bargaining between the president and the oversight committees:

[i]t is agreed . . . that the protection of intelligence sources and methods is not to be used as a device to place one branch in a position of advantage. By agreement both branches recognize that particular circumstances will require the exercise of unusual care and discretion. . . . Consequently, over the past four years the intelligence oversight committees have consulted with the executive branch to determine those areas where, on the basis of past experience and a reasonable sense of future needs, there might be good and sufficient reason to withhold information when some compelling reasons arise . . . .

H. CONF. REP. NO. 96-1350 (1980), reprinted in 1980 U.S.C.C.A.N. 4207, 4212.

56. Neither the 1980 oversight statute nor its 1991 revision, for example, have as much as a single interpreting case listed in the U.S. Code Annotated.

57. The courts have not been entirely without interest in national security matters that intersect domestic affairs, having involved themselves in such matters as the adjudication of disputes over the relationship between the right to freedom of expression embodied in the First Amendment to the U.S. Constitution and “contract-based” restrictions on former intelligence officers’ ability to write “kiss-and-tell” books on their trade—disputes in which judges have generally sided with the government. See, e.g., *Snapp v. United States*, 444 U.S. 507 (1980) (permitting government to require, by contract, that *all* information be subject to prepublication review, and permitting placement of profits from unreviewed materials in constructive trust); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972) (permitting CIA to require

system like most areas of domestic legislation, in other words, in which recourse to an authoritative third-party decision-maker (i.e., a court) may be had. Instead, it is one where the outcome of disputes is left to politics, power, and expediency as played out between an executive branch possessing the advantages of information and initiative and a legislature possessing the power of the purse (and perhaps also of publicity).<sup>58</sup> The U.S. system of intelligence oversight law has long been one that far outstrips foreign analogues in its specificity and intrusiveness upon security functions traditionally left to executive discretion. It is also a scheme that is inescapably incomplete and that must be fleshed out in vital ways through informal processes of negotiation and compromise as Congress and the president live out the long-running iterated game relationship that is the U.S. system of "separated organizations sharing public authority."<sup>59</sup>

This excursion into U.S. intelligence oversight law illustrates the more general importance of cooperative institutional mores in national security oversight, even in a regulatory scheme characterized by an extraordinary degree of statutory codification.<sup>60</sup> This, in

---

former employee, by contract, to submit publications for vetting prior to publication in order to censor classified information). See generally Anthony Lewis, *Introduction*, in VICTOR MARCHETTI & JOHN D. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* xi-xvii (1983) (discussing "contract-based" censorship cases). Overall, the courts' level of general interest in such things as intelligence oversight has been quite low, see, e.g., JOHNSON I, *supra* note 34, at 46 (reproducing chart purporting to show trends in "Legislative Review," "Executive Review," and "Judicial Review" of intelligence over time, and indicating far lower average levels of concern on part of U.S. courts since early 1970s), and their impact upon most intelligence activity has been minimal.

58. See, e.g., 50 U.S.C. § 414(b) (prohibiting use of funds available to intelligence agencies for "any intelligence or intelligence-related activity for which funds were denied by the Congress"); *id.* § 414(c) (prohibiting use of funds on covert actions not authorized through procedures set out in 50 U.S.C. § 414(b)).

59. See RICHARD NEUSTADT, *PRESIDENTIAL POWER* 26 (1980); see also ROBERT A. PASTOR, *CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY* 55 (1980) (describing Congress and executive branch as having "independent and active influence in each other's decision-making arena").

60. Even during the height of the "Intelligence Wars" between the U.S. executive and legislative branches in the mid-1970s, for example, eager congressional investigators hot on the trail of various foreign and domestic intelligence scandals were never quite willing *fully* to pull the veil off of the U.S. intelligence apparatus. See JOHNSON I, *supra* note 34, at 110. As John Ranelagh has recounted, it was understood that even in the heat of dramatic investigations and the collapse of presidencies there would remain some "secret place" that would "not [be] examined too closely. It existed by implication rather than by outright statement. Specifics could be spotlighted, but people were not willing to expand upon those specifics to the general picture." JOHN RANELAGH, *THE AGENCY: THE RISE AND DECLINE OF THE CIA* 599 (rev. ed. 1987). Almost all of the secrets revealed by the endless congressional hearings were "dead" (thus for the most part avoiding the direct compromise of ongoing operations), and the "big questions" relating to the nature of secret activity within a democracy "were never really addressed" in any explicit fashion. *Id.* at 598-99.

turn, underscores the need to ensure that the basic architecture of the national security system is very carefully constructed, so as to make it possible for meaningful accountability to survive the informal interplay of institutional forces to which national security law tends to leave its enforcement. If the oversight system is to serve both liberty and efficiency in the pursuit of security, these bargaining processes cannot occur between institutional actors having greatly unequal power. A successful oversight scheme works more as a prophylaxis than a cure—that is, it functions best when it prevents wrongdoing by increasing the security services' incentives to behave by making sure they know that at least *someone* is watching.

Though obviously eager to learn from other countries' experiences with security oversight,<sup>61</sup> the ANC's post-apartheid South Africa has yet fully to flesh out how “the law as we live it” will deal with such tensions and achieve this balance.<sup>62</sup>

### b. *The Role of the Courts*

As the example of U.S. intelligence law illustrates, the role of the national courts in deciding security oversight issues is a crucial determinant of the functional character that a country's security-oversight scheme will assume. The degree to which national security law issues are left to the sort of informal bargaining procedures

---

Even vis-à-vis Congress, therefore, one might say that the U.S. intelligence services were permitted to remain at least somewhat “surrounded by . . . a mysterious circle of mist . . . [or] protective and veiling cloud.” FRIEDRICH NIETZSCHE, *ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE* 40–41 (Peter Preuss trans. 1980). It seems to have been felt that *too* much transparency, even to congressional overseers, was undesirable. Cf. ELY, *supra* note 34 (arguing that one of the reasons that the War Powers Resolution has failed more significantly to restrain U.S. presidential power is that Congress usually has not *wanted* to play more than an advisory role in decision-making relating to the deployment of U.S. troops overseas); JOHNSON I, *supra* note 34, at 111 (quoting former Director of Central Intelligence William Colby to effect that “Congress is informed to the degree that Congress wants to be informed”).

61. See, e.g., House of Assembly *Hansard* 11 Nov 1994 Col 4151 (remarks of L.T. Landers) (citing influence of American, Canadian, and Australian intelligence oversight); *id.* Col 4149 (remarks of Kader Asmal) (discussing CIA scandals of 1970s and creation of congressional intelligence-oversight committees in United States); *id.* at 4144 (remarks of M.F. Cassim) (apparently discussing alleged rivalry between CIA and FBI in United States as obstacle to effective oversight); Senate *Hansard* 15 Nov 1994 Col 3040–41 (remarks of S.S. Makana) (noting that South Africa's oversight legislation “looks like a workable solution. Broadly speaking, many countries of the world are adopting this approach to intelligence and security. We still need to test it in our part of the world”).

62. South Africa's “Intelligence White Paper” refers to this balance as that between “transparency and secrecy.” REPUBLIC OF SOUTH AFRICA, *WHITE PAPER ON INTELLIGENCE* 1994, ¶ 5.5; see also House of Assembly *Hansard* 11 Nov 1994 Col 4130 (remarks of J. Nhlanhla) (discussing balance between “secrecy and transparency”).

described above will depend in part upon the role that courts assume in adjudicating national security disputes—and in part upon how the courts play such a role if they assume it. For example, in the United States the actual meaning of the intelligence statutes is unlikely to be adjudicated by any court—even where such statutes are specific and fairly unambiguous.<sup>63</sup> Moreover, where U.S. courts do adjudicate “national-security” related controversies, they nevertheless commonly defer to the political process<sup>64</sup> by declaring such disputes to be “political questions,”<sup>65</sup> finding them otherwise unjusticiable,<sup>66</sup> or simply choosing to defer to the president in national security and foreign affairs matters.<sup>67</sup>

---

63. See, e.g., *supra* note 56.

64. As Thomas Franck once put it, “[i]n foreign-relations and national-security cases . . . judges proclaim the separation of powers but almost always decide in favor of the government.” THOMAS FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 30 (1992).

65. The “political question” doctrine of U.S. constitutional law is most clearly expressed in the case of *Baker v. Carr*, 369 U.S. 186 (1962) (specifically listing areas of, *inter alia*, international treaty termination, recognition of belligerency abroad, and recognition of foreign governments as ones generally unsuitable for judicial determination and which courts will therefore leave to adjudication through political process); see also *Local 2855, AFGE v. United States*, 602 F.2d 574, 579 (3d Cir. 1979) (arguing that “it would appear unseemly” for court to substitute its judgment for that of executive in political or military affairs).

66. See, e.g., *Dellums v. Bush*, 752 F.Supp. 1141 (D.D.C. 1990) (rejecting congressman’s challenge to warmaking authority of president vis-à-vis Congress as unjusticiable until such time as Congress should vote to *reject* use of force and president should go to war anyway). While not an indefensible legal position in the abstract, it seems clear that in all but the most extraordinary political circumstances, the district court’s position in *Dellums* amounts to *de facto* deference to the president on war powers issues.

67. See, e.g., *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (deferring to president in exercise of foreign affairs power summarily to return Haitian refugees seized upon high seas without complying with U.S. immigration law); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (deferring to executive claim of national security danger in case challenging internment of Japanese Americans on West Coast after outbreak of war with Japan); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding *Hirabayashi* holding against equal protection challenge); Jim McGee & Brian Duffy, *Someone to Watch Over Us*, WASH. POST MAG. (June 23, 1996), at 9, 12 (noting that Foreign Intelligence Surveillance Court established to provide judicial oversight over intelligence-related domestic wiretapping has never once flatly rejected a government wiretap application); Michael A. DiSabatino, *Construction and Application of “National Security” Exception to Fourth Amendment Search Warrant Requirement*, 39 A.L.R. FED. 646 (discussing courts’ willingness to dispense with customary Fourth Amendment restrictions on searches and seizures in “national security” cases). As this author has noted elsewhere, with respect specifically to war powers matters, “[s]ome very early cases were noticeably more solicitous of congressional prerogatives,” but “[a]s U.S. power and responsibility on the world stage have grown, so has the judiciary’s willingness to defer to the foreign affairs and warmaking initiatives of the executive branch.” Christopher A. Ford, *War Powers as We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers*



For this reason, despite the considerable degree of codification that has developed in U.S. national security law, this author has elsewhere suggested that national security law issues in the United States may be understood through an analytical framework originally suggested by a group of legal scholars associated with Yale Law School and known as the “New Haven School.”<sup>68</sup>

c. *Law as “Social Process?”*

These “New Haveners,” the most prominent of whom were Myers McDougal, Harold Lasswell, and (in the present generation) Michael Reisman, “spelled out an approach to understanding law not by its congruence with the terms of a text, but as an ongoing *process* of decision-making, in which norms develop partly independent of legal wording through the interaction of institutional actors and their expectations of each other’s reactions to future events.”<sup>69</sup> Because law is thus “a process of authoritative decision,”<sup>70</sup> it is distinguishable both from mere legal text and from “the enormous legalistic babble of . . . politics.”<sup>71</sup> Law nevertheless relates to legal text via a “continuous process” in which “expectations will be sustained or changed by the continuation or abatement of streams of communication about the authority and credible control intentions of those whose support is needed for the norms’ efficacy.”<sup>72</sup> Moreover, that process is characterized by “a constant stress for change and for stability by different groups and individuals using the different power bases at their disposal.”<sup>73</sup> Finally, the “process constantly accommodates to basic dispositions of authority and effective power.”<sup>74</sup> In simpler terms, the New Haven approach sees law as growing out of an informal process of expectation-shaping bargaining relations that change continually

---

*Resolution*, 11 J.L. & POL. 609, 618 n.48 (1995) [hereinafter Ford III]; see also *id.* at 613 n.24 (citing cases illustrating judicial deference to executive branch in foreign affairs and national security matters).

68. See generally Ford III, *supra* note 67, at 613–20.

69. *Id.* at 613–14; see generally Myers S. McDougal & Harold Lasswell, *The Identification and Appraisal of Diverse System of Public Order*, in INT’L L. ESSAYS 15 (Myers S. McDougal & W. Michael Reisman, eds. 1981).

70. W. Michael Reisman, *Law From the Policy Perspective*, in INT’L L. ESSAYS, *supra* note 69, at 1 [hereinafter Reisman I] (“[Law] is a process of making decisions in conformity with the expectations of appropriateness of those who are politically relevant: more concisely, a process of authoritative decision.”).

71. W. Michael Reisman, *International Lawmaking: A Process of Communication*, 1981 A.S.I.L. PROC. 101, 102 [hereinafter Reisman II].

72. *Id.* at 113.

73. *Id.*

74. Reisman I, *supra* note 70, at 10.

over time but in which can nonetheless be found characteristic behavioral patterns and “rules.”

While originally developed as a means of understanding the otherwise somewhat perplexing character of international law, this schema may be applied usefully to some domestic legal issues, particularly where courts generally play little role in deciding disputes between governmental actors and where the actual behavior of participants is only incompletely regulated by (or incompletely congruent with) legal texts.<sup>75</sup>

Whether or not this is so has considerable jurisprudential significance. If a given body of law is best understood through a “New Havener” analysis, it will be “important to use contextual and consequentialist methods of inquiry rather than methods of textual and logical derivation,” because a process-based legal scheme is “structurally different from [most areas of law in] developed domestic systems and perforce uses a different method for assessing lawfulness. Hence, the consequentialist mode, based on a thorough contextual examination rather than a textual and rule-oriented approach, should be employed.”<sup>76</sup> If, on the other hand, a body of law more closely fits the traditional domestic paradigm of textually derived rules interpreted by authoritative decision-makers who are *not* the principal actors whose behavior is regulated thereby—that is, in a system of codified law in which disputes are adjudicated by disinterested third parties (i.e., courts)—questions of “legality” and “illegality” will be determinable in more conventional ways.

#### d. Finding the Balance

In reality, of course, social systems need not (and do not) choose between “textual” and “process-based” legal schemes on an all-or-nothing basis. As illustrated by the example of U.S. intelligence law, it is entirely possible to have a highly textualized legal scheme in which crucial elements—e.g., the meaning of a “significant” intelligence activity or the degree of detail required in reporting “all” activities to Congress—are nonetheless left to bargaining processes among participants in long-running interrelated game relationships. Workable systems of national security law will necessarily draw upon both approaches, for there

---

75. See, e.g., Ford III, *supra* note 67, at 617–19 (arguing that congressional-executive disputes in United States over the “War Powers Resolution,” 15 U.S.C. §§ 1541–48 (1988), may for these reasons be understood through “New Haven” framework).

76. REISMAN & BAKER, *supra* note 36, at 141–42. Reisman and Baker do not discuss the possibility that such an analysis might obtain in certain areas of domestic jurisprudence, however, limiting their analysis in this respect only to “international law.” *Id.*

is probably no other way to mediate the tension between generality and specificity in security oversight law. Here again, the challenge is to find the balance appropriate for both society and circumstance.

It is still too early to tell whether South Africa will follow the United States either in the extent of its statutory development or in its jurisprudential commitment, nonetheless, of national security issues to resolution through a New Haven-style “legal process” of legislative, executive, and sometimes popular interaction. South Africa’s post-apartheid statutory scheme has only recently taken shape, and its courts have had little opportunity to develop (or refuse to develop) a relevant body of case precedent on national security issues. South African officials clearly understand that these first formative years of democratic rule are vital, and anticipate that “the checks and balances built into the new arrangements [will] not allow easy reversion” to the bad habits acquired by the country’s security forces during the apartheid era.<sup>77</sup> Nevertheless, they realize that a functional system of respect for rights and adherence to law “is not built up by having something on paper alone. Such a culture depends on human beings and on our ability to translate that piece of paper into reality.”<sup>78</sup>

The years ahead, therefore, will determine both the structure and character of the Republic’s security oversight scheme. A crucial variable in this equation will be whether South Africa’s courts will be willing to leave “national security” to New Haven-style dispute resolution, will wish to seize for themselves a more significant role in adjudicating such matters, or will attempt to steer some middle course between these approaches. If the South African courts seek a significant role in such matters, they will find little in U.S. precedent (or in that of any other country) upon which to model their efforts. If they do not, the basic architecture of South Africa’s security apparatus and its oversight institutions will become doubly important, for the success or failure of security oversight in the post-apartheid state would ride upon the highly contextual and contingent power-equilibria between them.

It is indisputable, however, that South Africa is likely to have many opportunities to advance the development of its national security law and policy, for even as these new institutions take shape, the new government has come to face significant—though not always very conventional—security challenges. It is to these issues that we turn in the following section.

---

77. Senate *Hansard* 15 Nov 1994 Col 3011 (remarks of S.S. Makana).

78. Senate *Hansard* 28 Jun 1994 Col 202 (remarks of Dullah Omar).

## B. South Africa's Challenges

### 1. Third World Problems

To no small extent, South Africa faces many of the characteristic problems of a developing country, not the least of which is the deep poverty of the majority of its non-White population, both in rural areas and in the sprawling urban townships. Under apartheid, vast pools of inexpensive labor formed on the fringes of South Africa's residentially race-segregated industrial centers. Whether with respect to providing employment, health care, public services, or housing, the ANC government faces enormous challenges in providing for the needs of its constituents and in meeting the great expectations non-White South Africans have had for the post-apartheid era. Like the governments of many developing countries, however, the ANC also faces considerable resource constraints. Unable fully to fund its ambitious Reconstruction and Development Program<sup>79</sup> ("RDP"), the ANC is acutely conscious of the need for fiscal austerity in cultivating a favorable business climate that will enlist foreign capital and expertise in the cause of South African economic development. This combination of great poverty and underdevelopment in large segments of South African society and sharply limited financial resources available for expenditure on development projects both contributes to the country's internal security problems and ensures that domestic development projects will have to compete with the security forces for a share of South Africa's small fiscal pie.<sup>80</sup>

---

79. For accounts of the ANC's ambitious agenda after the April 1994 national balloting, see Drusilla Menaker, *Bringing Racial Fairness to S. Africa Economy to Prove Difficult*, DALLAS MORNING NEWS, June 6, 1994, at 5A, and Danielle DeBruyn, *The Road to Democracy: South Africa's Democratic Elections*, NAT'L B. ASS'N MAG. May/June 1994, at 9. In the words of one observer, the ANC's sweeping promises of "Peace, Freedom and a better life for all" in the political campaigning that led up to its victory in the 1994 ballot, while arguably "appropriate for a liberation movement," nonetheless "verge[d] on the utopian" and were "questionable for a political party." D.S.K. Culhane, *No Easy Talk: South Africa and the Suppression of Political Speech*, 17 FORDHAM INT'L L.J. 896, 942 (1994).

80. The South African defense budget has already been cut roughly in half since 1989, declining from roughly 20 billion rand (some \$4.5 billion) to only about 10 billion rand in 1996 (\$2.6 billion)—principally in order to free up funding for social programs. See Joe Modise, DEF. NEWS, Aug. 5-11, 1996, at 22; see also *South Africa Cuts Defence Budget*, JANE'S DEFENCE '97, at 16. It appeared, by early 1996, that this period of defense retrenchment was ending, see, e.g., Helmoed-Romer Heitman, *\$2.9 Billion Defence Budget Marks End to Decline*, JANE'S DEF. WKLY., Mar. 25, 1995, at 5, but in April 1996, President Nelson Mandela announced that the defense budget would have to be cut once more. See *Mandela Pledges Support for Peace-Keeping, Regional Defence*, BBC Summary of World Broadcasts, Apr. 28, 1996, available in LEXIS, World Library,

South Africa also has an ugly history of violent conflict between races and between particular ethnic groups, some of which have acquired specific political party affiliations and carried their antagonisms into the governmental structure of the country.<sup>81</sup> This history of conflict, of course, has also produced an awkward situation—one not unfamiliar to other regional developing countries such as Zimbabwe and Namibia—in which groups formerly engaged in a bitter armed struggle against each other now must co-exist peaceably not only within the same political system but also within the same governmental structure including the security apparatus itself.

Particularly given South Africa's exploding rates of violent crime<sup>82</sup> and increasing problems with official

---

BBCSWB File. The competition of defense funding with social programs is likely only to become more acute in the next few years, as the SANDF faces considerable "block obsolescence" as aging equipment which had helped the former SADF survive the years of the anti-apartheid arms embargo finally reaches the end of its already over-extended service life and requires replacement. See Heitman, *supra*, at 5 (recounting urgency of upcoming replacement of SANDF Impala jet trainers, C-160 Transall transport aircraft, Mirage F-1AZ fighters, Alouette III helicopters, G-5 howitzers, *Ton* class minesweeping vessels, *Daphne* class submarines, coastal strike vessels, the Ratel infantry combat vehicle, Cheetah fighters, and C-130B Hercules transport aircraft). One of the SANDF's top purchasing priorities, the acquisition of new corvettes and submarines for the South African Navy, has been repeatedly delayed because of funding difficulties and has teetered on the edge of cancellation for the past two years. See *SAN Must Buy to Meet Its Objectives*, *Says Chief*, JANE'S DEF. WKLY., Nov. 20, 1996, at 18.

81. Antagonism between the predominantly Zulu Inkatha Freedom Party ("IFP") and the more multiracial ANC—long encouraged by the security forces of the White minority regime—resulted in a brutal war of attrition and intimidation in which as many as 14,000 lives were lost in the townships around Johannesburg and in the mountainous province of Natal between 1990 and 1994. See, e.g., Manby, *supra* note 10, at 40. Led by Chief Mangosuthu Buthelezi, former head of the semi-independent Zulu "homeland" of KwaZulu, the IFP won a parliamentary majority in the new province of KwaZulu-Natal (and nearly 11% of the national vote) in the April 1994 elections. *Id.* at 46 n.58. Meanwhile, the National Party itself (the White-dominated party that ran South Africa's apartheid-era government from 1948) managed to win a parliamentary majority in the Western Cape province. See Ellmann, *supra* note 4, at 6 n.2. Even South Africa's "Coloureds," their distinct sense of group identity cultivated for years by the apartheid government and their collective resentments fueled today by the fear that the ANC will ignore them in favor of its more numerous darker-skinned African constituents, are becoming not an insignificant anti-government political force. See generally Ford I, *supra* note 2, at 1985-90; see also Angus Shaw, *Mixed-Race Protesters Run Riot in S. Africa*, N.Y. TIMES, Feb. 7, 1997, at A15 (describing "the worst racial unrest since President Nelson Mandela defeated White leader Frederick W. de Klerk came to power in 1994" as stemming from fears of "poor people of mixed-race descent . . . [that] they have been treated unfairly by the new Black leaders").

82. Though politically motivated violence in South Africa—e.g., killings occurring in running battles between ANC and Inkatha supporters in Natal and the townships around Johannesburg—declined "almost miraculously" after the April 1994 elections,

corruption,<sup>83</sup> this constellation of problems poses great security challenges for the young ANC government—problems which, in many respects, South Africa shares with other developing countries in sub-Saharan Africa. In a country where the majority of citizens have only recently been offered any experience with modern democratic life, and with a legal and political system that is still trying to find its feet, meeting the twin challenges of security and development while preserving liberty may not be easy.

---

around Johannesburg—declined “almost miraculously” after the April 1994 elections, ordinary violent crime in South Africa has risen precipitously, giving the country “one of the worst crime rates in the world.” Gavin Cawthra, *From a Force to a Service: The Police in the New South Africa*, JANE’S INTEL. REV./SPECIAL REP. NO. 3, July 1994, at 19, 19; see also Melanie Cheary, *Crime Is Big Business in South Africa*, Reuters Financial Wire, March 10, 1996, available in LEXIS, World Library, REUFIN File (recounting crime statistics in South Africa, including data showing that more than 50 people are killed each day); Patrick Laurence, *Vigilantes Signal Loss of Faith in ANC Action to Beat Crime*, Irish Times, Aug. 19, 1996, available in LEXIS, World Library, TXTLNE File (noting that violent crime deaths in South Africa are now twice as common as motor vehicle deaths); Sudarsan Raghavan, *Africa Puts its Money Where its Fear Is*, BUS. WEEK, July 15, 1996, at 52 (recounting common occurrence of “carjacking” in South Africa’s Gauteng Province, where 9500 such crimes occurred in 1995); *Who Exactly Is in Command?*, ECONOMIST, Nov. 19, 1994 [hereinafter *Who Is in Command?*], at 48 (noting that South African murder rate is 2½ times that of United States). Particularly in the wake of recent high-profile crimes such as those occurring against members of South Africa’s foreign diplomatic community, see, e.g., *ANC Says Embassy Crime Must Be Seen in Context of Safety for All*, BBC Summary of World Broadcasts, May 27, 1996, available in LEXIS, World Library, BBCSWB File; Anton Ferreira, *Diplomats Fall Victim to South African Crime Wave*, Reuters Financial Wire, May 22, 1996, available in LEXIS, World Library, REUFIN File, these dramatic and worsening crime problems have led the private-security and home-security industry to become one of South Africa’s healthiest economic sectors. See Anton Ferreira, *Business Booms in S. African Security Sector*, Reuters Financial Wire, Mar. 9, 1995, available in LEXIS, World Library, REUFIN File.

83. Not the least disturbing of such reported corruption in South Africa is that said to have developed within the ranks of the police service—the service whose job it is (or should be) to help combat such evils. See, e.g., Shaun McCarthy, *Muslim Vigilantes or Islamic Extremism in South Africa?*, JANE’S INTEL. REV., Dec. 1996, at 569, [hereinafter McCarthy, *Vigilantes*] (noting that “the police are hampered in dealing with [drug trafficking in South Africa] because of the levels of corruption within their own ranks” and that “[m]any officers are alleged to be on the payroll of the drug barons”); *Official Seeks Tighter Weapons Control in Security Forces*, BBC Summary of World Broadcasts, June 28, 1995, available in LEXIS, World Library, BBCSWB File (quoting Deputy Minister of Intelligence Services Joe Nhlanhla as calling for tighter controls on weapons within security forces in order to reduce illegal weapons trafficking); *S. African Police Involved in Gunrunning: Government Minister*, Agence France Presse, Dec. 5, 1995, available in LEXIS, World Library, AFP File (quoting Mpumalanga Province Minister of Safety and Security to the effect that at least four senior members of police “firearms unit” in town of Nelspruit had been implicated in arms smuggling ring bringing illegal weapons from Mozambique into Johannesburg and into KwaZulu-Natal).

This said, however, South Africa faces nothing like the wholesale “collapse” of state functional and political legitimacy that has characterized some post-colonial regimes in sub-Saharan Africa.<sup>84</sup> Despite its considerable problems, South Africa has a long-standing separate national identity, a highly sophisticated institutional and financial infrastructure, and a large and still quite vibrant economy. With respect to civil-military relations, South Africa does not seem to face significant danger from the notorious “predisposition of African military élites to usurp the reigns of government after a number of years of declining economic activity.”<sup>85</sup> Whereas for many post-colonial African states “the military was often the only administratively competent institution in an undeveloped country,” making it “neither surprising nor especially alarming that [when economic or political crises developed] the man on horseback should intervene,”<sup>86</sup> South Africa has the good fortune to possess highly sophisticated institutions in many areas of government and the private sector, reducing the military’s temptation to intervene and its likelihood of success in doing so. More generally, at least for the moment,

South Africa is already markedly different from other countries which have emerged from tyranny and have retained oppressive laws from the past, later using them to get rid of opposition under the fig leaf of “national security.” In South Africa’s case, the laws from the old days have been dumped and the [government] shows no sign of wanting to resuscitate them—not even with the leading partners [in that government], the African National Congress, by far in the majority with close to two-thirds of electoral support.<sup>87</sup>

Though sharing many problems of underdevelopment with its sub-Saharan compatriots, South Africa nonetheless finds itself far better off than most (and perhaps all) other states on the continent.

In fact, the predominant impression for many observers of South African affairs—myself included—is less despair at the considerable challenges that remain than a happy astonishment at the

---

84. See generally Makau wa Mutua, *Putting Humpty-Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State*, 21 BROOK. L. INT’L J. 505, 509 & 511–13 (1995).

85. Greg Mills, *The Armed Forces in the New South Africa*, JANE’S INTEL. REV./SPECIAL REP. NO. 3, July 1994 [hereinafter Mills I], at 7, 9.

86. Paul Bracken, *Reconsidering Civil-Military Relations*, in CIVIL-MILITARY RELATIONS, *supra* note 34, at 145, 154 (emphasis deleted).

87. Benjamin Pogrud, *South Africa’s New Openness in Danger of Being Squandered*, WORLD PAPER, Mar. 1996, at 1.

Republic's ability to achieve so much so fast, and so successfully.<sup>88</sup> After all, as one review of South African affairs put it,

[e]ven as South Africans were going to the polls in [April] 1994, there was a widespread assumption that bloodshed on a large scale would be unavoidable. It seemed likely that right-wing White supremacist groups would attempt a coup, or perhaps, that the already violent face-off between the newly dominant ANC and the [Inkatha Freedom Party] would develop into a full-scale civil war in Natal.<sup>89</sup>

Blessedly, such ominous expectations of civil war or a "preemptive coup d'etat"<sup>90</sup> appear to have been confounded.

## 2. First World Problems

In certain important respects, South Africa resembles a First World country much more than it resembles its less-developed neighbors to the north. In most ways, it must be said, this is a distinct advantage. In terms of security oversight issues, however, this presents the Republic with some additional challenges as it attempts to define the role of its security forces both domestically and in promoting development and stability in southern Africa as a whole. Intriguingly, both in South Africa's position of economic and military predominance in southern Africa<sup>91</sup> and in the nature of its debates over the appropriate structure and role for the armed forces in this contemporary security environment, South Africa perhaps resembles no developed country more than it does the United States.

---

88. See, e.g., *South Africa: Review 1996*, Quest Economics Database, Africa Review World of Information, May 1996, available in LEXIS, News Library, CURNWS File [hereinafter *Review 1996*] (noting how remarkable South Africa's transition has been and discussing factors responsible for this fact).

89. *South Africa: Review 1995*, Quest Economics Database, Africa Review World of Information, Sept. 1995, available in LEXIS, News Library, CURNWS File.

90. See William R. Cotter, *Book Review: National Legal Systems and Private Dispute Resolution*, 82 AM. J. INT'L L. 684 (1988) (quoting Patrick O'Meara and N. Brian Winchester appearing in *THE SOUTH AFRICAN QUAGMIRE: IN SEARCH OF A PEACEFUL PATH TO DEMOCRATIC PLURALISM* 113 (S. Prakash Sethi, ed. 1987)).

91. See, e.g., Simon Baynham, *U.S. Security Interests in Africa*, JANE'S INTEL. REV./POINTER, Nov. 1996, at 12 ("[T]he [Republic of South Africa], as the regional hegemon, has the most powerful and professional armed forces in sub-Saharan Africa."); see also Helmoed-Roemer Heitman, *Reshaping South Africa's Armed Forces* [hereinafter Heitman, *Reshaping*], JANE'S INTEL. REV./SPECIAL REP. NO. 3, July 1994, at 10, 16 (describing South Africa's role in offering training assistance to regional air forces as that of allowing other African aviators to "train with the most proficient air force on the continent").



*a. Uncertain International Responsibilities*

Like the United States at the dawn of the post-Cold War era, South Africa clearly faces no immediate foreign military challenges. As Defense Minister Joe Modise has admitted, “[t]here is no identifiable threat to [South Africa’s] security. . . .”<sup>92</sup> As is the case with the U.S. armed forces, however, at the same time that the SANDF faces declining military budgets and personnel retrenchments as a result of this otherwise congenial threatlessness, it also faces increasing calls to become involved in international deployments such as peacekeeping operations. This places demands upon it quite different from those arising out of the more traditional military missions for which it has hitherto been trained.<sup>93</sup>

Regional security operations are increasingly becoming a focus of South African defense planning, particularly now that the Southern African Development Community (“SADC”)—the contemporary incarnation of the Southern African Development Coordination Conference (“SADCC”), an organization originally founded to encourage cooperation among Black-ruled Southern African governments in developing “countermanding responses” to

---

92. Joe Modise, interview, DEF. NEWS, Aug. 5–11, 1996 [hereinafter *Joe Modise*], at 22; see also Helmoed-Romer Heitman, Christopher F. Foss & Carol Reed, *Facing up to New Realities*, JANE’S DEF. WKLY., Apr. 29, 1995, at 23 (“The present strategic situation is that there is no immediate, near-term or even long-term military threat to South Africa.”); Mills I, *supra* note 85, at 8 (“There is no longer an external military threat to speak of.”); Martin Navias, *South Africa’s Security Challenges*, JANE’S INTEL. REV./SPECIAL REP. NO. 3 [hereinafter *Navias I*], at 4, 6 (“The only security threats emanating from [South Africa’s neighbors] from Pretoria’s point of view concern the inflow of migrants and weaponry.”). Among South Africa’s neighbors, Botswana has recently (and for somewhat mysterious reasons) embarked upon a significant military buildup. See, e.g., Simon Baynham, *Arms Spree in Southern Africa*, JANE’S INTEL. REV., Sept. 1996, at 12; Gumisai Mutume, *Neighbors Uneasy as Botswana Shops for Arms*, Inter Press Service, June 28, 1996, available in LEXIS, World Library, INPRES File. This Botswanan “arms spree,” however, does not seem to concern the South African defense ministry. Indeed, if anything, recent South African comments suggest an interest in *encouraging* neighbors to augment their military capabilities. See *infra* note 105.

93. For a discussion of the U.S. dilemma in this respect, see, for example, Don M. Snider & Miranda A. Carlton-Carew, *The Current State of U.S. Civil-Military Relations: An Introduction*, in CIVIL-MILITARY RELATIONS, *supra* note 34, at 1, 10 (noting that “[r]apid force reductions and demobilization, in conjunction with America’s post-cold war foreign policy, are also creating tensions” as international community looks to U.S. “to assist in resolving conflicts around the world” while “the U.S. military lacks the budget and force structure as well as the political mandate to meet these expectations”), and Curtis L. Gilroy, *Civil-Military Operations and the Military Mission: Differences Between Military and Influential Elites*, in CIVIL-MILITARY RELATIONS, *supra* note 34, at 68, 68 (contrasting traditional warfighting role of U.S. military with “[a] nontraditional interpretation [which] sees the mission as broader . . . [and argues that] the armed forces can (and should) be used for missions other than war”).

the apartheid state's "war of attrition against its neighbors"<sup>94</sup>—has dedicated itself to developing a "community-based approach on matters of security" in Southern Africa,<sup>95</sup> principally under the leadership of South Africa.<sup>96</sup> According to South African Defense Minister Joe Modise, it is the Republic's "ultimate goal" to see Southern Africa develop a common defense policy.<sup>97</sup> Many other countries are eager to see the SANDF acquire a prominent role in peacekeeping and other policing activities too, not only in Southern Africa but throughout sub-Saharan Africa. The Clinton Administration in the United States, for example, has strongly encouraged South Africa to become involved in plans for an all-African peacekeeping force organized under the auspices of the Organization for African Unity,<sup>98</sup> and South Africa's neighbors have

---

94. P. Kenneth Kiplagat, *Jurisdictional Uncertainties and Integration Processes in Africa: The Need for Harmony*, 4 TUL. J. OF INT'L COMP. L. 43, 58 & n.80 (citing Derrick Chitala, *The Political Economy of SADCC and Imperialism's Response*, in SADCC: PROSPECTS FOR DISENGAGEMENT AND DEVELOPMENT IN SOUTHERN AFRICA 13, 32 (Samir Amin et al. eds., 1987)); see also *id.* at 46–47 (discussing SADCC).

95. SADC Organ on Politics, Defense and Security, communique of June 28, 1996, § 4.2.1(m), in *Southern African Development Group Sets up Politics, Defence, Security Body*, BBC Summary of World Broadcasts, June 30, 1996, available in LEXIS, World Library, BBCSWB file.

96. The SADC "Organ on Politics, Defense and Security" has established an "Inter-State Defence and Security Committee" ("IDSC"), of which South African Defense Minister Joe Modise became the chairman in January 1996. South Africa's leadership role on the IDSC's various subcommittees was also pronounced: Gen. George Meiring, the head of the SANDF, was picked to chair the Defence Sub-Committee; Vice Admiral Robert Simpson-Anderson, the head of the South African Navy, headed the Standing Maritime Committee; and a representative from the South African Air Force headed the Flight Safety Sub-Functionary group of the Standing Aviation Committee. See Helmoed-Romer Heitman, *The Jane's Interview*, JANE'S DEF. WKLY., Jan. 3, 1996 [hereinafter Heitman, *Jane's Interview*].

97. Heitman, *Jane's Interview*, *supra* note 96 (quoting Joe Modise); see also Mike Hough, *Debate on National Security*, JANE'S INTEL. REV./POINTER, Dec. 1, 1996, at 12 (noting that the draft "National External Security Strategy" document circulated in late 1996 identified the "promot[ion] [of] regional security" and "contribut[ing] to international peace, stability and security" as two of the four most important goals of South African defense policy). So far, this emphasis upon a close involvement in cooperative regional security matters has produced a plan to use South African Navy ("SAN") ships and South African Air Force ("SAAF") aircraft to patrol regional littoral areas against arms and drugs smuggling—a project in which it hopes shortly to enlist other regional military forces. See *S. Africa to Conduct Anti-Crime Air, Sea Patrols*, Reuters World Service, May 6, 1995, available in LEXIS, World Library, REUWLD File.

98. See, e.g., *Neighbourhood Watch in Southern Africa*, ECONOMIST, Dec. 3, 1994, at 51; *Peacekeeping in Africa: By Africans?*, ECONOMIST, Oct. 29, 1994 [hereinafter *Peacekeeping by Africans?*], at 43, 44. Indeed, Washington's offer in 1995 to give South Africa three surplus U.S. C-130 transport aircraft and an undetermined number of P-3 maritime patrol aircraft was apparently designed to help South Africa better undertake regional security missions. U.S. officials also expressed interest in organizing joint training and peacekeeping exercises with the SANDF. See *USA Offers South Africa Three C-130s and P3s*, JANE'S DEF. WKLY., Aug. 19, 1995, at 14.

also repeatedly urged the Republic to undertake more regional security missions.<sup>99</sup> South Africa is increasingly “expected to play a more active role in the region,”<sup>100</sup> and will be “hard put to avoid involvement in regional security operations.”<sup>101</sup>

At the same time, however, the SANDF is desperately short of funding even for its conventional missions,<sup>102</sup> and is presently in a poor position to sustain roles abroad that require new equipment, training, and capabilities.<sup>103</sup> Like the contemporary United States, therefore, South Africa is consequently “divided about the dangers—and costs—of sending peacekeeping troops abroad to try to end long-simmering disputes in other lands.”<sup>104</sup> President Mandela has voiced his principled approval for the Republic’s participation in peacekeeping deployments,<sup>105</sup> but has carefully cautioned that such activities will only be undertaken “where we have got the capacity”—as understood in light of South Africa’s

---

99. See, e.g., Mtimkulu, *supra* note 26 (recounting pressure on South Africa by regional organizations to help form African peacekeeping force); Heitman, *Jane’s Interview*, *supra* note 96 (quoting Joe Modise describing neighbors’ efforts to encourage South African involvement in regional maritime patrolling); Helmoed-Romer Heitman, *South Africa Wary of “Regional Policeman” Role*, JANE’S DEF. WKLY., July 24, 1996 [hereinafter Heitman, *South Africa wary*], at 14 (recounting efforts by Angola, Mozambique, and Tanzania to encourage greater South African involvement in regional security operations); *Peacekeeping by Africans?*, *supra* note 98 (recounting discussions by eight regional countries about possibility of regional peacekeeping force).

100. Interview with Joe Modise, in *Def. Min. Discusses SANDF Transformation*, Periscope Daily Defence News Capsules, Nov. 12, 1996, available in LEXIS, Market Library, IACNWS File.

101. Heitman, Foss & Reed, *supra* note 92, at 23.

102. See generally *supra* note 80.

103. See, e.g., Heitman, *Jane’s Interview*, *supra* note 96; Heitman, *South Africa Wary*, *supra* note 99; Mtimkulu, *supra* note 26 (also noting relative inexperience of South African troops in peacekeeping missions in contrast to those of neighboring states such as Zimbabwe with recent experience in United Nations deployments, especially given SADF’s traditional experience in using maximum force against anti-apartheid guerrillas).

104. Mtimkulu, *supra* note 26. Mtimkulu also notes the similarity between “rancorous discussions” in both the United States and South Africa “about how best to stem the influx of illegal immigrants who flock across the border in search of a better life.”

105. Interestingly, with respect to recent fighting between Rwandan and Zairian forces, Mandela displayed an instinct even for unilateral intervention in African crises. For a while, the South African government appeared poised to intervene in support of Rwanda, reportedly dispatching arms to Rwanda for “self-defence” purposes and placing a “task force” on alert for possible military intervention. The shipment of arms to Rwanda was supposedly undertaken by Mandela against the advice of his intelligence staff. See Peter Youngusband, *Mandela May Make Zaire His Vietnam*, DAILY MAIL, Nov. 4, 1996, at 13.

“unique” financial circumstances.<sup>106</sup> Despite these signs of caution, however, South African military officials announced in February 1997 that the Republic had finished training two battalions for international peacekeeping duties, and would be prepared to contribute up to 1000 soldiers to any such force.<sup>107</sup>

### b. Domestic Military Roles

Nor is the debate over the proper role and structure of the SANDF limited to regional or other international missions and responsibilities. Rather, like the post-Cold War U.S. military, the SANDF is under considerable pressure to increase its involvement in domestic affairs.<sup>108</sup> Though some commentators feel that South

---

106. *Mandela Affirms South Africa Intends to Participate in UN Peacekeeping Missions*, BBC Summary of World Broadcasts, Oct. 24, 1995, available in LEXIS, World Library, BBCSWB File; see also *Mandela Pledges Support for Peace-Keeping, Regional Defence*, BBC Summary of World Broadcasts, Apr. 28, 1996, available in LEXIS, World Library, BBCSWB File (quoting Mandela remarks to SANDF Day Parade that Republic must be prepared to participate in peacekeeping “when conditions permit”). It is also a pillar of South Africa’s contemporary regional strategy to encourage other regional governments to augment their own capability to participate in such operations (so as to relieve South Africa of a disproportionate burden), see Simon Baynham, *Arms Spree in Southern Africa*, JANE’S INTEL. REV., Sept. 1996, at 12, as well as to emphasize “preventative diplomacy” so as to keep problems from escalating to the point where troop deployments might be needed. Mtimkulu, *supra* note 26 (citing Deputy Director of Foreign Affairs Abdul Minty). Perhaps trying to reconcile South Africa’s regional dominance with its considerable interests in self-restraint, one government minister proclaimed in 1994 that “[o]ur power in the subcontinent is so great that we must learn some humility.” House of Assembly *Hansard* 11 Nov 1994 Col 4129 (remarks of Kader Asmal).

107. Greg Mills, *Preparation for Peacekeeping*, JANE’S SENTINEL/POINTER REV., Apr. 1997, at 11.

108. For a discussion of such pressures upon the U.S. armed forces, see Gilroy, *supra* note 93, at 71–73 (discussing contemporary calls for greater use of U.S. military in domestic affairs) (citing, *inter alia*, BRIAN OHLINGER, PEACETIME ENGAGEMENT: A SEARCH FOR RELEVANCE? (1992), and SAM NUNN, DOMESTIC MISSIONS FOR THE ARMED FORCES (1993)); Douglas Johnson & Stephen Metz, *An American Civil-Military Relations: A Review of the Recent Literature*, in CIVIL-MILITARY RELATIONS, *supra* note 34, at 201, 218 (noting that some observers predict “a melding of law enforcement and traditional military functions in response to ‘gray area’ threats, the privatization of security, and new forms of high technology terrorism”) (citing MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 192–227 (1991) and Steven Metz, *Insurgency after the Cold War*, in 5 SMALL WARS & INSURGENCIES 63, 71–73 (1994)); James F. McIsaac & Naomi Verdugo, *Civil-Military Relations: A Domestic Perspective*, in CIVIL-MILITARY RELATIONS, *supra* note 34, at 21, 31–32 (arguing that “[w]ith domestic conditions in many areas deteriorating, the tendency for some Americans actively to solicit ways for the military to get involved in non-war-fighting domestic tasks seems to be growing” and that “pressures . . . will increasingly be brought to bear on the armed forces to expand their participation in civil works”); Snider & Carlton-Carew, *supra* note 93, at 9, 13 (noting that “[n]ow, to an unanticipated degree, [the U.S.] military is being asked to forsake or subordinate its former specialization and instead to . . . assist in

Africa has yet to articulate a coherent, integrated national security strategy,<sup>109</sup> the South African defense ministry seems to have developed an extremely broad conception of its contemporary mission. According to the long-awaited Defence White Paper presented to parliament in May 1996, the ANC's conception of "national security" has been "broadened to incorporate political, economic, social and environmental matters."<sup>110</sup> As presently envisioned, "national security" threats are now seen to encompass a range of "developmental non-military insecurities" ranging from stemming cross-border refugee flows and arms smuggling<sup>111</sup> to "appeas[ing] external investor perceptions."<sup>112</sup> In the words of Deputy President Thabo Mbeki, "the security of our peoples must be defined within . . . the context of their development and prosperity."<sup>113</sup> The object of the Republic's plans for regional security cooperation is to create the conditions of stability necessary for economic development.<sup>114</sup> Given South Africa's pressing need for domestic development, the army's perceived "ability to deploy skilled personnel and equipment to support infrastructural programmes,"<sup>115</sup> and the already considerable involvement of SANDF troops in supporting the deployment of police units to quell domestic unrest in South Africa's still-volatile townships,<sup>116</sup> there will be much pressure to keep the focus of SANDF activity "decidedly domestic in nature."<sup>117</sup>

---

addressing domestic problems" and that "in a dramatically changed international environment that poses no direct external threat to U.S. security, the public and their elected representatives are expecting the [U.S.] military to participate in numerous 'nontraditional' missions such as disaster relief operations and support for other domestic needs").

109. See, e.g., Hough, *supra* note 97, at 12.

110. *Defence White Paper Tabled in Parliament*, BBC Summary of World Broadcasts, May 10, 1996, available in LEXIS, World Library, BBCSWB File [hereinafter *Defence White Paper*].

111. Mills I, *supra* note 85, at 8; see also Navias I, at 6; Heitman, *Reshaping*, *supra* note 91, at 18 (quoting the comments of Defense Minister Modise on need to fight cross-border crime and drug-trafficking).

112. Greg Mills, *A Formalised SADC Defence Agreement?*, JANE'S SENTINEL/POINTER, Oct. 1996, at 13; see also Heitman, Foss & Reed, *supra* note 92, at 23 (noting that "[n]obody will invest in countries plagued by bandits, pirates, smugglers and warlords"); Joe Modise, *supra* note 92, at 22 (quoting Defense Minister Modise that "no right-thinking person is going to invest in a country that is not militarily strong enough to defend those investments").

113. Quoted by Helmoed-Romer Heitman, *Southern African States Pave Way for Co-operative security*, JANE'S DEF. WKLY., Sept. 23, 1995, at 19.

114. *Id.* (quoting Defense Minister Modise).

115. Heitman, *Reshaping*, *supra* note 91, at 11.

116. See *infra* text accompanying notes 227-34.

117. Navias I, *supra* note 92, at 4.

c. *The SANDF's New Roles and Civil-Military Relations*<sup>118</sup>

Other than perhaps exacerbating the Defense Ministry's budget crisis and distracting the SANDF from its efforts to bring its newly integrated military services up to their traditional level of proficiency in conventional and counter-insurgency warfighting, South Africa's embarkation upon nontraditional international military missions is likely to have few domestic consequences as long as the SANDF avoids becoming embroiled in a particularly costly foreign campaign. It may not be possible to say the same, however, about the South African military's growing role at home.

Some scholars of civil-military relations have warned of the potential dangers inherent in giving professional military services significant domestic responsibilities distinct from their traditional mission of securing a country's territory against external aggression. Such a "growing internal focus," it has been argued, "could undermine civilian control of the military"<sup>119</sup> by making soldiers "something other than warriors" and encouraging their creeping involvement in *making* the domestic policies in which they become increasingly important participants.<sup>120</sup> Others have focused less specifically upon this erosion of the distinction between military and political affairs, but still worry about the consequences for civilian supremacy in countries with large militaries which are suddenly deprived of external threats<sup>121</sup>—also circumstances in which South Africa certainly finds itself today.

---

118. In South African usage, as elsewhere, "civil-military relations" is understood to relate to "the distribution of power and influence between the armed services and the civilian authority." REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE (1996), at 9.

119. Michael C. Desch, *U.S. Civil-Military Relations in a Changing International Order*, in CIVIL-MILITARY RELATIONS, *supra* note 34, at 166, 176.

120. Charles J. Dunlap, Jr., *Melancholy Reunion: A Report from the Future on the Collapse of Civil-Military Relations in the United States*, Address given at U.S. Air Force Air University, Maxwell AFB, Alabama, Aug. 21, 1996, at 3; *see also* Snider & Carlton-Carew, *supra* note 93, at 7 (warning that U.S. military "which has found itself playing increasingly major roles in nontraditional operations, such as peacekeeping and domestic disaster and humanitarian relief, presumes it is entitled to help develop the policies that affect its status and competency"). Col. Dunlap has become prominently associated with this thesis through his deliberately provocative sketches of a hypothetical future in which, spurred on by such developments, the U.S. military ultimately mounts a coup against its civilian masters. *See* Charles Dunlap, *The Origins of the American Military Coup of 2012*, 22 PARAMETERS 14 (Winter 1992-93); McIsaac & Verdugo, *supra* note 108, at 31 (discussing Dunlap's thesis); Feaver, *supra* note 37, at 119 (same).

121. Desch, *supra* note 119, at 167, 169-70 (arguing that "civil-military relations are most stable in states whose militaries have significant external missions," noting that "the greatest danger to civilian control" is likely to come when the state is left with "a large military force but no external mission," and observing that the countries with the

In this respect, the ANC government's contemporary articulation of a such an all-inclusive conception of its "national security" mission<sup>122</sup> should be somewhat worrisome. It is perhaps worth remembering that it was just such an all-encompassing conception of "national security"—also developed within the South African Ministry of Defense—that helped produce the corruption of South African civil-military relations and erosion of security force accountability under the National Security Management System ("NSMS") of the 1980s. The NSMS was the brainchild of former National Party prime minister and state president Pieter W. Botha, who established the NSMS scheme as the institutional incarnation of the "Total National Strategy" ("TNS") he developed while serving during the mid-1970s as Defense Minister in the cabinet of Prime Minister John Vorster. Convinced that communist-inspired and Soviet-directed anti-apartheid forces had mounted a "total onslaught" against South Africa,<sup>123</sup> it was P.W. Botha's ambition to organize a "total strategy" in response—one that would coordinate South Africa's reactions on every conceivable front: military, political, economic, ideological, and social.<sup>124</sup> This all-embracing idea naturally elicited an all-embracing institutional response in the form of the NSMS, erasing in the process all notions of security accountability and the separation of national affairs into military and civilian spheres. The ambition to organize a *dirigiste* response across the socio-political spectrum led necessarily towards the notoriously heavy-handed authoritarianism of late-apartheid South Africa.

This ugly history suggests why it is worrying that the contemporary South African security forces have adopted such a

---

worst records of civil-military relations in the developing world are those "that faced few external threats but many internal ones").

122. See *supra* text accompanying notes 110, 112–114.

123. See, e.g., House of Assembly *Hansard* 21 Mar 1980 Col 3321 (remarks of P.W. Botha) ("South Africa finds itself the target of a three-pronged onslaught . . . calculated to bring about the downfall of this state . . . . The main object of the onslaught on the Republic of South Africa, under the guidance of the planners in the Kremlin, is to overthrow this state and create chaos instead, so that the Kremlin can establish its hegemony here.").

124. See, e.g., REPUBLIC OF SOUTH AFRICA, MINISTRY OF DEFENSE, WHITE PAPER ON DEFENCE 5 (1977) (describing need to coordinate "on an interdepartmental basis" numerous "aspects of national security" from intelligence operations to natural resource management to religious and cultural affairs, to telecommunications). The idea of a "total strategy," however, was not original to P.W. Botha's defense ministry but rather appears to have derived from Andre Beaufre's 1974 articulation of a national endeavor integrating military, political, economic, moral, and ideological elements. See Douglas Johnson & Steven Mets, *American Civil-Military Relations: A Review of the Recent Literature*, in CIVIL-MILITARY RELATIONS, *supra* note 34, at 204 (citing ANDRE BEAUFRE, STRATEGY FOR TOMORROW ix (1974)).

broad working definition of “national security.” As we have seen, Joe Modise’s Defence White Paper embodies a conception of “security” elastic enough to include a variety of “developmental non-military insecurities” ranging from stemming cross-border refugee flows and arms smuggling<sup>125</sup> to “appeas[ing] external investor perceptions.”<sup>126</sup> The situation is much the same with respect to South Africa’s post-apartheid intelligence services. Though existing legislation sharply divides the domestic and the external realms into separate spheres of institutional responsibility—the former being the responsibility of the National Intelligence Agency (“NIA”) and the latter that of the South African Secret Service<sup>127</sup> (“SASS”)—“national security” is viewed as encompassing everything “associated with and essential to the quality of life, freedom, justice, prosperity, and development.”<sup>128</sup> As Deputy Minister of Intelligence Services Joe Nhlanhla put it in 1994, for example,

[a]gainst the background of failed traditional national security approaches, policy-makers around the world have begun to seek new models to inform the notion of national security. In terms of the new approaches, national security is defined as the most desired state of a nation’s political, economic and social well being and not merely the absence

---

125. Mills I, *supra* note 85, at 8; see also Navias I, at 6; Heitman, *Reshaping*, *supra* note 91, at 18 (quoting Modise).

126. Greg Mills, *Formalised SADC Defence Agreement?*, JANE’S SENTINEL/POINTER, Oct. 1996, at 13.

127. See § 2(1)(a) of National Strategic Intelligence Act 39 of 1994 (giving NIA responsibility for “domestic” intelligence collection and analysis); *id.* § 2(2)(a) (giving SASS similar responsibility for “foreign” intelligence).

The NIA, SASS, the criminal intelligence arm of the Police, and the SANDF’s Intelligence Division are apparently the only South African intelligence services. The South African Constitution permits the president to establish intelligence agencies as he sees fit, but requires that he do so only “in terms of national legislation.” See S. AFR. CONST. § 209(1); *cf. id.* § 199(3)(a) (“Other than the security services established in terms of the Constitution, armed organizations or services may be established only in terms of national legislation.”). Thus does the post-apartheid constitutional scheme seek to prevent the establishment of secret “alternative” intelligence arms to further the personal agenda of the head of state and evade conventional mechanisms of oversight and accountability—as Lt. Col. Oliver North had in mind during the “Iran-Contra Affair” scandal in the United States, and has apparently become a tradition within the French intelligence system. See JOHNSON I, *supra* note 34, at 78 (discussing North’s vision of an independent, self-financing, “off-the-shelf” covert action organization); DOUGLAS PORCH, *THE FRENCH SECRET SERVICES* 437–54 (1995) (discussing repeated use by French presidents of *ad hoc* alternative intelligence institutions).

128. Senate *Hansard* 11 Nov 1994 Col 3011 (remarks of S.S. Makana); see also *id.* Col 4128 (remarks of Minister of Water Affairs and Forestry Kader Asmal) (stressing need for “pre-emptive” provision for “basic human needs” as means to enhance security).



of military threat or war. It is this definition of national security that places a responsibility on the security policy-makers of a nation to collectively address the vulnerability within society. At the core of this new definition . . . lies the concept of human security.

Human security must reflect the balance between the freedom from fear and the freedom from want. Our country's emerging national security doctrine should be based on the principles of democracy, participation, reconstruction, reconciliation, development and stability.<sup>129</sup>

No issue or policy arena, it thus seems, can fall outside the realm of South African "national security" as understood by its top security policy-makers.

The point is not to suggest anything remotely akin to an identity between these conceptions and the paranoid and authoritarian "Total National Strategy" theories of the Botha era. In spirit and substance, these two approaches to "national security" today remain—thankfully—worlds apart. But there does remain something at least *potentially* dangerous about a security apparatus that conceives of its mission as "incorporat[ing] political, economic, social and environmental matters"<sup>130</sup> and protecting society against "ethnic hatred, [and] religious intolerance"<sup>131</sup>—particularly at a time when the professional military components of that apparatus have been deprived of external enemies and are increasingly being given domestic responsibilities by the civilian authorities.

Defining "national security" as nothing less sweeping than "human security" in all its variegated socio-economic richness<sup>132</sup> may sound enlightened and progressive, but such an all-encompassing idea of "security" makes it dangerously tempting to enlist the country's "security forces" in its pursuit across the breadth of domestic policy.<sup>133</sup> So long as government officials use such an all-embracing conception of "national security" as merely a way of reminding themselves that providing for "basic human needs" is

129. *Id.* Col 4132 (remarks of Joe Nhlanhla).

130. *Defence White Paper*, *supra* note 110.

131. Helmoed-Romer Heitman, *Modise Stresses Wider Role, Effective Forces*, JANE'S DEF. WKLY., July 1, 1995, at 18 (quoting Deputy Defense Minister Ronnie Kasrils).

132. House of Assembly *Hansard* 11 Nov 1994 Col 4132 (remarks of Joe Nhlanhla).

133. The Secretariat for Safety and Security—the civilian bureau administering the South African Police Service—is, in fact, already statutorily charged with "promot[ing] and facilitat[ing] participation by the [South African Police] Service in the Reconstruction and Development Programme." § 3(d) of South African Police Service Act 68 of 1995; *cf.* S. AFR. CONST. § 208 (requiring establishment of civilian secretariat for police service).

more important than "seeking so-called enemies or foes under, in or above the beds,"<sup>134</sup> South Africa's citizens (and neighbors) will thank them for it. But if confronted with sudden crises or acute inter-institutional stresses, there is some danger that a security establishment with such a broadly defined area of responsibility could decide that the proper fulfillment of its domestic role requires rather more than a proper balance between liberty and security should permit.

It is this danger to which one opposition parliamentarian in South Africa alluded in 1994, for example, during the National Assembly's debate over the government's new intelligence legislation. Worrying that the statutory definition of "intelligence" was "wide enough to drive a truck through," Kobus Jordaan of the Democratic Party warned that "[t]here are certain components in the [government's] White Paper [on Intelligence] which refer very clearly to the political arena and in respect of which the political terms of today are used, just as the wording 'total onslaught' was used in the past."<sup>135</sup> Observers with sensitivities honed by years of watching the abuse of the term "national security" under apartheid might note with some nervousness today, for example, the fact that South Africa's National Intelligence Agency is given jurisdiction over "intelligence on any internal activity, factor or development which is detrimental to the national security of the Republic . . ."<sup>136</sup> The Intelligence Services Act, in turn, permits the NIA to undertake electronic surveillance or physical searches of property in pursuit of any "information which has or could probably have a bearing on the functions of the Agency."<sup>137</sup> Understood in this context, therefore, Joe Nhlanhla's concept of an all-encompassing "human security" sounds positively alarming; with "national security" defined with such a broad brush, no one and nothing in South Africa could fail to be the lawful object of clandestine NIA attentions.<sup>138</sup>

134. House of Assembly *Hansard* 11 Nov 1994 Col 4128 (remarks of Kader Asmal).

135. *Id.* Col 4144-45 (remarks of J.A. Jordaan). It is thus perhaps no coincidence that representatives of the National Party so quickly agreed with Deputy Minister of Intelligence Services Nhlanhla's broad definition of security. *See, e.g., id.* Col 4134 (remarks of D.P.A. Schutte) (describing the role of intelligence services as "cover[ing] the whole field of the nation's existence").

136. *See* §§ 1 & 2(1)(a) of National Strategic Intelligence Act 39 of 1994 (giving NIA jurisdiction over "domestic intelligence" and defining "domestic intelligence" as "intelligence on any internal activity, factor or development which is detrimental to the national security of the Republic, as well as threats or potential threats to the constitutional order of the Republic and the safety and the well-being of its people").

137. § 5(2)(a)-(b) of Intelligence Services Act 38 of 1994

138. The intelligence arm of the South African Police Service, by contrast, is limited to the covert collection of "crime intelligence," which is defined to mean "intelligence used in the prevention of crime or to conduct criminal investigations and to prepare evidence for purposes of law enforcement and the prosecution of offenders." §§ 1 &

In the realm of security oversight, it should thus be clear, there is much virtue in a narrow conception of “national security”—especially for an unstable society struggling to overcome a very ugly past. To be sure, the South African security services are both statutorily and constitutionally required (as well as certainly expected) to avoid partisan involvement in South African domestic politics.<sup>139</sup> The danger, however, is that too broad a conception of “national security” will tend to blur the lines between legitimate and illegitimate service concerns, ultimately making such prohibitions unintelligible to those who are supposed to be bound by them.<sup>140</sup> Walking the requisite security-accountability tightrope in the years ahead may prove to be a significant challenge for the post-apartheid state.

### 3. Uniquely South African Challenges

#### a. *Transforming the Military*

South Africa also faces a number of security-related challenges deriving from its peculiar recent history of White minority rule and a negotiated transfer of power. Part of the price of apartheid’s negotiated demise was, as we have seen, the retention of White members within the security establishment.<sup>141</sup> Because of the danger

---

2(3) of National Strategic Intelligence Act 39 of 1994 (limiting SAPS jurisdiction to “crime intelligence” and defining term).

139. See, e.g., S. AFR. CONST. § 199(7)(a)–(b) (prohibiting security services or members thereof from “prejudic[ing] a political party interest that is legitimate in terms of the Constitution” or “further[ing], in a partisan manner, any interest of a political party”). With respect to the South Africa’s intelligence services, for example, statutory law also requires the directors-general of the National Intelligence Agency and the South African Secret Service to take all “reasonably practicable” steps to ensure that “no action is carried out that could give rise to any reasonable suspicion that the Agency or Service, as the case may be, is concerned in furthering, protecting or undermining the interests of any section of the population or any political party or organization.” § 4(3)(b) of Intelligence Services Act 38 of 1994.

140. Nor, it should be noted, does the literature on intelligence oversight lack examples illustrating the perils of an “intelligence culture” which “blur[s] the lines between politics and intelligence, [and] which [sees] no contradiction in using intelligence for partisan ends.” PORCH, *supra* note 127, at 459–60 (discussing “Rainbow Warrior” affair in which French intelligence agents killed New Zealand man in process of sinking ship belonging to Greenpeace anti-nuclear protesters).

141. Joe Modise, *South Africa; Army Marches into the Future*, Africa News, Nov. 8, 1996, available in LEXIS, World Library, AFRNWS File (noting that “dominant positions” in SANDF are still in hands of former SADF generals because of “[the late South African Communist Party leader and Minister of Housing] Joe Slovo’s so-called ‘sunset clause’ ” requiring their retention in the post-apartheid military). Needless to say, the Ministry of Defense was more than willing to accept resignations from SADF

of a preemptive military coup by the White-dominated SADF should the transfer of power be perceived to be going too far or too fast,<sup>142</sup> it was clear to ANC officials that “in Defence, more than in any other state institution, the conflicting pressures of stability and transformation need to be sensitively managed.”<sup>143</sup> With the transition period marked by a notably conciliatory tone set by Mandela himself, the appointment of the respected White commander Gen. George Meiring to head the SANDF,<sup>144</sup> and Defense Minister Modise’s tireless (if not always successful) efforts to win the military adequate funding,<sup>145</sup> the new government managed to keep the trust of the officer corps.<sup>146</sup> Within the Defence Ministry itself, a new civilian secretariat was also established, with the aim of ensuring that “civilians [would] formulate Defence policy and the military [would execute] this policy,” leaving “civilians . . . responsible for the political dimensions” of defense policy.<sup>147</sup> Despite mutterings by some ANC officials concerned that the party’s plans may be “thwarted by the White-controlled bureaucracy, including the police and army,”<sup>148</sup> the military has

---

holdovers who did not wish to serve the ANC government; by November 1996 Modise had already accepted several thousand military resignations. *Id.*

142. See, e.g., *supra* text accompanying notes 89–90.

143. *Def. Min. Discusses SANDF Transformation*, Periscope Daily Defence News Capsules, Nov. 12, 1996, available in LEXIS, Market Library, IACNWS File [hereinafter *SANDF Transformation*] (quoting Joe Modise); see also Brummer, *supra* note 19 (quoting Deputy Defense Minister Ronnie Kasrils to effect that ministry “has to be sensitive to the nature of the transition” in order to ensure stability); Joe Modise, *South Africa; Army Marches into the Future*, Africa News, Nov. 8, 1996, available in LEXIS, World Library, AFRNWS File. [hereinafter Modise, *Into the Future*] (same). Achieving such a “sensitive[] balance,” said Defense Minister Joe Modise, was “my ministry’s greatest challenge.” *SANDF Transformation, supra* (quoting Joe Modise).

144. See Brummer, *supra* note 19.

145. See *Review 1996, supra* note 88.

146. South Africa’s Black-ruled neighbors may also have played at least some role in mollifying the White-dominated top leadership of the SADF. According to the SANDF Acting Chief of Staff Lt. Gen. Sipiwe Nyanda, SADC’s willingness to give South Africans a leadership role in forging regional security arrangements may have been at least in part influenced by a desire to assure the SANDF of its continuing prestige and important security responsibilities in the post-apartheid era. See *South Africa to Head Regional Defence and Security Committee*, BBC Summary of World Broadcasts, Sept. 8, 1995, available in LEXIS, World Library, BBCSWB File (describing the decision to hold IDSC meeting in Cape Town as “an attempt by Africa to boost the confidence of the [South African] security forces and encourage them to respect democracy”).

147. REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE (1996), at 13; see also S. AFR. CONST. § 204 (requiring establishment of civilian secretariat for defense).

148. *Who Is in Command?*, *supra* note 82, at 48 (citing concerns expressed by Tokyo Sexwale, premier of Gauteng Province).

proven “conspicuously loyal”<sup>149</sup> and remarkably willing to give “visible support to its new Black masters.”<sup>150</sup>

But the “transformation” process in the SANDF has still been far from smooth, particularly with respect to the incorporation of thousands of former anti-apartheid guerrillas into the ranks of the regular uniformed service. After a long series of negotiations that began in April 1993 between the then-ruling National Party, the ANC, and various other groups,<sup>151</sup> the South African military after the April 1994 elections began the complicated process of integrating former guerrillas from *Umkhonto we Sizwe*<sup>152</sup> (“MK,” the military arm of the ANC) and the Azanian People’s Liberation Army (“APLA,” the military arm of the Pan-Africanist Congress)<sup>153</sup> with troops from the old SADF and military units from South Africa’s apartheid-era ethnic “homelands.”<sup>154</sup> The plan aimed to integrate these disparate forces, ultimately creating a standing military strength of approximately 75,000 persons.<sup>155</sup>

149. *Review 1996*, *supra* note 88.

150. Navias I, *supra* note 92, at 4 (noting that “[t]his demonstrative backing, coupled with no coup pledges, highlights both the realism of the military and the shift in power that only a few months ago would have seemed unbelievable”).

151. *See generally* Heitman, *Reshaping*, *supra* note 91, at 10 (recounting negotiations leading up to April 1994 elections); Mills I, *supra* note 85, at 7 (same). As something of an experiment in military integration—a “micro-level forerunner for the integration programme”—a “National Peacekeeping Force (NKPF)” was also set up in January 1994, combining troops from the military wing of the ANC, “homeland” military forces, and the SADF itself. This experiment did not go well, however, and “as a result of the incidence of ill-discipline and racism experienced both in preparation and during actual deployment in the strife-torn Johannesburg townships, the unit was disbanded in June [1994].” Mills I, note 85, at 9.

152. The name means “Spear of the Nation” in the Xhosa language.

153. The PAC initially refused to take part in the integration process, but subsequently relented. *See* Heitman, *Reshaping*, *supra* note 91, at 11.

154. According to Abdul Minty, deputy director of the South African Foreign Affairs Department (the civil service arm of the foreign ministry), the integration process involved 14,600 former MK and APLA fighters, 11,000 troops from the former “homelands” of Transkei, Venda, Bophuthatswana, and Ciskei, and some 80,000 SADF regulars. *See* Mtimkulu, *supra* note 26 (quoting Minty). Defense Minister Joe Modise, however, later gave somewhat different numbers, saying that of 28,000 registered MK fighters and another 6000 from APLA, a total of 16,000 opted for military integration (4,000 of whom chose to mobilize as regular-service soldiers). According to Modise, of those integrated, some 1700 (including 150 women) were appointed as officers, including 11 generals (of whom one was female). This made the former guerrillas approximately 10% of the SANDF officer corps. Some 500 officers from the former “homeland” armies were also integrated. *See SANDF Transformation*, *supra* note 143.

155. *See* Mtimkulu, *supra* note 26 (quoting Abdul Minty). Because simply combining these forces would produce “a huge and clumsy army far too big for South Africa’s needs,” Heitman, *Reshaping*, *supra* note 91, at 13, the integration program planned also to demobilize as many as 60,000 soldiers. Mtimkulu, *supra* note 26; *see also* *SANDF Transformation*, *supra* note 143 (quoting Modise discussing efforts to facilitate

Integrating the former “homeland” soldiers apparently did not prove too difficult—after all, their armed forces had been established under SADF tutelage and trained according to SADF doctrine<sup>156</sup>—but the former MK and APLA guerrillas were often troublesome.<sup>157</sup> Indeed, amid disputes over pay and their treatment within the military, thousands of disgruntled MK fighters rejected military discipline for five months, leaving their training camps and marching on the ANC’s headquarters in Johannesburg, camping on Nelson Mandela’s presidential lawn in Pretoria, and demonstrating in front of the headquarters of the South African Broadcasting Corporation. Only in mid-October 1994 did the ANC reassert control over the guerrillas, ordering them back to barracks and discharging some 2000 of them outright.<sup>158</sup> The integration of the remaining trainees proceeded apace, but the SANDF’s first annual report made clear that integration had not been harmonious even after their training had been completed: “[a]lthough the phenomenon of mistrust is gradually decreasing, it still plays a negative role . . . where mistakes are sometimes seen as mischief and established personnel practices are considered to be discriminatory.”<sup>159</sup> Morale

---

reintegration of demobilized personnel into civilian society by means, *inter alia*, of demobilization gratuities and job training).

156. See Heitman, *Reshaping*, *supra* note 91, at 13.

157. See *generally id.* (“The primary problem is the lack of formal military training and actual service experience. Many of the ANC’s 16,000 men received little or no training, and its operations never progressed much beyond urban terrorism. The result is that, as a force, it is difficult to amalgamate with a normal military structure. The ANC sent many of its personnel to friendly countries for training after 1992, but much of that was conducted in countries with doubtful standards.”). A 30-man British “Military Advisory and Training Team” was imported to help ease this process of transition for former MK and APLA fighters by acting as a neutral arbiter in a training and selection process sure to be rife with suspicion, see *generally* Mills I, *supra* note 85, at 7; Heitman, *Reshaping*, *supra* note 91, at 13, but some tensions could not be avoided.

158. See *Who Is in Command?*, *supra* note 82, at 48. Some of the demonstrators had also thrown rocks at former MK Chief of Staff Sphiwe Nyanda, and set his car alight, as well as jeering at their former MK commander, Defense Minister Joe Modise. Some of the former guerrillas discharged in October as a result of these disturbances reportedly went to ground in South Africa’s townships with their government-issue weapons, even threatening to attack police stations and government offices unless given an appropriate “financial package” by the government. *Id.*

159. Quoted by Brendan Boyle, *Brain Drain Dogs New South African Army*, Reuters North American News, Nov. 7, 1995, available in LEXIS, World Library, REUNA File. Both the ex-guerrillas and the regular SADF troops apparently felt mistreated in the process, the former perceiving an endemic institutional racism and the regular feeling slighted by personnel practices that they felt eroded military standards and resulted in the elevation of ANC stalwarts to positions unwarranted by their military capabilities and experience. See Mtinkulu, *supra* note 26; Boyle, *supra*. At least to some extent, both groups were surely correct. See, e.g., Heitman, *Reshaping*, *supra* note 91, at 13 (“Some senior MK officers will . . . be taken into the defence force in senior positions whether their training and experience justify this or not. That is a political necessity that cannot be avoided.”); Mills I, *supra* note 85, at 9 (describing how 1994 experiment

problems among former SADF regulars also made it difficult to retain skilled personnel, and resignations among instructors, junior officers, aviators, intelligence operatives, and medical personnel reportedly greatly eroded SADF mission capabilities.<sup>160</sup> Nonetheless, despite these problems, the armed forces *have* been integrated: by the end of March 1995, for example, the SANDF reported that it had 75,479 personnel, of whom 39,473 were Africans, 28,192 were White, 6982 were Coloured, and 832 were Asian (Indian).<sup>161</sup>

The ultimate success of this “blending” process<sup>162</sup> may have significant implications for civil-military relations in South Africa. Scholars of civil-military relations have pointed to two basic theories of how best to control the role of the armed forces in society. One model derives in large part from the work of Harvard political scientist Samuel Huntington,<sup>163</sup> and argues that the establishment of “a body of [regulatory] laws . . . and a formal chain of command [will] make the military responsible to their host society.”<sup>164</sup> A second approach, associated with the work of Morris Janowitz,<sup>165</sup> takes a more sociological turn, arguing that “civilian control of [the] armed forces is best realized when the military are integrated with and woven into the broader social fabric.”<sup>166</sup> These two models, in

---

in integration had to be abandoned in part because of racist treatment of new trainees); Modise, *Into the Future*, *supra* note 141 (describing “Affirmative Action and Equal Opportunities” program to “fast-track” non-Whites with “the greatest capability”).

160. Of some 488 pilot positions in the South African Air Force (“SAAF”), for example, only 375 could be filled by March 1995, and the SAAF expected to have fewer than 300 trained pilots by March 1996. See Boyle, *supra* note 159.

161. At that time, there still remained some 12,000 ex-guerrillas to be integrated. *Id.* Except for the use of the term “African” instead of the reported “Black,” this race-classificatory breakdown is apparently that given by the SANDF itself. For a discussion of the problems of racial terminology in discussing contemporary South Africa, see *supra* note 12.

162. The term is that of Abdul Minty, deputy director of South Africa’s department of foreign affairs. See Mtinkulu, *supra* note 26.

163. See SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* (1957); see also Snider & Carlton-Carew, *supra* note 93, at 3 (crediting Huntington with paternity of this traditional model of civil-military relations theory).

164. David R. Segal, *U.S. Civil-Military Relations in the Twenty-First Century: A Sociologist’s View*, in *CIVIL-MILITARY RELATIONS*, *supra* note 34, at 185, 189.

165. See MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* (1960).

166. Segal, *supra* note 164, at 189. This idea long predates Janowitz, however, a form of it having been articulated even in the debates over the drafting of the U.S. Constitution. See PALMER, *supra* note 39, at 122 (recounting arguments at Constitutional Convention by Gouverneur Morris that congressmen should be permitted simultaneously to hold military commissions because to do otherwise would contribute to isolation of military from society and political process and produce an alienation that could prove dangerous to civil-military relations).

turn, broadly suggest the two principal techniques by which civilians may attempt to control the military: (1) “adjusting the incentives of the military” so as to make *coups d’etat* both difficult and unattractive; and (2) “adjusting the ascriptive characteristics of the military so it will be populated by people disinclined to [mount a] coup.”<sup>167</sup> These approaches are not, of course, mutually exclusive, and in its efforts to “develop security forces that are more broadly representative of society,”<sup>168</sup> South Africa has employed both. If establishing a new statutory scheme to govern defense affairs, enshrining civilian control of the SANDF in South Africa’s new Constitution,<sup>169</sup> and endeavoring to cultivate “new military attitudes”<sup>170</sup> may be said to represent the former technique, the process of “blending” the former guerrillas and the regular army—however awkward it may have been—clearly represents the latter.

So far, despite some obvious problems (especially in the initial phases of the integration process), this approach seems to be working. Some writers have worried that an over-zealous attempt to employ “ascriptive” control techniques may be counterproductive as a means of civilian control because of the tendency of such methods to politicize the armed forces,<sup>171</sup> but South Africa’s situation suggests that an *incomplete* ascriptive process may actually make civil-military relations more manageable. At least for the moment, the SANDF is far from the politicized creature of the ANC. Quite to the contrary, the awkward process of “blending” former guerrillas and former regulars has created a military with less of a monolithic political interest than ever before—and one containing demographic and ideological factions perhaps more concerned with policing *each other’s* propriety than with acting in concert against civilian authority. While residual internal divisions and suspicions resulting from the guerrillas’ integration will undoubtedly continue to take a

---

167. Feaver, *supra* note 37, at 115–116.

168. The phrase is actually that of U.S. Assistant Secretary of Defense for International Security Joseph Nye, describing South Africa’s efforts to “transform” its armed services. See *Pentagon Looks to Military Cooperation with South Africa*, Agence France Presse, Aug. 7, 1995, available in LEXIS, World Library, AFP File.

169. See, e.g., S. AFR. CONST. §§ 201–02, 204 (establishing military accountability to president, cabinet, and parliament, and requiring establishment of civilian defense secretariat).

170. See Modise, *Into the Future*, *supra* note 141 (noting Defense Ministry efforts to create new attitudes through such measures as “civic education, language and religion work groups together with [equal opportunity hiring and promotion] structures” within military); see also S. AFR. CONST. § 199(5) (requiring that security services “act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic”).

171. See, e.g., Feaver, *supra* note 37, at 116 (citing HUNTINGTON, *supra* note 164, at 80).



toll on the SANDF's combat effectiveness, at least in the near term, the ANC's incomplete ascriptive transformation of the armed services probably bodes well for civil-military relations.

Nevertheless, the "potentially explosive process of 'blending' South Africa's military"<sup>172</sup> has been and continues to be a particular challenge for the post-apartheid state, because the ANC must concern itself not simply with controlling the military and ensuring that its conduct remains within the bounds permitted by law but also with ensuring that it remains capable of protecting South Africa's security interests at home and abroad. As we have seen, the imperatives of military accountability and effectiveness pull at least to some extent in different directions.<sup>173</sup> It will remain the new government's challenge to see that both of these masters are adequately served.

#### b. Problems in the Police Force

Unlike the SANDF, the process of "blending" forces into the new South African Police Service ("SAPS") has principally involved only regular personnel from the old South African Police "Force" and police units from the ten former ethnic "homelands" of the apartheid era.<sup>174</sup> Because former ANC guerrillas had little training even arguably relevant to conventional police work, ANC integration in this area proceeded slowly (for the most part only through conventional processes of recruitment and training).<sup>175</sup> Members of

---

172. Mtimkulu, *supra* note 26.

173. See *supra* text accompanying notes 35–38.

174. See, e.g., Suzanne Daley, *Apartheid's Feared Police Prove Inept and Corrupt*, N.Y. TIMES, Mar. 25, 1997, at A1. Upon the integration of the homeland forces with both White and non-White members of the South African Police after the April 1994 elections, the new SAPS contained some 50,000 White policemen (of whom some 47,000 remained in service in early 1997). *Id.*

175. Cawthra, *supra* note 82, at 19–20. The only analogous experience in ANC ranks was in intelligence collection and, with respect to the ANC's VIP protection unit, bodyguard work. *Id.* Some ANC-affiliated township "Self-Defense Units" ("SDUs"), however, were also potential candidates for police integration, *id.*, but such projects have proven quite controversial—especially after the Eastern Cape province's minister of safety and security, Maliza Mpehle, was implicated in establishing an anti-crime police unit made up of former MK and SDU members that was involved in a bloody incident at Tsolo in which over 150 persons were killed. See *Eastern Cape Security Minister Suspended for Establishing Anticrime Unit*, BBC Summary of World Broadcasts, Feb. 20, 1995, available in LEXIS, World Library, BBCSWB File. SDUs were also accused of abusing their positions as police auxiliaries in the East Rand township of Kathelong. These problems notwithstanding, provincial government still endeavored to integrate SDUs in to community policing efforts. See generally Shaun McCarthy, *South Africa's Self-Defence Units*, JANE'S INTEL. REV., Nov. 1994 [hereinafter McCarthy, *SDUs*], at 520, 521.

both of the principal components of the new force, in other words, had spent their previous careers in defense of the apartheid status quo. For this reason—and because the police had borne the brunt of the burden in the White minority government's struggle to crush anti-apartheid unrest—it was long feared that the police would be more troublesome even than the military.<sup>176</sup> Efforts properly to reform and restructure the police also got off to a slow start, with senior leadership preoccupied with “crisis management” tasks.<sup>177</sup> Among other things, the police reportedly suffered from significant morale problems related to the exposure of apartheid-era human rights violations by police units (in which many senior White officers were implicated),<sup>178</sup> the restrictions placed upon police powers by the country's interim Constitution, and the government's release of many prisoners.<sup>179</sup> Police reform efforts were delayed,<sup>180</sup> morale eroded, and discipline was weakened by funding problems, prompting members of the South African Police Union to refuse to work overtime and conduct “go-slow” protests over salary and overtime-pay issues.<sup>181</sup> Though the police budget had been greatly increased under the new government—rising to 8.5 billion rand for 1994-95 and “rapidly closing the gap with the [declining] Defence budget”<sup>182</sup>—it was not enough to forestall a series of violent strikes

---

176. See, e.g., Navias I, *supra* note 92, at 5 (also noting that “[i]t is among the Whites in the police that support for far right-wing fringe groups has been strongest”).

177. See generally Mills I, *supra* note 85, at 8.

178. Though apparently not himself directly implicated in such police “dirty tricks,” even national police commissioner Gen. Johan van der Merwe was “deeply compromised” by his support for senior officers suspected of such abuses. See, e.g., Cawthra, *supra* note 82, at 20. As a result, van der Merwe was replaced by Maj. Gen. George Fivaz—a White with some 30 years of police service—in January 1995. See *New Police Chief Calls for Professionalism; Parliament Considers “Truth Commission,”* AP, Jan. 30, 1995, available in LEXIS, News Library, AP File [hereinafter *Police Professionalism*].

179. Mills I, *supra* note 85, at 8.

180. One reform that did quickly occur, however, was the establishment of a civilian secretariat, paralleling the top uniformed ranks of the Police Service and headed by a Secretary for Safety and Security who is formally co-equal to the (uniformed) National Commissioner for Police. This civilian secretariat was intended to “establish a degree of continuity in policy management in the department even as individual ministers may change.” REPUBLIC OF SOUTH AFRICA, ANNUAL PLAN OF SOUTH AFRICAN POLICE SERVICE 1996/97 (1996), at 27–28; see also § 2(1)(a) of South African Police Service Act 68 of 1995 (establishing civilian Secretariat for Safety and Security). The secretariat is charged, *inter alia*, with promoting “democratic accountability and transparency” within the Police Service. § 3(1)(c) of South African Police Service Act 68 of 1995.

181. See, e.g., *Mandela Intervenes to Improve Police Pay*, Reuters World Service, Mar. 25, 1995, available in LEXIS, World Library, REUWLD File; *Minister Appeals for Calm as S. African Detectives Begin Go-Slow*, Agence France Presse, Mar. 24, 1995, available in LEXIS, World Library, AFP File.

182. Cawthra, *supra* note 82, at 21. A gift of 20 million rand by the Belgium government also proved helpful, but obviously amounted to only a small fraction of

in early 1995 in which loyal security forces killed or wounded several protesting policemen in the process of quelling police mutinies.<sup>183</sup>

The situation has stabilized since those tense early months of 1995, but the process of post-apartheid “transformation” in the South African Police clearly has been rocky. In conjunction with the police’s traditional de-emphasis of ordinary policing in favor of “internal security” duties (i.e., in favor of the suppression of anti-apartheid domestic unrest),<sup>184</sup> these problems have helped leave the police still unequal to the significant criminal and public-order challenges that face contemporary South Africa<sup>185</sup>—thereby further eroding both internal morale and the service’s reputation in the public eye.<sup>186</sup>

---

police expenditure. See *Belgium to Provide Funds, Advice on Demilitarization of Police*, BBC Summary of World Broadcasts, May 16, 1995, available in LEXIS, World Library, BBCSWB File.

183. See *Mandela Moves to Rebuild Police*, AP, Jan. 29, 1995, available in LEXIS, News Library, AP File (recounting suppression of January 1995 police strike in Soweto in which one protesting officer was killed and one wounded); *Police Professionalism*, *supra* note 178; *South African Troops End Police Mutiny*, UPI, Feb. 26, 1995, available in LEXIS, News Library, UPST95 File (recounting incident in which security forces using helicopters and mortar fire regained control of town of Umtata in Eastern Cape province from police mutineers, killing one and wounding another); David Beresford, *Mandela Gets Tough*, MANCHESTER GUARDIAN WKLY., Mar. 5, 1995, at 4 (same).

South African law prohibits strikes by members of the police. See § 41(1) of South African Police Service Act 68 of 1995 (“No member [of the SAPS] shall strike, induce any other member to strike or conspire with another person to strike.”).

184. See Navias I, *supra* note 92, at 5; Daley, *supra* note 174, at A1 (declaring that “the police force the National Party left behind is deeply corrupt, barely literate and lacking some of the most basic skills needed in conventional police work” and recounting that while police “kept Blacks out of White areas and controlled riots,” their investigative skills often did not go far beyond “beat[ing] a confession out of the suspect”).

185. See KEITH B. RICHBURG, *OUT OF AMERICA 197–98 (1997)* (describing its many years as “a tool of antiBlack repression” as having made the SAP into “one of the world’s most incompetent when it came to detective work or rudimentary crime-solving”). With so much competition for that title on the African continent alone, Richburg’s claim seems somewhat exaggerated, but his basic point is well taken.

186. After so many years of seeing the country’s security services enlisted in the fight to suppress anti-apartheid protest, these services (and especially the police) also began the era of majority rule with significant problems of legitimacy among the country’s non-White population. See, e.g., Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 BROOK. J. INT’L L. 857 n.39 (1996) (noting degree to which security forces are “associated with apartheid repression”). The police service’s inability to protect South Africans against the country’s contemporary explosion of violent crime—not to mention reports of police corruption, see *supra* note 83—has made these problems worse.

*c. The Entrenched Civil Service*

Another peculiar challenge for the new ANC government resulting from the National Party's negotiated departure from power has been the job guarantees given to South Africa's apartheid-era civil servants. Despite the financial burdens of maintaining an expensive public service sector that has been described as "bloated" on account of the 1.2 million members it maintains (a number which includes some 750,000 civil servants), the ANC government promised a five-year guarantee against involuntary layoffs both to the (predominantly White) ranks of the national civil service and to some 500,000 civil servants in South Africa's former ethnic "homeland[s]."<sup>187</sup>

In addition to the considerable budgeting problems entailed by the necessity to maintain such a large civil service<sup>188</sup> and the political discontent among the ANC's non-White constituency engendered by the decision to retain so many of the former administrators of the apartheid state,<sup>189</sup> these job-guarantees may have intriguing implications for South African security oversight. On the one hand, as with the incomplete process of armed services "blending" discussed above, the retention of so many Whites within the South

---

187. See *Review 1996*, *supra* note 88.

188. According to Deputy President Thabo Mbeki, public service salaries and welfare payments and payments made in servicing South Africa's large state debt made up approximately 90% of the state budget. *Mbeki Says Right Wing No Longer a Serious Threat to South Africa*, BBC Summary of World Broadcasts, May 1, 1995, available in LEXIS, World Library, BCSWB File [hereinafter Mbeki, *Right Wing*]. This problem was made worse, moreover, because the hoped-for level of civil service retirements failed to materialize on account of funding problems in the principal civil service pension funds. See *Review 1996*, *supra* note 88.

189. Not least of these is the great delay the job-guarantees have caused in the ANC's efforts to "redress the imbalances of the past" in South Africa's public administration in order make the government bureaucracy "broadly representative of the South African people." S. AFR. CONST. § 195(a)(i) (stating principle of public administration). As this author has elsewhere recounted,

[n]on-Whites are being brought into the government bureaucracy to replace Whites who retire or resign, but although early retirement is encouraged and many new positions (fillable by non-Whites) have been created, few, if any, Whites have actually been laid off. The Mandela government's relatively cautious and conciliatory approach to public sector affirmative action has, in fact, apparently proven quite frustrating to many ANC supporters who had hoped quickly to be given government employment after the 1994 elections. After Mandela's inauguration, for instance, some two million job applications reportedly flooded in for the 11,000 civil service openings then available.

Ford I, *supra* note 2, at 170 (citations omitted) (citing, *inter alia*, Ellmann, *supra* note 4, at 28 n.88; Arlene Getz, *South Africa Pushes to Put Blacks in Top Jobs*, ST. PETERSBURG TIMES (Fla.), Nov. 25, 1994, at 23A).

African civil service suggests that the non-uniformed security bureaucracy—e.g., the foreign and domestic intelligence services—is in no immediate danger of becoming a wholly politicized instrument of the ANC in ways that could threaten the political freedoms of the post-apartheid era. The high rate of White retention probably also makes it rather more likely that any such abuses will quickly be brought to light in the press or by opposition parliamentarians. On the other hand, however, even apart from concerns about the practices to which such individuals may have become accustomed in the past, the large mass of officials retained from the National Party's civil service greatly complicates the ANC's own *intra-governmental* oversight processes. That is, the job guarantees the ANC made before the April 1994 elections will require of the Mandela cabinet a continuing effort to ensure that the various arms of the national administration actually obey their duly-elected political masters and to prevent government policies from being "thwarted by the White-controlled bureaucracy."<sup>190</sup>

#### d. Domestic Political and Religious Groups

Despite much domestic and international agonizing before and during the National Party's transfer of power to the present ANC-dominated government,<sup>191</sup> there does not presently appear to exist a significant right-wing domestic security threat in South Africa. After the collapse of a bungled effort at military insurrection and territorial independence undertaken by self-styled commandos from the neo-Nazi Afrikaner Resistance Movement ("AWB") in conjunction with the ethnic "homeland" government of Bophuthatswana,<sup>192</sup> and the arrest of some thirty-four members of the so-called Afrikaner Republican Army ("BBL") in the wake of a series of ominously well-orchestrated car-bombings in 1994,<sup>193</sup> little seems to remain of any organized White resistance to majority rule.<sup>194</sup>

The same cannot quite be said of non-White radicals. Armed revolutions, it has been observed, tend to breed revolutionaries

---

190. *Who Is in Command?*, *supra* note 82, at 48 (citing concerns expressed by Tokyo Sexwale, premier of Gauteng Province).

191. *See, e.g., supra* note 89.

192. *See* Manby, *supra* note 10, at 36.

193. *See* Shaun McCarthy, *The Afrikaner Resistance Movement in Decline?*, JANE'S INTEL. REV., July 1994, at 22, 24 (noting that "[i]n the space of a few days, the BBL conducted a far superior spate of attacks than the ANC was able to achieve even at the height of their terror campaign.").

194. *See id.* at 22; *see also* Mbeki, *Right Wing*, *supra* note 188 (noting decline in right-wing threat).

whose preferred methods of political change are often incompatible with those required of citizens in a democratic civil society.<sup>195</sup> There has also developed in post-apartheid South Africa something of an “expectations gap,” as the politically and financially constrained ANC government has found it increasingly hard to fund the RDP and to fulfill its grandiose promises of “Peace, Freedom and a better life for all.”<sup>196</sup> The coincidence of these two factors presents a danger to the new government: the risk that the more radicalized of the ANC’s non-White constituents will find in the decades-long armed struggle against apartheid so tempting a “process and a language [with which] to deal with an iniquitous government”<sup>197</sup> that such a discourse of violence will come to structure their relations with the new regime as well.

The initial signs, however, are fairly hopeful. A significant potential security danger to the ANC government was avoided after the 1994 elections when the Pan-Africanist Congress—a smaller but more radical anti-apartheid movement long notorious for its slogan of “one [White] settler, one bullet”<sup>198</sup>—agreed to allow its APLA guerrillas to take part in the SANDF’s integration process. Though dissidents from within both APLA and the ANC’s own *Umkhonto we Sizwe* have caused some concern to the new government’s security forces,<sup>199</sup> the ANC now claims that such groups are no longer a threat.<sup>200</sup>

Nevertheless, the new government still faces some headaches in this respect. Tactics from the anti-apartheid struggle designed to make the country “ungovernable” for the White minority government remained popular in South Africa’s sprawling and impoverished townships after the arrival of majority rule, with strikes, sit-ins, and rent boycotts remaining common ways of

---

195. See PALMER, *supra* note 39, at 11 (“Revolutions inevitably cast up revolutionaries. . . . Having overthrown one government, they slide easily in to contemplation of overthrowing another. Force is their proven method of choice.”).

196. See *supra* note 80.

197. PALMER, *supra* note 39, at 176.

198. See, e.g., Culhane, *supra* note 79, at 929 n.208.

199. Lesotho police claimed in 1995, for example, to have seized large APLA arms caches hidden in that country, and at the end of that year Lesotho (and possibly South African) police arrested former APLA commander Letlapa “Happy” Mphahlele on charges relating to a December 1991 hand grenade attack upon a police station in Bloemfontein, South Africa. See *Security Minister Says Ex-APLA Commander’s Arrest Was Legal*, BBC Summary of World Broadcasts, Jan. 31, 1996, available in LEXIS, World Library, BBCSWB File.

200. Or so Minister of Defense Modise claimed when asked about this problem in parliament. See *Defence Minister Says MK and APLA Dissidents Pose ‘No Threat’ to Security*, BBC Summary of World Broadcasts, Sept. 15, 1995, available in LEXIS, World Library, BBCSWB File.

expressing discontent with social and economic conditions.<sup>201</sup> Township “Self-Defense Units” made up of radicalized youths and “comrades” from the ANC’s young urban cadres, established during the apartheid years as an alternative township control structure, also proved hard to control and to assimilate in the post-apartheid era—some reportedly even abandoning the ANC and moving into drug and weapons trafficking.<sup>202</sup>

Even greater a concern for the new government is an entirely new township phenomenon: that of radical Islamic groups dedicated to a form of vigilante *jihad* (or holy war) against reputed drug dealers and local crime bosses. With its roots in a combination of religious faith and populist outrage against the spiraling problems of violent crime and drug trafficking in South Africa’s townships, groups such as “People Against Gangsterism and Drugs” (“PAGAD”) have attracted significant support in the past two years among members of the country’s Muslim community.<sup>203</sup> PAGAD—and, particularly, a number of more radical Islamic fundamentalist groups with which it is loosely affiliated—have proven to be an increasing headache for the ANC government. To protest the ineffectiveness of the national police in curbing South Africa’s post-apartheid crime epidemic, for example, armed PAGAD members occupied the Cape Town residence of Justice Minister Dullah Omar in March 1996, forcing the ANC’s top law enforcement official to move elsewhere.<sup>204</sup>

Even more dramatically, in August 1996, some 2000 PAGAD members and supporters descended upon the home of one of the Western Cape’s most notorious drug dealers, Rashaad Staggie, shooting him several times before burning him to death amid widely publicized calls for a vigilante *jihad* against drug

---

201. See, e.g., *Who Is in Command?*, *supra* note 82, at 48–50; McCarthy, *SDUs*, *supra* note 175, at 520.

202. See generally McCarthy, *SDUs*, *supra* note 175, at 520–21 (discussing problems reported in integrating SDUs into municipal policing efforts).

203. Various commentators give greatly varying estimates for the size of the Islamic community in South Africa. See *Islamic Fundamentalism Threatens South African Security*, Africa News, Aug. 29, 1996, available in LEXIS, World Library, AFRNWS File [hereinafter *Fundamentalism Threatens*]; Beatrice Khadige, *Resurgent Islamic Militancy in S. Africa Has Its Roots in Apartheid*, Agence France Presse, Aug. 14, 1996, available in LEXIS, World Library, AFP File (giving figure of between 500,000 and 1 million); Patrick Laurence, *Vigilantes Signal Loss of Faith in ANC Action to Beat Crime*, Irish Times, Aug. 19, 1996, available in LEXIS, World Library, TXTLNE File (giving figure of 350,000); McCarthy, *Vigilantes*, *supra* note 83, at 570 (claiming that the Muslim community “numbers approximately 2.6 million”). Racially, PAGAD’s supporters in the Cape Town area are apparently predominantly of the group that the apartheid state classified as “Coloured.” See Khadige, *Fundamentalism Threatens*, *supra*.

204. See Laurence, *supra* note 203; McCarthy, *Vigilantes*, *supra* note 83, at 569.

traffickers.<sup>205</sup> After clashes between government security forces and PAGAD supporters which led the ANC's Western Cape spokesman to suggest that a state of emergency might be needed,<sup>206</sup> the police subsequently arrested one PAGAD leader on charges of murder and sedition while others fled into hiding.<sup>207</sup> The ANC government has since moved to defuse some of these tensions, announcing the establishment of a joint government-PAGAD committee to investigate ways to curb crime.<sup>208</sup> Feelings still run high, however, and violent crime as yet shows no signs of decreasing.<sup>209</sup>

Also quite worrying, from an internal security perspective, is mounting evidence that Muslim radicals affiliated with PAGAD or its associated groups have developed close ties both to international radical Islamic governments such as Iran and Libya, and to Islamic terrorist groups such as *Hamas* and *Hizbollah*.<sup>210</sup> Cape Town's Muslim community, apparently more inclined to fundamentalist militancy than South African Muslims in the Johannesburg area, plays host to a number of organizations linked to PAGAD but reputedly more radical and inclined toward international fundamentalist activism. Perhaps none of these groups is more notorious than the group known as *Qibla*,<sup>211</sup> which has in the past

---

205. See generally *Fundamentalism Threatens*, *supra* note 203.

206. Roger Matthews, *S. Africa Moves on Moslem Militants*, FIN. TIMES, Aug. 14, 1996, at 4. The ANC, however, did not control the Western Cape government, which was in the hands of the National Party ("NP"). NP provincial premier Hennis Kriel seemed more sympathetic to PAGAD, no doubt also relishing the chance to embarrass the ANC for its problems in controlling crime and to cement the support of his large number of Coloured constituents. Kriel called merely for an inquiry into the early August violence, while expressing his sympathy for the public's frustration with an ineffective policing and judicial system. See *Fundamentalism Threatens*, *supra* note 203.

207. See generally Matthews, *supra* note 206, at 4; Hugh Dellios, *Vigilantes Take on S. African Drug Gangs*, CHI. TRIB., Aug. 25, 1996, at 4.

208. See *South Africa to Form Liaison Committee for Security*, Xinhua News Agency, Dec. 3, 1996, available in LEXIS, World Library, XINHUA File.

209. In February 1997, Minister of Safety and Security Sydney Mufamadi spoke harshly to Police Commissioner George Fivaz, complaining of the lack of progress in curbing violent crime, while President Mandela told Parliament in Cape Town that criminals were "easily evading" the country's law enforcement authorities. See Simon Baynham, *Pretoria's Strategy Failing to Cut Crime*, JANE'S SENTINEL POINTER, Apr. 1997, at 11.

210. *Hamas* is a Palestinian terror organization that developed during the period of Palestinian *intifada* in the 1980s and 1990s in resistance to Israel's occupation of the West Bank and Gaza and which opposes the sporadic efforts of Yasser Arafat's Palestinian Liberation Organization (*al-Fatah*) to negotiate with Israel over the establishment and enlargement of the Palestinian Authority in the West Bank. *Hizbollah* is a Lebanese terrorist organization backed by Iran which achieved notoriety in the 1980s for its multiple kidnappings of foreigners (especially Americans) in Beirut.

211. See generally *Fundamentalism Threatens*, *supra* note 203 (discussing *Qibla*'s role in recruiting South African Muslims to fight in Bosnia and in hosting visit by d'Anouar



proclaimed the need to turn South Africa into an Islamic state and whose members are said to be a powerful force within PAGAD.<sup>212</sup>

South African security personnel and Western intelligence sources are reported to believe that PAGAD and affiliated Muslim groups have received training and support from Iran and from *Hamas* and *Hizbollah*.<sup>213</sup> According to one police spokesman, in fact, militant Islamic cells have been established in several areas of South Africa, and members of *Qibla* have been trained in Libya and Pakistan, even acquiring some guerrilla experience by fighting with *Hizbollah* against Israeli forces in Lebanon.<sup>214</sup> It has also been reported that in 1996, in response to Israeli complaints, South African officials admitted the existence of several *Hizbollah* training camps near the city of Pietermaritzburg, though the government claimed that these camps had only been used to marshal Islamic fighters en route to Bosnia and that they had since been closed.<sup>215</sup> Even given the recently developed warmth of Nelson Mandela's relations with radical Middle Eastern governments such as his much-publicized recent courting of Libya's Muammar Quaddafi—a controversial approach apparently taken partly out of gratitude for these regimes' support during the armed struggle against apartheid and in reaction to Israeli and Western support for the former National Party government<sup>216</sup>—the involvement of such groups with

---

Haddam of Algeria's banned Islamic Salvation Front (FIS)); McCarthy, *Vigilantes*, *supra* note 83, at 570 (discussing radicalism of Cape Town Islamic community); Dele Olojede, *Militants Mobilizing in S. Africa?*, *NEWSDAY*, Aug. 19, 1996, at A16 (listing fundamentalist groups in South Africa, including *Qibla*, Bosnia Action Committee, Islamic Unity Convention, Islamic Jihad Movement, and S.A. Hizbollah).

212. See Olojede, *supra* note 211, at A16 (noting prominence of *Qibla* leader Achmad Cassiem—an Islamic cleric who reportedly believes the ANC government to be illegitimate because it agreed to a negotiated settlement—at PAGAD rallies); Dellos, *supra* note 207, at 4 (noting *Qibla*'s calls for Islamic state).

213. See, e.g., Con Coghlin, *Iran Coaches Cape Town Street Gangs*, *DAILY TELEGRAPH*, Dec. 9, 1996, at 24; Olojede, *supra* note 211. PAGAD leader Mohammed Ali Parker at one point confirmed at least that *Hamas* and *Hizbollah* had made offers of assistance, though this was subsequently disputed by the Islamic Unity Convention. See *Counter-Violence in the Cape Causes Concern*, *JANE'S SENTINEL POINTER*, Oct. 1996 [hereinafter *Counter-violence in the Cape*], at 11; McCarthy, *Vigilantes*, *supra* note 83; Matthews, *supra* note 207, at 4.

214. *Fundamentalism Threatens*, *supra* note 203 (quoting police spokesman Reg Crewe).

215. McCarthy, *Vigilantes*, *supra* note 83, at 570; see also *Fundamentalism Threatens*, *supra* note 204 (noting claims by Israeli newspaper that five such camps exist); Olojede, *supra* note 212 (describing briefing by security officials on training camps).

216. See McCarthy, *Vigilantes*, *supra* note 83, at 570; see also *Palestinians View South African Security Equipment*, *Reuters North American News*, Sept. 17, 1996, available in *LEXIS*, World Library, REUNA File (noting warmth of South African relations with new Palestinian Authority in West Bank).

domestic Islamic militancy poses a significant potential security threat for the ANC government.

*e. Cross-border Problems: Aliens, Weapons, Drugs, and Theft*

Finally, contemporary South Africa faces a panoply of cross-border and domestic threats which, while hardly unique to the post-apartheid era, have become markedly worse in recent years. Illegal immigration is one problem, for example, that has increased enormously with the coming of majority rule. South Africa has made extensive use of foreign laborers in its mineral extraction industries since the late nineteenth century, and for many years it has had problems with illegal immigration as well. Since the coming of majority rule in 1994, however, illegal immigration has become almost a flood, and current estimates suggest that between three and four million persons presently live illegally in South Africa, placing great strains upon the ANC government's already under-funded development programs and adding to the country's unemployment rate (which was estimated to be about forty percent in 1996).<sup>217</sup> The illegal cross-border flow of persons is also closely linked to drug trafficking and gunrunning from war-torn Mozambique and elsewhere;<sup>218</sup> this suggests an increasingly important domestic mission for the SANDF in providing border security.<sup>219</sup>

---

217. Michael Hough, *Illegal Aliens Threaten Security*, JANE'S INTEL. REV. [hereinafter *Illegal Aliens*], June 1, 1996, at 11; see also *Neighbourhood Watch in Southern Africa*, ECONOMIST, Dec. 3, 1994, at 51.

218. *Illegal Aliens*, *supra* note 217, at 11. Weapons smuggling problems are of particular concern to the security forces given the explosion of violent crime in South Africa, see *supra* note 82, not to mention the traditional propensity of ANC and Inkatha supporters to come to blows in KwaZulu-Natal and in the townships around Johannesburg, see *supra* note 81. Indeed, the propensity of domestic groups to resort to violence in public gatherings has led to a general ban on the display and possession in public gatherings of a wide range of lethal (or potentially lethal) weapons—including spears, *assegais* (traditional Zulu stabbing spears), machetes, swords, daggers, axes, metal-loaded sticks, petrol bombs, sharpened sticks, and clubs. See *Security Minister Bans Weapons at Public Gatherings*, BBC Summary of World Broadcasts, Oct. 2, 1996, available in LEXIS, World Library, BBCSWB File; *S. Africa's Weapons Ban Goes Countrywide*, Xinhua News Agency, Oct. 2, 1996, available in LEXIS, World Library, XINHUA File.

219. See generally Heitman, *Reshaping*, *supra* note 91, at 13. South Africa has already announced plans to "intensify" joint police activity with Zimbabwe and Zambia, and has been attempting greatly to increase security on the border with Swaziland and Mozambique. See *Southern African Countries to Intensify Police Cooperation*, Xinhua News Agency, Aug. 8, 1995, available in LEXIS, World Library, XINHUA File; *South Africa to Step Up Border Security Control*, Xinhua News Agency, Dec. 11, 1995, available in LEXIS, World Library, XINHUA File. Cross-border drug trafficking was also the subject of a meeting between officials from SADC and from the European Union in

Adding to its cross-border problems, South Africa apparently has just “the ‘right profile’ for exploitation” by a host of international malefactors involved in drug trafficking, foreign-exchange fraud, vehicle theft, gunrunning, and passport thievery:

a sudden boom in free trade, the movement (legally and illegally) of much larger numbers of people across its borders[,] . . . an inadequate bureaucracy ill-prepared to meet the new challenge . . . [and a] combination of poverty, lawlessness and a highly sophisticated banking system through which [unlawfully obtained] funds can be efficiently laundered.<sup>220</sup>

Though somewhat “shielded during the apartheid era from much of the global growth in the narcotics trade,”<sup>221</sup> South African security forces now face an exploding drug economy that has encouraged police corruption,<sup>222</sup> helped turn some formerly pro-ANC township “self-defense units” into outlaw gangs,<sup>223</sup> and spurred reactive vigilante violence by PAGAD against drug dealers such as the late and unlamented Rashaad Staggie.<sup>224</sup> In 1994, police officials even uncovered an assassination plot by drug traffickers against the ANC’s Gauteng provincial premier Tokyo Sexwle, allegedly in response to his efforts to control the drug trade.<sup>225</sup>

#### f. *A Continuing Internal Security Role for the Military*

The various cross-border and internal security threats faced by the new South African government have so far demanded more than that country’s troubled police force has been able to provide. Although South Africa’s Constitution makes clear that the mission of the SANDF is to protect the Republic against external threats and to leave internal security to the police service,<sup>226</sup> it is authorized in

---

November 1995, which suggested the development of a regionally coordinated approach to drug control. Greg Mills, *A Formalised SADC Defence Agreement?*, JANE’S SENTINEL POINTER, Oct. 1996, at 13.

220. Simon Baynham, *Drugs Set to Become Africa’s New Invaders*, JANE’S INTEL. REV., Sept. 1996 [hereinafter Baynham, *Drugs*], at 426, 427; see also *Interpol Chief Warns of Organized Crime Threat in South Africa*, Agence France Presse, May 29, 1995, available in LEXIS, World Library, AFP File.

221. Baynham, *Drugs*, *supra* note 220, at 426.

222. See *supra* note 83.

223. See *supra* text accompanying note 202.

224. See *supra* text accompanying note 205.

225. *Id.* at 428.

226. Compare S. AFR. CONST. § 200(2) (“The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people . . .”) with *id.* § 205(3) (“The objects of the police service are to protect, combat and investigate crime,

certain circumstances to operate domestically<sup>227</sup> and Nelson Mandela has proclaimed—quite in keeping, it must be said, with the ANC's all-encompassing conception of "national security"<sup>228</sup>—that the military will continue to play a vital role in supporting the police in internal security tasks.<sup>229</sup> For most of 1993 and 1994, some 10,000 army troops were deployed in support of police operations,<sup>230</sup> and the government's repeated reliance upon the SANDF in response to periodic local crises of domestic unrest since the 1994 elections<sup>231</sup> has made it clear that the military will play such a role for some time. After PAGAD's execution of Rashaad Staggie in August 1996, for example, the government rushed additional police and some 200 troopers from the 44th Parachute Brigade to the Cape Flats to keep order.<sup>232</sup> It is avowedly Mandela's intention to "sideline and even crush all dissident forces in our country,"<sup>233</sup> and it is apparently his intent that the SANDF join the policemen in the effort.

Despite a general prohibition upon domestic involvement by South African military intelligence, this continuing internal role may

---

to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."); see also Cawthra, *supra* note 82, at 21 (making same point about interim Constitution).

227. See, e.g., S. AFR. CONST. § 201(2) ("The defence force may be employed in co-operation with the police service, in defense of the Republic . . . under the authority of the President.").

228. See *supra* text accompanying notes 110, 112–114.

229. *Mandela Pledges Support for Peace-Keeping, Regional Defence*, BBC Summary of World Broadcasts, Apr. 28, 1996, available in LEXIS, World Library, BBCSWB File (recounting Mandela's speech of April 27, 1996, on the occasion of "SANDF Day").

230. Cawthra, *supra* note 82, at 21.

231. See, e.g., Tom Cohen, *Mandela Orders Police, Soldiers to Trouble Spots*, AP, Feb. 27, 1995, available in LEXIS, News Library, AP File (recounting Mandela's dispatch of extra police, backed by soldiers, to part of KwaZulu-Natal, parts of Eastern Cape, Johannesburg, and Cape Town); Heitman, Foss, & Reed, *supra* note 92, at 23 (recounting that army has "a daily average of 44 companies deployed on border protection and in support of the police in areas hit by political violence"); *S. Africa to Conduct Anti-Crime Air, Sea Patrols*, Reuters World Service, May 6, 1995, available in LEXIS, World Library, REUWLD File (recounting dispatch by Minister of Safety and Security Sydney Mufamadi of extra police and troop to KwaZulu-Natal and Gauteng provinces because of political and criminal violence); *Security Forces to be Stepped Up in Crime-Ridden Areas*, Agence France Presse, Aug. 16, 1995, available in LEXIS, World Library, AFP File (recounting Mufamadi and Modise announcement that police and soldiers would "immediately and substantially" be sent to Johannesburg area, KwaZulu-Natal, and Eastern Cape to fight violent crime); Heitman, *Jane's Interview*, *supra* note 96 (quoting Modise discussing SANDF deployments in KwaZulu-Natal and Gauteng in support of police).

232. *Counter-Violence in the Cape*, *supra* note 213; see also McCarthy, *Vigilantes*, *supra* note 83, at 569.

233. *Mandela Says Government Will "Sideline and Even Crush" All Dissident Forces*, BBC Summary of World Broadcasts, June 2, 1995, available in LEXIS, World Library, BBCSWB File. Mandela noted, however, that he would "prefer" to use persuasion on such dissidents. *Id.*

keep the SANDF's Intelligence Division involved in South African internal affairs. As the government's 1996 *Defence White Paper* described the situation, while "[a]s a general rule, the Division is not permitted to collect domestic military intelligence in a covert manner," where the SANDF is "deployed internally in support of the police, the National Strategic Intelligence Act provides that the President may authorise the Division to engage in such collection in a specific geographical area for a specified duration."<sup>234</sup> As long as there are "troopies" on duty in South Africa's townships, in other words, there will probably be military "spooks" lurking in the alleyways and SANDF wiretaps on the telephones.

### C. Lessons from the U.S. Experience?

South Africa, to its credit, has been nothing if not self-aware in drawing upon a variety of international models in the creation of its new constitutional and statutory system.<sup>235</sup> Though issues of security oversight and civil-military relations have been a less prominent part of this undertaking than have broader legal and constitutional issues, the ANC government has also professed itself eager to learn from the experiences of other countries in building a post-apartheid order that is both free *and* secure.<sup>236</sup> And well it should be. For while

---

234. REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE (1996), at 12; *see also* House of Assembly *Hansard* 11 Nov 1994 Col 4140 (remarks of Kader Asmal) (noting that statute prohibits covert collection of domestic intelligence by military "except under exceptional circumstances and with the explicit permission of the Cabinet"). Under intelligence legislation adopted in 1994, the SANDF was authorized to undertake clandestine collection of domestic military-related intelligence when the President

is of the opinion that conditions are such that the [SANDF] has to prepare itself for possible employment for [domestic] service referred to in . . . the Constitution and upon having been authorized by the Co-ordinator for Intelligence acting with the concurrence of [the National Intelligence Coordinating Committee] and the Cabinet.

§ 3(2) of National Strategic Intelligence Act 39 of 1994.

235. Johan van der Vyver, a professor at South Africa's University of the Witwatersrand, for example, wrote an article in 1991 that illustrates the breadth of the jurisprudential net South Africans cast in searching the legal systems of the world for principles and institutions that would well serve the post-apartheid state. *See* van der Vyver, *supra* note 9, at 760-820 (discussing British, Canadian, Dutch, French, German, Namibian, United States, and other legal systems, principles of international law, and principal approaches to South African constitutionalism espoused by academics and South African political parties); *see also, e.g., supra* note 62 (citing examples of South African interest in drawing upon security oversight models from, *inter alia*, the United States).

236. Defense Minister Modise, for example, has expressed a desire to learn from other SADC countries' experiences in this regard. In his view, many of South Africa's

issues of racial equality, federalism, and constitutional rights are obviously vital to the future of the Republic, it is the thesis of this Article that issues of national security law and oversight are vital as well. The ugly history of South Africa in the twentieth century teaches crucial lessons not only about segregation and racial injustice but about the evils that may befall a state which entrusts power without accountability to those in whom it vests a monopoly upon lawful violence and coercion. Sub-Saharan Africa, after all, is thick with countries whose peoples have shed oppression by other races only to brutalize and impoverish themselves under more indigenous tyrannies. History should suggest to South Africans today that for those who aspire to democracy and justice within a stable constitutional order, racial equality is not enough. Reaching an appropriate equilibrium between liberty and security, therefore, is an area in which South Africa will be able to learn from other countries. With luck, it will also be a subject in which the Republic can prove teacher as well.

In drawing upon foreign lessons and experiences in national security law, it seems only natural that the United States should be an important object of study. This is not to suggest that U.S. models are worthy of reflexive approval or adoption in other lands. Indeed, if anything, the idiosyncrasies of the American separation of powers system might make certain approaches and innovations—even if praiseworthy—very difficult to adopt in other contexts. And, as has been suggested above with respect to intelligence oversight law,<sup>237</sup> there is by no means agreement even within the United States that its approach to security regulation is always wise, and there are surely many foreign observers of American affairs who must think it somewhat mad to commit so much to statutory text.

Even if one were to grant such criticisms some validity, however, the fact remains that the United States essentially invented national security law, and remains its foremost practitioner today. As the first nation to establish a constitutional democracy and the present possessor of both the most powerful military force and “the largest organization for the production of [secret] information in the history of civilization,”<sup>238</sup> it is thus both appropriate and

---

Black-ruled neighbors are, like South Africa, “emerging democracies. They have embarked on building civil-military relations which are consistent with democracy. There is much we can learn from each other.” Helmoed-Romer Heitman, *Southern African States Pave Way for Co-operative Security*, JANE'S DEF. WKLY., Sept. 2, 1995, at 19.

237. See *supra* text accompanying note 53.

238. See JOHNSON I, *supra* note 34, at 7. Though the actual figures are classified, according to Loch Johnson, the U.S. intelligence community employs more than 150,000 people and spends “some \$28–30 billion a year.” *Id.* at 6. To put this in perspective, a \$30 billion allocation for U.S. intelligence in 1993 would have been the

unsurprising that the United States should be at the forefront of security oversight law.

The American concern for these issues, in fact, long pre-dates the establishment of the formidable U.S. national security apparatus of modern times. The proper balancing of the interests of liberty and security was a fundamental concern of the Framers of the U.S. Constitution, who acutely perceived both the necessity of a competent professional security apparatus and the imperative of ensuring its subjection to the Constitution, civilian authority, and the rule of law. As George Washington stated, “[a]ltho’ a *large* standing Army in time of Peace hath ever been considered dangerous to the liberties of a country, yet a few Troops, under certain circumstances, are not only safe, but indispensably necessary.”<sup>239</sup> Then as now, the trick was to find a way to walk the tightrope between liberty and security and to establish institutions and procedures that will permit one’s successors also to do so. Always a principal preoccupation of the Framers, national security law issues never lost their significance in American history, but they became even more important after the end of the Second World War when the pressures of global involvement on an unprecedented scale and the demands of the worldwide confrontation with the Soviet Union led to the establishment of a massive national security bureaucracy in the United States. The structures and functions of this security apparatus were established by statute,<sup>240</sup> thereby bringing the dilemmas of national security law and oversight into a particularly sharp focus at a point when history provided—in the form of Nazi Germany and international communism—indelible examples both of the need for vigilance against foreign aggression and domestic subversion and of the perils of entrusting too much power to one’s guardians.

---

equivalent of not much less than one-fifth of South Africa’s *entire gross domestic product* for that year. Cf. CIA, WORLD FACTBOOK 364 (1994).

239. Quoted in PALMER, *supra* note 39, at 25.

240. 50 U.S.C. §§ 401 *et seq.* (National Security Act of 1947). The U.S. executive branch established national security institutions under its own authority as well. The National Security Agency (“NSA”), for example—the organization responsible for electronic eavesdropping and code-breaking, and an agency having a budget reportedly significantly larger than that of the Central Intelligence Agency—was established solely by a top-secret (and still classified) presidential directive in 1952. See CHRISTOPHER ANDREW, FOR THE PRESIDENT’S EYES ONLY 197 (1996) (recounting “secret presidential signature” and noting that “[b]efore long, both the new agency’s budget and its personnel outstripped those of the CIA”); JAMES BAMFORD, THE PUZZLE PALACE 12, 15 & 81 (1983) (recounting establishment of NSA and describing it as largest single item in U.S. intelligence budget); JOHNSON I, *supra* note 15, at 125 (“The NSA . . . is considered ‘the largest and most expensive intelligence agency in the history of Western civilization.’”) (quoting Christopher Andrew).

National security law issues grew into even greater prominence in the U.S. during the 1970s, fueled by the disillusionment with executive power that accompanied the collapse of the U.S. war effort in Vietnam, the resignation of President Richard Nixon amid scandals small and large, and the revelation of intelligence agencies' involvement in widespread domestic spying and other activities. The mid-1970s thus saw the birth of the second generation of statutory national security oversight in the United States with the passage of the War Powers Resolution<sup>241</sup> and the first intelligence oversight statutes,<sup>242</sup> setting in motion a process of statutory adjustment and readjustment that continues to this day.<sup>243</sup>

The United States' long-standing engagement with the dilemmas of national security law and oversight makes its experience with these issues, while perhaps sometimes rather idiosyncratic, by far the most extensive of any political or legal system on the planet. Such experience must almost inevitably provide *some* lessons for the emerging security oversight regime in South Africa.

#### D. The Challenges of Security Oversight

##### 1. A Taxonomy of Oversight Law and Policy

South Africa's post-apartheid system will have to grapple with the five principal tasks of security oversight:

- (1) *Executive Oversight*—the establishment and maintenance of institutions or procedures that tell the president and the cabinet what various portions of the security bureaucracy are doing so as to facilitate the maintenance of civilian control over these institutions and to prevent them from deviating from government policy or from the bounds imposed by the Constitution and laws;

---

241. The War Powers Resolution was adopted in 1973 by a two-thirds majority vote of the U.S. Congress, overriding President Nixon's veto. See generally STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 119 (1990).

242. See *supra* text accompanying notes 43–51.

243. For examples of the ongoing debate over the present system of authorizing the use of U.S. military force overseas, for example, see ELY, *supra* note 34; HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION (1990); Thomas Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 AM. J. INT'L L. 605 (1977); Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988); Eugene Rostow, "Once More Unto the Breach:" *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1 (1986).



(2) *Intra-institutional Oversight*—the establishment and maintenance of institutions or procedures to ensure that the various constituent parts of individual state security organs remain within the bounds of law and institutional policy;

(3) *Popular Accountability*—the establishment and maintenance of institutions or procedures to ensure that the public as a whole remains sufficiently aware of actions the government undertakes in its name to hold that government politically accountable;

(4) *Legislative Oversight*—the establishment and maintenance of institutions or procedures to ensure that the operations of the national executive and the security apparatus are known to the national legislature so as to make it possible for that body to hold the government politically (and financially) accountable for its actions and to permit the legislature to enact or amend national law to reflect its understanding of oversight requirements; *and*

(5) *Judicial Oversight*—the establishment and maintenance of institutions or procedures to ensure that the national executive does not violate the Constitution or laws in its operation of the security apparatus, and that the legislature does not in its pursuit of security enact laws that violate the Constitution.

The Republic's contemporary circumstances suggest that all of these will prove challenging in some respects, but some clearly have special importance as South Africa attempts to develop norms and institutions appropriate both to the values of democracy and constitutionalism and to the country's security needs.

## 2. Setting the Security-Oversight Mold: Now or Perhaps Never

The democratically elected South African government of Nelson Mandela is still young and the country has only just begun its life under the permanent Constitution it adopted last year. If the Republic is to achieve a workable system of security oversight capable of meeting the challenges this new government faces, this is the period in which the laws, institutions, procedures, practices, and cultural norms required by such a system must be set. Real legal and constitutional accountability has never before been asked of South Africa's security services, the military has never before been genuinely integrated, the ANC-led parliament is "largely new to the

business of running a country,"<sup>244</sup> a body of judicial precedent dealing with oversight issues has yet to develop, and the patterns of behavior between (and within) the security forces, the parliament, and the public with respect to these matters have not yet taken root. As will be seen hereinafter, much of the formal institutional structure for security oversight in South Africa has already been established, but it is still too early to tell how all of these mechanisms will work together in responding to the tensions and challenges that lie ahead.

Because of the premium national security law places upon the setting and continuous adjustment of a fine equilibrium between liberty and security, systems of national security oversight are perhaps even more dependent than other areas of law upon norms of intra- and inter-institutional propriety. The patterns of behavior set today, in other words, will powerfully determine the shape of security oversight for years to come. Learned Hand once suggested that such mores are in fact more important than a country's formal institutions of oversight and accountability:

I often wonder whether we do not rest our hopes too much upon Constitutions, upon laws and courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law, no court can save it; no Constitution, no law, no court can even do much to help it.<sup>245</sup>

Particularly in a system in which the role of the courts themselves in security oversight has yet to be determined—and in which it therefore remains unclear whether conventional adjudicative models or a more informal, "New Havenish" process will form the backbone of South African national security law—it is vital quickly to establish a culture of accountability. Especially in times of crisis, the norms of behavioral propriety internalized by members of the security forces may well turn out to be society's regulatory mechanism of both first and last resort.<sup>246</sup>

---

244. Heitman, Foss, & Reed, *supra* note 92, at 23.

245. LEARNED HAND, *THE SPIRIT OF LIBERTY* 189–90 (3d ed. 1960).

246. With respect to observance of lawful conduct by U.S. military personnel during the war in Indochina, for example, it has been suggested that "legal restraints [are] not that important in the eyes of most commanders[,] . . . [who instead] act[] more on their own sense of moral right and wrong, ignoring written rules where they seriously impeded operations, while seeking some sense of moral proportionality . . ." ROGER H. NYE, *THE CHALLENGE OF COMMAND* 88–89 (1986). The quoted argument is not necessarily that of Nye himself, but later he does concede, for example, that codes of military conduct specifying that soldiers must not obey "unlawful" orders are essentially unenforceable in any formal sense. In all but the most egregious cases, he writes, "the refusal to obey is worked out between contending parties" rather than

The early years of any new governmental system are obviously crucial ones in establishing the patterns according to which its various constituent parts will interact for good or for ill. It was certainly so in the American experience, and both U.S. citizens and the rest of the world owe much to the example set by George Washington and his compatriots in the early years of *that* republic, for instance, in staving off military meddling in political governance during the so-called Newburgh Conspiracy of 1783 and in suppressing the Whisky Rebellion of 1793-94 only through actions taken in painfully strict observance of constitutional propriety.<sup>247</sup> Capitulation to expediency or any less rigorous an insistence upon proper legal conduct in those formative years could have “altered forever the equation of civil-military relations in the United States, with what calamitous results we will never know.”<sup>248</sup> Less dramatically but perhaps no less importantly, the period immediately following the Second World War—in which a “basic alignment” among the “most critical [U.S.] civil-military subsystems” was established by legislation such as the National Security Act of 1947<sup>249</sup> at just the point when American policymakers were acquiring vast international responsibilities and found themselves plunging into a bitter period of confrontation with the Soviet Union and its communist allies—was a vital watershed for future patterns of security oversight and civil-military relations in the United States. The new constitutional democracy in South Africa will also face significant security oversight challenges in the months and years ahead; it will be similarly vital that it pass these tests with its integrity unblemished.

---

through any formal adjudication of the actual legality of the command in question. The principal purpose for the “unlawful order” rule, therefore, is “to deter commanders from issuing illegal orders.” *Id.* at 120.

Much more broadly, as Nye recognizes, the tension between the efficient pursuit of security and the demands of individual liberty are also continually “adjudicated” through such informal means in the day-to-day interactions between military commanders and their subordinates. *Id.* at 124–25. These observations on the observance and efficacy of the rule of law during the heat of battle not only illustrate the importance of informal “New Haven”-style analysis in national security matters, but also the importance of what are described hereinabove as “ascriptive” civil-military control techniques that seek to ensure that security professionals are carefully selected and trained with an eye to the inculcation of a strong sense of professional propriety and restraint. *Id.* at 167; *cf.* JOHNSON I, *supra* note 34, at 29 (discussing selection and training of intelligence officers).

247. *See, e.g.*, PALMER, *supra* note 39, at 18 (discussing Newburgh Conspiracy); *id.* at 264, 267–68 (discussing Whisky Rebellion).

248. *Id.* at 20.

249. Paul Bracken, *Reconsidering Civil-Military Relations*, in CIVIL-MILITARY RELATIONS, *supra* note 34, at 145, 156.

South Africa thus enjoys a vital “window of opportunity,” that offers great opportunities for good. Today, though the institutions and practices of the South African oversight system remain somewhat fluid, the government is in a position to set the tone for years to come. The political momentum of establishing an entirely new governmental system is conducive to “new thinking” about such problems, and reformers could hardly wish for a better call to arms—or a better lesson in what *not* to do in matters of security regulation—than the abuses carried out in the name of national security during the apartheid era and now being exposed in gruesome detail by Bishop Desmond Tutu’s “Truth Commission.”<sup>250</sup>

Moreover, because the personal prestige and credibility of Nelson Mandela have played a critical role in smoothing the Republic’s uneasy transformation from racist oligarchy to constitutional democracy, the window in which security oversight reforms may be carried out and patterns set will not last forever. Mandela has made it clear that he will “definitely not” seek another term as South Africa’s president after the expiration of his present term in 1999.<sup>251</sup> Because “no one can fill Mandela’s shoes,” many South Africans reportedly “look to the post-Mandela era with trepidation.”<sup>252</sup>

Taking full advantage of this “window of opportunity” while it lasts is therefore one of the greatest challenges facing the ANC government today. And the stakes are enormously high. To paraphrase one American military historian, determining the character and powers of a nation’s national security institutions is essential to the creation of that nation itself: a country’s vision of its own future is reflected in the consensus it forms about the nature of the institutions it creates in order to protect itself.<sup>253</sup> What a triumph it would be for those who so long resisted majority rule in South Africa, after all, for the post-apartheid era to squander the freedoms for which its people fought for so long by falling back into the ugly patterns of unaccountable authoritarianism that plagued the

---

250. Though the incident had been an international *cause célèbre* since its occurrence, for example, it was only “confirmed” (i.e., officially admitted) in 1997 submissions to the Truth Commission that Steve Biko—the leader of South Africa’s “Black Consciousness Movement”—had been murdered while in police custody in 1977. *In South Africa, Confessions to Dark Era’s Worst Crimes*, N.Y. TIMES, Jan. 29, 1997, at A1.

251. See, e.g., Peter Gregson, *Mandela in Good Health But Will Not Seek New Term*, Reuters World Service, Feb. 15, 1995, available in LEXIS, World Library, REUWLD File.

252. Rohan Minogue, *When Mandela Goes-South Africa Looks to 1999 with Trepidation*, Deutsche Presse-Agentur, Dec. 25, 1995, available in LEXIS, World Library, DPA File.

253. PALMER, *supra* note 39, at 24 (“[D]etermining the scale and scope of a nation’s military structure is an essential prerequisite to the creation of the nation itself. The vision of the shape of a country’s future is depicted largely in the consensus formed over the shape of its army.”).

Republic until recently.<sup>254</sup> If South Africa is to establish legal, institutional, and cultural patterns appropriate for its new democratic constitutional order, now is the time in which it must do so.

## II. NATIONAL SECURITY LAW AND POLICY IN SOUTH AFRICA

### A. Executive Oversight

Earlier, this Article described executive oversight as relating to the establishment and maintenance of institutions and procedures that inform the top political leadership of

what various portions of the security bureaucracy are doing so as to facilitate the maintenance of civilian control over these institutions and to prevent them from deviating from government policy or from the bounds imposed by the Constitution and laws.

This definition obviously implicates issues of both legal propriety (“Did they break any laws?”) and policy control (“Are they doing what I told them to do?”),<sup>255</sup> although the focus of this Article is upon oversight of the legal variety.<sup>256</sup> Continuing concerns over the

254. Or, as George Washington put it upon being offered an American crown at the close of his successful campaign to expel those who would govern the American colonies in the name of a British one, “What a triumph for our enemies to verify their predictions! What a triumph for the advocates of despotism to find that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal and fallacious!” *Id.* at 72.

255. Even in the highly legalized world of U.S. security oversight, it was the “policy” nexus which traditionally received the most attention from senior leaders; only after the intelligence scandals of the mid-1970s did specifically “legal” concerns acquire currency. *See, e.g.*, UNITED STATES INTELLIGENCE: AN ENCYCLOPEDIA 234–36 (Bruce Watson, Susan Watson, & Gerald Hoppie, eds. 1990) [hereinafter INTELLIGENCE ENCYCLOPEDIA]. In many other countries, such as France, the legal oversight issue has traditionally received very little attention, and intelligence “reform” efforts—to the extent they are undertaken at all—involve improvements in inter-agency coordination. *See, e.g.*, PORCH, *supra* note 128, at 466–67 & 494–96 (discussing French proposals to adopt interagency coordination committee for intelligence matters).

In South Africa, the principal institution of policy coordination was an effort to reduce fragmentation in the national intelligence apparatus through the establishment of a “National Intelligence Co-ordinating Committee” (“NICOC”) made up of the Co-ordinator for Intelligence, the directors-general of the NIA and the South African Secret Service, the chief of the SANDF’s Intelligence Division, and the head of the National Investigation Service of the police service. *See* National Strategic Intelligence Act 39 of 1994.

256. Similarly, security oversight functions may be understood also to include the more conventional criminal/prosecutorial tasks of ensuring that members of the country’s security bureaucracy obey anti-corruption laws—e.g., the Corruption Act 94

degree to which South Africa's intelligence services really understand themselves to be "playing on the same team," however, underscore the point that both the policy and the legal aspects of executive oversight will have to be important parts of post-apartheid South African governance.<sup>257</sup>

South Africa, it should be noted, is no stranger to extra-institutional executive-level security oversight, having historically had some experience with appointed overseers who occasionally approached their work with a remarkable degree of vigor and independence. Observers of the contemporary South African scene will be familiar, for example, with the Goldstone Commission's pathbreaking inquiry into "third-force" violence and extra-judicial executions by members of the apartheid-era security forces.<sup>258</sup> It is often forgotten today, however, that it was also the inquiring eye of Auditor-General Gerald Barrie that helped topple the government of Prime Minister B.J. Vorster in 1978 after Barrie's audit of the Ministry of Information revealed widespread misappropriation of government funds<sup>259</sup>—and this only a year after Vorster had led the National Party to win the largest majority it had ever enjoyed in South Africa's all-White House of Assembly. These examples illustrate that it is indeed possible for persons of integrity to play a

---

of 1992—and remain subject to ordinary criminal prohibitions. This Article, however, will focus more narrowly upon abuse-of-power issues, leaving it for others to cover South Africa's contemporary criminal justice system.

257. Most dramatically, press accounts in early 1996 suggested that electronic listening devices found in the homes of several prominent police officials had been planted by the National Intelligence Agency. National Police Commissioner George Fivaz told the press that former police official and apartheid-era "dirty tricks" specialist Dirk Coetzee had identified NIA as the institution responsible. Deputy Minister of Intelligence Services Joe Nhlanhla, Deputy Co-ordinator for Intelligence Moe Shaik, and NIA Director-General Sizakale Sigxashe, however, all denied any NIA involvement—while Coetzee is said to have subsequently recanted (Shaik, however, declared that it was "extremely possible" that the plan originated with rogue elements within the police service itself). See *Deputy President Mbeki Calls Meeting of Senior Police on Spying Allegations*, BBC Summary of World Broadcasts, Jan. 5, 1996, available in LEXIS, World Library, BBCSWB File; Lynne Duke, *S. African Police Asking Who Bugged Their Line*, WASH. POST, Jan. 6, 1996, at A18.

In May 1996, the Democratic Party's Tony Leon also directed a parliamentary question at Justice Minister Dullah Omar inquiring as to whether the government had been monitoring the communications of cabinet ministers, members of parliament, and provincial government officials. Omar, however, refused to answer, claiming that the Interception and Monitoring Prohibition Act barred the disclosure of any such information. See House of Assembly *Hansard* 11 Mar 1996 Col 279–80 (remarks of A.J. Leon and Minister of Justice with respect to Question 65).

258. See, e.g., *supra* note 10.

259. See generally HISTORY, *supra* note 12, at 451. The scandal growing out of Barrie's audit was known variously as "Infogate" and "Muldergate," the latter term being derived from the name of Minister of Information Connie Mulder, who was forced to resign before Vorster himself stepped down for reasons of "health."

fundamental role in investigating allegations of wrongdoing and bringing to light abuses of power by even the most secretive of administrations. It will be up to their modern analogues to build upon this legacy in South Africa today.

Contemporary South Africa has already, in fact, developed a number of semi-independent institutions dedicated to providing certain types of “oversight,”<sup>260</sup> all of which have at least some potential relevance to the regulation of the country’s security services. Three of these institutions are written into South Africa’s new Constitution: the Public Protector, the Auditor-General, and the Human Rights Commission. All are appointed by the President with the approval of the National Assembly,<sup>261</sup> and may be removed only for cause and by a full Assembly vote.<sup>262</sup> These “[s]tate [i]nstitutions [s]upporting constitutional [d]emocracy” are intended to be genuinely “independent” institutions, “subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.”<sup>263</sup> Other organs of state are bound to “assist and protect” these offices, while they, in turn, must report at least annually to the National Assembly on the progress of their work.<sup>264</sup>

Inspired by the recognition that modern democracies need someone to “watch the watchdog,”<sup>265</sup> the office of the Public Protector is perhaps the position with the most direct relevance to security oversight. According to one ANC parliamentarian, the idea for the Protector was borrowed from Swedish law, which has established a general government Ombudsman—“an independent and impartial officer whose task would be to act as a guardian of the people in a democracy” by standing up “against any unscrupulous action at any level of government by any person holding public office”—charged with receiving and investigating a wide variety of complaints lodged by the public.<sup>266</sup> Legislation adopted in 1994, moreover, went further than the present Constitution requires in

260. Some have suggested that modern South Africa actually has *too many* such independent institutions. President Mandela’s legal advisor, for example, has described South Africa’s new Constitution as being “littered” with oversight institutions almost to a fault. Nicholas Haysom, remarks to the University of Michigan School of Law (Mar. 21, 1997).

261. S. AFR. CONST. § 193(4)–(5).

262. *Id.* § 194(1) (describing procedures for removal due to misconduct, incapacity, or incompetence).

263. *Id.* § 181(2).

264. *Id.* § 181(3), (5). Under legislation adopted in 1994, the Public Protector was required to report to Parliament every six months. *See* Senate *Hansard* 2 Nov 1994 Col 2655 (remarks of Deputy Minister of Justice).

265. *Id.* Col 2666 (remarks of M.W. Moosa).

266. *Id.* Col 2657–58 (remarks of R.J. Radue).

encouraging a degree of independence for the Public Protector, providing for his appointment by the President only upon the recommendation of a multi-party parliamentary committee, and subjecting the Protector to parliamentary approval by a seventy-five percent vote.<sup>267</sup>

According to the new Constitution, the Public Protector is empowered to investigate “any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice[,]” to report on such conduct, and “to take appropriate remedial action.”<sup>268</sup> The drafters of the Protector’s authorizing legislation seem to have envisioned the office principally as a weapon against official corruption,<sup>269</sup> but its constitutional and its statutory mandate are written broadly enough to cover almost any wrongdoing by government employees and might well extend to security oversight issues.<sup>270</sup> Whether the occupants of this office will choose to involve themselves in security matters, of course, is something that remains to be seen; the impact of the Public Protector upon oversight issues is a necessarily idiosyncratic variable that will no doubt vary enormously from one Protector to the next. The constitutional requirement that reports issued by the office “must be

---

267. See § 3(2)(b) of Public Protector Act 23 of 1994; see also House of Assembly *Hansard* 11 Nov 1994 Col 4155 (remarks of J.A. Jordaan); Senate *Hansard* 2 Nov 1994 Col 2673 (remarks of R. Rabinowitz). The Constitution requires that the Public Protector be limited to a single, non-renewable seven-year term. See S. AFR. CONST. § 183.

268. S. AFR. CONST. § 182(1).

269. See, e.g., Senate *Hansard* 2 Nov 1994 Col 2654–55 (describing Public Protector as “the operational arm of Parliament” in “ensur[ing] that . . . funds are properly used and that such funds are properly accounted for”); see also *id.* Col 2665–67 (remarks of M.W. Moosa and J.R. De Ville).

270. § 6(4) of Public Protector Act 23 of 1994 (giving Public Protector, “[i]n addition to the powers and functions assigned . . . [by] the Constitution,” powers to investigate any alleged “maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity,” “abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by [such] an institution or entity,” “improper or unlawful enrichment or receipt of any improper advantage,” or “act or omission by a person in the employ of [such] an institution or entity . . . which results in unlawful or improper prejudice to any other person”); see also Senate *Hansard* 2 Nov 1994 Col 2675–76 (remarks of E.N. Lubidla) (describing duties of Public Protector as including “the investigation of complaints regarding any alleged maladministration in connection with the affairs of the government at any level, the abuse or unjustified exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function, as well as improper or dishonest acts, or omissions or corruption with respect to public money”).



open to the public” except in “exceptional circumstances”<sup>271</sup> may also make it difficult for the Public Protector to deal routinely with security oversight matters.<sup>272</sup> One may hope, however, that the prestige and power of this office—it has, for example, been called “one of the most important checks and balances for which provision has been made in our Constitution to combat the many evils of government”<sup>273</sup>—will be usefully so employed (Particularly to the extent that corruption within the security services erodes their ability to safeguard South Africa’s borders against drug and weapons trafficking and properly to pursue criminal investigations against international and domestic organized crime syndicates,<sup>274</sup> moreover, even a monomaniacal focus by the Public Protector upon traditional “corruption” issues will be of no small benefit to security oversight in South Africa).

Another constitutionally created office with potential relevance for security oversight issues is the position of Auditor-General. The Auditor-General’s jurisdiction only extends to financial matters,<sup>275</sup> but this mandate, of course, is by no means unimportant to security issues. As noted above, after all, it was an Auditor-General who in 1977-78 helped bring down the Vorster government by exposing the

---

271. S. AFR. CONST. § 182(5). The authorizing statute, however, does not require such publication, providing merely that the Public Protector “may . . . in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.” § 8(1) of Public Protector Act 23 of 1994.

272. There is apparently no provision in South African law for a wholly confidential institution of security oversight analogous to the United States’ Intelligence Oversight Board (“IOB”)—a standing committee of the President’s Foreign Intelligence Advisory Board (“PFIAB”) charged with reporting to the White House on suspected violations of law, executive order, or presidential directive by U.S. intelligence agencies. See generally E.O. 12,863 (Sept. 13, 1993), at §§ 2.1-2.3 (re-establishing IOB as part of PFIAB and defining IOB’s responsibilities). The IOB was first established in 1977 by President Gerald Ford upon the recommendation of the Rockefeller Commission, which had been appointed to study abuses by the U.S. intelligence services. See E.O. 11,905 (February 18, 1976). With apparently only one exception—its release in June 1996 of a report on CIA activities in Guatemala, see INTELLIGENCE OVERSIGHT BOARD, REPORT ON THE GUATEMALA REVIEW (June 28, 1996)—the IOB’s reports have always been secret.

273. Senate *Hansard* 2 Nov 1994 Col 2668 (remarks of J.R. De Ville). Even the ANC—whose officials will for the foreseeable future be the principal objects of scrutiny from the Public Protector—claims to recognize the importance of this office. As one parliamentarian put it in 1994, though the ANC felt that no Public Protector was needed as long as it was in power, “we . . . believe in transient majorities” and endorse the need to write strong oversight institutions into the fabric of South African law. *Id.* Col 2656 (remarks of E.S. Mchunu).

274. See, e.g., *supra* notes 83, 184, & 220.

275. S. AFR. CONST. § 188(1)(a) (providing that the Auditor-General “must audit and report on the accounts, financial statements, and financial management of all national and provincial state departments and administrations”).

Ministry of Information's illegal clandestine propaganda campaigns both within South Africa and abroad.<sup>276</sup> What role this office will play in the years ahead, of course, remains to be seen, but the role the Auditor-General can play in uncovering corrupt misuses of government funds is itself an important one.

The other constitutionally created office with at least potential relevance to security oversight is the Human Rights Commission. This body is generally charged with "monitor[ing] and assess[ing] the observance of human rights in the Republic[.]" and is empowered "to take steps to secure appropriate redress where human rights have been violated . . ."<sup>277</sup> Under authorizing legislation enacted in 1994, the Commission enjoys considerable investigatory and even quasi-prosecutorial powers. "All organs of state" are required to give the Commission "such assistance as may be reasonably required for the effective exercising of its powers and performance of its duties and functions."<sup>278</sup> In the course of conducting its own investigation, the commission may require the production of information, administer oaths, and compel testimony.<sup>279</sup> Persons who "without just cause" obstruct or otherwise refuse to cooperate with a Commission investigation, moreover, are subject to a fine or imprisonment of up to six months.<sup>280</sup> The Commission also enjoys a robust power of search and seizure of

---

276. See HISTORY, *supra* note 12, at 448-49, 451.

277. S. AFR. CONST. §§ 184(1)(c), (2)(b). By statute, the Commission's jurisdiction extends over issues concerning "fundamental rights." § 7(1)(c) of Human Rights Commission Act 54 of 1994. In addition, the Commission must each year require "relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment." S. AFR. CONST. § 184(3).

278. § 7(2) of Human Rights Commission Act 54 of 1994.

279. *Id.* § 9(1)(a)-(d). With respect to testimony before the Commission, there is no self-incrimination privilege *per se*, but section 9(3)(a) of the statute provides that incriminating answers "directly or indirectly derived from [required testimony] shall not be admissible as evidence against the person concerned . . . in a court of law or before any body or institution established by or under any law." Such testimony, however, *is* admissible for certain specific purposes (e.g., in prosecutions for perjury or with respect to criminal prosecutions under the provisions of section 18 of the Human Rights Commission Act, which imposes penalties for non-cooperation with the Commission).

280. *Id.* § 18 (providing penalties for, *inter alia*, refusing to cooperate with the Commission; knowingly giving false evidence; interrupting or "misbehav[ing]" during Commission proceedings; "defam[ing] the Commission or a member of the Commission in his or her official capacity;" committing actions that would otherwise constitute contempt of court; attempting improperly to influence the Commission, or failing to offer necessary assistance).

premises and property,<sup>281</sup> although a court warrant for such action is usually required.<sup>282</sup> Ultimately, the Commission may “bring proceedings [for the enforcement of rights] in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.”<sup>283</sup>

The extensive powers of the Human Rights Commission—so broad as to cause some opposition parliamentarians to voice a concern that the Human Rights Commission watchdog might itself need some watching<sup>284</sup>—may have some significance for security oversight in post-apartheid South Africa. The Constitution’s bill of rights includes a number of provisions restraining the conduct of the security services with respect to law enforcement, domestic intelligence collection, and in-country SANDF deployments. Its clauses protecting the rights of prisoners and detainees,<sup>285</sup> providing South Africans with a general right of access to “any information held by the state,”<sup>286</sup> and articulating a broad right of privacy with significant implications for domestic intelligence surveillance,<sup>287</sup> for example, seem likely to give the Human Rights Commission some ability to act as a check upon the South African security forces.

Finally, South African statutory law contains provisions for certain additional oversight institutions. A law enacted in 1993, for example, created a “Security Forces Board of Inquiry” made up of

281. *Id.* § 10(1) (allowing the Commission to “enter any premises on or in which anything connected with [a Commission] investigation is or is suspected to be”); *id.* § 10(3) (authorizing seizure of evidence therein); see also Senate *Hansard* 28 Jun 1994 Col 204 (remarks of R.J. Radue) (discussing Commission’s “unqualified right to enter upon and inspect any premises” and to seize any documentation “reasonably required for the purpose of investigating the suspected contravention of the human rights concerned”).

282. § 10(5) of Human Rights Commission Act 54 of 1994. No warrant is needed, however, where the Commission (or its agent) believes “on reasonable grounds” that going through the process of requesting a warrant would “defeat the object of the entry and search.” *Id.* § 10(6)(b).

283. *Id.* § 7(1)(e). Generally, however, the Commission is expected first to attempt to “resolve any dispute” or “rectify any act or omission” through the use of “mediation, conciliation or negotiation.” See *id.* § 8.

284. See, e.g., Senate *Hansard* 28 Jun 1994 Col 208, 213–14 (remarks of J. Selfe & J.R. De Ville) (suggesting that Commission’s powers to compel testimony are overbroad).

285. § 12(1) of Human Rights Commission Act 54 of 1994 (providing right “not to be deprived of freedom arbitrarily or without just cause,” “not to be detained without trial,” “to be free from all forms of violence,” “not to be tortured in any way,” and “not to be treated or punished in a cruel, inhuman or degrading way”); *id.* § 35 (providing various procedural and substantive rights to “arrested, detained and accused persons”); see also *id.* § 37(6)–(7) (providing some protections for detainees in event of state of emergency).

286. *Id.* § 32(1)(a).

287. *Id.* § 14 (providing persons with right “not to have . . . their person or home” or “their property searched,” “their possessions seized,” or “the privacy of their communications infringed”).

three persons (one of whom had to be a judge).<sup>288</sup> Grounded in the supposition that South Africa's police force "cannot adequately investigate allegations against its own members,"<sup>289</sup> this Board was charged with "inquir[ing] into the alleged commission of a serious offense by a member of a security force" and making reports and recommendations to the government with respect to any violations thereby discovered.<sup>290</sup> A statute passed in October 1996, moreover, provided more generally for a government mechanism for the ad hoc creation of task-oriented presidentially appointed "Special Investigating Units" and corresponding "Special Tribunals" to investigate and adjudicate allegations of "serious maladministration in connection with the affairs of any State institution," "improper or unlawful conduct by employees of any State institution," or "unlawful appropriation or expenditure of public money or property."<sup>291</sup> These institutions may be established by the president by proclamation in the *Government Gazette* whenever he or she deems it "necessary."<sup>292</sup> Furthermore, the special investigating unit enjoys powers to require the production of information, compel testimony, and search premises similar to those wielded by the Human Rights Commission.<sup>293</sup>

It is unclear what impact these statutory bodies will have upon security oversight in South Africa. The Special Investigating Units/Tribunals, it was said, were necessary to give the government a greater "capacity to act swiftly and decisively upon allegations of conduct posing serious threats to the interests of the State and the public at large" than it already possessed.<sup>294</sup> The "special" investigation process was apparently intended principally to target

---

288. See § 3(1) of Security Forces Board of Inquiry Act 95 of 1993.

289. House of Assembly *Hansard* 10 Jun 1993 Col 10745 (remarks of L. Fuchs).

290. § 2 of Security Forces Board of Inquiry Act 95 of 1993. The Act defined a "member of a security force" in such a way as to exclude members of a civilian intelligence service such as the then-National Intelligence Service (now the NIA). See *id.* § 1 (defining phrase to include members of then-SADF or Reserve force, police officers, members of Department of Correctional Services, or certain other officials). A "serious offence" was defined to mean murder, kidnapping, assault upon a person in custody with intent to do grievous bodily harm, violating the Corruption Act 94 of 1992, "defeating the ends of justice," or committing "any other offence which in the opinion of the Chairman and the Chief Executive Officer [of the Board of Inquiry] is of a serious nature." *Id.*

291. § 2(2)(a)-(c) of Special Investigating Units and Special Tribunals Bill B 76B-96 of 1996.

292. *Id.* § 2(1).

293. See generally *id.* §§ 5-6 (enumerating the powers of the special investigation unit); see also *id.* § 12 (providing penalties for interference with, non-cooperation with, or obstruction of Investigating Unit inquiry).

294. MEMORANDUM ON THE OBJECTS OF THE SPECIAL INVESTIGATING UNITS AND SPECIAL TRIBUNALS BILL B 76B-96, § 2 (1996).

“corruption in Government departments and corruption and malpractices in parastatals,”<sup>295</sup> but its authorizing statute contains extremely broad phrasing giving it jurisdiction over all “improper or unlawful” activities by state employees.<sup>296</sup> The responsibilities of these “special institutions,” therefore, could easily be understood to extend generally to abuses of power by security personnel or other issues related to security oversight.

To the observer concerned with checks upon government power in post-apartheid South Africa, however, these “Investigating Units” and “Tribunals” might well seem more alarming than reassuring. In a sense, these bodies represent a parallel, government-controlled judicial system designed to resolve matters without being inconvenienced by the delays and procedural impediments of formal litigation.<sup>297</sup> The Special Tribunal is, in fact, authorized “to adjudicate upon any civil law dispute which may be brought before [it] by a Special Investigating Unit or an interested party.”<sup>298</sup> The Tribunal’s jurisdiction reaches only government employees and is limited to civil (as opposed to criminal) wrongdoing,<sup>299</sup> but the Tribunal still enjoys considerable coercive power even with respect to persons not formally the target of its attentions (e.g., witnesses). It may, for example, imprison someone “with a view to securing his or her presence as a witness” or to produce evidence,<sup>300</sup> and it is authorized to “make any order which it deems appropriate so as to give effect to any ruling or decision given or made by it”<sup>301</sup>—perhaps

---

295. House of Assembly *Hansard* 29 Oct 1996 Col 3124 [unrevised copy] (remarks of Minister of Justice).

296. § 2(2)(b) of Special Investigating Units and Special Tribunals Bill B 76B-96 of 1996.

297. *Id.* § 3 (“The object of the Special Investigating Units and Special Tribunals Bill is, therefore, to provide a mechanism through which such serious allegations can be comprehensively and swiftly investigated, and at the same time, through which remedial steps, which would ordinarily have to be pursued through the courts of law, can be taken swiftly and cost-effectively.”); *see also* House of Assembly *Hansard* 29 Oct 1996 Col 3124 [unrevised copy] (remarks of Minister of Justice) (“The object of the legislation is to strengthen the hand of the executive, to strengthen the hand of political authority, if I could put it that way, and indeed to strengthen the hand of the President, so as to enable effective action to be taken to deal with allegations of serious misconduct or maladministration.”). The Tribunal process was considered preferable to reliance upon the Public Protector, for example, in part because the Protector lacked “adjudicative powers to enforce its findings.” MEMORANDUM ON THE OBJECTS OF THE SPECIAL INVESTIGATING UNITS AND SPECIAL TRIBUNALS BILL B 76B-96, § 2 (1996)

298. MEMORANDUM ON THE OBJECTS OF THE SPECIAL INVESTIGATING UNITS AND SPECIAL TRIBUNALS BILL B 76B-96, § 8.1 (1996).

299. § 8(2) of Special Investigating Units and Special Tribunals Bill B 76B-96 (1996).

300. *Id.* § 8(5).

301. *Id.* § 8(2)(b).

even including the power to imprison persons for contempt.<sup>302</sup> For a country that has only recently and at great cost managed to acquire a system of constitutional rights enforceable against the political branches of government by an independent judiciary, the establishment of such a government-run “alternative” court system sounds regressive, to say the least. With their authorizing statute having only recently been enacted, however, it is still far too early to tell whether these bodies will prove to be a powerful weapon in the battle against the abuse of power or themselves a tool wielded in such abuse.

### B. Intra-Institutional Oversight

Intra-institutional oversight, as we have seen, relates to “institutions or procedures to ensure that the various constituent parts of individual state security organs remain within the bounds of law and institutional policy.” The task of ensuring intra-institutional legal and policy conformity is particularly important on account of the awkward “blending” process of integrating apartheid-era security officers, “homeland” security units, and former anti-apartheid guerrilla fighters of APLA and MK.<sup>303</sup> In addition to the more conventional problems of monitoring intra-institutional compliance, South Africa thus faces the task of making sure its security institutions run smoothly even when comprised of groups of formerly antagonistic ex-combatants who no doubt still somewhat distrust each other.<sup>304</sup> Partly for this reason—and partly simply because such institutions contribute to the security oversight process in important ways—the post-apartheid government has developed a number of organs dedicated to intra-institutional oversight. Most prominent among these is the institution of the inspectors-general.<sup>305</sup>

With respect to South Africa’s intelligence services, the new Constitution requires Parliament to enact legislation to permit “civilian monitoring of the activities of [the intelligence] services by

---

302. See *id.* § 8(2)(b) (noting Tribunal’s general power to “make any order which it deems appropriate”). Anything done “in relation to a Special Tribunal” that in a court of law would justify a citation for contempt (a category which presumably includes failing to obey an order issued by the Tribunal) is a crime punishable by up to five years’ imprisonment. *Id.* § 12(1)(d).

303. The “blending” process for the SANDF has been described above. See *supra* text accompanying notes 151–161.

304. See, e.g., Daley, *supra* note 174, at A1 (recounting that before 1994 elections, “African National Congress candidates worried that even when they took office, their phones would be tapped, their meetings spied upon, their efforts sabotaged”).

305. It was an audit of the Ministry of Information begun by the inspector-general.

an inspector appointed by the President as head of the national executive, and approved by a resolution adopted by the National Assembly by a vote supported by at least two-thirds of its members.<sup>306</sup> Intelligence legislation adopted in 1994 went further than today's Constitution requires, by providing that the inspector-general be nominated by the parliamentary committee charged with intelligence oversight and requiring that any such appointment be approved by a parliamentary vote.<sup>307</sup> Under this statute, the inspector-general for each intelligence service (the NIA or SASS)<sup>308</sup> is formally responsible to the President, reports to the relevant cabinet minister and the parliamentary oversight committee, and is generally charged with reviewing service activities, monitoring compliance with official policy, and evaluating service actions in response to "unlawful intelligence activity" and "significant intelligence failure[s]."<sup>309</sup> Each service's inspector-general was also

---

306. S. AFR. CONST. § 210(b).

307. See §7(1) of Committee of Members of Parliament on an Inspectors-General of Intelligence Act 40 of 1994. The 1994 legislation specified approval by a "resolution adopted by a majority of at least 75% of the members present and voting at a joint meeting" of the then-Senate and National Assembly. *Id.* § 7(1)(b).

308. Billy Masethla is presently the director-general of SASS, having succeeded Mike Louw (who for some time was the most senior of apartheid-era intelligence officials to remain in office) after the latter's retirement in April 1996. Sizakhele Sigxashe, a former member of the ANC's Directorate of Intelligence and Security, now heads the NIA—having himself succeeded former APLA commander Muziwendoda Ndluli, who died of a gunshot wound to the head under somewhat mysterious circumstances in October 1995. (Adding to the sensation of Ndluli's death, some South African papers carried accounts that Ndluli had been spying for Zimbabwe's Central Intelligence Organization). See generally Simon Baynham, *ANC Gets a Grip on State Power*, JANE'S INTELL. REV., Aug. 1, 1996, at 12 (reporting on the ANC's presence in the security and intelligence forces); *South African Intelligence Chief Found Dead*, Reuters North American News, Oct. 3, 1995, available in LEXIS, World Library, REUNA File; *South African Security Service (SASS)*, JANE'S INTELL. REV., Dec. 1, 1996, at 576; *Zimbabwe Says S. African Spy Chief Not Its Agent*, Reuters World Service, Oct. 29, 1995, available in LEXIS, World Library, REUWLD File.

309. See § 7(7), (11)(b) of Committee of Members of Parliament on and Inspectors-General of Intelligence Act 40 of 1994 (enumerating the functions of the Inspectors-General and requiring the submission of yearly activity reports and reports of corrective action in the event of unlawful activity or intelligence failure). According to one cabinet minister, this legislation was also intended to give the Inspector-General a role in helping intelligence service personnel "appeal in terms of the constitutional, and especially the human rights, provision in our bill of rights as protection for their services." House of Assembly *Hansard* 11 Nov 1994 Col 4151 (remarks of Kader Asmal).

In contrast to the Inspector-General's role at the U.S. Central Intelligence Agency—which was expanded in the 1950s to include financial auditing, apparently on the assumption that the General Accounting Office might be unable properly to handle classified information, see Geoffrey R. Weller, *Comparing Western Inspectors General of Intelligence and Security*, 9 INT'L J. INTEL. & COUNTER-INTEL. 383, 392 (Winter 1996)—the South African Inspectors-General are not generally responsible for auditing and financial oversight. *But see* House of Assembly *Hansard* 11 Nov 1994 Col

given a broad right of access to intelligence-related information needed for the fulfillment of these functions<sup>310</sup>—a right considerably broader than that allocated South Africa’s parliamentary intelligence oversight committee.<sup>311</sup> Loosely based on the inspector-general provisions of Canadian intelligence law<sup>312</sup>—but adding the constitutional requirement of parliamentary appointment by supermajority vote—this South African system is designed to provide the cabinet with an independent set of “eyes and ears” within the intelligence apparatus charged with reporting “whether anything done by a service is . . . unlawful or an unreasonable exercise of power.”<sup>313</sup>

---

4153 (remarks of L.T. Landers) (describing Inspector-General as having a role in ensuring provision by intelligence services of “a quality product and value for money”).

310. The governing legislation provides that

[n]otwithstanding anything to the contrary contained in any other law or the common law, an Inspector-General shall have access to any intelligence, information or premises under the control of the Service in respect of which he or she has been appointed if such access is required by the Inspector-General for the performance of his or her functions, and he or she shall be entitled to demand from the Head of Service and its employees such intelligence, information, reports and explanation as the Inspector-General may deem necessary for the performance of such functions.

§ 7(8) of Committee of Members of Parliament on and Inspectors-General of Intelligence Act 40 of 1994; *see id.* § 7(9) (“No access to intelligence, information or premises . . . shall be withheld from an Inspector-General on any ground.”); REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE INTELLIGENCE 1994, § 6.1 (“These two Inspectors-General will have unhindered access to classified information.”); Senate *Hansard* 15 Nov 1994 Col 3041 (remarks of Deputy Minister of Justice) (“No access to intelligence, information or premises may be withheld by a service from an Inspector-General.”). Such access, of course, is vital to the ability of the Inspectors-General to play their role in the oversight scheme properly. *See generally* Weller, *supra* note 309, at 394–95 (“The work of the Inspectors General would be hampered and their reputation and credibility damaged, if they were unable to obtain the full access necessary to carry out their function.”).

311. *See infra* note 377; *see also* House of Assembly *Hansard* 11 Nov 1994 Col 4151 (remarks of Kader Asmal) (noting that Inspectors-General of intelligence have “very wide access to documents, information or premises under control of the various intelligence services, including intelligence sources and the methods used to obtain information. These powers go beyond those of the committee of members of Parliament.”).

312. *See* Senate *Hansard* 15 Nov 1994 Col 3041 (remarks of Deputy Minister of Justice) (describing the South African system as being based on Canadian Security Intelligence Service Act of 1984).

313. *Id.* (remarks of Deputy Minister of Justice); *cf.* Weller, *supra* note 309, at 385 (“[I]n the Parliamentary systems [of Canada, Australia, and the United Kingdom] the Inspectors-General are the Minister’s ‘eyes and ears’ on the intelligence agencies covered by the relevant legislation.”). According to one official, South Africans can not



The foregoing examination has focused upon the oversight of intelligence operations by means of the inspector-general mechanism, but the NIA and SASS are not alone subject to such intra-institutional oversight. There is also an inspector-general of the SANDF, not only charged with overseeing policy and legal compliance but also given financial auditing and management oversight responsibilities.<sup>314</sup> Within the South African Police Service there is also an “Independent Complaints Directorate” at both the national and provincial levels that is charged with investigating “any misconduct or offence allegedly committed by any member” of the police.<sup>315</sup>

The effectiveness of such intra-institutional actors in providing meaningful oversight of the security apparatus is, of course, highly dependent upon the strength of character, assiduousness, and credibility of those the government appoints to fill these positions. On paper, South Africa’s intra-executive oversight institutions sound quite promising. The inspectors-general of intelligence—appointed by a three-quarters parliamentary vote (rather than simply upon the direction of the president) and given an apparently unlimited right of access to classified information—would seem particularly well-equipped to fulfill their oversight functions. Provided that the government can both appoint and retain high-caliber individuals,<sup>316</sup> such offices are likely to become a vital part of the security oversight system in South Africa, complementing the institutions of executive oversight discussed above (e.g., the Public Protector and Auditor-General)<sup>317</sup> in ensuring that the executive

---

“justly claim that we . . . have the most advanced system of supervision and control over intelligence in the world.” *Id.* (remarks of Deputy Minister of Justice).

314. The Inspector-General of the SANDF also has responsibility for intelligence oversight functions vis-à-vis the Intelligence Division of the military service. See generally REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE 1996, at 12. The Defence White Paper also urged the creation of a “Military Ombudsman,” whose main duty would be to investigate complaints against the SANDF made by military personnel or members of the public. *Id.* at 11.

315. See § 53(2) of South African Police Service Act 68 of 1995; see also *id.* § 50(1)–(4) (establishing directorate, providing for its independence from rest of SAPS, and requiring all organs of state to give Directorate “such assistance as may reasonably be required”); REPUBLIC OF SOUTH AFRICA, ANNUAL PLAN OF SOUTH AFRICAN POLICE SERVICE 1996/97, at 28 (“[I]t is [the] responsibility [of the Independent Complaints Directorate] to investigate allegations of abuse of powers against police officers.”).

316. The appointment process, of course, is only half the battle: the government must also provide remuneration and working conditions sufficient both to attract and keep quality personnel in oversight positions. In October 1996, Inspector-General-for-intelligence-designate Louis Skweyiya resigned his post as the result of a salary dispute. See *Intelligence Monitor: South Africa*, JANE’S INTEL. REV., Mar. 1997, at 144. Hopefully, such problems can be avoided in the future.

317. If anything, the intra-institutional offices (e.g., the inspectors-general) are likely to be more important than offices such as the Public Protector because of their much

branch of the South African government should be able to exercise self-control if it wishes to do so. The possibility that it might *not* wish to do so, however, leads us to the consideration of extra-executive institutions of security oversight.

### C. Popular Accountability

This category of “oversight” revolves around ensuring “that the public as a whole remains sufficiently aware of actions the government undertakes in its name to hold that government politically accountable” for what it does.<sup>318</sup> Especially in a democracy of which the fundamental law is said to represent “the collective wisdom of the South African people and [to have] been arrived at by general agreement,”<sup>319</sup> this is a vital function. Unfortunately, however, while popular accountability is the bedrock of governmental oversight in most areas of governance, it can be difficult to rely upon it in the national security arena—where some information must quite properly remain hidden from the public’s direct view. Nevertheless, as the United States CIA found out in the 1970s when the *New York Times* broke the story of its “Operation CHAOS” domestic mail-opening program,<sup>320</sup> an inquiring media and an informed public can be a powerful check upon even the most closely guarded of clandestine initiatives.

At first glance, and in contrast to the secrecy-obsessed regime it succeeded, the post-apartheid South Africa takes a position of extreme openness. The Constitution itself provides for a sweeping right to information from the government. Specifically, “[e]veryone has the right of access to . . . any information held by the state.”<sup>321</sup> The Constitution, in fact, mandates that “[n]ational legislation . . . be enacted to give effect to this right,” although this requirement is subject to “reasonable measures to alleviate the administrative and financial burden on the state” that such access may entail.<sup>322</sup> As a

---

greater ability to acquire expertise in their subject area and to devote their attentions specifically to security issues.

318. Cf. JOHNSON I, *supra* note 34, at ix (“[D]emocracy relies on a knowledgeable citizenry to provide general guidance to those few individuals who make foreign policy decisions on their behalf.”)

319. S. AFR. CONST. explanatory memorandum.

320. See generally JOHNSON I, *supra* note 34, at 117 (discussing the influence of the media as a check upon overreaching by intelligence agencies); RANELAGH, *supra* note 43, at 533–36 (discussing Operation CHAOS).

321. S. AFR. CONST. § 32(1). The Constitution also provides that “[e]veryone has the right of access to . . . any information that is held by another person and that is required for the exercise or protection of any rights.” *Id.*

322. *Id.* § 32(2). The phrasing of this section suggests that the “reasonable measures” refer to procedural matters relating to access (e.g., fees and the imposition of an

general matter, moreover, the Constitution provides that as a general principle of public administration in South Africa, “the public must be encouraged to participate in policy-making” and that “[t]ransparency must be fostered by providing the public with timely, accessible, and accurate information.”<sup>323</sup> Despite some political growing pains on the part of ANC officials unused to the glare of critical media scrutiny<sup>324</sup>—and despite both the government’s disturbing willingness in mid-1996 to invoke section 205 of the Criminal Procedure Act in its effort to force the media to divulge information about the sources used for news stories<sup>325</sup> and the South African arms industries’ willingness to hide behind apartheid-era laws in restricting information about its efforts to cultivate overseas markets<sup>326</sup>—most apartheid-era laws sharply restricting access to any arguably security-related information have

---

application process) rather than to measures designed to protect national security information from disclosure.

Until the enactment of such “national legislation,” however, § 32(1) shall be deemed to read only that “[e]very person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.” *Id.* at Sched. 6, § 23(2)(a)(1). This default rule is considerably less broad than the “any information held by the state” provisions that are to apply only once a legislative scheme is in place to regulate the assertion of the sweeping constitutional right. Compare *id.* § 32(1)–(2) with *id.* Sched. 6, § 23(2).

323. *Id.* § 195(1)(e), (g). This rule is said to apply to “the administration in every sphere of government” and all “organs of state” and “public enterprises.” *Id.* § 195(2). “Proclamations, regulations and other instruments of subordinate legislation” must also be “accessible to the public.” *Id.* § 101(2).

324. See, e.g., Pogrund, *supra* note 88 (discussing Deputy President Thabo Mbeki’s tendency “to react with suspicion even to well-intentioned reporting in a sensitive area such as [governmental] corruption” and recounting Mbeki’s 1995 appointment of “special task group” to review government communications policy, including possibility of government ownership); see also Culhane, *supra* note 79, at 942–43 (“Early indications of the ANC’s commitment to free political speech remain mixed.”) (citing, *inter alia*, Bill Keller, *The Urge to Suppress Persists in South Africa*, N.Y. TIMES, Aug. 1, 1993, at A16).

325. Section 205 of the Criminal Procedure Act is a provision that permits the police to demand information from individuals, who face imprisonment if they refuse. The government invoked § 205 last year in an attempt to force the disclosure of information learned from confidential media sources. Specifically, the police served subpoenas under § 205 requiring several South African newspapers, the Associated Press, and the South African Broadcasting Corporation (“SABC”) to reveal information relating to violence in the Cape Flats relating to PAGAD. See generally *Media-Security Relations In South Threatened*, Africa News, Sept. 10, 1996, available in LEXIS, World Library, AFRNWS File. Should such attempts succeed, of course, it would become much harder for South Africa’s media to function as a check upon governmental overreaching.

326. See, e.g., Jeff Erlich, *S. African Firm Bars Reports on Arms Exports*, DEF. NEWS, Aug. 4–10, 1997, at 4.

been repealed or replaced.<sup>327</sup> In today's South Africa, it has been said, "[t]here are virtually no limits, apart from defamation—and in some instances, pornography—on the freedom to ask, to probe, and to criticize."<sup>328</sup>

At the heart of South Africa's information-access system is the so-called "Open Democracy Bill" being drawn up by the Deputy President's Office. This legislation, it has been reported, would put statutory flesh on the constitutional bones of South Africa's right of information access by creating a "fast-track information court" procedure, an expedited process of review in conventional courts through which the adjudication of requests for information would be carried out.<sup>329</sup> If this bill is enacted in a form that permits it to play as significant a role in the process of public accountability as the Freedom of Information Act ("FOIA") has in the United States,<sup>330</sup> South Africa's emergent security oversight regime will have been well served. At least with respect to the U.S. security services, it should be remembered that FOIA has been a notable restraining influence. According to a former staff member of one of the U.S.

---

327. See, e.g., Protasius Ndauendapo, *Media Laws Under Scrutiny*, Inter Press Service, Nov. 1, 1995, available in LEXIS, World Library, INPRES File; *South Africa: Opening Up*, ECONOMIST, Oct. 29, 1994, at 44. See generally Culhane, *supra* note 79 (listing apartheid-era legislation that directly or indirectly restricted South Africans' freedom of speech).

328. Pogrund, *supra* note 87.

329. It had originally been proposed in January 1995 to create an entirely separate "information court" with specialized procedures, but the present version would require individuals to use an expedited motion procedure in the country's High Court. The proposal to create a separate "Open Democracy Commission"—charged with reviewing all laws and regulations relating to governmental accountability, responsiveness, and openness—was also dropped. See generally Richard Calland, *Open Democracy Bill: Snail's Pace to Transparency*, PARLIAMENTARY WHIP, Feb. 21, 1997, at 2.

330. 5 U.S.C. §§ 551 *et seq.* The FOIA statute does not impose a blanket requirement that government-held information be released to the public, however, but rather contains exemptions for, *inter alia*, (1) information "specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and . . . properly classified pursuant to such executive order;" (2) information "related solely to the internal personnel rules and practices of an agency;" (3) information "specifically exempted from disclosure by statute" without making such withholding subject to agency discretion; (4) "trade secrets and commercial or financial information obtained from a person and privileged or confidential;" (5) "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;" (6) personnel or other files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;" and (7) "records or information compiled for law enforcement purposes" to the extent that disclosure would interfere with proceedings, invade personal privacy, disclose the identity of confidential sources, or cause an unfair trial. *Id.* § 552(b). It remains to be seen how the Open Democracy Bill will deal with issues of privacy, security classification, and the protection of information about ongoing law enforcement investigations.

intelligence oversight committees, in fact, FOIA “has been the best of all external overseers” of the U.S. intelligence community.<sup>331</sup>

How well the South African process works in practice—whether it will be able to advance both liberty and security in the post-apartheid state—remains to be seen. The South African security services have proclaimed their sensitivity to the need for “a fair and acceptable balance . . . between the need to protect sensitive information and the demands for freedom of information in respect to intelligence activities.”<sup>332</sup> “Although a measure of secrecy will undoubtedly be necessary,” the Defence Ministry has pledged, “the governing constitutional principle is ‘freedom of information.’ Exceptions to this principle should be limited and specific, and will be dealt with in legislation.”<sup>333</sup> Since the underlying right to information is a *constitutional* one enforceable against the legislature as much as against the national executive itself, however, whether (and how) South African law is to provide national security exceptions to this rule will be a matter as much for the courts to decide as it is for parliamentarians. Needless to say, South Africa’s jurisprudence of information access is still in its infancy.

While the need for at least *some* such exceptions is clear, however, this very necessity illustrates the principal problem of relying upon public accountability to provide a check upon a country’s security services. Simply put, there are some types of information—certain details of a country’s operational military deployments and contingency planning, its intelligence services’ sources and methods, the progress of ongoing criminal investigations, what it has learned of other countries’ secrets, the new technologies or techniques its arms industry is developing, the “keys” to its diplomatic and military cryptography, and so forth—that even the most open democracy must conceal. Every government must therefore create laws and institutions to establish and safeguard this secrecy. The very success of these laws and institutions in obscuring certain security-related aspects of governance,

---

331. JOHNSON I, *supra* note 34, at 117.

332. REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE 1996, at 12; *see also Cooperative Security*, *supra* note 113 (quoting Defence Minister Joe Modise: “[t]he conditions that required total secrecy in the past are over . . . [M]uch can be conveyed to our parliaments and citizens without prejudicing security interests.”). The preparation of the government’s 1996 Defence White Paper, through an elaborate process of public consultation with virtually anyone who expressed interest, set a good example for public involvement in debating South African security policy. *See generally Def. Min. Discusses SANDF Transformation*, Periscope Daily Defence News Capsules, Nov. 12, 1996, available in LEXIS, Market Library, IACNWS File; Boyle, *supra*, note 159; *Defence White Paper*, *supra* note 111 (discussing the consultation process preceding the Cabinet approval of the White Paper).

333. REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE 1996, at 11.

however, works powerfully against public accountability. Worse, this necessary cloaking can give the government both incentive and opportunity for malfeasance in precisely the areas shielded from view.

Unalloyed “public accountability” is thus generally an unreliable vehicle for security oversight. Voters cannot react to things of which they are denied knowledge, and one cannot rely solely upon corrective action at the ballot box as a check upon governmental overreaching in areas relating to national security and intelligence operations. Instead, “public accountability” becomes a two-step process: the first line of defense must be provided by the public’s “elected surrogates” in the political branches (e.g., inquiring parliamentarians and oversight committees),<sup>334</sup> individuals or institutional checks within the security apparatus itself (e.g., inspectors-general or agency “whistleblowers,”)<sup>335</sup> or the scrutiny of an independent judiciary. The check of the ballot box comes later, if it comes at all. “When surrogates are shut out, so are the people.”<sup>336</sup>

#### D. Legislative Oversight

This category of oversight involves ensuring “that the operations of the national executive and the security apparatus are known to the national legislature,” so as to enable that body to “hold the government politically (and financially) accountable for its actions and . . . enact or amend national law to reflect its understanding of oversight requirements.” Under South Africa’s new Constitution, the National Assembly is the legislative body principally responsible for policing the activities of the permanent bureaucracy, having been charged by the Constitution with “scrutinizing and overseeing executive action.”<sup>337</sup> To this end, members of the Cabinet are “accountable collectively and

---

334. Cf. JOHNSON I, *supra* note 34, at 79 (“[T]he people in modern [American] society are forced to rely chiefly on their elected surrogates in both Congress and the White House to monitor and assess the wisdom of secret foreign policy initiatives.”).

335. The awkwardly integrated character of South Africa’s present security services—combining, as they do, both holdovers from the apartheid era and former guerrilla fighters and ANC appointees—may itself help keep these services in check by increasing the likelihood that misdeeds by one element will find their way to the attention of parliamentarians or the media by back-channel means of communication. It is admittedly somewhat awkward to think of “leaks” as instruments of “security oversight law,” since such disclosures are often patently unlawful and can sometimes be profoundly destructive. Nevertheless, as any observer of contemporary U.S. politics can attest, the likelihood of “leaks” can be a hugely powerful check upon governmental action.

336. JOHNSON I, *supra* note 34, at 79.

337. S. AFR. CONST. § 42(3).

individually to Parliament for the performance of their functions,<sup>338</sup> and must “provide Parliament with full and regular reports concerning matters under their control.”<sup>339</sup> The Constitution also requires the National Assembly to provide for “mechanisms . . . to ensure that all executive organs of state in the national sphere of government are accountable to it.” In addition, the assembly must “maintain oversight” of each “organ of state.”<sup>340</sup>

South African officials make much out of this legislative oversight function and its importance in security issues, emphasizing the constitutional and statutory powers of the parliament with respect to “investigation, recommendation and supervision” *vis-à-vis* the security services, which include “approval of Defence legislation and the Defence budget; and review of the President’s decisions to deploy the SANDF in critical functions.”<sup>341</sup> With regard to the South African intelligence community, officials also boast of having achieved “a system whereby Parliament asserts its right to monitor and oversee the intelligence services,”<sup>342</sup> giving South Africa “an intelligence service that is probably one of the most transparent, most accountable and subject to the most supervision in the world.”<sup>343</sup> As one government minister put it, “[t]he basic issue here is who guards the guardians.” “Accountability to Parliament,” he said, “is central to democracy. This is what we see in action [today].”<sup>344</sup>

### 1. The Current Legislative Scheme

Much of South Africa’s legislative oversight system is indeed worth some boasting. The process of drafting the country’s first post-apartheid intelligence legislation in 1994, for example, was a commendably bipartisan one which began in May 1994 with a series of formal consultations involving cabinet officials, legislators from the Parliamentary Committee on Intelligence, and representatives of the intelligence services.<sup>345</sup> Indeed, President Mandela went so far as

---

338. *Id.* § 92(2).

339. *Id.* § 92(3).

340. *Id.* § 55(2).

341. REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE 1996, at 11.

342. House of Assembly *Hansard* 11 Nov 1994 Col 4149 (remarks of Kader Asmal).

343. *Id.* Col 4133 (remarks of D.P.A. Schutte); *see also id.* Col 4139 (remarks of Kader Asmal) (“Never before have the activities of the intelligence community been regulated clearly and in a forthright way by statute.”).

344. *Id.* Col 4149 (remarks of Kader Asmal) (discussing Committee of Members of Parliament on an Inspectors-General of Intelligence Bill).

345. *Id.* Col 4126 & 4129 (remarks of Kader Asmal & J.M. Nhlanhla) (discussing process).

to delegate much of the responsibility for supervising the drafting process to his former oppressor and National Party predecessor, Frederick W. de Klerk (who had become Executive Deputy President in the first Mandela cabinet after the April 1994 elections, and who in that capacity chaired the cabinet's Committee on Security and Intelligence)<sup>346</sup>—a choice which must have helped build the security forces' confidence in majority rule even as it annoyed the ANC's rank-and-file.

The resulting legislation established a parliamentary committee charged with overseeing intelligence affairs, comprised of eleven members of parliament selected by the President. Of the eleven, nine were chosen from among National Assembly members on the basis of party-proportional representation and two came specifically from parties "holding seats in Parliament but which are not [otherwise] represented on the Committee."<sup>347</sup> This committee, the structure of which was intended to provide "multi-party parliamentary supervision of [intelligence] activities,"<sup>348</sup> was supposed to

ensure that fundamental rights enshrined in the Constitution are not contravened. It will initiate or review legislation related to intelligence. . . . It will also, uniquely in our situation, receive complaints from the public and refer them to the appropriate structures such as the Ombudsman, the Public Protector or the Human Rights Commission. It will report to the President, the Ministers and Parliament, on its activities and those of the intelligence services.<sup>349</sup>

The committee's job, in other words, was to "be a watchdog over intelligence functions."<sup>350</sup>

346. See Senate *Hansard* 15 1994 Col 3013, 3022 (remarks of G.W. Koornhof and Deputy Minister of Justice) (discussing multiparty negotiations that produced 1994 intelligence bills).

347. See § 2(2)–(3) of Committee of Members of Parliament on an Inspectors-General of Intelligence Act 40 of 1994; see also House of Assembly *Hansard* 11 Nov 1994 Col 3044 (remarks of J.E. Sosibo). Originally, the committee was to have had seven members, but this was expanded to 11 in an effort to provide more vigorous oversight—though the opposition Democratic Party would have preferred 13. See *id.* Col 3047, 3049 (remarks of J. Sefle and Deputy Minister of Justice). Given the makeup of the National Assembly after the April 1994 elections (and under South Africa's previous "interim" Constitution), this expansion meant that five political parties were likely to have representatives on the committee, rather than only three. See *id.* Col 4135 (remarks of D.P.A. Schutte).

348. *Id.* Col 4133 (remarks of D.P.A. Schutte).

349. *Id.* Col 4150 (remarks of Kader Asmal). See generally § 3 of Committee of Members of Parliament on and Inspectors-General of Intelligence Act 40 of 1994 (listing statutory functions of committee).

350. House of Assembly *Hansard* 11 Nov. 1994 Col 4150 (remarks of Kader Asmal).



## 2. The Structural Weakness of Legislative Oversight in South Africa

The legislative oversight scheme is clearly an improvement over the non-existent accountability mechanisms of the apartheid era. In particular, providing opposition parliamentarians some small window into the clandestine world of intelligence operations, as required by section 199(8) of the new Constitution,<sup>351</sup> represents real progress. Nevertheless, this scheme is less robust than its proponents would have one believe (especially when compared to the often highly adversarial American approach to legislative oversight of the security bureaucracy), and may have some difficulty providing the sort of “jealous eye” needed to keep South Africa’s intelligence services in check. In fairness, these weaknesses are not principally the fault of the 1994 oversight legislation itself, although a committee structure that gave a greater role to opposition MPs would strengthen the process considerably.<sup>352</sup> Rather, these weaknesses are structural ones, tied to the nature of the British parliamentary system upon which the South African legislative scheme is still based and exacerbated by the particular ways in which the post-apartheid state has chosen to organize democratic representation.

For the first time in its history South Africa today enjoys a system of judicially enforced constitutional rights the fundamental rules of which trump the day-to-day electoral majorities of the national legislature.<sup>353</sup> The basic mechanism of governance under South Africa’s present Constitution, however, remains a parliamentary system modeled on that of the United Kingdom. The President of the Republic, who is vested with and exercises the executive power of the South African government,<sup>354</sup> is elected by and from among the members of the National Assembly<sup>355</sup>—with the effect that in South Africa, as in other parliamentary regimes, the party or coalition controlling the legislature forms the government and sends its political leader into office as the head of that

---

351. S. AFR. CONST. § 199(8) (“To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.”).

352. See generally *supra* note 347 (discussing enlargement of committee membership).

353. See, e.g., S. AFR. CONST. § 8(1) (“The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.”); *id.* § 167(4) (giving the Constitutional Court the power to (a) “decide disputes between organs of state in the national or provincial sphere;” (b) “decide on the Constitutionality of any parliamentary or provincial Bill;” and (c) “decide that Parliament or the President has failed to comply with a constitutional duty.”).

354. *Id.* § 85(1)–(2).

355. *Id.* § 86(1).

government.<sup>356</sup> The President selects the Deputy President from the membership of the National Assembly, as well as most of his cabinet Ministers.<sup>357</sup> The President may be removed by a two-thirds vote of the Assembly for “a serious violation of the Constitution or the law,” “serious misconduct,” or the “inability to perform the functions of office;”<sup>358</sup> alternatively, the President may be dismissed by a majority vote of the Assembly in the event that it passes a motion of no-confidence in the government.<sup>359</sup>

The bottom line, however, is that control of the government automatically goes to the party (or coalition), that wins a majority in the National Assembly: upon such a victory, the leadership of the majority group becomes the leadership of the executive branch and is, in effect, legislatively accountable only to its own party rank-and-file. Very much unlike the freewheeling U.S. congressional system—in which different parties can and often do control the legislative and executive branches and party cohesion in the legislature is notoriously loose—British-style parliamentary regimes tend to leave politics almost wholly within the hands of a disciplined majority party. As British Prime Minister John Major discovered in May 1997, the loss of such a majority topples parliamentary governments; short of that, however, party discipline tends to be well enforced, “aisle-crossing” is rare, and legislative oversight is an intrinsically weak vehicle.<sup>360</sup>

South Africa is no exception to this general rule. Indeed, if anything, it might seem more afflicted than its British antecedent, since South Africa follows a proportional-representation approach to parliamentary democracy that is based upon party “lists.” Though South Africa once had a constituency-based system of governance, the present Constitution takes a different course—in part on account of its framers’ desire to give small parties a way into the national legislature and in part simply because its drafters were never able to

---

356. Unlike Britain, of course, the head of government in South Africa is also the head of state—there being no monarch in whom formal nominal authority could reside.

357. The Constitution permits the President to select “any number” of ministers from the ranks of the Assembly, but no more than two from outside it. S. AFR. CONST. § 91(3).

358. *Id.* § 89(1).

359. The National Assembly can remove the Cabinet by passing a motion of no-confidence that specifically excludes the President, or it can pass a more general motion of no-confidence, which requires that the President, all cabinet members, and any deputy ministers must resign. *See id.* § 102(1)–(2).

360. Cf. JOHNSON I, *supra* note 34, at 132 (comparing U.S. and British intelligence oversight schemes and concluding that British approach “seems a rather weak system of accountability, at least compared to . . . [t]he American approach [which] emphasizes the Madisonian principle of checking power”).

devise an acceptable means of demarcating electoral constituencies.<sup>361</sup> Whatever the wisdom of this decision in other respects, however, it has had the unfortunate side-effect of depriving members of the National Assembly of any formal ability to resist proposals made by their party leadership. Parties, not their individual members, are elected to parliament, and an individual member takes his seat only by virtue of having been given, by his party leadership, a position on the “party list” high enough that the proportion of the popular vote the party has received still leaves a spot unfilled after all those above him on the list have been seated. Rather than enjoying a base of electoral support in a particular constituency, therefore, the individual member is wholly dependent upon party affiliation for his political future. To cross the party leadership is to risk expulsion not simply from the party, therefore, but from parliament itself.<sup>362</sup> In such a system, aisle-crossing is not simply rare, it is essentially impossible.

Unfortunately, the traditions of South African parliamentary democracy—albeit, of course, a democracy limited until recently to a small racial subset of the population—also bespeak some weakness for a particularly unaccountable brand of parliamentary majoritarianism. Party discipline within the National Party (“NP”) during the apartheid era, for example, was rigidly enforced, and successive Nationalist prime ministers<sup>363</sup> such as Hendrik Verwoerd and B.J. Vorster ran the party’s parliamentary caucus with an iron hand.<sup>364</sup> The secure parliamentary majority enjoyed by the NP, in

---

361. See Dion Basson & Gay McDougal, remarks at panel entitled “A Particular Vision of Democracy: Electing a Parliament with Proportional Representation,” University of Michigan School of Law (Mar. 21, 1997). Judge Basson serves on the bench of the Labour Court of South Africa. Gay McDougal was a member of the Independent Electoral Commission that supervised South Africa’s 1994 elections.

362. This happened in early 1997, for example, with respect to Bantu Holomisa, who lost both his ANC membership and his parliamentary seat for criticizing government corruption.

363. The government was run by a prime minister—and nominally headed by a ceremonial president—until 1984, when a new Constitution created the office of State President, which P.W. Botha first occupied as the head of a racially segregated tricameral parliamentary scheme. See generally HISTORY, *supra* note 12, at 469.

364. Within the National Party caucus on foreign affairs issues, for example, Deon Geldenhuys has described “essentially a one-way flow of communications . . . from the prime minister and minister of foreign affairs to ordinary MPs,” such that the party ranks produce no “major policy input.” DEON J. GELDENHUYS, THE DIPLOMACY OF ISOLATION 59–67 (1984). Hendrik Verwoerd, for example—who served as prime minister from 1960 until his assassination in 1966—demanded rigid party obedience, running “a very tight ship” and “[keeping] everyone in line and in awe of the leader.” Deon J. Geldenhuys, interview with the author, Johannesburg (Aug. 5, 1988). Verwoerd’s successor, John Vorster, was less unblinkingly authoritarian within his own cabinet, but still refrained from giving any significant power to the party rank and file. For his part, P.W. Botha (who succeeded Vorster in 1978) returned somewhat

turn, permitted the government enormous freedom to have its way with South African law and politics. When, for example, it was discovered that the SADF's invasion of Angola in 1975-76 had actually been illegal, because the law then prohibited sending conscript soldiers on missions beyond the Republic's borders, the parliament simply passed a law permitting such deployments—and made the law retroactive to one day before the illegal invasion had commenced.<sup>365</sup> Even more dramatically, after the South African courts repeatedly declared certain segregationist legislation invalid, parliament increased the size of the Supreme Court's Appellate Division to require the appointment of five additional judges and almost doubled the size of the South African Senate (which made such appointments) so as to ensure that the National Party could guarantee the selection of sympathetic candidates.<sup>366</sup> Not surprisingly, the resulting Appellate Division bench was rather more pliant.<sup>367</sup>

South Africa's new system of judicially enforced constitutional rights will lessen the legislature's ability to repeat such maneuvers in the post-apartheid era;<sup>368</sup> so will statutory provisions (such as those incorporated in the 1994 intelligence legislation) providing for multi-party representation on oversight committees. And, of course, there is yet little reason to attribute a National Party-style parliamentary unscrupulousness to the ANC.<sup>369</sup> Nevertheless, it

to the Verwoerdian management style, presiding at the helm of the State Security Council and acquiring a reputation as *Die Groot Krokodil* ("The Great Crocodile") for his irascible authoritarianism.

365. See Defence Amendment Acts 1 of 1976 and 35 of 1977 (amending § 103(3), (4) of Defence Act 44 of 1957), in STATUTES OF THE REPUBLIC OF SOUTH AFRICA 457(1), 517, 525(1)–525(2), 621–25; see also House of Assembly *Hansard* 2 Feb 1976 Col 434–570.

366. See generally Heubner, *supra* note 12, at 967 n.28 (discussing the court-packing episode and citing, *inter alia*, Senate Act 53 of 1955, and W. Le R. De Vos, *The Role of the South African Judiciary in Crisis Periods*, 3 TYDSKRIF VIR DIE SUID-AFRIKAANSE REG. 281 (1986)).

367. *Id.*; see also Heubner, *supra* note 12, at 969 n.37 ("[T]hroughout the apartheid era the government quickly and unabashedly closed any loophole the judges managed to find in the draconian laws. . . . [I]mmediate, effective, and scornful neutralization has consistently followed the court's few valiant attempts to imbue the South African regime with notions of basic rights.").

368. Cf. van der Vyver, *supra* note 9, at 818 ("The history of South African constitutional law should also be seen to rule out the British system of entrusting Parliament with almost incontestable powers and relying on the legislature's commitment to convention and the sense of honor and propriety of its members not to abuse those powers.").

369. In this context, however, it is worth remembering that the ANC also has a history of being quite ruthless in the pursuit of its goals—and of being less than forgiving to those within its ranks who express disagreement. See *supra* text accompanying note 21.

seems clear that "Legislative Oversight" means something rather different—and, of necessity, less rigorous—in such a parliamentary regime than it does in a separation-of-powers system such as that of the United States. With government inherently going to the majority party and individual members structurally incapable of challenging their party leadership, there is simply very little even the most conscientious legislator can do to contest the course chosen by the party leadership.

South Africa's provision for parliamentary oversight of presidential decision-making with respect to the use of military force illustrates this difficulty. In contrast to the acrimonious debates in the United States over the War Powers Resolution<sup>370</sup> and the constitutional propriety of executive deployments of American troops in harm's way overseas,<sup>371</sup> the "war powers" process in South Africa is functionally little different from an ordinary vote of no-confidence. Under the new Constitution, any deployment of the SANDF "(a) in co-operation with the police service; (b) in Defence of the Republic; or (c) in fulfillment of an international obligation" requires that the President (who is empowered to give such orders) inform Parliament "promptly and in appropriate detail of—(a) the reasons for the employment of the Defence force; (b) any place where the force is being used; (c) the number of people involved; and (d) the period for which the force is expected to be employed."<sup>372</sup> Parliament is thereafter free to pass a vote of no-confidence if it sees fit, but this, of course, would have been true in any event: the reporting provisions are no more than a clear-statement rule committing the chief executive to a policy of disclosure to the parliamentary majority he heads. Even if the legislature were not already controlled by a parliamentary majority loyal to the politician who had ordered the deployment, therefore, members of parliament would be able to disapprove of that specific use of force only by formally removing the entire government and precipitating new general elections by passing a vote of no-confidence.<sup>373</sup> As this example suggests, in a system in which the government's

---

370. 50 U.S.C. §§ 1541–48 (1988).

371. See, e.g., Ford III, *supra* note 67.

372. S. AFR. CONST. § 201(2)–(3). If parliament is not sitting within seven days of the commencement of any such operation, the President must make his § 201(3) report "to the appropriate oversight committee." *Id.*

373. The President's power to declare a "state of national defence" lapses within seven days unless formally approved by Parliament. *Id.* § 203(3). Even in this eventuality, however, a well-disciplined parliamentary majority will enable the government to survive any challenge. The only advantage to a specific-approval requirement is that it may be somewhat easier politically to cast a vote specifically against an improvident "state of national defence" than it would be to support a no-confidence vote that would replace the government in its entirety.

accountability to the legislature means little more than its accountability to itself, the task of ensuring that the security services have to learn to live with genuinely “hawk-eyed oversight committee[s]”<sup>374</sup> may be something of an uphill battle.

It was also somewhat problematic that the members of the security oversight committees were selected for such service by the President himself—the very figure whose executive apparatus these committees are tasked with policing. With respect to the intelligence oversight committee, for example, Kobus Jordann of the Democratic Party (“DP”) complained that

[w]hat [this] in fact means is that the Government of National Unity would be policed by its own people . . . . We cannot afford to have an intermingling of the legislative authority and the executive authority—as we find to a great extent in this legislation—in any form whatsoever. . . . [W]e believe that strong consideration should be given to the possibility of the Chairman of the Committee being chosen from a party which is not part of the Government of National Unity.<sup>375</sup>

ANC government officials, however, were not responsive to this suggestion, declaring simply that it was a “myth that independence only comes from people who are not in the Government.”<sup>376</sup> The provision for at least *some* opposition membership on the committee did not leave the government entirely “policed by its own people,” but—especially since it appeared that committee members would have only a limited access to intelligence service “documents,

---

374. House of Assembly *Hansard* 11 Nov 1994 Col 4151–52 (remarks of L.T. Landers) (describing “a hawk-eyed oversight committee” as “an essential cog in the machine that provides the series of control and checks and balances of the intelligence service”).

375. *Id.* Col 4155 (remarks of J.A. Jordaan). It was apparently for this reason that Jordaan’s party supported the 1994 intelligence oversight legislation only as “an interim measure.” *Id.*

376. *Id.* Col 4159 (remarks of Kader Asmal). Asmal felt—and expressed rather indelicately—that the failure of White liberals (such as the members of Jordaan’s Democratic Party) to do more to end the apartheid system showed that there was no necessary connection between being the “Opposition” and being genuinely *in* opposition. *Id.* The Minister was doubtlessly correct that there exists no such inevitable connection. He was surely wrong, however, to expect that an official selected by the President from among his own legislative supporters is likely provide sharper-eyed oversight than an opposition parliamentarian. For Asmal, the key to the committee’s success was “what powers we give it.” *Id.* He apparently attributed no significance to its members’ interest or industry in keeping the intelligence community in check.

information, or premises”<sup>377</sup>—the appointments process did suggest that it might be hard for the committee to watch over the intelligence bureaucracy with a sufficiently “jealous eye.”<sup>378</sup> Perhaps for this reason, the statute was amended in July 1995 to provide for the appointment of members of the Committee on Intelligence by the in-house parliamentary leadership, with only the “concurrence” of the President of the Republic.<sup>379</sup> Given the nature of parliamentary democracy, however, these officials would most likely be members of the same political party or coalition that forms the government itself; the “policed by its own people” problem has not been eliminated.

### 3. The Power of the Purse

The comparison to American “war powers” oversight made above also highlights another serious impediment to rigorous parliamentary oversight of the security bureaucracy in South Africa; limitations upon the legislature’s power of the purse *vis-à-vis* the government. It has long been a fundamental tenet of security oversight in the United States, as George Mason put it in the formative early years of the Republic, that “[t]he purse and the sword ought never to go into the same hands whether legislative or executive.”<sup>380</sup> In U.S. practice, even without the existence of hotly contested statutory measures such as the War Powers Resolution,

---

377. *See id.* Col 4151 (remarks of Kader Asmal) (comparing Inspector-General’s “very wide access to documents, information or premises under control of the various intelligence services, including intelligence sources and the methods used to obtain information” with the “powers . . . of the committee of members of Parliament,” which were not so broad).

According to the oversight committee’s authorizing statute, no service “shall be obliged to disclose to the Committee” the “name or identity of any person or body engaged in intelligence or counter-intelligence activities,” or information that would reveal the identity of an intelligence source or any “intelligence or counter-intelligence method” the revelation of which would reveal either of the foregoing two types of information. § 4(2)(a)(i)–(iii) of Committee of Members of Parliament on and Inspectors-General of Intelligence Act 40 of 1994. This phrasing of the first exclusion (“name or identity of any person or body engaged in intelligence or counter-intelligence activities”) is strangely broad: it seems to authorize an intelligence service to withhold from the committee information about the service’s organizational structure, the identities of its senior leaders, and perhaps even the name of the service itself.

378. *Cf. PALMER, supra* note 39, at 108.

379. Under this legislation, the committee members were to be appointed by the Speaker of the Assembly and the President of the Senate. *See* Committee of Members of Parliament on and Inspectors-General of Intelligence Amendment Act 31 of 1995 (becoming effective July 21, 1995). The contemporary analogue to the pre-1997 Senate is the National Council of Provinces.

380. PALMER, *supra*, note 39, at 115.

the most basic power lawmakers enjoy over executive branch adventurism is that of restricting the purposes for which federal money may be spent—a tactic used repeatedly by Congress with respect, for example, to military deployments and “covert action” by intelligence agencies.<sup>381</sup> After all, as the late former CIA Director William Colby once put it,

[i]n order to persuade the CIA to abandon a proposed covert action, an [Intelligence] Committee chairman needs only to say to the [Director of Central Intelligence] at the end of a briefing [on a presidential covert action finding]: “Write down in your notebook \$100 million, because—if you go ahead—that is what is coming out of your CIA budget next year.”<sup>382</sup>

In U.S. practice, the power of the purse—a power explicitly given to the legislature<sup>383</sup> and thus not subject to constitutional gainsaying of the sort that bedevils the War Powers Resolution—is perhaps the most important weapon the legislature possesses.

Even where formal limitations fail to become law—as was the case, for example, with Senator George McGovern’s attempt to force the disclosure of the CIA’s annual budget and Senator Stewart Symington’s attempt to cut off funds for that organization’s “secret war” in Laos in 1971—the proposal, debate and near-passage of such measures can send unmistakable signals to the U.S. executive branch that if it does not change course, worse will follow. Sometimes, in fact, this can be all that is needed to check the executive. As it turned out in 1971, however, President Richard

---

381. See, e.g., 139 CONG. REC. S13424–25 (daily ed. Oct. 14, 1993) (text of amendment to defense appropriations bill providing that “funds appropriated or otherwise made available in this or any other Act to the Department of Defense may be obligated for expenses incurred only through March 31, 1994, for the operations of United States Armed Forces in Somalia”); Appropriations Act of 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830 (1983) (“None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual . . . for the purpose of overthrowing the Government of Nicaragua . . .”); 22 U.S.C. § 2293 note (reproducing § 118(a) of International Security and Development Cooperation Act of 1980 [the “Clark Amendment”]) (“Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose, or which would have the effect, of promoting or augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola . . .”).

382. JOHNSON I, *supra* note 34, at 135.

383. See, e.g., U.S. CONST., art. I, § 8, cl.1 (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).



Nixon neglected to heed Congress' shot across his bow, and the failed McGovern and Symington efforts were shortly followed by a successful bill sponsored by Senator Clifford Case that cut off all funding for CIA and other U.S. government paramilitary operations in Cambodia. These measures, indeed, were the opening salvos in the U.S. "intelligence wars" of the mid-1970s, with Sen. Case's bill serving as the first example of "a general and bipartisan revolt against overweening executive power."<sup>384</sup> More recently, the U.S. Congress was also able to send "signals" of noteworthy clarity to Presidents Ronald Reagan and Bill Clinton with regard, respectively, to American military deployments in Lebanon and Somalia—signals which contributed in no small way to the disengagement of U.S. forces from their involvement in those countries' civil wars.<sup>385</sup>

In South Africa, too, it is said that "[b]ecause Parliament provides the executive with funds on behalf of society, Parliament also has a very important control function in order to ensure that these funds are properly used and that such funds are properly accounted for."<sup>386</sup> But unlike the United States, where the Constitution specifies that the House of Representatives must originate all spending bills and both houses of Congress play a role in writing and re-writing such legislation,<sup>387</sup> the South African Constitution actually prohibits either the National Assembly or the National Council of Provinces from initiating or preparing "money Bills"<sup>388</sup> (a "money Bill" is defined as "[a] Bill that appropriates money or imposes taxes, levies or duties").<sup>389</sup> Such bills may be introduced into the National Assembly and thereafter amended by Parliament according to the conventional procedures,<sup>390</sup> but the Constitution denies Parliament formal responsibility for preparing government budgets in the first instance. As with the Canadian Security Intelligence Review Committee ("SIRC"), that country's parliamentary oversight body, the South African committee lacks U.S.-style line-by-line budget authority,<sup>391</sup> and is rather the weaker

---

384. See JOHNSON I, *supra* note 34, at 185–86.

385. See Ford III, *supra* note 67, at 657–58, 692–95.

386. Senate *Hansard* 2 Nov 1994 Col 2654 (remarks of Deputy Minister of Justice).

387. U.S. CONST., art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

388. S. AFR. CONST. § 55(1) (specifying that the National Assembly may initiate or prepare legislation "except money Bills"); *id.* § 68(b) (specifying that the National Council of Provinces may initiate or prepare certain types of legislation "but may not initiate or prepare money Bills").

389. *Id.* § 77(1).

390. *Id.* §§ 73(1), 77(3).

391. Cf. JOHNSON I, *supra* note 34, at 132 (comparing the SIRC to the U.S. legislative oversight committees and concluding that the U.S. Congress is "stronger overall").

for it. In conjunction with the government's ability to rely, almost by definition, upon the support of a parliamentary majority and a highly disciplined party rank-and-file, there would seem to be a near identity between "the purse and the sword" in South Africa.

#### 4. The Legislature as an Oversight Organ

Despite these concerns, it should be emphasized, this author does not wholly mean to dismiss the impact of legislative oversight upon the South African security services. As noted above, statutory provisions (such as those written into the 1994 intelligence legislation) which specifically provide a role for opposition parliamentarians on security oversight committees, are a valuable addition to South Africa's oversight system. An amendment to South Africa's intelligence legislation in 1995 also somewhat modified the parliamentary oversight system in order to enhance the budgetary control of the parliamentary committee charged with policing the intelligence apparatus.<sup>392</sup> Moreover, the hallowed institution of parliamentary questions, in which members of parliament are formally empowered to require top officials to give at least *some* answer to prickly questions about the operations of their ministries, can provide a useful service in bringing information to the attention of Parliament and the public alike—a skill developed into something of an art form by opposition parliamentarians both under the apartheid regime and today.<sup>393</sup>

This author does not wish to suggest that the formidable powers Congress enjoys *vis-à-vis* the U.S. security apparatus are invariably exercised with admirable discretion. To the contrary, political grandstanding and partisan manipulation are depressingly common, with legislators sometimes preferring the pursuit of political gain to the delicate balancing that lies at the heart of security oversight. Nor have the U.S. security services always escaped from the process untainted, as U.S.-style legislative oversight can encourage a degree of reliance and dependence upon particular congressional factions or individual legislators for funding and political protection.<sup>394</sup> Legislative oversight,

---

392. See Committee of Members of Parliament on and Inspectors-General of Intelligence Act 31 of 1995.

393. Democratic Party leader Tony Leon, in fact, appears to have rejected President Mandela's recent offer to join his coalition government in large part because such an arrangement would have entailed an obligation to cease the DP's persistent questioning of government officials. See Suzanne Daley, *Mandela Fails in an Effort to Broaden His Cabinet*, N.Y. TIMES, Mar. 3, 1997, at A6.

394. Cf. INTELLIGENCE ENCYCLOPEDIA, *supra* note 255, at 117 (discussing "Congressional Oversight" and warning of "politicalization of the Intelligence Community").

American style—vigorous to a fault and famously inhospitable to the keeping of secrets—is an unattractive process probably enjoyed by few of its protagonists.<sup>395</sup>

On the whole, however, these obvious faults do not stop the U.S. approach from working remarkably well. Democracy, it has been said, is a system of government that “as a guard against the abuse of power, depends vitally on the kind of ‘interference’ ”<sup>396</sup> by other organs of government that the U.S. system seemingly goes out of its way to encourage. And in its present U.S. incarnation, legislative “interference” is an undeniably powerful check—indeed, in some respects, the *only* check—upon the largest and most powerful military and intelligence institutions in human history. As a former staff member from the Senate Select Committee on Intelligence (“SSCI”) once put it, “the most important form of oversight goes unseen. . . . The CIA worries that Congress is looking over its shoulder; therefore, it is less reckless. It makes them . . . think twice before they act.”<sup>397</sup> Thus does the inelegant U.S. approach to security oversight keep the security services on their toes, reminding us of Aeschylus’ somber warning that “[t]here are times when fear is good. It must keep its watchful place at the heart’s controls.”<sup>398</sup> Such oversight in a separation-of-powers regime is not pretty, perhaps, but it can be quite effective.

Unfortunately, for some very important structural reasons, it is probably the nature of legislative oversight in a parliamentary regime to be somewhat less than vigorous—less vigorous, in fact, than a troubled country with South Africa’s ugly past is likely to require. As the history of parliamentary questioning of P.W. Botha’s

395. Nor, perhaps, is the legislative oversight paradigm necessarily equally well suited to all democracies. Douglas Porch, for example, recounts the alarm of former French intelligence chief Alexandre de Marenches at the thought of establishing a parliamentary oversight committee in mid-1980s France: not only did France lack anything approaching an American degree of bipartisan agreement on foreign policy, but a multiparty parliamentary oversight committee might actually have put members of the French Communist Party in positions overseeing French intelligence operations against Eastern Bloc intelligence services such as the KGB. *See generally* PORCH, *supra* note 127, at 465–66. South Africa, however, does not today find itself in an analogous position.

396. JOHNSON I, *supra* note 34, at 79; *see also* INTELLIGENCE ENCYCLOPEDIA, *supra* note 255, at 115 (describing “Congressional Oversight” of intelligence as involving “not only the relations of the Intelligence Community with the organs of government, but also the competition between the organs of government, specifically the White House and Congress, as to who would oversee the Intelligence Community”).

397. JOHNSON I, *supra* note 34, at 117.

398. AESCHYLUS, *THE EUMENIDES* (Richmond Lattimore trans. 1953), at lines 517–25 (“There are times when fear is good. / It must keep its watchful place / at the heart’s controls. There is advantage / in the wisdom won from pain. / Should the city, should the man / rear a heart that nowhere goes / in fear, how shall such a one / any more respect the right?”).

apartheid-era National Party government by the Progressive Federal Party (as the DP was formerly known) makes clear, even the elicitation of embarrassing revelations (when this occurs) is far from enough to derail the policies of a determined majority party. Endeavoring to be the “conscience” of the ruling government can be a valuable service at times, but it is no substitute for votes. For legislative oversight to be taken seriously in the new South Africa, the ANC will have to prove itself more willing to engage in real self-investigation and less intolerant of intra-party dissent than it has been in the past—and it will have to be more flexible in both of these respects than majority parties in parliamentary systems usually tend to be.

### *E. Judicial Oversight*

This final category relates to “the establishment and maintenance of institutions or procedures to ensure that the national executive does not violate the Constitution or laws in its operation of the security apparatus,” and that the legislature, in its *own* pursuit of national security, does not “enact laws that violate the Constitution.” As noted above, this is not an area of law and policy that has traditionally received much attention from U.S. courts. Despite a degree of activism in other areas which must to many foreign observers often seem quite astonishing, the U.S. federal judiciary has tended to shy away from national security issues, and when forced to confront them has tended to defer to the claims of the executive branch in national security litigation—implicitly concluding time and time again that such matters are usually better resolved through informal and “political” methods of dispute-resolution. The potential weaknesses of legislative oversight in South Africa, however—combined, to some extent, with the traditions of the South African bench itself—suggest the possibility that the South African judiciary may be able to usefully contribute to the process of security oversight in the Republic.

In theory, at least, the South African judiciary would seem well placed to provide impartial and independent security oversight. The new South African Constitution provides that the national judiciary is “independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”<sup>399</sup> Other organs of state, in fact, are constitutionally obliged to “assist and protect the courts to ensure the[ir] independence, impartiality, dignity, accessibility

---

399. S. AFR. CONST. § 165(2).

and effectiveness.”<sup>400</sup> Moreover, for the first time in its history, South Africa now enjoys a system of judicial review for constitutionality: at the top of the country’s judicial hierarchy resides the Constitutional Court, an institution of eleven judges that “may decide only constitutional matters, and issues connected with decisions on constitutional matters” but which is the highest authority in the Republic on such points of law.<sup>401</sup> More significantly for present purposes, the Constitutional Court possesses the authority to declare unconstitutional any bill originating in South Africa’s national or provincial parliaments<sup>402</sup> upon, *inter alia*, the application for such a declaration from one-third of the members of the National Assembly within thirty days of a bill’s adoption.<sup>403</sup> The President and Deputy President of the Constitutional Court judges are appointed by the President of the Republic, but only after “consultation” both with the Judicial Service Commission and with the leaders of parties represented in the National Assembly. Other members of the constitutional bench are also appointed from a list of Commission nominees after consultation with the President of the Court and the party leaderships. (Nothing appears to oblige the President to listen to those with whom he “consults,” but the principle of consultation, at least, is constitutionally enshrined.)<sup>404</sup>

Judges on the Constitutional Court are appointed for non-renewable terms of twelve years.<sup>405</sup> Other judges hold office

---

400. *Id.* § 165(4).

401. *Id.* § 167(1), (3)(a)–(b). The Constitutional Court also maintains exclusive jurisdiction over “disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state.” *Id.* § 167(4)(a).

402. *Id.* § 167(4)(b).

403. *Id.* § 80(1)–(2).

404. *Id.* § 174(3). The Judicial Service Commission is comprised of (a) the Chief Justice of the Supreme Court of Appeal; (b) the President of the Constitutional Court; (c) Judge President selected by and from among the various Judges President of the lower court divisions; (d) a government cabinet member; (e) two private attorneys and two practicing advocates appointed by the President; (f) a law teacher; (g) six persons designated by the National Assembly (of whom at least three must be opposition parliamentarians); (h) four delegates to the National Council of Provinces; and (i) four additional presidential appointees. Additionally, when the Commission considers matters relating to a provincial or local division of the High Court, the Judge President of that division and the provincial Premier become ad hoc members. *Id.* § 178(1).

405. Judges are, however constitutionally required to retire at the age of seventy. *Id.* § 176(1). Under the previous, interim Constitution that came into effect with the April 1994 elections, the judges of the Constitutional Court served for seven-year terms without the possibility of renewal. See Bob Drogin, *S. Africa's New Court Signifies Change*, HOUS. CHRON., Feb. 15, 1995, at A14. Every court in existence when the new Constitution took effect in early 1997 continued in existence subject to consistency with the new document and subject to the possible repeal of any relevant authorizing legislation. The Appellate Division of the Supreme Court, however, was renamed,

indefinitely, “until they are discharged from active service in terms of an Act of Parliament”<sup>406</sup>—which the Assembly is permitted to do only with a two-thirds vote and only upon a finding “that the judge [in question] suffers from an incapacity, is grossly incompetent, or is guilty of gross misconduct.”<sup>407</sup> The lower levels of the judiciary, however, are less insulated, with the magistrates—whose tribunals are the lowliest to be explicitly mentioned in the Constitution<sup>408</sup>—actually being members of the civil service without protection from salary changes, transfers, or demotions.<sup>409</sup> At least at its highest levels, however, the South African judiciary thus seems relatively insulated from political pressures and thus potentially well-placed to provide some oversight of the security bureaucracy.

### 1. A Tradition of Judicial Independence Squandered

It should not be forgotten that for many years, the South African courts enjoyed a reputation for judicial independence. As one observer put it,

[d]espite the lack of judicial review and of a justiciable bill of rights, the [South African] judiciary was largely viewed, for the first half of this century, as the only branch of government to which all South African citizens could turn with a reasonable expectation of justice.<sup>410</sup>

Relying upon the color-blind tradition of common-law jurisprudence, South African judges initially acted as something of a brake upon early segregationist legislation. Shortly after the National Party came to power in 1948, for example, the Supreme Court set aside the conviction of a non-White man for traveling in a Cape Town railway coach, reasoning that it was “the duty of the courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence

---

becoming in its present incarnation the Supreme Court of Appeal—the country’s highest non-constitutional court. *See* S. AFR. CONST. Sched. 6, § 16.

406. S. AFR. CONST. § 176(2).

407. *Id.* § 177(1). Technically, the National Assembly does not remove the judge, but rather adopts a resolution calling for his removal, at which point the President is constitutionally obliged to comply. *Id.* § 177(2) (“The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.”).

408. *Id.* § 166(d). The Constitution authorizes Parliament to create other courts, including “any court of a status similar to either the High Courts or the Magistrates’ Courts.” *Id.* § 166(e).

409. Huebner, *supra* note 12, at 963–64.

410. *Id.* at 966.

of the authority of an Act of Parliament, resulted in partial or unequal treatment between different sections of the community.<sup>411</sup>

As this essentially procedural ruling suggests, however, such a braking role could survive only so long as such discriminatory measures were undertaken by lesser political authorities than the all-powerful Parliament itself. Hobbled by the nature of traditional British-style parliamentary democracy, the courts' independent streak did not survive long into the apartheid era of National Party rule. Parliament quickly found its answer to judicial obstructionism in this respect, and with the Reservation of Separate Amenities Act of 1953, it established a firm legal foundation for countrywide transportation segregation by writing such a policy in parliamentary ink.<sup>412</sup>

The railway segregation issue, however, was just a skirmish; it was not until 1955 that Parliament beat the courts wholly into submission. In 1951, the National Party passed the Separate Registration of Voters Act by a majority vote in both the House of Assembly and the Senate. This bill sought to end the voting privileges of Coloured (mixed-race) South Africans, which enjoyed the protection inherent in being one of the few provisions under existing South African law that could only be abolished a two-thirds majority vote of both houses.<sup>413</sup> Accordingly, the Appellate Division of the Supreme Court promptly (and unanimously) declared the new Act invalid.<sup>414</sup> An angry Nationalist Parliament responded by passing the High Court of Parliament Act, which purported to give the national legislation the power to review any decision of the Appellate Division that invalidated an Act of Parliament—at which point the Appellate Division declared *that* law to be invalid too. Not to be outdone, however, the National Party settled the issue by destroying the independence of the courts, passing the Appellate Division Quorum Act, No. 27 of 1955, to increase the court's quorum requirement by five judges. To ensure its control over the appointment of the new judges who would thereby be required, the National Party also passed an act nearly doubling the size of the Senate so as to give the NP an unassailable majority in the body responsible for appointing judges.<sup>415</sup> Thereafter, a larger and more pliant Appellate Division stuffed with Nationalist appointees had no difficulty reaching the conclusion that a court could only invalidate acts of Parliament for failure to follow proper legislative

---

411. HISTORY, *supra* note 12, at 394.

412. *Id.*

413. See Huebner, *supra* note 12, at 967 n.28.

414. See *Minister of the Interior v. Harris*, 1952 (4) SA 769 (A).

415. See Huebner, *supra* note 12, at 967 n.28.

procedures.<sup>416</sup> Thus did the unchecked National Party majority in apartheid-era South Africa replace the rule of law with the rule merely of lawmakers.

Faced by Nationalist majorities in Parliament willing to use their judicially unaccountable legislative prerogatives subject only to the limits of expediency, the courts lost their independence and acquired a new reputation as apologists for the apartheid security state—particularly after 1984, when the country's new "tricameral" Constitution combined the offices of Prime Minister and State President, giving NP leader P.W. Botha the power essentially to hand-pick members of the judiciary.<sup>417</sup> Over time, as the courts settled into their residual role of ensuring merely that racist oppression be undertaken with a proper eye to legal formalities, "public confidence in the judicial system . . . steadily and precipitously eroded."<sup>418</sup>

By the 1980s, it was possible for one observer to conclude that South African judges had "com[e] to be seen as willing and obedient servants of a repressive legislature rather than impartial and objective arbiters and dispensers of justice, stepping in to protect the individual citizen from legislative and executive excesses."<sup>419</sup> The situation seemed particularly bad with respect to the arena of security oversight, where it was said that "loyalty to the status quo, especially in times of social crisis, [was] the dominant characteristic of the South African courts,"<sup>420</sup> and the courts were guilty of nothing less than "judicial dereliction."<sup>421</sup> South African judges, some observers concluded, had "actively and determinedly reshaped jurisprudence so as to grant the greatest possible latitude to the executive to act outside conventional legal controls."<sup>422</sup>

---

416. See *Collins v. Minister of the Interior*, 1957 (1) SA 552 (A).

417. Pursuant to § 10 of Supreme Court Act 59 of 1959, all South African judges were to be "appointed by the State President under his hand and the Seal of the Republic of South Africa." See Huebner, *supra* note 12, at 963 n.6. When P.W. Botha became both head of government and head of state in 1984, he thus inherited the presidency's appointment power. See generally *South Africa: Opening Up*, *ECONOMIST*, Oct. 29, 1994, at 44 (noting that post-apartheid system of selecting judges is "a big change from the days when the minister of justice and national president simply hand-picked new judges").

418. Huebner, *supra* note 12, at 966.

419. M.G. Cowling, *Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premise*, 3 S. AFR. J. HUM. RTS. 177, 181 (1987).

420. Dennis Davis & Hugh Corder, *A Long March: Administrative Law in the Appellate Division*, 4 S. AFR. J. HUM. RTS. 281, 296 (1988).

421. A.S. Mathews, *The South African Judiciary and the Security System*, 1 S. AFR. J. HUM. RTS. 199, 201 (1985).

422. Nicholas Haysom & Clive Plasket, *The War Against Law: Judicial Activism and the Appellate Division*, 4 S. AFR. J. HUM. RTS. 303, 303 (1988).



## 2. Reinventing the Judicial "Jealous Eye?"

Like the security services themselves, therefore, South Africa's judiciary has some rather bad habits to unlearn if the country is to overcome the legacies of its ugly past. The fact that the judiciary was once able to exercise a degree of independence from the political branches of government, however, may place it in a better position than the security services in this respect: the bench has merely to reclaim and build upon its past, whereas the coercive arms of South African government power have really never known restraint. As one official from the ANC-run Ministry of Justice put it recently, there were indeed, over the years, certain "deviations [in which] there were courageous interventions by the judiciary." The courts were once jealous guardians of their own independence, never succumbed to corruption, and may be able to draw upon traditions of "judicial activism in the past" in ways that will prove "good for today" by checking the excesses of South African policymakers.<sup>423</sup> Indeed, South Africa's Constitutional Court has already shown signs of what may in time become a plucky independence from the political arm, even on the weightiest of issues. Charged with judging the new Constitution's compliance with a set of "constitutional principles" adopted by the parties ahead of time, the Court actually rejected the first draft document in September 1996 after its approval by a two-thirds vote of the constitutional Assembly—sending South Africa's first-ever majority-rule Constitution back to the drawing board<sup>424</sup> (it approved the second draft, to which no fewer than thirty-nine changes had been made).<sup>425</sup> As Stephen Ellmann has noted, this clear effort to place the law before even the most important of political concerns bodes well for the Court's future independence.<sup>426</sup>

---

423. Thuli Madonsela, Deputy Director, Planning Unit, South African Ministry of Justice, Remarks at the *Michigan Journal of Race & Law* Symposium, "Constitution-Making in South Africa" (Mar. 21, 1997).

424. Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744 (CC)

425. Certification of the Amended Text of the Constitution of the Republic of South Africa 1996, 1997 (2) SALR 97 (CC). See generally Deborah Fine, *Court Hears Argument for Rejecting Certification of Constitution*, BUS. DAY, Nov. 19, 1996 (describing the opposition to the certification of the Constitution for failure to comply with constitutional principles).

426. Stephen J. Ellmann, Remarks at the *Michigan Journal of Race & Law* Symposium, "Constitution-Making in South Africa" (Mar. 21, 1997). Heinz Klug and Nicholas Haysom, speaking at the same conference, both described this first certification judgment as having been a clear effort at judicial institution-building by the fledgling Constitutional Court. Haysom is presently Legal Advisor to President Nelson Mandela.

Ironically, at least with regard to security oversight, it may actually be advantageous that the new Constitution allows so much of the existing judiciary to continue in place: if the South African courts are in any way to provide the “jealous eye” of security oversight urged upon constitutional democracies by David Palmer,<sup>427</sup> it is perhaps for the best that the bench not too quickly be replaced with appointees sympathetic to the new ANC government.<sup>428</sup> An “unrepresentative judiciary” may face political problems of legitimacy *vis-à-vis* ordinary South Africans,<sup>429</sup> but this may actually be an advantage with respect to security oversight to the extent that judges’ ideological (and perhaps racial) distance from the political masters of the security establishment encourages the bench to view claims of security necessity with a somewhat skeptical eye. With luck, by the time the bench becomes (as it must) more genuinely representative of the South African people,<sup>430</sup> this habit of skepticism will have taken root and the courts’ long-dormant tradition of feisty independence will have been revived.

### 3. A Case Study: Domestic Intelligence Surveillance

Today, the South African courts have already begun to acquire a role, albeit still a small one, in overseeing the security apparatus. In a break with the entirely unaccountable practices of the past, wiretapping, electronic eavesdropping, and searches and seizures of personal property for purposes of intelligence collection and law enforcement are undertaken in the new South Africa pursuant to the Interception and Monitoring Prohibition Act 127 of 1992. Under section 3 of this statute, only the South African Police Service, the

---

427. Cf. PALMER, *supra* note 39, at 108.

428. In this respect, it is perhaps worth noting that veteran anti-apartheid activist and ANC stalwart Albie Sachs wrote an article in 1990 that “articulated profound distrust . . . for [the idea of] a justiciable bill of rights [in South Africa].” Sachs did not think it proper to “entrust the judiciary with the power of implementing a bill of rights, at least not until—‘later years when the foundations of a stable new nation will have been laid . . .’ ” Instead, Sachs proposed to give the enforcement of rights merely to “specialized commissions ‘that operate under the overall supervision of the people’s representatives in Parliament.’ ” Van der Vyver, *supra* note 9, at 765 n.76 (quoting Albie Sachs, *Towards a Bill of Rights in Democratic South Africa*, 6 S. AFR. J. HUM. RTS. 1, 3–4 & 16–17 (1990)). Sachs, who would thus have preferred to leave the business of restraining the ANC government to nothing more than its own scruples, is presently a justice on South Africa’s Constitutional Court.

429. See, e.g., A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1032–33 (1993).

430. Cf. Huebner, *supra* note 12, at 962 (noting that negotiated nature of South African transfer of power will ensure only slow change in demographics of judiciary because most current judges will probably remain on the bench until mandatory retirement at age 70).

SANDF, and the National Intelligence Agency (the domestic spying organization) may lodge applications for such monitoring with a judge specially designated to hear such issues.<sup>431</sup> Interceptions are permitted if the judge is convinced that a “serious offence that cannot be properly investigated in any other manner” “has been or is being or will probably be committed,” or where “the security of the Republic is threatened.”<sup>432</sup> Permission for such interception is usually given only for a three-month period, but this is subject to extension for successive periods of three additional months upon renewed application.<sup>433</sup> This form of judicial oversight is also embodied in section 5(2) of the Intelligence Services Act, which permits a properly designated judge to grant an application for covert physical entry upon specified premises when he is convinced that

information which has or could probably have a bearing on the functions of the [National Intelligence] Agency or the [South African Police] Service as contemplated in section 2 of the National Strategic Intelligence Act, 1994, can be obtained on any premises and such information is of substantial importance to the Agency or the Service in the discharge of its functions . . . [or] is required by the Agency or the Service for the proper discharge of its functions . . . .<sup>434</sup>

In providing an abbreviated procedural mechanism for domestic intelligence gathering, the South African judicial approval process for covert domestic intelligence collection somewhat resembles the scheme established in the United States by the Foreign Intelligence Surveillance Act (“FISA”), pursuant to which a secret court of specially designated judges (the Foreign Intelligence Surveillance Court, or “FISC”) was established in Washington, D.C. to entertain applications for electronic surveillance and physical search warrants for intelligence purposes.<sup>435</sup>

---

431. See *Senate Hansard* 11 Mar 1995 Col 279–80 (remarks of Minister of Justice in response to Question 65).

432. See § 3(b) of Interception and Monitoring Prohibition Act 127 of 1992; see also *Senate Hansard* 11 Mar 1995 Col 279–80 (remarks of Minister of Justice in response to Question 65) (describing Act as permitting interception in cases of “serious [criminal] offenses or where the security of the Republic is threatened”).

433. See, e.g., *Senate Hansard* 15 Nov 1994 Col 3016 (remarks of P.H. Groenwald) (describing Interception and Monitoring Prohibition Act).

434. See § 5(2)(a)–(b) of Intelligence Services Act 38 of 1994. This act also provides for an ordinary duration of three months for a judicial permission-to-enter, with the possibility of successive three-month extensions upon renewed application. *Id.* § 5(4).

435. See 50 U.S.C. §§ 1801–1829 (1994). This statute authorizes the Chief Justice of the U.S. Supreme Court to “designate seven district court judges from seven of the

As with its secretive American counterpart, however, it is quite hard for an outsider to assess the success of South Africa's judicial surveillance-approval scheme as a check upon overreaching by the security forces. In response to parliamentary questions, Justice Minister Dullah Omar revealed that 406 applications (including applications for the renewal of pre-existing permissions) were received by the designated judge in 1994; of these, 396 were granted. In 1995, 246 of 279 applications were approved.<sup>436</sup> By contrast, the American FISC processed 697 FISA applications in 1995<sup>437</sup>—though it is impossible to make any real comparison because the FISA process is restricted to interceptions undertaken solely for intelligence purposes, whereas most of the South African permissions are reportedly for law enforcement purposes.<sup>438</sup> In terms of rates of application approval, however, the South African process—with an approval rate apparently on the order of ninety-four percent<sup>439</sup>—is arguably somewhat *more* rigorous than its U.S. analogue, which has reportedly *never* flatly rejected a government application for intelligence-related domestic surveillance (though “[s]ome have been revised . . . [and] [s]ome have been withdrawn and resubmitted with additional information . . .”).<sup>440</sup>

---

United States judicial circuits who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States.” 50 U.S.C. § 1803(a). A three-judge court of review is given jurisdiction to review any denials of applications made by these judges; if the application is denied by this panel, the government may take the case to the U.S. Supreme Court. *Id.* § 1803(b). In 1994, the Foreign Intelligence Surveillance Court was also given jurisdiction over similar applications for physical searches of specific locations undertaken for foreign intelligence purposes. *Id.* § 1822(c).

This process, however, is not the only way the U.S. government can undertake domestic electronic surveillance, however: this requirement for court approval does not apply in wartime, *see id.* § 1811, and in any event the President, through the U.S. Attorney General may authorize non-court-approved electronic surveillance for foreign intelligence purposes “for periods of up to one year” if its target is “the contents of communications transmitted by means of communications used exclusively between or among foreign powers” or “the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power” and there is “no substantial likelihood” that such surveillance will acquire “the contents of any communication to which a [statutorily defined] United States person is a party. . . .” *Id.* § 1802(a)(1).

436. Senate *Hansard* 14 May 1996 Col 711–12 (remarks of Minister of Justice in response to Question 300). The Minister of Justice also said that 615 applications were received in 1993, of which six were still in force in May 1996. *Id.*

437. McGee & Duffy, *supra* note 67, at 11.

438. *See* Senate *Hansard* 15 Nov 1994 Col 3022 (remarks of Deputy Minister of Justice).

439. This figure is an average of Dullah Omar's figures recounted above.

440. Royce Lamberth, *Intelligence on the FISA Court*, LEGAL TIMES, Apr. 14, 1997, at 18. Judge Lamberth, who presently sits on the FISC, defended his court's practices in

In any event, the data presently available is too scanty to permit many conclusions about South Africa's surveillance court. To the extent that these surveillance procedures represent a small step toward a more robust system of security oversight capable of at least partly making up for the structural weaknesses of legislative oversight in South Africa, they are to be applauded. Where the South African surveillance court seems less wholesome, however, is in the breadth of its jurisdiction. In the United States, the FISA process observes a strict distinction between collecting information for "intelligence" purposes and its collection for purposes of "law enforcement." The highly abbreviated procedures for obtaining judicial approval of surveillance apply only to "foreign intelligence information,"<sup>441</sup> and FISA mandates that the target of such surveillance must be either a foreign government or an agent thereof.<sup>442</sup> For law enforcement intelligence, America's security apparatus must go through the much more difficult process of obtaining a warrant from the conventional courts, a requirement enforced by rigid "exclusionary rules" that generally bar the

---

this respect, arguing that "the attorney general is conscientiously doing her job, as is her staff," so that surveillance applications are usually done properly. *Id.*

Usually, however, the FISC is criticized for its seeming deference to the executive branch. See, e.g., McGee & Duffy, *supra* note 67, at 12 ("The courts sometimes sends an application back for more work, saying it hasn't met the legal test for authorization. But the court has never formally rejected an application. Not once."); see also BAMFORD, *supra* note 240, at 466 ("[T]he federal government has never lost a case before the court. . . . Given the fact that the top secret court has never said no to the government, it would be difficult to conclude that it has become anything other than a rubber stamp."). Ironically, reports Bamford, the process of approval used in the United States prior to the creation of the FISA court—which involved the review of applications by an interagency panel made up of the Secretaries of Defense and State, and chaired by the Director of Central Intelligence—apparently did sometimes reject surveillance proposals. *Id.* at 467.

441. See 50 U.S.C. § 1801(e) (defining "[f]oreign intelligence information" as (1) "information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against . . . (A) actual or potential attack or other grave hostile acts," (B) "sabotage or international terrorism," or (C) "clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power," or (2) "information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—(A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States").

442. *Id.* § 1805(a)(3) (requiring judge to issue order permitting electronic surveillance upon finding that "there is probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power" and "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power"); *id.* § 1824(a)(3) (providing same rule for physical searches); *id.* § 1801(a)-(b) (providing definitions of "[f]oreign power" and "[a]gent of a foreign power"); see also BAMFORD, *supra* note 240, at 369-72 (describing process of obtaining FISA approval from intelligence tasking requests from specific agency through FISC approval).

admission into evidence of information not obtained through proper warrant procedures.<sup>443</sup>

The South African surveillance court, however, has an infinitely broader jurisdiction. Where the American system reserves the relatively permissive FISA process for foreign-targeted "intelligence" collection, South Africa freely uses its surveillance court to approve wiretapping and physical searches for criminal investigative purposes as well. Indeed, *most* of the applications approved by the South African court are for law enforcement purposes,<sup>444</sup> and there exists no American-style exclusionary rule in South African law.<sup>445</sup> Moreover, as we have seen,<sup>446</sup> even those South African surveillance approvals that actually *are* for "intelligence" purposes are available to the National Intelligence Agency in its pursuit of "domestic intelligence," a term wedded to South Africa's breathtakingly broad conception of "national security."<sup>447</sup> It may not be much of an exaggeration, therefore, to conclude that while the South African judiciary *is* a check upon unlawful domestic surveillance, there is hardly anything that would qualify as *unlawful* surveillance so long

---

443. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (finding that exclusionary rule is aspect of incorporated Fourth Amendment right to be free of unreasonable searches and seizures). Cf. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."). This exclusionary rule has not escaped criticism on grounds of constitutional doctrine. See e.g., Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J. L. & PUB. POL. 457, 459 (1997) ("The Fourth Amendment generally does not require, does not call for, does not even invite, the exclusion of evidence as a remedy for an unconstitutional search or seizure."). Whatever its faults as a matter of legal doctrine and policy propriety, however, the exclusionary rule remains an important part of American criminal law and a powerful weapon against overeager law enforcement.

444. See Senate *Hansard* 15 Nov 1994 Col 3022 (remarks of Deputy Minister of Justice).

445. Z.M. Yacoob, comments to the author at the University of Michigan Law School, Mar. 22, 1997. Zac Yacoob was a member of the Panel of Independent Constitutional Experts who advised the Constitutional Assembly as it drafted South Africa's present Constitution.

446. See *supra* text accompanying notes 136-138.

447. See § 1 of National Strategic Intelligence Act 39 of 1994 (defining "domestic intelligence" as "intelligence on any internal activity, factor or development which is detrimental to the national stability of the Republic, as well as threats or potential threats to the constitutional order of the Republic and the safety and the well-being of its people"); *id.* § 2(1)(a) (defining NIA functions with respect to collection and analysis of "domestic intelligence" in order to "identify any threat or potential threat to the security of the Republic or its people").

As if this were not enough, moreover, it is worth remembering that South African law permits searches and surveillance where such activity merely "could" produce information that is "of substantial importance to the Agency or the Service in the discharge of its functions." § 5(2)(a) of Intelligence Services Act 38 of 1994.

as the government is willing to request it, in secret, from the designated judge.

#### 4. An Inevitable Judicial Role in Oversight Issues

Although these surveillance rules must therefore be seen as something of a misstep—as too hasty an effort to paste judicial oversight onto what is essentially an ugly apartheid-era tradition of unlimited government intrusion into the lives of its citizens—the present constitutional scheme in South Africa seems likely to involve the courts increasingly in security oversight issues. The enormously expansive “fundamental rights” protected by the new Constitution may have great bearing upon security oversight issues, and they positively cry out for judicial interpretation.

At first glance, the Constitution seems to place absolute restrictions upon the exercise of government power. It provides that “[t]he Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.”<sup>448</sup> In exercising its legislative authority, Parliament is bound by nothing other than the Constitution, but by this document it is bound absolutely.<sup>449</sup> The Constitution is “the supreme law of the Republic,” and therefore all “law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.”<sup>450</sup> Indeed, the organs of state are prohibited from “assum[ing] any power or function except those conferred on them in terms of the Constitution.”<sup>451</sup>

---

448. S. AFR. CONST. § 8(1). Provisions of the Bill of Rights also bind all natural and juristic persons “if, and to the extent that, [these provisions are] applicable [to such persons], taking into account the nature of the right and of any duty imposed by the right.” *Id.* § 8(2).

449. *Id.* § 44(4) (“When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.”). Generally, the Constitution may only be amended through supermajority votes by the National Assembly and (if the change affects the country’s various provinces or alters the National Council of Provinces) by the National Council of Provinces, and with the assent of the President.

While normally such a vote in the National Assembly requires the support of two-thirds of the members, § 1 of the Constitution—the section proclaiming that the Republic is founded upon the principles of “[h]uman dignity, the achievement of equality and advancement of human rights and freedoms,” “[n]on-racialism and non-sexism,” “[s]upremacy of the Constitution and the rule of law,” and “[u]niversal adult suffrage,” *id.* § 1—may not be amended without at least a 75% vote. Constitutional amendments affecting only a particular province or provinces, moreover, cannot be approved without the assent of the relevant provincial legislature or legislatures. *See id.* § 74.

450. *Id.* § 2; *see also id.* § 237 (“All constitutional obligations must be performed diligently and without delay.”).

451. *Id.* § 41(1)(f).

The rights thereby guaranteed, however, are enormously broad and varied. These rights include: a highly comprehensive anti-discrimination right;<sup>452</sup> a right to conduct religious observances at state institutions;<sup>453</sup> a right to exercise the freedom of "artistic creativity;"<sup>454</sup> a right to "make political choices [and to hold] free, fair and regular elections for any legislative body established in terms of the Constitution;"<sup>455</sup> a right to leave and re-enter the Republic;<sup>456</sup> a right "to choose [one's] trade, occupation or profession freely;"<sup>457</sup> a right "to an environment that is not harmful to [one's] health or well-being;"<sup>458</sup> a right "to have access to adequate housing" and health care services;<sup>459</sup> and a right "to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable."<sup>460</sup> Children even have a constitutional right to "a name and a nationality from birth" and to "family care, parental care, or appropriate alternative care when removed from the family environment."<sup>461</sup>

Significantly, however, not all of this extensive collection of "constitutional rights" is equally enforceable against the government, and none of these rights would seem to enjoy genuinely unqualified protection. To a great extent, the constitutional scheme embodies the idea of what some scholars have called "second generation" rights. The Bill of Rights thus lists many protections or obligations which it is actually *expected* that the government will be unable to honor, at least "in the near future," but which have been included in order formally to exhort officials toward better governance.<sup>462</sup> Even by their own terms, moreover, the rights contained in South Africa's Bill of Rights are explicitly limitable. Section 36(1) of the Constitution (part of the Bill of Rights

---

452. See *id.* § 9(3) ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.").

453. *Id.* § 15(2).

454. *Id.* § 16(1)(c).

455. *Id.* § 19(1)-(2).

456. *Id.* § 21(2)-(3).

457. *Id.* § 22.

458. *Id.* § 24(a).

459. *Id.* §§ 26(1), 27(1).

460. *Id.* § 29(2).

461. *Id.* § 28(1).

462. See generally van der Vyver, *supra* note 9, at 783-84 n.125 (discussing "second generation" rights and recounting arguments, *inter alia*, of Richard Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 172, 176).



itself) provides a broad “limitation-of-rights” clause, pursuant to which

[t]he rights in the Bill of Rights may be limited . . . [by] law[s] of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose;
- and
- (e) [whether there are] less restrictive means to achieve the purpose.<sup>463</sup>

The Constitution also explicitly empowers the courts, in applying the provisions of the Bill of Rights, to “apply, or where necessary, develop, the common law to the extent that legislation does not give effect to that right” and to “develop rules of the common law to limit the right, provided that the limitation is in accordance with section

463. S. AFR. CONST. § 36(1); *see also id.* § 7(2)–(3) (noting that while “[t]he state must respect, protect, promote, and fulfill the rights in the Bill of Rights,” those rights are subject to “limitations contained or referred to in section 36, or elsewhere in the Bill”).

Moreover, the Constitution also provides that in an emergency declared pursuant to § 37 of the Constitution, certain rights may be freely abridged in the interest of public order. In contrast, certain rights are explicitly “non-derogable.” *See id.* § 37(5)(c). The broad right to “equality,” for example, is “non-derogable” only with respect to the categories of “race, colour, ethnic or social origin, sex, religion or language.” The right to freedom and security of the person is similarly non-derogable only with respect to the right not to be tortured or suffer “cruel, inhuman or degrading” punishment and the right “not to be subjected to medical or scientific experiments without [one’s] informed consent.” *Id.* §§ 12(1)(d)–(e), (2)(c), 37(5)(c).

The list of non-derogable rights does not include the right “not to be deprived of freedom arbitrarily or without just cause.” *See id.* §§ 37(5)(c), 12(1)(a). In the event at least of detention without trial “in consequence of a derogation of rights resulting from a declaration of a state of emergency,” however, the government is obliged to notify the detainee’s family and to publish the name of the detainee. Furthermore, “[a] court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.” *Id.* § 37(6)(e).

According to Professor Christina Murray of the University of Cape Town, who served as an advisor to the constitutional Assembly which drafted that document, the Constitution’s table of “non-derogable” rights was meant only to delimit the government’s powers to abridge rights in a formal state of emergency—and was not intended to create a hierarchy of “derogable” and “non-derogable” protections with any meaning or application in other contexts. Christina Murray, remarks to the author at University of Michigan, Mar. 22, 1997.

36(1).<sup>464</sup> These are, of course, loopholes of potentially enormous size. Such provisions—along with broadly written guarantees permitting access to the courts for citizens who believe their constitutional rights to have been “infringed or threatened”<sup>465</sup>—highlight the substantial role the courts will have to play in delineating the specific parameters of governmental power and constitutional protection in post-apartheid South Africa.

South Africa’s plethora of enumerated “rights”—and the variability of the degree to which they will be enforceable against the government—will necessitate the development of an elaborate jurisprudence of graduated constitutional protection in every area of government endeavor. Indeed, the Constitution positively cries out for judicial activism in the definition and delimitation of constitutional rights. According to Leon Wessels, who served as deputy chairman of the constitutional Assembly that wrote South Africa’s present Constitution, some of the Constitution’s imprecision was intentional. On some constitutional issues, he said, the political bargaining process in the Assembly simply broke down, and—preferring a measure of “constructive ambiguity” to the danger of derailing South Africa’s precarious transition process by trying to make the document clear in all its particulars—the negotiating parties drafted constitutional language with “constructive ambiguity” sufficient to permit agreement.<sup>466</sup> Dion

---

464. S. AFR. CONST. § 8(3); see also *id.* § 39(1) (authorizing the court interpreting the Bill of Rights to “consider international law [and] . . . foreign law,” and “when developing the common law or customary law . . . [to] promote the spirit, purpo[se], and objects of the Bill of Rights”); *id.* § 173 (“[T]he Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power . . . to develop the common law, taking into account the interest of justice.”).

465. *Id.* § 38. Indeed, the Constitution guarantees citizens “the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum.” *Id.* § 34. South Africans “ha[ve] the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.” *Id.* § 38. The Constitution also requires that persons be permitted to appeal to the Constitutional Court “from any other court” when an appeal is “in the interest of justice and with leave of the Constitutional Court”—and that they even be permitted “to bring a matter directly to the Constitutional Court” without prior judicial disposition. *Id.* § 167.

In 1996, in the first case of its kind in South Africa, a man named Ntandazeli Fose applied directly to the Constitutional Court for R200,000 in compensatory and punitive damages on account of allegedly being tortured by the Vanderbijlpark Riot and Related Crimes Investigation Unit in May 1994. See Mungo Soggot, *Security Minister Faces Torture Case*, Africa News, Sept. 3, 1996, available in LEXIS, World Library, AFRNWS File.

466. Leon Wessels, Remarks at the *Michigan Journal of Race & Law Symposium*, “Constitution-Making in South Africa” (Mar. 21, 1997). Speaking at the same conference, Nicholas Haysom, President Mandela’s legal advisor, has suggested that such “creative ambiguity” was necessary if South Africa were to have any

Basson, formerly an advisor to the Constitutional Assembly and presently a judge on the Labour Court of South Africa, similarly recalls that when negotiations broke down on a particular issue, the parties simply wrote vague language in anticipation that the courts could sort out the details later.<sup>467</sup> The judiciary, therefore, cannot escape a significant role in patching holes in this framework of fundamental law and in deciding what real meaning to give to the various items on South Africa's extraordinary laundry list of rights and constitutional "governing principles."

Many of the rights specifically enumerated in the South African Constitution would seem to have little relevance from the perspective of security oversight; some, however, are likely to have real significance. Quite irrespective of the statutory enactment of judicial protections in the Interception and Monitoring Prohibition Act or the Intelligence Services Act, for example, the constitutional right to privacy explicitly includes the right not to have one's home or property searched or one's communications "infringed."<sup>468</sup> Other enumerated rights—for example, the rights to freedom of movement, assembly, and access to "any information held by the state"<sup>469</sup>—also have clear relevance to security oversight. More broadly, although Chapter 11 of the Constitution includes a list of governing principles for the South African security forces, it is quite uncertain what significance these principles will have.<sup>470</sup>

As the South African courts set about trying to build a workable jurisprudence of constitutional scrutiny upon the wide but

Constitution. Many provisions that today seem "less than ideal," he said, were included in order to keep the process from breaking down.

467. Dion Basson, Remarks at the *Michigan Journal of Race & Law* Symposium, "Constitution-Making in South Africa" (Mar. 21, 1997). As recounted at the same conference by Leon Wessels and by Roelf Meyer (formerly the National Party government's chief negotiator at the Multi-Party Negotiating Forum that produced South Africa's interim Constitution and presently Secretary-General of the National Party), time pressures also played a role in limiting the parties' ability to arrive at genuine agreements on certain issues. Wessels agreed, describing the resulting process as one of "legislation by exhaustion."

468. S. AFR. CONST. § 14.

469. *Id.* § 32(1).

470. What does it mean, for example, to write into a Constitution that security policy "must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life?" S. AFR. CONST. § 198(a) (emphasis added). And what does it mean that the Constitution *requires* the security service to both "teach" and "act" in accordance with law, including customary international law? *Id.* § 199(5). Generally, however, customary international law which is inconsistent with the Constitution or an act of parliament is not binding on the government. *Id.* § 232. If such commandments are not strictly enforceable against the government (as one suspects must be the case), might such principles serve as general principles to guide judges' evaluation of security issues that do make their way before the courts?

somewhat unsteady foundation provided by their country's Bill of Rights, judges are likely to acquire a role in security oversight far greater than that assumed by the judiciary in most other countries—including, certainly, the United States.

### III. THE FUTURE OF SOUTH AFRICAN SECURITY OVERSIGHT?

South Africa's breathtakingly ambitious project of political, economic, and legal transformation is in many respects, of course, still in its infancy. With respect to security oversight issues, the government has shown itself genuinely committed to serious institutional reform: to the creation of a system of institutional controls that will enable South Africa's fractious political culture to enjoy the benefits of a strong and capable security apparatus without repeating the disastrous errors and abuses of the past. Without detracting from the enormous progress South Africa has already made in this respect, however, it may be useful to offer at least a few suggestions for the future.

#### *A. Recommendations*

##### 1. Legislative Oversight Issues

In the preceding pages, this author has suggested that South Africa's present system of party-list proportional-representation parliamentary governance, whatever its other virtues, has some significant weaknesses with respect to security oversight. This said, however, it is no doubt also true that such a system must be taken as a fact of life in modern South Africa: this bridge has been crossed, and one should probably not expect much consideration to be given to a return to constituency-based politics—let alone to a system that would provide independent political bases for the legislature and the national executive.

Even within a parliamentary scheme, however, it may be possible to improve the prospects of a meaningful parliamentary "check" or "balance" upon the power of the majority-run security apparatus. Much, in fact, has already been done in this respect, and this author applauds the mandatory involvement of opposition parliamentarians in the oversight committee framework and the seventy-five percent supermajority voting requirement imposed for the appointment of inspectors-general and the Public Protector. Such innovations—which are admirably consistent with the "multiparty" and "consensus"-based approach to governance pioneered by the Government of National Unity ("GNU") after the elections of April

1994—should be jealously protected, and strengthened where possible.

The role of the oversight committees should, for example, be strengthened with increased line-by-line budget authority over security functions, and the role of opposition members within the committee framework increased through the adoption of parliamentary rules of procedure somewhat analogous to the GNU's style of consensual policymaking—or to the loose member-empowering procedures of the U.S. Senate, where the institutions of the “filibuster” and the “cloture vote” encourage a much more consensus-driven approach than the more majoritarian and party-disciplined U.S. House of Representatives.<sup>471</sup> Such changes would not alter the bedrock reality of parliamentary rule; if “push” were really to come to “shove,” an ANC majority would probably be able to have its way subject only to checks imposed by the bench or the ballot box. But writing a more consensus-based approach to governance into the law and procedure of parliamentary rule today will help ensure that such a political culture can survive tomorrow—after the glow of South Africa's remarkably amicable transition has faded.

## 2. The Surveillance Court

As discussed above, South Africa's present procedures for the judicial authorization of clandestine domestic surveillance and physical searches of property are inadequate: the virtually unlimited government right-to-spy these rules seem to permit is inappropriate for a modern constitutional democracy dedicated to the rule of law, to the judicial enforcement of constitutional rights, and to the avoidance of the sort of abuses that characterized its recent past.<sup>472</sup> Because South Africans have a constitutional right “not to have . . . their property searched . . . [or] the privacy of their communications infringed,”<sup>473</sup>—and because neither the Interception and Monitoring Prohibition Act nor the Intelligence Services Act provide for the kind

---

471. See, e.g., CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 187–222 & 691–756 (1989) (explaining different procedural regimes of House and Senate).

472. Among developed democracies also possessing a domestic intelligence service dedicated to providing national leaders with domestic “information in the political, social, and economic domains” acquired in part by “surveillance, infiltration of political groups and trade unions, opening mail, [and] tapping telephones” is France, whose Renseignements Généraux (“RG”) has precisely such a function. In 1990, the RG was revealed to have been involved in a number of abuses of power and which was decried in the French parliament as “a permanent threat to democracy.” See PORCH, *supra* note 127, at 422–30.

473. S. AFR. CONST. § 14.

of judicial balancing envisioned in the limitation of rights rule of section 36(1) of the new Constitution—these statutes may also be unconstitutional.

It is important, therefore, that the jurisdiction of South Africa's surveillance court be redefined. Ideally its jurisdiction should be limited to "intelligence" matters, leaving the covert collection of "law enforcement" information through privacy-invasive means to formal warrant-application procedures in the regular courts and subjecting it to some form of exclusionary rule. To the extent that such abbreviated judicial procedures are still permitted to authorize government surveillance, a "foreign power" nexus analogous to that written into the U.S. FISA process could be enacted—lest South Africa's overbroad working definition of "national security" be taken to justify *any* spying the security forces decide would be useful. Short of such a "foreign power" requirement, there should at least be imposed a relatively demanding threat-to-public-order standard to help ensure that only something rather more urgent than the NIA's curiosity is permitted to justify such invasive activity. In any event, the Constitution would also seem to impose the requirement that *any* authorization for domestic surveillance pass muster under the "limitation of rights" provisions of section 36(1): while the rigor of the constitutional test required for clandestine "intelligence" and "law enforcement" collection might well be understood to vary according to the circumstances presented in each case, the Constitution apparently requires that *some* explicit balancing take place—just as the U.S. Constitution requires surveillance and search applications to be grounded in a showing of "probable cause."<sup>474</sup> If the South African Bill of Rights is to have any meaning, such section 36(1) balancings must be undertaken by a judge, not merely by the government functionaries who decide whether or not to apply for surveillance authorization.<sup>475</sup>

As a general matter, moreover, it is hard not to agree with the suggestion of some opposition parliamentarians that it would be safer if the Interception and Monitoring Prohibition Act and Intelligence Services Act were modified to require that applications for such judicially approved surveillance be presented to a panel of

---

474. See U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

475. Deputy Minister of Intelligence Services Joe Nhlanhla said upon his swearing-in during early 1995 that South Africa's "new security doctrine would evolve from needs of the people and their inherent right to privacy and security." *New Deputy Intelligence Minister Says Era of Spying Is Over*, BBC Summary of World Broadcasts, Feb. 25, 1995, available in LEXIS, World Library, BBCSWB File. Jurisdictional adjustments to the surveillance-authorization process are needed in order to ensure that the truth of this statement does not depend merely upon the NIA's goodwill.

jurists rather than a single judge.<sup>476</sup> Such a change would lessen the likelihood of the institutional “capture” of the designated judge by the intelligence agencies whose representatives appear repeatedly before him and might also, in time, serve to better acquaint the judiciary as a whole with security oversight problems and the constitutional balancing issues that they raise.

### 3. Other Oversight Organs

Little can be said at this point about the role of organs such as the inspectors-general, the Auditor-General, the Public Protector, and the Human Rights Commission in South Africa’s security oversight scheme except to exhort government officials to ensure that these positions are filled by persons of integrity who are provided with the resources necessary to do their job—and that these officers are encouraged to view abuses of power in the security arena as matters well within their jurisdictions.

With respect to South Africa’s new “Special Investigating Units” and “Special Tribunals,” however, the point made above with respect to the surveillance court must be reiterated: the right of privacy enjoyed by all South Africans requires that any searches or seizures undertaken under the authority of such bodies be explicitly tied to the balancing test articulated in section 36(1) of the Constitution. The authorizing statute should be amended to this effect, and a process instituted whereby individuals affected by such a search can challenge its constitutional propriety. Such a requirement would, of course, somewhat impair the vaunted “efficiency” of the “Special Tribunal” process. As Americans learned long ago, however, many such procedural impediments are the price a society must pay for having a genuine commitment to constitutionally guaranteed rights.

---

476. See Senate Hansard 15 Nov 1994 Col 3020 (remarks of J. Selfe) (arguing that in this respect, “two heads are better than one”); *id.* Col 3019 (remarks of P. Powell) (discussing Senator Selfe’s proposal for enlargement of judicial panel). The American FISC bench, by contrast, consists of seven federal judges picked by the Chief Justice of the Supreme Court to serve for staggered, non-renewable terms of up to seven years—though the FISC judges initially consider applications only in single-judge panels. See 18 U.S.C. § 1803(a), (d); BAMFORD, *supra* note 240, at 370–71. (Interestingly, the normally entirely secret FISC once actually published one of its opinions. See *In re Application of the United States for an Order Authorizing the Physical Search of Non-residential Premises and Personal Property* (Washington D.C.: U.S.F.I.S.C.) June 11, 1981).

#### 4. The Role of the Judiciary

##### a. *A New Jurisprudence of "Warning?"*

Given the problems inherent in other forms of security oversight in South Africa—especially those associated with the weaknesses of legislative supervision in a parliamentary regime that does not cleanly distinguish between the majority party and the government—it may be time for the South African courts to begin to expand small judicial beachheads such as the surveillance court into a more significant role in security oversight. This suggestion, however, returns us to one of the central conundrums of national security law discussed previously. As we have seen, security oversight is, at its core, the process of achieving a balance between liberty, on the one hand, and the expedient pursuit of security, on the other. But if the precise point and character of this balance shifts as a country's political culture and its security environment develop over time, formal legal dispute resolution—which tends to produce binary win/lose determinations and to fix its results into precedential stone—may be an awkward and often unsuitable way to approach many problems of national security law. How, then, is it possible usefully and more broadly to employ the judiciary in the security oversight arena?

To some extent courts, the new South African Constitutional Court among them, already know how to do this. As Heinz Klug has argued, the Court has already played an important role in the process of post-apartheid political transition by being "constructively ambiguous" in its rulings. Legal disputes, in Klug's characterization, are seldom fully answered in a firm "yes/no" fashion by the Court. Rather, between its somewhat vaguely written opinions and its efforts to leave many issues aside in narrowing the legal questions to be considered, the Court can ensure that even losing parties are seldom *wholly* shut out.<sup>477</sup> Despite repeated losses challenging the new Constitution's provisions dividing power between South Africa's national and provincial tiers of government, for example, the Inkatha Freedom Party has yet to become so disenchanted with the Court that it will fail to bring further challenges.<sup>478</sup> This is only a partial answer, however, because narrowed though they be in subject matter by such a cautious

---

477. Heinz Klug, Remarks at the *Michigan Journal of Race & Law* Symposium, "Constitution-Making in South Africa" (Mar. 21, 1997).

478. See, e.g., Fine, *supra* note 425 (discussing IFP and DP challenge to second draft of Constitution after initial rejection by Constitutional Court); Suzanne Daley, *SA's New Beginning*, SOWETAN, June 12, 1996.



court—and however much the law may develop by evolutionary increments as “lines are pricked out by the gradual approach and contact of decisions on the opposing sides”<sup>479</sup>—conventional legal decisions are still binary yes/no judgments, the results of which are recorded as binding law for lower courts and controlling precedent for the future. Might there be a way for courts to be more flexible still?

One possible answer may be in the development of a constitutional “warnings” jurisprudence analogous to that sometimes employed, for example, in Japanese law in circumstances where traditional win/lose determinations are felt to be inappropriate. It is the practice of the Japanese Supreme Court sometimes to engage in “constitutional prodding—declaring the need for appropriate constitutional behavior but stopping, if possible, short of the formal invocation of coercive legal authority” in such a way as to permit the political authorities to modify their behavior without the awkward necessity of a formal legal finding of right or wrong.<sup>480</sup> This, for example, occurred in a series of cases involving dramatic disparities in voting power between urban and rural districts in elections for the Japanese National Diet.<sup>481</sup> These discrepancies, which resulted from long-outdated political district demarcations that were retained because of the advantages they gave to the ruling Liberal Democratic Party’s rural constituents, seemed clearly to violate the equality provisions of the Japanese Constitution. Rather than simply declaring the districting plans unconstitutional (or borrowing from American jurisprudence and involving judges themselves in redrawing the districts),<sup>482</sup> however, the Japanese Supreme Court preferred to issue what one scholar has termed “warnings of unconstitutionality.”<sup>483</sup> These “rhetorical shot[s] across the government’s bow” were intended to permit the government to at least partially redress the problem “without the unpleasant necessity of the Supreme Court

---

479. *Noble State Bank v. Haskell*, 219 U.S. 104, 112 (1911) (discussing development of legal doctrine with respect to scope of government’s police power and “elsewhere in law”).

480. Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT’L L. 3, 48 (1996) [hereinafter Ford IV].

481. See generally *id.* at 47–49.

482. Cf. *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (ruling that an electoral district may be challenged on constitutional equal protection grounds if the court finds its shape “so irrational that it can be understood only as an effort to segregate voters” by race).

483. See Toshihiko Nonaka, *The Significance of the Grand Bench Decision Concerning Proportional Representation in the House of Representatives and Related Issues*, 18 LAW IN JAPAN 134, 141–42 (David Nelson trans. 1986).

actually having to invalidate a law (or worse, the results of an election)."<sup>484</sup>

What significance does this idea of a "warnings jurisprudence" have for South Africa? As we have seen, the hugely expansive provisions of constitutional rights written into the new South African Constitution—and the varying degree to which they are likely to be enforceable against the government—will require the courts to acquire an unprecedented quasi-policymaking role with respect to security oversight issues. It will fall to judges to find the law's proper path through South Africa's dense thicket of constitutional verbiage, and to authorize the curtailment of constitutional rights where a careful balancing of "the nature of the right" against the "the importance of the purpose [and] . . . the nature and extent of the limitation" indicates that such restriction is necessary.<sup>485</sup> As we have also seen, however, it is the nature of security oversight law to require a continual process of delicate, circumstance-driven balancing, as the requirements of liberty are weighed against the demands imposed by pursuit of that security necessary for liberty's survival.

Such balancings are highly contextual things: the "right" answer in one case is not always the right answer in another. As we have seen, this makes national security issues somewhat resistant to useful embodiment in "hard" case precedent of the sort that characterizes most judicial determination. Not limited by a "case or controversy" requirement of the sort that requires U.S. courts to take cognizance only of full-blown legal disputes between adversarial parties and shun the issuance of merely advisory opinions,<sup>486</sup>

---

484. Ford IV, *supra* note 480, at 47. As Johan van der Vyver has also noted in his own search for jurisprudential models suitable for post-apartheid South Africa, German law employs a somewhat analogous doctrine by "affording the legislature time to remedy a situation that has been found to be unconstitutional." Van der Vyver, *supra* note 9, at 314 (citing Ipsen, *Constitutional Review of Laws*, in MAIN PRINCIPLES OF THE GERMAN BASIC LAW 132-33 (1983)). This is an approach which the U.S. courts themselves have used on at least one occasion, though with less than complete success. Compare *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1954) (requiring "a prompt and reasonable start toward full compliance" with the desegregation decision, and instructing lower courts to enforce the decision "with all deliberate speed") with *Griffin v. Sch. Bd.*, 377 U.S. 218, 234 (1963) ("The time for mere 'deliberate speed' has run out . . ."). Both the German and the American "all deliberate speed" approaches, however, are predicated upon an actual formal finding of unconstitutionality: only the remedy is left to the political process.

485. S. AFR. CONST. § 36(1).

486. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 11 (1975) ("Congress may not . . . require this Court to render opinions in matters which are not 'cases or controversies.' ") (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). This "case or controversy" rule of U.S. federal court jurisdiction has its origins in the U.S. Constitution itself, which provides that "[t]he Judicial Power shall extend," *inter alia*, to "all Cases, in Law and Equity, arising under this Constitution, [or] the Laws of the

however, there would seem to be no constitutional bar to the development of a wide-ranging jurisprudence of constitutional value-balancing in the interests of security oversight by the South African Courts. Accordingly, there exists no reason why such a jurisprudence could not usefully employ “warnings” of unconstitutionality as one means by which the courts prod the political branches of government back into line without having to write rigid win/lose determinations into precedential stone.

b. *A CIPA Analogue?*

With respect to security oversight, however, one thing that such a jurisprudence would require is the development of a workable system for protecting national security information introduced in court and a clear constitutional rule reconciling the imposition of such restrictions with the Constitution’s guarantee of a right of “access to . . . any information held by the state.”<sup>487</sup> The procedures used to govern the judicial approval of surveillance and search applications under the Interception and Monitoring Prohibition Act might prove a useful model in some (very limited) respects, but those procedures involve only a single, specially designated judge in a court whose proceedings are inherently secret. What South Africa needs, by contrast, is a statute both to facilitate the use of secret information in ordinary courts in ordinary cases and to protect any such information thus introduced. In the United States, this function is fulfilled in criminal proceedings by the Classified Information Procedures Act (“CIPA”),<sup>488</sup> but no such provisions apply to civil litigation, leaving the government with a politically embarrassing but legally all-powerful “state secrets” trump card with which to stymie requests for information from opposing litigants. Because the South African courts may play a much broader role in oversight issues than does (or can) the U.S. federal judiciary—and because the

---

United States” and to “Controversies between two or more States.” U.S. CONST., art. III, § 2, cl. 1. It has been interpreted to require that appellants in U.S. federal court have a “personal stake in the outcome of the controversy,” *Baker v. Carr*, 369 U.S. 186, 204 (1962), sufficient to make their dispute into “a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *Haworth*, 300 U.S. at 241.

By contrast, the South African Constitution would seem to permit courts to hear cases where the infringement of rights has been merely “threatened” and give citizens a cause of action to pursue the judicial resolution of “any dispute that can be resolved by the application of law.” S. AFR. CONST. §§ 34, 38.

487. S. AFR. CONST. § 32(1).

488. Pub. L. No. 96-456, Oct. 15, 1980, 94 Stat. 2025 (1980) (codified at 18 U.S.C. App. 3, §§ 1-15).

South African Constitution provides not only a general right of access to information held by the state but also a specific right to “any information that is held by another person and that is required for the exercise or protection of any right” that is not limited in applicability to criminal procedures<sup>489</sup>—South Africa would seem to require an analogue to the American CIPA designed to be used throughout the court system and in all types of litigation.

c. *The Concept of “National Security”*

Finally, in a much more general sense, South Africa’s post-apartheid government would do well to retreat a bit from its expansive conception of “national security.” As explained previously, a sweeping vision of “security” encompassing virtually every aspect of society can produce a dangerous tendency to assume that it is therefore the business of the “security forces” to involve themselves in all such matters. We have already seen how the ANC’s sweeping view of “national security” threatens to give the NIA *carte blanche* to spy on all South Africans at will under the provisions of the Interception and Monitoring Prohibition Act and the Intelligence Services Act. And, of course, one should not be permitted to forget what happened the *last* time officials in Pretoria developed an all-encompassing “total” vision of “national security.” Such conceptual over-reaching is a mistake the post-apartheid state should not permit itself to make.

Since the habits and mores of democratic South African governance and security oversight are today still being set, it should not be difficult to confine this vision of domestic “national security” jurisdiction to such traditional concepts as defending the Republic’s borders against attack or infiltration, enforcing its laws, preventing and coping with public violence and disorder, detecting and countering the clandestine activities of foreign intelligence services, preventing terrorism and domestic subversion, and planning and conducting military operations pursuant to lawful constitutional authority. Such an old-school vision of “national security” is hardly a constricted one, and as the above account of contemporary South African security challenges should suggest, even such a narrowed view would certainly leave the post-apartheid security forces with a great deal of work. Nor, of course, would such a traditional view of security in any way prevent the ANC government from concentrating its energies upon the socioeconomic advancement of its constituents: being unable to call economic and social problems “national security” issues hardly prevents their redress. It is time for

---

489. S. AFR. CONST. § 32(1).

the ANC's sweeping rhetoric of liberation and transformation to take a back seat, at least in this respect, to the more sober speech of governance.

### CONCLUSION: A PARTING WORD

South Africa is today setting the patterns by which it will live in the future. If South Africans are to take advantage of the "window of opportunity" they still enjoy in establishing the habits and mores necessary to a working security oversight regime, therefore, now is the time to act with conspicuous restraint and prudence. In many respects, in fact, it is this process of moral and cultural education that is the most important element of security oversight: without it, all the clever legal draftsmanship and carefully crafted legal doctrine in the world cannot prevent a repeat of past abuses. "Liberty," as Judge Learned Hand stated, "lies in the hearts of men and women; when it dies there, no Constitution, no law, [and] no court can save it . . . ."<sup>490</sup> For a variety of reasons, as outlined above, South Africa may indeed have to rely heavily upon the care and perspicacity of its judiciary in resolving the dilemmas of security oversight in the post-apartheid state. The fundamental responsibility for learning the lessons of the past and preventing future abuses of power, however, must be understood to lie elsewhere.

[A] society so riven that the spirit of moderation is gone, no court *can* save; . . . a society where that spirit flourishes, no court *need* save; [and] in a society which evades its responsibility by thrusting upon the courts [alone] the nurture of that spirit, that spirit in the end will perish.<sup>491</sup>

If South Africa can win this battle for the hearts and minds of its citizens, security bureaucrats, uniformed servicemembers, and public officials, the legal and institutional challenges of consolidating and improving the security oversight system will be comparatively simple. The challenge of security oversight, in other words, is a challenge for everyone.

---

490. HAND, *supra* note 245, at 189–90.

491. LEARNED HAND, *THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION* (1942).