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# Using the Military at Home: Yesterday, Today, and Tomorrow

Richard H. Kohn\*

Today the United States is undergoing a great transformation in national security thinking and priorities. Between the end of the Cold War in 1989 and the collapse of the Soviet Union in 1991, the country began to abandon the policy of containment and the strategy of deterrence that had governed American relations with the rest of the world for over four decades. For only the fourth time in its national history, the United States has been changing its national security policies and reconfiguring its military institutions to adapt to a new role in world politics.<sup>1</sup> Once again, for a variety of reasons not least because

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\* Professor of History, University of North Carolina at Chapel Hill. Portions of this article were included in lectures to the National Security Studies Decision Making Seminar, Johns Hopkins University School of Advanced International Studies, Baltimore, Maryland; the History and Strategy Roundtable, National War College, Washington, D.C.; the National Security Law Course, Duke University Law School, Durham, North Carolina; and the National Security Management Course, Maxwell School of Citizenship and Public Affairs, Syracuse University, Syracuse, New York. The author thanks Michael Allsep, Andrew J. Bacevich, Peter D. Feaver, Abigail A. Kohn, Lynne H. Kohn, Jonathan Lurie, Erik Riker-Coleman, and Scott Silliman for assistance and advice.

<sup>1</sup> Previous transition periods were: the 1780s to early 1800s when the US created national military policies and institutions to replace the military and naval direction and forces Britain had provided its colonies, and to create the 19th century constabulary military establishment; the 1880s to the early 20th century, when the Navy and Army modernized their weapons, organizations, and doctrines to change from constabularies into war-fighting institutions planning and preparing in peacetime for mobilization and warfare; and the late 1940s to the early 1950s, when the United States reorganized the government for national security, adopted containment and deterrence as its foreign policy and military strategy, and constructed a large standing military establishment partly deployed overseas, ready for limited or general war, and stationed in Europe and the Far East. For short, comprehensive interpretations of the American military experience, see John Shy, *The American Military Experience: History and Learning*, in John Shy, *A People Numerous and Armed: Reflections on the Military Struggle for American Independence* 265 (Michigan rev ed 1990); C. Vann Woodward, *The Future of the Past*, ch 4 (Oxford 1989). The effort to reorganize the military establishment in the 1990s can be followed in a series of reviews conducted on the Department of Defense, see Les Aspin, US Department of Defense, *Report on the Bottom-Up Review* (1993), portions available online at <<http://www.fas.org/man/docs/bur/index.html>> (visited Mar 4, 2003); Commn on Roles and Missions of the Armed Forces, *Directions for Defense: Report of the*

of technologies Americans themselves pioneered, defense of the American homeland has become central to national security. Protecting the American people inside the United States is the most significant and perplexing of the changes underway in national defense. What should be—must be—the role of the military in homeland defense?

## I. HISTORICAL EXPERIENCE

Until the middle of the 20th century, safeguarding the continental United States and American territories overseas was the primary mission of the American military. The very first American military forces, the colonial militias, came into existence precisely for the purpose of homeland defense, adapted from the citizen military forces of early modern England which themselves had been formed for defense against invasion in the absence of a standing army. In North America beginning in the second quarter of the 17th century, colonial governments required the service of the able-bodied white male population to muster periodically, keep arms, train, and embody not only for defense but for offensive expeditions against hostile Indian tribes. In the 18th century, during the wars between England and France for imperial domination, the threat metastasized into the combined invasion of French and sometimes Spanish forces from the sea as well as on land. The scale and scope of these conflicts forced the colonies to depend on British military forces, and on occasion to fully mobilize the human and material resources of their own populations. So focused on defense were these militia forces that they were almost always restricted by law to service within the colony. At the same time, volunteers or men drafted from the units were used for offensive expeditions to attack Indian tribes, or to seize the seaports, cities, or fortifications of other European powers in the new world.<sup>2</sup>

Through the 19th century, these local militias—either in the form of the enrolled units (the entire militia of a colony or state), a group of individual

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*Commission on Roles and Missions of the Armed Forces*, Executive Summary ES-1–ES-9 (1995), available online at <<http://www.fas.org/man/docs/corm95/di1062.html>> (visited Mar 4, 2003); William S. Cohen, US Department of Defense, *Report of the Quadrennial Defense Review* (1997), available online at <<http://www.defenselink.mil/pubs/qdr/index.html>> (visited Mar 4, 2003); Natl Def Panel, *Transforming Defense: National Security in the 21st Century* (1997), available online at <<http://www.dtic.mil/ndp/FullDoc2.pdf>> (visited Mar 17, 2003); US Commn on Natl Security/21st Century, *Road Map for National Security: Imperative for Change: The Phase III Report of the U.S. Commission on National Security/21st Century* (2001), available online at <<http://www.nssg.gov/PhaseIIIFR.pdf>> (visited Mar 8, 2003).

<sup>2</sup> For surveys of the militia and colonial wars, see John K. Mahon, *History of the Militia and the National Guard* 6–34 (Macmillan 1983); Douglas Edward Leach, *Arms for Empire: A Military History of the British Colonies in North America, 1607–1763* (Macmillan 1973). For examples of the extent of mobilization of the population during the colonial period, see Fred Anderson, *A People's Army: Massachusetts Soldiers and Society in the Seven Years' War* (North Carolina 1984); Harold E. Selesky, *War and Society in Colonial Connecticut* (Yale 1990).

volunteers, drafted individuals, or through the concept of a citizen's obligation to serve when required—formed the basis of American military power. After the Civil War, with the creation of state national guards (volunteer militia), the militias began their transformation into the war-fighting reserves of the regular armed forces.<sup>3</sup> Beginning in the 1970s, the reserves became even more closely aligned with the regulars in the "Total Force" policy;<sup>4</sup> some ground units were assigned to fill out regular Army divisions to make them ready for combat, and some support functions like civil affairs migrated almost entirely into the reserve components.<sup>5</sup> In the case of the Air Force, reserve forces grew increasingly integrated into virtually all the combat and support operations of the regulars over a generation's time.<sup>6</sup> In the 1990s, National Guard and reserve ground forces began to supplement regular Army forces in peacekeeping and peace enforcement duties overseas, an unprecedented use of reserves in constabulary duties in addition to their other duties.<sup>7</sup> The Guard and Reserve leadership grasped every mission available to prove the military importance of reserve forces and to acquire the most resources and most modern weapons possible.<sup>8</sup> The regulars, stretched thin after the Cold War by numerous foreign interventions and peacekeeping operations, welcomed the relief from the stresses that a high operational tempo had placed on their personnel and equipment.<sup>9</sup> Yet through the 20th century, the National Guard remained state forces, no matter how closely monitored, trained, organized, or shaped by the

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<sup>3</sup> See Mahon, *History of the Militia and the National Guard* at 110 (cited in note 2). For a general discussion, see also id at 108–24.

<sup>4</sup> See id at 253–256, 265; Richard B. Crossland and James T. Currie, *Twice the Citizen: A History of the United States Army Reserve, 1908–1983* 211–17 (Office of the Chief, Army Reserve 1984); Charles Joseph Gross, *Prelude to the Total Force: The Air National Guard, 1943–1969* 3, 166–72 (Office of Air Force History, USAF 1985); Gerald T. Cantwell, *Citizen Airmen: A History of the Air Force Reserve, 1946–1994* 249–57 (Air Force History and Museums Program 1997).

<sup>5</sup> Gary Hart, *The Minuteman: Restoring an Army of the People* 140–43 (Free Press 1998).

<sup>6</sup> See Mahon, *History of the Militia and the National Guard* at 254 (cited in note 2). For a general discussion, see also Gross, *Prelude to the Total Force* (cited in note 4); Cantwell, *Citizen Airmen* (cited in note 4).

<sup>7</sup> See David T. Fautua, *How the Guard and Reserve Will Fight in 2025*, *Parameters* 127, 129 (Spring 1999); David T. Fautua, *Army Citizen-Soldiers: Active, Guard, and Reserve Leaders Remain Silent About Overuse of Reserve Components*, *Armed Forces J Intl* 72 (Sept 2000); Joshua Kucera, *U.S. Bosnia Force Now Made Up Only of Guard, Reserve Units*, *Pittsburgh Post-Gazette* A10 (Dec 8, 2002); Faye Fiore, *A County That's in Fatigues: In Alabama, One Place Will Sacrifice Like No Other if War Comes; Police, Teachers, Even a Mayor, Are Set to Deploy, Leaving Critical Gaps*, *LA Times* A1 (Jan 21, 2003); Karen Scrivo, *Report Says National Guard Strained by New Demands*, *Natl J Cong Daily* (Feb 19, 2003).

<sup>8</sup> See Fautua, *Armed Forces J Intl* at 74 (cited in note 7).

<sup>9</sup> See id at 72; Kucera, *U.S. Bosnia Force Now Made Up Only of Guard, Reserve Units*, *Pittsburgh Post-Gazette* at A10 (cited in note 7).

federal government, or how completely focused they became on war-fighting in doctrine, organization, training, and weapons.<sup>10</sup>

Furthermore, going back to the beginning of American history, American military forces, both militia and regular, fulfilled internal domestic functions as well, particularly the maintenance of order when local and state law enforcement institutions proved inadequate. The framers of the Constitution agreed, as one put it after the Constitutional Convention, that “[n]o government can be stable, which hangs on human inclination alone, unbiased by the fear of coercion.”<sup>11</sup> While they disagreed about the extent to which government depended on military power to keep order and enforce its will, they were agreed that regular forces must remain in the background. “Force,” according to Alexander Hamilton, “may be understood [as] a *coertion of laws* or *coertion of arms*.”<sup>12</sup> For the normal functioning of society, law would compel obedience and keep order. If that were to fail, then the power of the community would act in the form of police or sheriffs forces, or in extremity, the militia. If that failed, then the regular forces would be called out as the last resort: “when resistance to the laws required it,” James Madison told the Virginia ratifying convention, in order to prevent “society from being destroyed.”<sup>13</sup> As far as the internal use of military power was concerned, the Constitution favored very specifically militia rather than regulars. Congress’ power read: “To provide for calling forth the Militia to execute the Laws of the Union” and “suppress Insurrections.”<sup>14</sup>

Militias have been used throughout American history to keep order and to enforce the laws. State forces suppressed rebellions in western Pennsylvania in 1794 and in Rhode Island in 1841; intervened in coal mine strikes in Pennsylvania and Colorado early in the 20th century, and in a famous textile strike in Lawrence, Massachusetts, in 1912; mobilized to stop a lynching in Mississippi in 1904, to quarantine Arizona against California cattle with hoof-and-mouth disease in the early 1920s, and to stop violence in the longshoreman’s strike in San Francisco in 1934. In the decade from 1886–1895 alone, a time of intense industrial strife, state governors called out the Guard over three hundred times.<sup>15</sup> In the South an additional militia role developed,

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<sup>10</sup> See Fautua, *Parameters* at 130–31 (cited in note 7). For a general discussion, see also Mahon, *History of the Militia and the National Guard* (cited in note 2); Gross, *Prelude to the Total Force* (cited in note 4); Cantwell, *Citizen Airmen* (cited in note 4).

<sup>11</sup> Quotation is from the original documents as noted in a more extended analysis in Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in Richard H. Kohn, ed, *The United States Military Under the Constitution of the United States, 1789–1989* 61, 67 (NYU 1991) (quoting Edmund Randolph).

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> US Const, art I, § 8, cl 15.

<sup>15</sup> For short overviews of the use of the militia domestically, see Robert W. Coakley, *Federal Use of Militia and the National Guard in Civil Disturbances: The Whiskey Rebellion to Little Rock*, in

adapted from sugar plantations in Barbados in the 17th century Caribbean: to police slavery through the prevention of insurrection, regulation of slave movement and gatherings, and the apprehension of runaway slaves by means of regular patrols in towns and the countryside—practices that lasted over a century and a half to the end of the Civil War, and that continued illegally against African-Americans by the Ku Klux Klan and other terrorist or vigilante groups during Reconstruction.<sup>16</sup>

The regular armed forces, created in the 1780s and 1790s after American Independence, fulfilled similar missions of homeland defense and internal order. For over a century, the Army garrisoned frontier and seacoast forts to occupy American territory, control strategic points of transportation and communication, and prevent or slow invasions of more populated areas.<sup>17</sup> Until its modernization at the end of the 19th century and the adoption of doctrines emphasizing command of the sea and the destruction of invading forces in fleet actions, the Navy focused on harassment of hostile forces, raiding enemy commercial shipping, and the defense of American coasts and harbors. Even the new fleet strategy was predicated on stopping enemy forces from invading the United States. As late as the eve of World War II, with hemispheric defense the basis of American war planning, even such offensive forces as the strategic bomber fleets being planned by the Army Air Corps were being justified to Congress and the American people as defenses that could attack enemy fleets heading for North America.<sup>18</sup> Only during and after the Cold War did American strategy call for defending the country and advancing American interests by positioning forces abroad and going on the offensive. Even then, a sizable slice of American military power—strategic nuclear forces, air defenses, portions of the National Guard and reserves—was configured deliberately to prevent attack on American soil or respond to it in some way.

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Robin Higham, ed, *Bayonets in the Streets: The Use of Troops in Civil Disturbances* 17 (Kansas 1969); Clarence C. Clendenen, *Super Police: The National Guard as a Law-Enforcement Agency in the Twentieth Century*, in Higham, *supra* at 85.

<sup>16</sup> Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* 12–13, 16–24, 30–32, 35–47, 206–220 (Harvard 2001).

<sup>17</sup> The deployment of the Army can be conveniently viewed in Francis Paul Prucha, *A Guide to the Military Posts of the United States 1789–1895* 6–7, 9, 11, 13, 15, 17, 22, 27, 29, 31, 33, 35 (State Historical Society of Wisconsin 1964). See also Emanuel Raymond Lewis, *Seacoast Fortifications of the United States: An Introductory History* (Smithsonian 1970); Robert B. Roberts, *Encyclopedia of Historic Forts: The Military, Pioneer, and Trading Posts of the United States* (Macmillan 1988).

<sup>18</sup> For interwar planning, see Louis Morton, *Germany First: The Basic Concept of Allied Strategy in World War II*, in Kent Roberts Greenfield, ed, *Command Decisions* 11 (Office of the Chief of Military History, Dept of the Army 1960); Edward S. Miller, *War Plan Orange: The U.S. Strategy to Defeat Japan, 1897–1945* (Naval Institute 1991); David E. Johnson, *Fast Tanks and Heavy Bombers: Innovation in the U.S. Army, 1917–1945*, ch 11 (Cornell 1998); Mark A. Stoler, *Allies and Adversaries: The Joint Chiefs of Staff, the Grand Alliance, and U.S. Strategy in World War II*, chs 1–2 (North Carolina 2000).

Moreover, the regular armed forces have always fulfilled internal, constabulary functions, even in the 20th century after they had recast themselves into war-fighting organizations designed to combat the military establishments of the great powers.<sup>19</sup> The Army explored the West, enforced Jefferson's embargo laws (or tried to), mapped and surveyed railroad routes, implemented government policy toward the Indians, enforced federal law over the Mormons, captured fugitive slaves, intervened to restore order during the era of industrial and labor strife into the 1920s, restored order during race riots, dispersed Bonus marchers in the nation's capital in 1932, ran Civilian Conservation Corps camps, guarded interned Japanese Americans during World War II, fought forest fires, dredged rivers and harbors, built dams and flood control systems, and fed and sheltered Americans displaced by fires, floods, and earthquakes. Disaster assistance became "so commonplace" that "by the 1960s," according to one historian, "few seasons passed without some involvement in flood, hurricane, tornado, blizzard, or other form of help for civilians in emergencies."<sup>20</sup> The Navy mapped and charted coastal areas and distant seas, chased pirates, suppressed the slave trade, negotiated foreign agreements, safeguarded Americans and their interests overseas, promoted and protected American commerce, and fostered scientific research. Marines guarded diplomats and the US mails,<sup>21</sup> suppressed riots, fought fires, and, like the other services, engaged in disaster relief. The Air Force has provided search and rescue, aerial photography, humanitarian airlift, medical evacuation, and disaster relief throughout its history.<sup>22</sup>

Many of these internal roles receded into the background after World War II because the armed forces (including the National Guard and reserves) became absorbed by foreign war-fighting, preparing to intervene abroad or to wage limited wars as part of the Cold War. Nation-building and exploration were no

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<sup>19</sup> For a recent overview of the military's historical role in providing a broad array of functions all in the name of homeland defense, see John S. Brown, *Defending the Homeland: An Historical Perspective*, Joint Forces Q 10 (Summer 2002).

<sup>20</sup> B. Franklin Cooling, *The Army and Flood and Disaster Relief*, in Robin Higham and Carol Brandt, eds, *The United States Army in Peacetime: Essays in Honor of the Bicentennial, 1775–1975* 61, 73 (Military Affairs/Aerospace Historian 1975).

<sup>21</sup> For a brief note on the Marines' defense against mail robberies, see Edwin Howard Simmons, *The United States Marines: A History* 112 (Naval Institute 3d ed 1998).

<sup>22</sup> For a historical look at some of the internal constabulary roles played by the various branches of the armed forces, consider Russell F. Weigley, *History of the United States Army* (Indiana enlarged ed 1984); Simmons, *The United States Marines* (cited in note 21); Kenneth J. Hagan, ed, *In Peace and War: Interpretations of American Naval History, 1775–1978* (Greenwood 1978); Kenneth J. Hagan and William R. Roberts, eds, *Against All Enemies: Interpretations of American Military History From Colonial Times to the Present* (Greenwood 1986); Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945* (Center of Military History, US Army 1997); Maurer Maurer, *Aviation in the U.S. Army, 1919–1939* 131–48, 299–317, 422–26, 443–44 (Office of Air Force History, USAF 1987).

longer necessary or desirable because they distracted the armed forces from the capacity to win high-tech, high-tempo military conflicts against foreign adversaries, particularly Soviet and Warsaw Pact forces. After World War II, industrial strife diminished, and except for some notable instances of racial conflict—either urban riots or southern resistance to school desegregation—violence and disorder on a scale that overpowered local and state law enforcement institutions declined in frequency.

Yet the armed forces never quite succeeded in evading some domestic functions. Since World War II, the National Guard has been activated innumerable times by state governors or by the President to quell riots, enforce racial integration, prevent looting in the wake of natural disasters, or for other purposes of internal order. Disaster assistance, fighting forest fires, keeping order, coping with anti-Vietnam War violence, and many other internal activities involved the American military episodically throughout the last half of the 20th century. Army units manned antiaircraft missile defenses around American cities in the 1950s and 1960s while squadrons of air defense fighters maintained readiness to intercept Soviet bombers. Regular Army units at Ft. Lewis, Washington, were even pressed into the hunt for “D.B. Cooper,” the legendary criminal who hijacked a jetliner over the Northwest, parachuted out of it, and disappeared with the \$200,000 ransom he extorted out of the FBI.<sup>23</sup> Ground forces were still called upon to cope with race riots and resistance to school desegregation in Arkansas, Mississippi, and Alabama, and to support other state and federal organizations in time of need. Beginning in the late 1980s, the Army and Air Force were pressed into service to assist in the “war” on drugs in interdicting shipments headed for American shores, and in some instances to assist in the effort to halt illegal immigration along the border with Mexico.<sup>24</sup> On the eve of 9/11, the reserve forces had just begun to consider reevaluating their roles and missions. The regular forces, although under great pressure by the new Bush administration to “transform,” had done little to alter their doctrine, weapons, or organization to meet the challenges of the 21st century security environment. Neither regulars nor reserves had even begun to seriously contemplate homeland defense, a term hardly known to the armed forces of the

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<sup>23</sup> E-mail from Andrew J. Bacevich, Director, Center for International Relations, Boston University, to author (Feb 27, 2003) (on file with author) (Bacevich was stationed at Ft. Lewis at the time and participated in the search); Sam Skolnik, *30 Years Ago, D.B. Cooper's Night Leap Began a Legend*, Seattle Post-Intelligencer A1 (Nov 22, 2001).

<sup>24</sup> See Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 Wash U L Q 953, 953–54, 972 (1997); Charles J. Dunlap, Jr., *The Thick Green Line: The Growing Involvement of Military Forces in Domestic Law Enforcement*, in Peter B. Kraska, ed, *Militarizing the American Criminal Justice System: The Changing Roles of the Armed Forces and the Police* 29, 31–32 (Northeastern 2001).



United States when the airplanes struck the Pentagon and felled two of the three tallest buildings in the country on September 11, 2001.<sup>25</sup>

## II. SINCE 9/11

The attacks of September 2001 quickly forced the military establishment to think anew and act on the internal role that had so declined in relative importance. Air National Guard and regular Air Force fighter planes scrambled to intercept the hijacked airliners heading for the Pentagon and over Pennsylvania. Even in the reduced level of threat before that tragic day, the North American Aerospace Defense Command (“NORAD”) operated air defense fighters regularly assigned and on alert to protect American air space, but with almost no concept of defense against terrorists using aircraft as weapons of destruction and no intention of flying regular interceptor patrols over American cities, which became routine for months after, and continues intermittently, albeit with reduced numbers of sorties, today. “Operation Noble Eagle isn’t an operation,” Secretary of the Air Force James Roche informed an audience during the increased homeland defense threat level of “Code Orange” in February 2003. “Ladies and gentlemen, it’s our future. It’s never going away.”<sup>26</sup>

From the beginning of the crisis on 9/11, the armed forces rushed to support the state and local agencies responding to the disaster—as armed forces have been doing for most of American history. According to the Bush administration’s *National Strategy for Homeland Security* document issued in July 2002, “New Jersey and New York guardsmen and Navy and Marine Corps reservists provided medical personnel to care for the injured, military police to assist local law enforcement officials, key asset protection, transportation, communications, logistics, and a myriad of other functions to support recovery efforts in New York City.”<sup>27</sup> In Washington, Maryland Guardsmen sent military police for security at the Pentagon. Nationwide, over 7,000 National Guard

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<sup>25</sup> For a sense of the debate over homeland defense before 9/11, see Aaron Weiss, *When Terror Strikes, Who Should Respond?*, Parameters 117 (Autumn 2001). The author was a member of a seminar in Maclean, Virginia, organized by Booz Allen Hamilton for the Department of Defense’s Reserve Forces Policy Board, *Seminar on the National Guard and Reserves in the 21st Century: Recommendations for the Total Force Policy – 2025* (Sept 5, 2001). The author was also a member of the National Security Study Group, a collection of national security scholars and practitioners that assisted the US Commission on National Security/21st Century (the “Hart-Rudman Commission”), which recommended in March 2001 the creation of a cabinet department for homeland defense. See US Commn on Natl Security/21st Century, *Road Map for National Security* at 10–29 (cited in note 1).

<sup>26</sup> *The Sound of Freedom: Everlasting*, Inside the Pentagon (Feb 20, 2003).

<sup>27</sup> Office of Homeland Security, *National Strategy for Homeland Security* 44 (July 2002), available online at <[http://www.whitehouse.gov/homeland/book/nat\\_strat\\_hls.pdf](http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf)> (visited Mar 7, 2003).

began patrolling 429 commercial airports and soon, Guardsmen began supplementing Customs Service and Immigration Service officers at US borders. At West Point, the need to protect the installation twenty-four hours a day, seven days a week, so overwhelmed the Military Academy's local security details that the faculty—even one general—took turns as gate guards until the National Guard could be put in place.<sup>28</sup> Between 9/11 and early February 2003, some 170,000 Guardsmen and reservists were activated at one time or another to supplement border security, protect airports, guard military bases and civilian installations such as power plants and bridges, protect the population at special sporting or civic events, and for other purposes of homeland defense.<sup>29</sup> For the first time, Army reservists were to guard US Air Force bases.<sup>30</sup> As the armed forces mobilized and deployed for a campaign against Iraq, the numbers exceeded 150,000 by mid-February 2003, and may reach as high as 250,000 people on active duty.<sup>31</sup> The Secretary of Defense ordered a change in the missions of the regulars and reserves: the active duty regular forces were to concentrate on overseas missions, including those that had in recent years been migrating to the reserves, and reserve forces were to focus on defense inside the United States. As the Pentagon's "transformation" chief, retired Navy Vice Admiral Arthur Cebrowski, put it, the "post-9/11 reality" is "that we need a new way to rebalance our overseas interests and our concern for homeland security."<sup>32</sup>

The Coast Guard, the nation's fifth armed service formed in 1915 from a merger of the Revenue Cutter and Life Saving Services, underwent a metamorphosis. From a law enforcement institution operating under the Transportation Department devoted to catching smugglers, enforcing fisheries

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<sup>28</sup> E-mail from Captain Kevin Clark, Instructor, United States Military Academy (West Point), to author (Mar 29, 2003) (on file with author).

<sup>29</sup> In its early 2003 budget document, the Administration listed "8,000 National Guard at baggage screening checkpoints at 420 major airports." George W. Bush, *Securing the Homeland, Strengthening the Nation* 4 (2002), available online at <[http://www.whitehouse.gov/homeland/homeland\\_security\\_book.pdf](http://www.whitehouse.gov/homeland/homeland_security_book.pdf)> (visited Mar 7, 2003). See also Lieutenant Colonel Daniel J. Shanahan, *The Army's Role in Homeland Security*, in Williamson Murray, ed, *Transformation Concepts for National Security in the 21st Century* 285, 295–98 (Strategic Studies Institute 2002).

<sup>30</sup> Bill Gertz and Rowan Scarborough, *Inside the Ring*, Wash Times A7 (Dec 13, 2002).

<sup>31</sup> To see the speed of the buildup in February 2003, compare *National Guard and Reservists Now on Duty Exceed 110,000*, Miami Herald 20A (Feb 6, 2003); Thomas E. Ricks and Vernon Loeb, *Unrivaled Military Feels Strains of Unending War: For U.S. Forces, a Technological Revolution and a Constant Call to Do More*, Wash Post A1 (Feb 16, 2003). See also Sydney J. Freedberg Jr., *Weekend Warriors No More*, 34 Nat'l J 1690 (June 8, 2002). Reserve components make up 47 percent of the entire military establishment; for the Army, reserve components actually outnumber the regulars, 550,000 to 480,000. Michael Kilian, *Reserves Turning Into Active Force: Iraq War Would Add to Civilian Burden*, Chi Trib § 1, at 1 (Nov 20, 2002).

<sup>32</sup> Vince Crawley, *Changing of the Guard: Revised Missions, Chain-of-Command Pattern Emerging*, Army Times 23 (Nov 25, 2002).

statutes, interdicting illegal drugs, and providing maritime safety services to Americans on coasts, lakes, and inland waterways, the Coast Guard almost overnight became an antiterrorist force charged with security for the nation's ports and sea frontiers. Now it is part of the new Department of Homeland Security. Its aged fleet of aircraft, ships, and boats will be replaced or upgraded as quickly as possible, a recapitalization of at least seventeen billion dollars over the next two decades, "the largest contract for new assets ever awarded in Coast Guard history."<sup>33</sup>

Since 9/11 the White House and Justice Department have used the military establishment to incarcerate and interrogate suspected terrorists and "enemy combatants" and keep them beyond the reach of the civilian judicial system, even if they are American citizens, in order to collect intelligence and prevent future attacks. The threat to try terrorists in military commissions under the authority of an Executive Order that severely restricted the individual rights of the detainees, seemed at the time it was issued (barely two months after 9/11) grounded as much in expediency as necessity.<sup>34</sup> Repudiated by a committee of the American Bar Association, the Executive Order was softened by rules

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<sup>33</sup> Jacquelyn Zettles, *Interview With the Commandant*, Coast Guard Mag 10 (Aug 2002). For a review of the new ships and aircraft, see id at 30–57; Renae Merle, *For the Coast Guard Fleet, a \$15 Billion Upgrade: Agency's Profile, and Its Duties, Have Grown Since Sept. 11*, Wash Post A3 (June 25, 2002). "We were always involved in homeland defense," said the commander of the 14th Coast Guard District in Hawaii, Rear Admiral Ralph Utley. "But on Sept. 10 it only took up 2 percent of our time. By Sept. 12, it was up to 58 percent." Gregg K. Kakesako, *9/11 Changed Coast Guard: The Terrorist Attacks Force a Shift in Priorities From Rescues to Maritime and Harbor Security*, Honolulu Star-Bulletin (Sept 8, 2002). Nationally, the change in the "port security mission" was from "1–2 percent of daily operations to between 50–60 percent today [February 2002]," Bush, *Securing the Homeland* at 18 (cited in note 29). See also *The Coast Guard & Homeland Security: A New America*, CD-ROM video, enclosed in a letter from Rear Admiral K.J. Eldridge, Assistant Commandant for Governmental and Public Affairs, US Coast Guard, to author (Feb 21, 2003) (on file with author). A short history of the Coast Guard can be found in John Whiteclay Chambers II, et al, eds, *The Oxford Companion to American Military History* 144–46 (Oxford 1999).

<sup>34</sup> See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed Reg 57833 (2001); *President Bush's Order on the Trial of Terrorists by Military Commission*, NY Times B8 (Nov 14, 2001). For early reaction, see William Safire, *Kangaroo Courts*, NY Times A17 (Nov 26, 2001); Susan Schmidt and Bradley Graham, *Military Trial Plans Nearly Done; Bush to Decide Which Detainees Will Be Tried by Tribunals*, Wash Post A10 (Nov 18, 2001); George Lardner, Jr., *Legal Scholars Criticize Wording of Bush Order: Accused Can Be Detained Indefinitely*, Wash Post A10 (Dec 3, 2001); Hearing on DOJ Oversight: Preserving Our Freedoms while Defending against Terrorism before the Senate Committee on the Judiciary, 107th Cong, 1st Sess (Nov 28, 2001) (statement of Scott L. Silliman, Executive Director, Center on Law, Ethics, and National Security, Duke University School of Law), available online at <[http://judiciary.senate.gov/testimony.cfm?id=126&wit\\_id=70](http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=70)> (visited Mar 7, 2003); Jeanne Cummings, *White House Counsel's Methods Outrage Military Legal Experts*, Wall St J A4 (Nov 26, 2002).

governing its implementation drawn up by the Pentagon.<sup>35</sup> At the same time, the government designated prisoners captured in Afghanistan and Pakistan as “unlawful enemy combatants” outside the provisions of the Geneva Convention on prisoners of war.<sup>36</sup> They have been incarcerated at the US Marine Corps base at Guantanamo, Cuba, precisely because that facility is beyond the reach of American courts. That detention has since been essentially sanctioned by two United States District Courts.<sup>37</sup> Two American citizens held in Navy prisons in Norfolk, Virginia, and Charleston, South Carolina, since April and June of 2002, have not been charged with crimes nor have they been allowed access to legal representation, an apparent violation of their constitutional rights. Efforts to allow them access to legal counsel have been opposed by the government and rebuffed by the judiciary, without any declaration or admission of the suspension of the right of *habeas corpus* by either Congress or the Executive Branch. This legal limbo was expressly sought by the government for the purposes of domestic security and intelligence collection but condemned by the American Bar Association.<sup>38</sup>

Perhaps the greatest change in the armed forces after 9/11 occurred not in operations or deployments or use of military legal institutions but in organizational changes inside the Department of Defense. Because intelligence is so critical to preventing terrorism, the Department has a new Undersecretary for Intelligence, a role to be filled by Stephen Cambone, Secretary Rumsfeld’s most trusted lieutenant for “transformation.” A new Assistant Secretary for

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<sup>35</sup> John Mintz, *U.S. Adds Legal Rights in Tribunals; New Rules Also Allow Leeway on Evidence*, Wash Post A1 (Mar 21, 2002); Jess Bravin, *U.S. Prepares Tribunal System to Prosecute Alleged Terrorists*, Wall St J A8 (Dec 10, 2002); Jess Bravin, *Crimes Qualifying for Military Tribunals Are Set*, Wall St J A2 (Feb 28, 2003).

<sup>36</sup> See Geneva Convention Relative to the Protection of Prisoners of War, 6 UST 3316 (1956).

<sup>37</sup> See American Bar Association, Task Force on Treatment of Enemy Combatants, Criminal Justice Section, Section of Individual Rights and Responsibilities, *Report to the House of Delegates* 3 n 8 (Feb 2003), available online at <<http://www.abanet.org/leadership/recommendations03/109.pdf>> (visited Mar 20, 2003); Paisley Dodds, *U.S. Defends Guantanamo Detentions*, AP Online (Jan 17, 2003); Armstrong Starkey, *The Prisoners*, 4 *Historically Speaking* 32–33 (Nov 2002).

<sup>38</sup> See American Bar Association, *Report to the House of Delegates* at 1 (cited in note 37) (Resolutions approved by the Association’s House of Delegates call for “meaningful judicial review of their status” such as to accommodate the needs of the detainee and the requirement of national security, for legal representation “in connection with the opportunity for such review,” and for “Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens and other[s] ... detained ... as ‘enemy combatants.’”). For the most recent court ruling, see Neil A. Lewis, *The Courts: Detention Upheld in Combatant Case*, NY Times A1 (Jan 9, 2003); *Hamdi v Rumsfeld*, 316 F3d 450 (4th Cir 2003); Anthony Lewis, *Marbury v. Madison v. Ashcroft*, NY Times A17 (Feb 24, 2003). Contrast with a defense of the government position in Ruth Wedgwood, *Rule of Law: Lawyers at War*, Wall St J A22 (Feb 18, 2003). See also Deborah R. Finn, Ruth Wedgwood, and Stewart Baker, Muhammed Saleem, and Suzanne Evans, Letters to the Editor, *Balancing Liberty and Security*, NY Times A30 (Feb 27, 2003).

Homeland Defense has also come into existence to coordinate planning and activities inside the Office of the Secretary. Most importantly, in response to a recommendation by the Joint Chiefs of Staff, the Secretary of Defense revised the Unified Command Plan, the document governing the organization and responsibilities of the nation's military forces worldwide, to create a command in North America to protect the United States. Northern Command will "consolidate ... existing missions that were previously executed by other military organizations. The command's mission is homeland defense and civil support, specifically ... to deter, prevent, and defeat threats and aggression aimed at the United States, its territories, and interests ... including consequence management operations" with whatever forces are "assigned ... by the President."<sup>39</sup> Northern Command's head (dual-hatted as NORAD commander), Air Force General Ralph Eberhart, not only plans and prepares operations to help civilian "first responders" after an attack, but also engages in military operations on and over "the continental United States, Alaska, Canada, Mexico, and the surrounding water out to approximately 500 nautical miles" including "the Gulf of Mexico, Puerto Rico and the U.S. Virgin Islands."<sup>40</sup>

What seemed to be major but essentially bureaucratic alterations represented in reality a transformation of American national security thinking: a greater concern about domestic safety than foreign attack, about internal threats than external war, about the murder of American citizens in large numbers and the harming of American institutions, installations, landmarks, and physical and

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<sup>39</sup> US Northern Command, *Who We Are—Mission*, available online at <<http://www.northcom.mil/index.cfm?fuseaction=s.whoweare&section=3>> (visited Apr 6, 2003). For the new intelligence position, see Thomas Duffy, *New DOD Intel Directorate Will Have Broad Policy, Program Influence*, Inside the Pentagon (Mar 27, 2003). For Northern Command and its background, see Bruce M. Lawlor, *Military Support of Civil Authorities—A New Focus for a New Millennium*, J Homeland Security (Oct 2000, updated Sept 2001), available online at <<http://www.homelandsecurity.org/journal/articles/Lawlor.htm>> (visited Feb 28, 2003) (Lawlor, an army major general with a law degree, was the first commanding general of "Joint Task Force—Civil Support," a headquarters begun in October 1999 to command "Department of Defense consequence-management forces in support of a civilian lead federal agency following a weapon of mass destruction incident in the United States, its territories, or its possessions." Currently he is Chief of Staff to Tom Ridge, the head of the Department of Homeland Security); Bradley Graham, *Military Favors a Homeland Command; Forces May Shift to Patrolling U.S.*, Wash Post A1 (Nov 21, 2001); Thomas E. Ricks, *Northern Command to Defend the U.S.: Pentagon Reveals Shift in Structure*, Wash Post A8 (Apr 18, 2002); News Call, *Pentagon Realigns Military Structure: U.S. Northern Command Will Be Activated in October*, Army Mag (June 2002), available online at <[http://www.ansa.org/www/armymag.nsf/\(news\)/20026?OpenDocument](http://www.ansa.org/www/armymag.nsf/(news)/20026?OpenDocument)> (visited Mar 20, 2003); Elaine M. Grossman, *Defense Officials Close to Naming New Homeland Security Command*, Inside the Pentagon (Dec 6, 2002); Elaine M. Grossman, *Rumsfeld Envisions New Command Responsible for Homeland Security*, Inside the Pentagon (Jan 17, 2002); *DOD to Establish Permanent Homeland Security Organization; Cambone Leads Transition Team*, InsideDefense.com (Mar 12, 2002).

<sup>40</sup> US Northern Command, *Who We Are—Homefront*, available online at <<http://www.northcom.mil/index.cfm?fuseaction=s.whoweare&section=4>> (visited Apr 6, 2003).

electronic infrastructure at home rather than war with foreign nations. “Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government,” the President declared in issuing his first *National Security Strategy*, a year after 9/11. “Today, that task has changed dramatically. Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores ... turn[ing] the power of modern technologies against us. ... The gravest danger our Nation faces lies at the crossroads of radicalism and technology.”<sup>41</sup>

### III. THE FUTURE

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

On the surface, there seems little ground for worry. The creation of a civilian cabinet department of homeland security charged with overall responsibility for preventing and dealing with the consequences of further attacks suggests that the military would not assume inappropriate authority over the population even in catastrophic circumstances. Expressing sensitivity about using the military at home, *The National Homeland Security Strategy* issued in the summer of 2002 listed only limited roles for the armed forces internally:

1. conventional military activities in those “extraordinary” situations “such as combat air patrols or maritime defense operations” where the military “would take the lead in defending people” and American “territory” with support “by other agencies”;
2. “responding” to “emergencies such as ... an attack or ... forest fires, floods, tornadoes, or other catastrophes,” for which the Defense Department would react “quickly to provide capabilities that other agencies do not have”; and
3. “limited scope” situations “where other agencies have the lead—for example, security at a special event like the recent Olympics.”<sup>42</sup>

The Defense Department has shunned a wider role for the military in law enforcement. “[F]rankly I don’t think the American people want to see the military performing a domestic law enforcement function,” Deputy Secretary of

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<sup>41</sup> Preface to *The National Security Strategy of the United States of America* (Sept 2002), available online at <<http://www.whitehouse.gov/nsc/nss.pdf>> (visited Mar 4, 2003).

<sup>42</sup> *National Strategy for Homeland Security* at 25 (cited in note 27).

Defense Paul Wolfowitz has stated. While there would be much “close handing off of information both ways” between the Defense Department and intelligence agencies and the FBI, “when it comes to doing a wiretap on a domestic suspect, I don’t think people want the Defense Department doing that.”<sup>43</sup> Likewise General Eberhart voiced genuine sensitivity to civil liberties: “We also understand Civics 101,” he told a reporter. “I really don’t think ... the military will be doing things that should be done by other agencies ... .”<sup>44</sup> The Northern Command’s website contains explicit pages on “Limitations” and “Operating with the Law.”<sup>45</sup>

Yet the behavior of the Bush administration in the fight against terrorism is anything but reassuring. The conservative columnist George Will, listing some of the radical changes inherent in many administration foreign and domestic policies and proposals, observed that “America has a president unusually comfortable contemplating, and pushing, change.”<sup>46</sup> Attorney General John Ashcroft, in a single statement at a National Security Council meeting the day after 9/11, altered the primary mission of the Justice Department and the FBI from law enforcement to antiterrorism—without comment from the President.<sup>47</sup> “The president had made clear to Ashcroft in an earlier conversation that he wanted to make sure an attack like the ones on the Pentagon and World Trade Center never happened again,” reported the *Washington Post*’s Bob Woodward. “It was essential to think unconventionally. Now, Ashcroft was saying, the focus of the FBI and the Justice Department should change from prosecution to prevention, a radical shift in priorities.”<sup>48</sup>

The administration apparently presumed that protecting an open society against a ruthless, formless, suicidal enemy bent on killing large numbers of Americans required new thinking and unprecedented measures—and perhaps heretofore unacceptable new methods. Ashcroft, acting and often speaking for the administration, has demonstrated a limited sensitivity to civil liberties and, despite rhetoric to the contrary, scant regard for traditional legal safeguards. Outgoing House Majority Leader Dick Armey, Republican of Texas, “said he

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<sup>43</sup> Timothy Dodson, *Face to Face: A Conversation With Paul Wolfowitz: ‘I Don’t Think the One Problem Can Wait on the Other’*, Sun-Sentinel (Fort Lauderdale) 5F (Nov 24, 2002).

<sup>44</sup> Philip Shenon and Eric Schmitt, *The Military: Meeting Daily, U.S. Nerve Center Prepares for Terrorists*, NY Times A14 (Dec 27, 2002). See also Eric Schmitt and Philip Shenon, *Domestic Defense: General Sees Scant Evidence of Close Threat in U.S.*, NY Times A26 (Dec 13, 2002).

<sup>45</sup> See US Northern Command, *Who We Are—Limitations*, available online at <<http://www.northcom.mil/index.cfm?fuseaction=s.whoweare&section=9>> (visited Apr 6, 2003); US Northern Command, *Who We Are—Operating With the Law*, available online at <<http://www.northcom.mil/index.cfm?fuseaction=s.whoweare&section=10>> (visited Apr 6, 2003).

<sup>46</sup> George Will, *Boldly Redeploying the Troops*, News & Observer (Raleigh) A17 (Feb 13, 2003).

<sup>47</sup> Bob Woodward, *Bush at War* 42 (Simon & Schuster 2002).

<sup>48</sup> Id.

thought Mr. Ashcroft and the Justice Department were ‘out of control.’”<sup>49</sup> A scholar of the history of the Attorney General’s office put it this way: “The terrorist attacks have energized Ashcroft in a remarkable way, resonating with his sincere belief that there is evil in the world.”<sup>50</sup>

Furthermore, the administration is the most secretive seen in Washington in decades: “a sea change in government openness,” according to a reporter who consulted “dozens of experts.”<sup>51</sup> A November 5, 2001, Executive Order restricted the release of presidential documents from previous administrations, angering not only historians and journalists but many in Congress, including some in the President’s own party.<sup>52</sup> A November 13, 2001, Executive Order authorized military commissions for the purpose of trying enemy combatants in secret.<sup>53</sup> The administration has closed immigration court proceedings to the public and chosen to keep secret the names of thousands of immigrants swept up after 9/11 and the names of the prisoners designated “unlawful enemy combatants” incarcerated at Guantanamo and in Bagram, Afghanistan. The

<sup>49</sup> Eric Lichtblau and Adam Liptak, *On Terror, Spying and Guns, Ashcroft Expands Reach*, NY Times A1 (Mar 15, 2003).

<sup>50</sup> Adam Liptak, *Under Ashcroft, Judicial Power Flows Back to Washington*, NY Times § 4, at 5 (Feb 16, 2003) (quoting Nancy Baker, associate professor of government at New Mexico State University). See also Anthony Lewis, *Taking Our Liberties*, NY Times A15 (Mar 9, 2002); James A. Barnes, et al, *Grading the Cabinet*, Natl J 232, 234 (Jan 25, 2003) (“What Attorney General John D. Ashcroft describes as the Justice Department’s ‘wartime reorganization and mobilization’ has dramatically shifted its focus from fighting crime in the streets to preventing another 9/11. ... Ashcroft’s aggressive tactics fit the desire within the White House to rewrite the rule book if that’s what it takes to fight the domestic war on terrorism.”). For an indication of Ashcroft’s response to the criticism, see Kevin Johnson, *Ashcroft Defends Anti-Terror Tactics; Prosecutors Told to Be “Unrelenting,”* USA Today A12 (Oct 2, 2002). For an overall assessment of Ashcroft’s leadership, see Lichtblau and Liptak, *On Terror, Spying and Guns, Ashcroft Expands Reach*, NY Times at A1 (cited in note 49).

<sup>51</sup> Adam Clymer, *Government Openness at Issue as Bush Holds Onto Records*, NY Times A1 (Jan 3, 2003). See also Lewis, *Taking Our Liberties*, NY Times at A15 (cited in note 50). In 2001, the number of document “classification actions ... increased by 44 percent,” Information Security Oversight Office, *2001 Report to the President 2* (Sept 2002), available online at <<http://www.fas.org/sgp/isoo/2001rpt.pdf>> (visited Feb 28, 2002).

<sup>52</sup> Executive Order 13233: Further Implementation of the Presidential Records Act, 66 Fed Reg 56025 (2001), reprinted in *Source Material: Executive Order 13233*, 32 Presidential Stud Q 185 (2002) (including the responses of the American Political Science Association and the American Historical Association); Martha Joynt Kumar, *Executive Order 13233: Further Implementation of the Presidential Records Act*, 32 Presidential Stud Q 194–209 (2002). See also Clymer, *Government Openness*, NY Times at A1 (cited in note 51); Stanley I. Kutler, *Presidency: An Executive Order Richard Nixon Would Love*, Washington Spectator, reprinted in History News Network (Jan 3, 2002), available online at <<http://www.historynewsnetwork.org/articles/article.html?id=494>> (visited Mar 7, 2003); David E. Rosenbaum, *Top Secret: When Government Doesn’t Tell*, NY Times § 4, at 1 (Feb 3, 2002); Bruce Craig, *Bush Issues New Secrecy Executive Order*, 9 NCH Washington Update 13 (Mar 27, 2003).

<sup>53</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed Reg 57833 (cited in note 34).



Attorney General established an interagency task force to reconsider punishments for leaking classified information, the first such review in two decades.<sup>54</sup> The administration has kept all sorts of information away from Congress, including activating a “shadow” government of civil servants at “secret underground sites outside Washington to ensure that the federal government could survive a devastating terrorist attack on the nation’s capital.”<sup>55</sup> At one point, after leaks on Capitol Hill, the President threatened to share classified information only with the heads of the committees involved in national security—to the dismay and sometimes outrage of lawmakers, including Republicans.<sup>56</sup>

Surveillance of American citizens and immigrants has expanded enormously, but not as much as the administration wished. Two weeks after the terrorist attacks in New York and Washington, the Attorney General suggested in a White House meeting that Americans spy on each other: “We want to convey the message that you’re likely to be detected if you’re doing something wrong.”<sup>57</sup> This Terrorism Information and Prevention System (“TIPS”), described by the Administration as “a nationwide program to help thousands of American truck drivers, letter carriers, train conductors, ship captains, and utility workers report potential terrorist activity,”<sup>58</sup> appeared so intrusive that Congress actually prohibited it.<sup>59</sup> A program of surveillance targeted at “hundreds of mostly young, mostly Muslim men” was instituted to find al Qaeda sleeper agents planted inside the United States.<sup>60</sup> The government won broad authority to use the permission of the Foreign Intelligence Surveillance Court to institute wiretaps and other undercover investigations against suspects, and to use the information gathered thereby in criminal proceedings, thus erasing a barrier

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<sup>54</sup> Jerry Seper, *Ashcroft Creates Interagency Force on Security Leaks; Some Urge Making It a Felony*, Wash Times A3 (Dec 16, 2001). See also Jack Nelson, *U.S. Government Secrecy and the Current Crackdown on Leaks*, Joan Shorestein Center on the Press, Politics and Public Policy, Working Paper No 2003-1 (Harvard 2002), available online at <<http://www.ksg.harvard.edu/presspol/publications/Nelson.pdf>> (visited Mar 7, 2003).

<sup>55</sup> Amy Goldstein and Juliet Eilperin, *Congress Not Advised of Shadow Government; Bush Calls Security “Serious Business”*, Wash Post A1 (Mar 2, 2002).

<sup>56</sup> Laurence McQuillan, *For Bush, Secrecy Is a Matter of Loyalty*, USA Today A1 (Mar 14, 2002). See also Steve Chapman, *Excessive Secrecy in the War on Terror: How Can We Judge Whether President Bush and John Ashcroft Have Acted Responsibly When They Refuse to Put All of the Cards on the Table?*, Chi Trib § 2, at 9 (Aug 18, 2002); James G. Lakely, *GOP Veterans Rap Secrecy on Defense Issues; Senators “Furious” With Rumsfeld*, Wash Times A1 (Jan 14, 2003); Robert D. Novak, *Disaffected Troops*, Wash Post A21 (Jan 13, 2003).

<sup>57</sup> Woodward, *Bush at War* at 169 (cited in note 47).

<sup>58</sup> *National Strategy for Homeland Security* at 12 (cited in note 27).

<sup>59</sup> Gail Russell Chaddock, *Security Act to Pervade Daily Lives*, Christian Sci Monitor 1 (Nov 21, 2002).

<sup>60</sup> Philip Shenon and David Johnston, *The Investigation: Seeking Terrorist Plots, the F.B.I. Is Tracking Hundreds of Muslims*, NY Times § 1, at 1 (Oct 6, 2002).

protecting the Fourth Amendment guarantee against “unreasonable searches” and warrants without “probable cause.”<sup>61</sup> According to one recent analysis, “[f]rom New York City to Seattle, police officials are looking to do away with rules that block them from spying on people and groups without evidence that a crime has been committed,” and “[a]t the same time, federal and local police agencies are looking for systematic, high-tech ways to root out terrorists before they strike.”<sup>62</sup> One Defense Department program provoked national attention and much anxiety: the Total Information Awareness (“TIA”) research effort at the Defense Advanced Research Projects Agency. TIA would sift thousands of disparate databases in order to detect suspicious activity in an effort to anticipate terrorist behavior. The system would “mine” computer records generated by Americans’ private behavior—credit card charges, phone usage, travel behavior, medical data, e-mail messages, and other evidence of personal behaviors—with such vast implications for privacy and opportunity for government abuse (acknowledged by a panel of computer scientists and policy experts who reviewed the system for the Pentagon) that Congress prohibited further development without regular reporting to, and oversight from, Capitol Hill.<sup>63</sup> Similarly the government, according to one report, plans to require “Internet service providers to help build a centralized system to enable broad monitoring of the Internet and, potentially, surveillance of its users.”<sup>64</sup>

Immediately after 9/11, the administration proposed legislation to expand authority to monitor voice and e-mail messages, broaden the definition of terrorism, punish people who even unknowingly support or harbor terrorists, intensify attacks on money laundering that could support terrorism, break down the barriers between intelligence gathering and criminal investigations, allow the government authority to detain immigrant suspects indefinitely or expel them without court review, and permit other heretofore prohibited or unprecedented police powers. The administration hurried its proposals through the House and Senate a month after 9/11, and when both chambers balked at the extremity of

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<sup>61</sup> Dan Eggen, *Broad U.S. Wiretap Powers Upheld; Secret Court Lifts Bar on Terror Suspect Surveillance*, Wash Post A1 (Nov 19, 2002); Linda Greenhouse, *Opponents Lose Challenge to Government's Broader Use of Wiretaps to Fight Terrorism*, NY Times A12 (Mar 25, 2003); US Const, amend IV.

<sup>62</sup> Michael Moss and Ford Fessenden, *New Tools for Domestic Spying, and Qualms*, NY Times A1 (Dec 10, 2002).

<sup>63</sup> See John Markoff, *Intelligence: Pentagon Plans a Computer System That Would Peek at Personal Data of Americans*, NY Times A12 (Nov 9, 2002); J. Michael Waller, *The Nation: Homeland Security: Fears Mount Over "Total" Spy System*, Insight (Dec 24, 2002), available online at <<http://www.insightmag.com/news/338890.html>> (visited Mar 8, 2003); Dan Eggen and Robert O'Harrow, Jr., *Surveillance Plan Worries GOP Senator*, Wash Post A13 (Jan 22, 2003); William Safire, *Privacy Invasion Curtailed*, NY Times A41 (Feb 13, 2003); Audrey Hudson, *"Supersnoop" Scheme Blocked Pending Review by Congress; Privacy Issues Cited in Pentagon TIA Project*, Wash Times A1 (Feb 13, 2003).

<sup>64</sup> John Markoff and John Schwartz, *Electronic Surveillance: Bush Administration to Propose System for Wide Monitoring of Internet*, NY Times A22 (Dec 20, 2002).

some of the provisions, the administration attacked the Democrats and intensified the pressure. In spite of these tactics, Congress insisted on limitations on the new government authority and sunset provisions for the more intrusive or authoritarian powers.<sup>65</sup> Yet in early 2003, the administration apparently intended to return to the Congress requesting further expansion of police powers, provisions for secret arrests and detentions, exceptions from judicial oversight, and other changes that invade civil liberties, in order to prosecute the war on terrorism more aggressively.<sup>66</sup>

If, then, the Bush Administration tilts decidedly in favor of security over liberty in order to prosecute what top officials see as an extremely difficult, ambiguous war against a suicidal enemy with no “center of gravity,” an enemy clearly capable of using the American legal system and the openness of American society to its advantage, it is likely that the military will be used internally, perhaps in ways that threaten civil liberties or diminish the war-fighting effectiveness of the regular armed forces. And it is likely that the American people will support such expedients.<sup>67</sup>

The dangers are threefold.

First, the federal government might turn to the regular armed forces because they are handy, convenient, and superficially at least, effective—and

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<sup>65</sup> For detailed summaries of the USA PATRIOT Act of 2001, see Elizabeth A. Palmer and Keith Perine, *Provisions of the Anti-Terrorism Bill*, CQ Wkly 329 (Feb 2, 2002); *Bill Summary and Status for the 107th Congress*, HR 3162, 107th Cong, 1st Sess, available online at <<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@L&summ2=m&>> (visited Apr 6, 2003). See also Neil A. Lewis and Robert Pear, *Negotiators Back Scaled-Down Bill to Battle Terror; Speaker Seeks a House Vote Soon—Wiretap Powers to Grow*, NY Times A1 (Oct 2, 2001); Neil A. Lewis and Robin Toner, *Democrats in Senate Are Pressured on Terror Bill*, NY Times B8 (Oct 3, 2001); Neil A. Lewis and Robert Pear, *Legislation: Terror Laws Near Votes in House and Senate*, NY Times B8 (Oct 5, 2001); Robin Toner and Neil A. Lewis, *Congress: House Passes Terrorism Bill Much Like Senate's, but With 5-Year Limit*, NY Times B6 (Oct 13, 2001); Adam Clymer, *Antiterrorism Bill Passes; U.S. Gets Expanded Powers; Bush Set to Sign; Measure Provides Tools White House Sought, With Some Limits*, NY Times A1 (Oct 26, 2001); Timothy Lynch, *Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism*, 443 Policy Analysis (Cato Institute 2002).

<sup>66</sup> See Charles Lane, *U.S. May Seek Wider Anti-Terror Powers*, Wash Post A1 (Feb 8, 2003); Adam Clymer, *Domestic Security: Justice Dept. Draft on Wider Powers Draws Quick Criticism*, NY Times A10 (Feb 8, 2003); Gene R. Nichol, *Ashcroft Wants Even More*, News & Observer (Raleigh) 15A (Feb 20, 2003). The administration also intends to try to make the USA PATRIOT Act's changes permanent. See Eric Lichtblau, *Republicans Want Terrorism Law Made Permanent*, NY Times B1 (Apr 9, 2003).

<sup>67</sup> For the willingness of the American public, even people traditionally sensitive to civil liberties, “to give up some of their personal freedoms in order to make the country safe from terrorist attacks,” see Laurie Goodstein, *Civil Liberties: Jewish Groups Endorse Tough Security Laws*, NY Times A14 (Jan 3, 2002). Michael Ratner provides a catalog of the Bush administration's invasions of, and threats to, civil rights and liberties in *Moving Toward a Police State or Have We Arrived?: Secret Military Tribunals, Mass Arrests and Disappearances, Wiretapping & Torture* (2002), available online at <<http://www.humanrightsnow.org/policestate.htm>> (visited Mar 20, 2003).

because the civilian agencies involved in homeland defense at various levels of government are not being funded adequately. The concern is not the ordinary conduct of the war at home. The use of a military surveillance system to help local law enforcement catch the Washington area sniper in the fall of 2002 drew little criticism. Nor did calling up the National Guard to patrol airports or protect military installations, or supplement the Border Patrol. In fact, re-orienting and re-ordering the National Guard to focus primarily on homeland security would be returning it to its traditional role; the hundreds of thousands of soldiers in the Guard, embedded in 3,100 communities, are the appropriate pool of military people to prepare for domestic attack.<sup>68</sup> They already possess the links with local responders—in some cases they *are* the local responders in civilian life (a duplication that would have to be prohibited): the fire, police, emergency medical, public health, and other people who provide security and would react to minimize the damage and begin reconstruction after a terrorist attack. Other internal military missions such as missile defense and cyber defense could be assigned to the Guard or reserves. The danger in developing capabilities in the regular forces for homeland use is that those capabilities would be most effective in civilian agencies, in the National Guard, or down at the state and local levels which will respond first to a terrorist attack. One example is the Marine Corps' Chemical and Biological Incident Response Force, developed in the mid-1990s in part to help civilian society.<sup>69</sup> One of a number of such organizations in the armed services and scattered across the federal government, the Force would likely be useless unless it arrived at the scene within an hour.<sup>70</sup> Experts know that responding to a chemical or biological attack will first occur at the local level, that speed will be critical, and that state and local emergency services, police, fire, public health, and government people need the training, equipment, practice, and staffing if lives are to be saved and

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<sup>68</sup> Bill Miller, *National Guard Awaits Niche in Homeland Security Plan; White House's Caution Chafes Against Those Urging Action*, Wash Post A12 (Aug 11, 2002). A call for the redirection of the National Guard was in the original Phase III Hart-Rudman Commission report, *Road Map for National Security* at 25–26 (cited in note 1), and is also in Gary Hart, Warren B. Rudman, and Stephen E. Flynn, *America Still Unprepared—America Still in Danger: Report of an Independent Task Force Sponsored by the Council on Foreign Relations* 34–36 (Council on Foreign Relations 2002), available online at <[http://www.cfr.org/pdf/Homeland\\_Security\\_TF.pdf](http://www.cfr.org/pdf/Homeland_Security_TF.pdf)> (visited Apr 6, 2003).

<sup>69</sup> See Kwame Holman, *The NewsHour With Jim Lehrer: Focus: Guarding the Homeland*, PBS television broadcast (Sept 27, 2002); *Chemical/Biological Incident Response Force (CBIRF)*, GlobalSecurity.Org, available online at <<http://www.globalsecurity.org/military/agency/usmc/cbirf.htm>> (visited Nov 24, 2002).

<sup>70</sup> See Amy E. Smithson and Leslie-Anne Levy, *Ataxia: The Chemical and Biological Terrorism Threat and the US Response* xiv, Stimson Center Report No 35 (2000), available online at <<http://www.stimson.org/?SN=CB20020111235>> (visited Apr 6, 2003); Holman, *The NewsHour With Jim Lehrer: Focus: Guarding the Homeland* (cited in note 69).

panic avoided.<sup>71</sup> Another example: should the Army really be training federal executives to deal with the issues facing them in terrorist attacks just because the federal executives are ineligible for the Justice Department program offered to state and local officials?<sup>72</sup> The dangers of using or relying on the military are many: the duplication and waste of resources, the ineffectiveness of the effort, and the diversion of money, people, and focus from traditional responsibilities which can diminish the war-fighting effectiveness of a military establishment already strained by a broad range of missions and commitments.<sup>73</sup>

A second danger is that the military establishment will be pressed into service temporarily on a substantial scale for disaster response should the United States be struck with one or more weapons of mass destruction, or some massive disruption of our cyber networks that causes multiple or sequential natural or human disasters—and that the “temporary” would last for a very long time. The United States remains, eighteen months after 9/11, enormously vulnerable to attacks on its trade, ports, transportation and cyber systems, power plants, chemical industry (some 850,000 “facilities that work with hazardous or extremely hazardous substances”), landmarks, and other sites.<sup>74</sup> In the year before the attacks, “489 million people, 127 million cars and 211,000 boats

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<sup>71</sup> Smithson and Levy, *Ataxia* at 113 (cited in note 70). For additional information on training and equipment programs, an assessment of frontline readiness, and for recommendations on how to prepare for chemical and biological terrorist threats, see id at 288–303 & chs 5–6.

<sup>72</sup> Jason Peckenpaugh, *Course Offers Anti-Terrorism Training for Federal Executives*, GovExec.com (Feb 19, 2003), available online at <<http://www.govexec.com/dailyfed/0203/021903p1.htm>> (visited Mar 7, 2003).

<sup>73</sup> For an example of how stretched one service is to deal with multiple commitments and a campaign in Iraq, see Elaine M. Grossman, *Air Chief Reaches Deeper to Find Forces for Multiple Warfronts*, Inside the Pentagon (Feb 20, 2003). See also Press Release, United States Department of Defense, *National Guard and Reserve Mobilized as of November 27, 2002* (Nov 27, 2002), available online at <[http://www.defenselink.mil/news/Nov2002/b11272002\\_bt603-02.html](http://www.defenselink.mil/news/Nov2002/b11272002_bt603-02.html)> (visited Apr 6, 2002). During the Afghan campaign, some 83,000 of the 1.25 million Guard/Reserves were on active duty. See Kilian, *Reserves Turning Into Active Force: Iraq War Would Add to Civilian Burden*, Chi Trib § 1, at 1 (cited in note 31). See also *Making Headlines This Week: Debate Swells Over Sending Unarmed Troops to Guard U.S. Borders*, Inside the Air Force (Mar 8, 2002); Hearing on Combating Terrorism: Protecting the United States—Part II before the Subcommittee on National Security, Veterans Affairs, and International Relations of the House Committee on Government Reform, Rep No 107-156, 107th Cong, 2d Sess 118 (2002) (statement of Peter Verga, Special Assistant for Homeland Security).

<sup>74</sup> The figure for chemical industry sites comes from Smithson and Levy, *Ataxia* at xiv (cited in note 70). For general analysis of national vulnerabilities, see id throughout; Hart, Rudman, and Flynn, *America Still Unprepared* (cited in note 68); Gilmore Commn, *Fourth Annual Report to the President and the Congress of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction: IV. Implementing the National Strategy* (2002), available online at <<http://www.rand.org/nsrd/terrpanel/terror4.pdf>> (visited Mar 3, 2003). See also James Dao, *Gaps in Security: Report Finds U.S. Unprepared for Next Terrorist Attack*, NY Times A15 (Oct 25, 2002); Philip Shenon, *Domestic Security: Ridge Discovers Size of Home Security Task*, NY Times A1 (Mar 3, 2002); Richard Pérez-Peña, *A Security Blanket, but With No Guarantees*, NY Times A1 (Mar 23, 2003).

passed through our border inspection systems,” wrote a Coast Guard commander who studied the problem and reported to the US Commission on National Security/21st Century.<sup>75</sup> Little or no additional federal support has reached the two million local firefighter, emergency service, and law enforcement first responders who would have to deal with a chemical or biological attack in their communities.<sup>76</sup> Nor has the public health system—federal, state, and local—been adequately improved, expanded, or reformed to deal with mass casualties.<sup>77</sup> Judging from the response of the government to 9/11 and the possibility of mass panic in the event of future attacks—the reaction to the anthrax and the Washington-area snipers—one can easily imagine enormous pressure for the use of military forces immediately after a successful attack. A large outbreak of smallpox might require huge areas to be quarantined, with checkpoints controlling the movement of the population, requiring numbers of people that only the military could provide. “[D]epending on the extent of the outbreak, a quarantine could remain in place—potentially in multiple U.S. cities or regions simultaneously—for weeks, months or even years.”<sup>78</sup> “The United States may have to declare martial law someday . . . in the case of a devastating attack with weapons of mass destruction causing tens of thousands of casualties,” retired Army General Wayne A. Downing speculated at the end of 2002, some six months after leaving the White House as Deputy

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<sup>75</sup> Stephen E. Flynn, *Safer Borders*, NY Times A23 (Oct 1, 2001). See also Jamie Dettmer, *Special Report: Tighter Security in Store for Seaports*, Insight (Feb 25, 2002), available online at <<http://www.insightmag.com/news/174891.html>> (visited Mar 8, 2003); Hans Binnendijk, et al, *The Virtual Border: Countering Seaborne Container Terrorism*, 16 Defense Horizons (2002), available online at <<http://www.ndu.edu/inss/DefHor/DH16/DH16.pdf>> (visited Mar 20, 2003).

<sup>76</sup> The President’s 2003 budget submitted in February 2002 called for an additional \$3.5 billion, more than a tenfold increase in federal monies, but a year later the money had just been appropriated. Bush, *Securing the Homeland* at 10–11 (cited in note 29); Philip Shenon, *Threats and Responses: Local Governments; Antiterror Money Stalls in Congress*, NY Times A1 (Feb 13, 2003); Daniel Benjamin and Steven Simon, *The Worst Defense*, NY Times A31 (Feb 20, 2003); Philip Shenon, *Domestic Security: In Reversal, White House Concedes That Counterterrorism Budget Is Too Meager*, NY Times A14 (Feb 27, 2003); Philip Shenon, *Bush Administration to Seek Emergency Money to Protect Against Terrorist Attacks in U.S.*, NY Times A22 (Mar 20, 2003).

<sup>77</sup> See American Political Network, *Bioterrorism Preparedness: States Not Ready for Potential Attack, Report*, American Health Line 7 (Nov 4, 2002) (describing the lack of preparedness of state health authorities for mass casualties in the event of a bioterrorist attack).

<sup>78</sup> Elaine M. Grossman, *U.S. Officials Mull a Military Role in Enforcing Smallpox Quarantine*, Inside the Pentagon (Dec 19, 2002). Grossman notes other experts who believe a massive vaccination program quickly instituted after an attack would be likely to make a quarantine regimen unnecessary. See also Sheryl Gay Stolberg and Judith Miller, *BioTerrorism: Many Worry That Nation Is Still Highly Vulnerable to Germ Attack*, NY Times A16 (Sept 9, 2002). For the possibility of panic, see David Wood, *America Is Vulnerable to Panic in Terror Attack, Experts Say*, Newhouse News Service (Aug 20, 2002). For a hint of the problems involved in quarantine—the need for military involvement and the great dangers to lives and civil liberties—see Smithson and Levy, *Ataxia* at 268–70 (cited in note 70).

National Security Adviser for Counterterrorism.<sup>79</sup> Northern Command's head, General Eberhart, agrees: "There may be situations if we ever got into a major chemical biological nuclear attack problem where we may, in fact, be in charge," but only if "it's become so bad that the lead federal agency in working with the state governors say ... 'we give up.' ... And then the president and the Secretary of Defense ... decide, 'yes, that is appropriate.'"<sup>80</sup> Assaults on the food supply, water, or energy resources could provoke a massive deployment of available people for response, recovery, and protection, so the possibilities of an incident involving the military establishment are significant. Even if tens of thousands are not pressed into service, the need for some of the specialized units—medical, chem-bio, police, civil administration, and the like—might prove enormously disruptive to military operations abroad. That is the value of Northern Command: to plan for such an event and to begin to think through the coordination with local and state authorities. Thinking about the very worst catastrophe—the explosion of nuclear weapons in American cities—goes back several years at least. In December 2002, at the recommendation of a commission created four years earlier "to advise the president and Congress on domestic response to terrorism involving weapons of mass destruction," discussions began "among various federal agencies" to "delineate a role for U.S. troops, should local and state law enforcement authorities become overwhelmed" by an attack using smallpox.<sup>81</sup> This same commission concluded that it was nowhere clear, even after the creation of the Department of Homeland Security, "which Federal agency" would be "in charge" of the federal response to various kinds of attacks, and "who is in charge is especially problematic when it comes to a bioterrorism attack."<sup>82</sup>

The very planning of such responses with the thousands of federal, state, county, and local public and private agencies and institutions by Northern Command contains inherent dangers. Military staffs are among the most effective planning organizations in American society. Their processes and perspectives—their unstated assumptions—could begin to influence the procedures and operations of state and local law enforcement agencies, fire departments, emergency services providers, public health organizations, and governmental agencies: militarizing them enough to harm the performance of

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<sup>79</sup> Quoted in Barton Gellman, *In U.S., Terrorism's Peril Undiminished: Nation Struggles on Offense and Defense, and Officials Still Expect New Attacks*, Wash Post A1 (Dec 24, 2002).

<sup>80</sup> Holman, *The NewsHour With Jim Lehrer: Focus: Guarding the Homeland* (cited in note 69). For the full interview, see Interview by Dan Sagalyn with Air Force General Ralph Eberhart, Online NewsHour (Sept 24, 2002), available online at <<http://www.pbs.org/newshour/terrorism/ata/eberhart.html>> (visited Feb 28, 2003).

<sup>81</sup> Grossman, *U.S. Officials Mull a Military Role in Enforcing Smallpox Quarantine*, Inside the Pentagon (cited in note 78).

<sup>82</sup> Gilmore Commn, *Fourth Annual Report to the President and the Congress* at iv (cited in note 74).

their normal responsibilities. In the last two decades, the military model has already invaded the American criminal justice system to an unprecedented degree: the dramatic rise in numbers of SWAT teams; increased cooperation between the military and police; “boot camps” in the correctional system; the language, concepts, and mentality.<sup>83</sup> American foreign relations likewise have come more and more to be influenced by military concerns, understandings, and the military itself, in ways unlike the era of the Cold War and quite beyond the demands of a “war” on terrorism: a reliance on military commands to manage many regional relationships or bilateral relations; the threat or use of force to achieve American aims; the subordination of other interests to security beyond the dictates of the war on terrorism.<sup>84</sup> An inadvertent militarization of domestic society<sup>85</sup>—quite beyond the uneven and diffuse ways in which the military has come to pervade American civic life and culture after five decades of world and cold war—arising indirectly, but unnecessarily, from the demands of homeland security, while unforeseen, is possible. And lurking in the background, there is always the possibility that military operations on American soil will result in collateral damage and unintended violence and death, unless the regular military devotes considerable time to training for a homeland role, with the resulting degradation of its conventional war-fighting capability.

A third danger is the increasing blurring of the line between military and civilian functions, in part because of convenience and in part because the struggle against terrorism is likely to last indefinitely. In many respects the “war on terrorism” is no war all, but a concerted (and hopefully coordinated) national and international effort involving law enforcement, policing, diplomacy, economic initiatives, and military operations to protect the United States against radical Islamic terrorists. There has been no mobilization, no continuous combat, no sudden heating up of the economy or rise in prices, no raising of taxes, no call to sacrifice, no major interruption or upheaval of civilian life—the kinds of experiences common to other wars in American history. In fact, just the opposite has occurred. Americans were asked to “go back to normal” after 9/11,

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<sup>83</sup> See Dunlap, *The Thick Green Line* at 32 (cited in note 24).

<sup>84</sup> See, for example, David Halberstam, *War in a Time of Peace: Bush, Clinton, and the Generals* (Scribner 2001); Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 60 *Naval War C R* 9 (Summer 2002); Andrew J. Bacevich, *American Empire: The Realities & Consequences of U.S. Diplomacy* (Harvard 2002); Dana Priest, *The Mission* (Norton 2003). For an argument that this trend is much broader than foreign policy alone and extends back almost three generations, see Michael S. Sherry, *In the Shadow of War: The United States Since the 1930s* (Yale 1995).

<sup>85</sup> My use of the term “militarization” follows Sherry’s: “the process by which war and national security became consuming anxieties and provided the memories, models, and metaphors that shaped broad areas of national life.” Sherry, *In the Shadow of War* at xi (cited in note 84). My use includes the “caveats” he applies to the concept, including a certain blurriness and a “varied and changing rather than uniform historical process” embracing “varied, even discordant, phenomena.” Id at xi–xii.



to travel and spend, and were given no precise definition of the enemy, no explicit articulation of a strategy to win the war, nor a description of what victory would be, how the war would be waged, and when and how it might end. Instead the government has repeated consistently that this war will last indefinitely, and that it might involve combat at home. One of the government's most senior, experienced counter-terrorism experts casts doubt on the "war" paradigm: "I am disturbed by how often I hear references to 'as long as the emergency lasts' or 'as long as the war on terrorism is going on.' ... What we are doing has an indefinite run."<sup>86</sup>

The greatest worry is the gradual transformation of military forces into adjuncts of the law enforcement, domestic intelligence, and prosecutorial functions that have heretofore been strictly civilian. This has happened before—during almost every war since the mid-19th century, with harm to American civil liberties and to the relationship between the armed forces and the American people. During the Civil War, the federal government used the Army to arrest, try, and imprison thousands of citizens for disloyalty, many of them Northerners, and some for statements or speeches that seemed to many at the time to be legitimate dissent or opposition to the Lincoln administration and its policies. Others were arrested on suspicion of profiteering, fraud, corruption, or otherwise shady dealings relating to the government, and there were documented cases of torture in the prisons.<sup>87</sup> During World War I, some 2,300 of over 6,000 enemy aliens arrested by the Justice Department were "interned by the military as dangerous to the national security."<sup>88</sup> The Army and Navy participated in government censorship of telegraph and cable messages, newspapers, radio, and public speech. The Army broke strikes, raided labor meetings and union headquarters, and harassed and suppressed radical labor

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<sup>86</sup> Paul Pillar, as quoted in Steve Hirsch, *The War Against Terror Will Be Indefinite*, Nat'l J 254 (Jan 26, 2002). The Chairman of the Joint Chiefs of Staff expressed similar views about the conflict being indefinite. Bradley Graham, *General to Troops: Sit Tight: In Qatar, Myers Says No End in Sight to War on Terrorism*, Wash Post A18 (Dec 21, 2002). For the debate over whether the struggle against terrorism is or should be a "war," see Donald H. Rumsfeld, *A New Kind of War*, NY Times A21 (Sept 27, 2001); Richard H. Kohn, *A War Like No Other*, 29 OAH Newsletter (Nov 2001), available online at <<http://www.oah.org/pubs/nl/2001nov/kohn.html>> (visited Mar 7, 2003); Michael Howard, *What's in a Name? How to Fight Terrorism*, 81 Foreign Affairs 8 (Jan/Feb 2002); William M. Arkin, *September 11 and Wars of the World*, Presentation at the US Naval War College, Newport, Rhode Island (Sept 25, 2002), available online at <<http://www.salon.com/news/feature/2002/10/11/arkin/print.html>> (visited Mar 20, 2003); Eliot A. Cohen, *World War IV*, Wall St J A18 (Nov 20, 2001); R. James Woolsey, *World War IV*, Address at Restoration Weekend, Center for the Study of Popular Culture (Nov 16, 2002), in FrontPageMagazine.com (Nov 22, 2002), available online at <<http://www.frontpagemag.com/articles/Printable.asp?ID=4718>> (visited Mar 2, 2003).

<sup>87</sup> See Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 94–103, 109–12 (Oxford 1991).

<sup>88</sup> Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 74 n 4 (Norton 1979).

groups, often acting in the role of local law enforcement—arresting and detaining suspects—as well as keeping order. In Seattle, the Office of Naval Intelligence actually arrested Wobblies (members of the International Workers of the World) on the docks and ships. Military Intelligence, which was, in the words of an Army history, “consciously antiradical and antilabor,” created over 500 units nationwide to spy on workers in war production plants in an attempt to prevent sabotage.<sup>89</sup> The Army connected not only with federal, state, and local law enforcement, but with private patriotic and vigilante groups watching aliens and radicals in what the history called a “machinery of repression” that in the end acted to suppress dissent as well as guarantee the security of the homefront.<sup>90</sup> During the 1920s and 1930s, the War Department maintained and updated plans to protect the country from domestic unrest and internal revolution fomented by radicals, leftists, and pacifists, on whom military intelligence collected information.<sup>91</sup> During World War II, the Army advocated and then carried out the evacuation of Japanese Americans from the West Coast to “relocation centers” run by the civilian War Relocation Authority.<sup>92</sup> During the Cold War, the Army gathered intelligence on civilian groups thought to be radical or subversive, including civil rights and peace organizations. During the Vietnam War, Army surveillance increased dramatically in size and scope: spying on antiwar protest, investigating unrest on college campuses, monitoring racial turmoil in American cities, and scrutinizing political dissent.<sup>93</sup>

The use of the military internally to support African-American voting during Reconstruction influenced Congress, with the approval of the Army, to pass the Posse Comitatus Act in 1878 in order to keep the regular Army from being used to enforce the laws. The military establishment valued this separation, not wishing to be diverted from its focus on war or to be perceived as the tool of one set of Americans against another. Thus the armed forces resisted eroding these restrictions in the 1980s to help interdict the importation

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<sup>89</sup> Laurie and Cole, *The Role of Federal Military Forces* at 233, 253 (cited in note 22).

<sup>90</sup> Id at 234. For a general discussion, see id at ch 10; William Preston, Jr., *Aliens and Dissenters: Federal Suppression of Radicals, 1903–1933* 105–17, 161, 244–46 (Harvard 1963); Joan M. Jensen, *Army Surveillance in America, 1775–1980* 131–77 (Yale 1991).

<sup>91</sup> Jensen, *Army Surveillance* at ch 9 (cited in note 90); Laurie and Cole, *The Role of Federal Military Forces* at ch 14 (cited in note 22).

<sup>92</sup> See Stetson Conn, *The Decision to Evacuate the Japanese From the Pacific Coast*, in Greenfield, ed, *Command Decisions* 125 (cited in note 18); Jacobus tenBroek, Edward N. Barnhart, and Floyd W. Matson, *Prejudice, War and the Constitution* (California 1970); Roger Daniels, *The Decision to Relocate the Japanese Americans* (Krieger reprint ed 1985); John Joel Culley, *Enemy Alien Control in the United States During World War II: A Survey*, in Kay Saunders and Roger Daniels, eds, *Alien Justice: Wartime Internment in Australia and North America* 138 (Queensland 2000); Sandra C. Taylor, *From Incarceration to Freedom: Japanese-Americans and the Departure From the Concentration Camps*, in Saunders and Daniels, supra at 205; Wendy Ng, *Japanese American Internment During World War II: A History and Reference Guide*, ch 3 (Greenwood 2002).

<sup>93</sup> Jensen, *Army Surveillance* at 240–47 (cited in note 90).

of narcotics in the “war” on drugs.<sup>94</sup> And the military continues to be troubled by the tendency. As one student of the problem concluded four years before 9/11, “in recent years, Congress and the public have seen the military as a panacea for domestic problems.”<sup>95</sup> “Civilian law enforcement requires the cognizance of individual rights and seeks to protect those rights, even if the person being protected is a bad actor. Prior to the use of force, police officers attempt to de-escalate a situation” and “are trained to use lesser forms of force when possible.” On the other hand, “soldiers” emphasize “deadly force.” “Escalation is the rule” and “in an encounter with a person identified with the enemy, soldiers need not be cognizant of individual rights, and the use of deadly force is authorized without any aggressive or bad act by that person.”<sup>96</sup>

The larger principle is this: that regular armed forces need to face outward, against American enemies, rather than inward where a military force can become an institution acting on behalf of one part of the community against another. That corrodes the morale of the forces, harms recruiting, reduces readiness, undermines the support of the country for the armed forces, and ultimately drives a wedge between the military and society. Temporarily reinforcing civilian agencies in border control or with drug interdiction, or to provide security for the Olympics or sporting events like the Super Bowl seem, on the surface, functional and helpful. For nearly two decades, regular military forces, including Special Forces, have been aiding border control authorities along the Texas-Mexico border and law enforcement organizations nationwide since the early 1990s. But when Marines inadvertently killed an innocent teenage goat herder in 1997, ground reconnaissance along the border ceased.<sup>97</sup> Yet today, that same border with Mexico presents a special challenge for keeping terrorists out of the United States.<sup>98</sup> Both the chairman of the Senate Armed Forces Committee and General Eberhart of Northern Command have called for a review of the Posse Comitatus Act limitations on domestic uses of the armed forces.<sup>99</sup> In January

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<sup>94</sup> See generally Jonathan A. Schmidt-Davis, *The Origins of the Posse Comitatus Act of 1878* (1999) (unpublished MA thesis, University of North Carolina at Chapel Hill) (on file with the University of North Carolina at Chapel Hill library); Dunlap, *The Thick Green Line* at 34–40 (cited in note 24). For a general discussion of policy reasons not to use the military to enforce civilian laws, see Hammond, 75 Wash U L Q at 953–84 (cited in note 24).

<sup>95</sup> Hammond, 75 Wash U L Q at 953 (cited in note 24).

<sup>96</sup> Id at 973.

<sup>97</sup> Timothy J. Dunn, *Waging War on Immigrants at the U.S.-Mexico Border: Human Rights Implications*, in Kraska, ed, *Militarizing the American Criminal Justice System* 65 (cited in note 24).

<sup>98</sup> Id at 76–77; Elaine M. Grossman, *U.S.-Mexico Border Control a Wild Card for New Homeland Command*, Inside the Pentagon (Sept 26, 2002); Tim Weiner, *U.S. and Mexico Coordinate Military Efforts for Mutual Protection Against Terror*, NY Times B13 (Mar 23, 2003).

<sup>99</sup> See Carl Levin, *Opening Statement of Senator Carl Levin, Chairman, Committee on Armed Services, Hearing on the Role of the Department of Defense in Homeland Security* (Oct 25, 2001), available online at <<http://levin.senate.gov/floor/102501cs1.htm>> (visited Mar 20, 2003); Interview

2003, Undersecretary of Defense Edward “Pete” Aldridge asked the Defense Science Board to review “what specific roles and missions” the military should possess in homeland defense. Citing the great resources the military possesses, Aldridge pointed out the “many ... systems engineering, technical capabilities, relevant technologies, logistics expertise and modeling and simulation capabilities needed for effective homeland security.”<sup>100</sup>

The problem in the end is not likely to arise from the military itself. Over a century of concern about the use of regular forces internally, and over a decade of discussion about the negative impact on war-fighting capabilities and civil liberties, have made the uniformed leadership extremely wary of altering the boundaries separating military and civil functions in law enforcement and domestic operations.<sup>101</sup> Memories of using the Army against labor and radical groups in World War I and to spy on antiwar protest during the Vietnam War have dimmed but remain alive in institutional understanding. The danger lies in public pressure exerted on the political leadership to act, and in turn a tendency to use the military because it has the resources and the organizational effectiveness to accomplish what the American public might demand.

The United States has experience with a national security state and its excesses during World War I, World War II, and the Cold War. While the domestic threat lies more in civilian counterintelligence, the use of the military lies constantly in the background, particularly for those nightmares—the endless “what ifs” in our imaginations—of one or more catastrophes involving weapons of mass destruction, the results of which overwhelm not only temporary civilian responders, but “consequence management” over the long term, and the patience and willingness of the American people to balance security with liberty.<sup>102</sup> Significantly, the courts, normally the bulwark of liberty in American society, have consistently deferred to the military in the operation of the system of military justice, and to the other branches and particularly the executive branch on civil liberties in wartime, permitting infringements during war that under other circumstances would not be allowed.<sup>103</sup> The Supreme Court under

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by Dan Sagalyn with Air Force General Ralph Eberhart, Online NewsHour (cited in note 80).

<sup>100</sup> Quoted in William Matthews, *Aldridge Calls for Study of U.S. Military's Role in Homeland Defense*, DefenseNews.com (Jan 16, 2003). See also Ken Guggenheim, *Warner Wants to Boost Military Role*, AP Online (Nov 13, 2002).

<sup>101</sup> See, for example, Lawlor, *Military Support of Civil Authorities*, J Homeland Security (cited in note 39).

<sup>102</sup> The possibilities of internal surveillance and some implications for civil liberties are depicted in Matthew Brzezinski, *Fortress America*, NY Times Mag 38 (Feb 23, 2003).

<sup>103</sup> See Jonathan Lurie, *The Role of the Federal Judiciary in the Governance of the American Military: The United States Supreme Court and “Civil Rights and Supervision” Over the Armed Forces*, in Kohn, ed, *The United States Military Under the Constitution* 405 (cited in note 11); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 221–25 (Knopf 1998); Diane H. Mazur, *Rehnquist's*

William Rehnquist has gone further, adopting a doctrine that designates the military “a society apart from civilian society,” superior morally and culturally, and essentially exempt from civilian judicial oversight.<sup>104</sup> Under this doctrine, civilian control would be left exclusively to executive and legislative branches that might, under future circumstances and without regard for traditional constitutional and legal safeguards, give power and authority to the military inside the United States, over American citizens. It is this blurring of boundaries—the militarization of internal security and the possible use of the military domestically—that poses the greatest danger.

Over two centuries ago, as the Constitutional Convention was concluding its work and the members were signing the document, the aged scientist, diplomat, and political leader Benjamin Franklin remarked that throughout the convention’s work he had speculated whether a sun carved on the back of the President’s chair was rising or setting. “But now at length I have the happiness to know that it is a rising and not a setting Sun.”<sup>105</sup> At the same time, Franklin sensed the fragility of the experiment. Accosted outside the hall by a local woman, “Well, Doctor, what have we got, a republic or a monarchy?” “A republic,” Franklin responded, “if you can keep it.”<sup>106</sup>

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*Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 Ind L J 701 (2002); Lewis, *Marbury v. Madison v. Ashcroft*, NY Times at A17 (cited in note 38).

<sup>104</sup> Mazur, *Rehnquist’s Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 Ind L J at 743 (cited in note 103), quoting Rehnquist in *Parker v Levy*, 417 US 733, 744 (1974). See also *id* at 745, 754, 759, 765, 767, 769, 773, 785 (discussing various ways in which Rehnquist places the military beyond civilian and constitutional oversight).

<sup>105</sup> The words are James Madison’s, recounting Franklin’s remark. Madison’s Notes (Sept 17, 1787), reprinted in Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 648 (Yale rev ed 1937).

<sup>106</sup> James McHenry’s Notes, *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 Am Hist Rev 595, 618 (1906) (punctuation added).