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Homeland Security vs. the Madisonian Impulse: State Building and Anti-Statism after September 11

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Abstract

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Jay Stowsky and Matthew Kroenig¹
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¹ Jay Stowsky is Adjunct Professor at the School of Information Management and Systems at the University of California, Berkeley and formerly served in the Clinton Administration as Senior Economist for Science and Technology Policy on the Staff of the White House Council of Economic Advisers. Matthew Kroenig is a PhD Candidate in the Department of Political Science at UC Berkeley and Fellow at the Institute of Global Conflict and Cooperation. For their helpful comments on an earlier draft of this article the authors would like to thank Brent Durbin, Lynn Eden, Angelo Gonzales, Peter Katzenstein, Jacob Shapiro, Steven Weber, and the participants in the Foreign Policy Colloquium at the Institute of International Studies, UC Berkeley.

Introduction

One of the direct consequences of September 11 was a flurry of proposals to strengthen the whip hand of the American state. Indeed, critics of US homeland security policy have consistently warned against the incautious adoption of police-state tactics, erosions of civil liberties, and drastic increases in the power of the executive branch. Now enough time has passed to conclude that the most striking characteristic of the American state in the wake of the terrorist attacks is, not the way its powers accumulate, but the way it resists centralized accretions of power. To a surprising extent, initiatives to counter the terrorist threat by expanding the state's powers domestically have been resisted, refined, or even rejected outright.

This is surprising because the shock of war is closely associated with the growth of the state, in the United States and everywhere else.² Yet each proposal to significantly consolidate or expand federal power since September 11th has enjoyed a brief period of momentum followed by a loss of political support. As demonstrated by the cases that follow, this pattern has repeated itself in a variety of areas, from the deployment of surveillance technology to the regulation of computer security, from the management of passenger screening at airports to the detention of terrorist suspects, and from the organization of domestic intelligence to surveillance of the US citizenry.³

We argue that this virtually uniform outcome is the result of enduring aspects of America's domestic political structure—the division of power at the federal level between three co-equal and overlapping branches, the relative ease with which non-governmental interest groups circumscribe the state's capacity to regulate or monitor private transactions, and the intensity with which guardians of the state's purposely fragmented institutions guard their organizational turf. Solely and in combination, these three persistent aspects of US political life, designed by the nation's founders to impede the concentration of state power, have substantially shaped the contemporary state's pursuit of "homeland security."⁴

² Recent works on the relationship between war and state building are Bruce D. Porter, *War and the Rise of the State: The Military Foundations of Modern Politics* (New York, Free Press, 1994); Charles Tilly, *Coercion, Capital, and European States, AD 990-1990* (Cambridge, Mass., Basil Blackwell, 1990). For a discussion of crisis and state growth in the United States see Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, (New York, Oxford University Press, 1987).

³ This paper focuses on the state's mobilization strategies and its regulatory and investigative powers. However, the state's extractive powers have not expanded in the wake of September 11 either; the Bush administration has not raised taxes or reinstated conscription, though it has controversially extended tours of duty for both the armed services and the National Guard. And although the new US Department of Homeland Security has let millions of dollars worth of private contracts, it has not sought to mobilize American industry in any centrally directive way.

⁴ For a corresponding argument with respect to limited US state expansion during the Cold War, see Aaron L. Friedberg, *In the Shadow of the Garrison State: America's Anti-Statism and its Cold War Grand Strategy* (Princeton: Princeton University Press, 2000) and Aaron L. Friedberg, "Why Didn't the United States become a Garrison State?" *International Security*, Vol. 16, No 4 (Spring, 1992), 109-142.

This argument will continue in four parts. First, we will briefly examine the conventional wisdom about homeland security policy after September 11th. Second, we will provide a framework for measuring state power and argue that contrary to conventional wisdom state power has not significantly increased since the “War on Terrorism” began. Next, we will present our domestic politics explanation of US homeland security policy and then provide empirical support for our argument through a number of qualitative case studies. Finally, we will conclude by considering the implications of our argument for ongoing debates about the proper balance between homeland security and civil liberties protections.

Expectations and Explanations

According to conventional wisdom, US Homeland Security policy in the wake of September 11th was characterized by a Bush administration that quickly implemented a number of proposals to expand executive authority, greatly strengthening the hand of the US government to deal with terrorist threats while trampling over the rights and liberties of individual citizens and other private actors.

Subsequent repeated warnings from leading figures on both the Left and the Right about the imminent threat of expanding state power have gelled into a sort of collective understanding about the gathering institutional ramifications of September 11th on American politics and law. Opinions on the issue range from concerns that the US is rashly sacrificing civil liberties at the altar of security to proclamations that we are already witnessing the establishment of a thoroughgoing American surveillance state.

As will become evident in the following analysis, the conventional wisdom is simply wrong. What has been most striking about US counterterrorism policy since 9-11 has not been how much state power has grown, but how little has changed. In the wake of a major attack on US soil we would have expected to see a significant reorganization of the US government to meet the newly perceived threat and perhaps even movements toward the creation of a garrison state. What we have witnessed instead is merely an ostentatious reshuffling of bureaucratic boxes and an admittedly more significant increase in the state’s authority to investigate and detain American citizens. In most areas relevant to the provision of homeland security, we have seen nothing more than a general maintenance of the status quo. Despite the consensus to the contrary, we argue, the “War on Terrorism” has not markedly strengthened the power of American state.⁵

Measuring State Power

⁵ At the same time, however, there has been an enormous and rapid growth in information gathering on US citizens by companies in the private sector, ostensibly for purposes of market research and enhanced customer service. Much of this information has been marketed, in turn, to US government agencies responsible for maintaining homeland security. For a thorough overview, see Robert O’Harrow, *No Place to Hide: Our Emerging Surveillance Society* (New York: Free Press, 2005).

Before demonstrating that the power of the state in the United States has not significantly increased since 9-11, let us begin by explicating a framework for measuring the expansion of state power. For the purposes of this work, we define state power as the executive branch's scope of authority. The executive's scope of authority can be measured as the number of functional issues over which the government exerts control. For the issue of counterterrorism functional issues include: domestic intelligence gathering and surveillance, border protection & immigration, defense of critical infrastructures, and emergency preparedness and response. As more of these issues, or subcomponents of these issues, come under executive branch control, the state's scope of authority increases, and by our definition the state's powers expand. For example, the creation of the Transportation Security Administration (TSA) and the federalization of airport screeners represented a slight increase in state authority as the protection of a key critical infrastructure, air transportation, was transferred from private to government hands. The expansion of state power can sometimes fill vacuums of authority, but, as in the case of TSA, usually occurs at the expense of individuals, private actors, or state and local governments.

Rather than gauge state power against some abstract standard, we ground our understanding of the expansion of state power in relation to both the pre-9-11 status quo and the early executive branch proposals for improving homeland security in the wake of the attacks. Cases in which early executive branch proposals were adopted in full, we score as "major" increases of state power. We code as "minor" increases of state power those cases in which executive ambitions were challenged and significantly scaled-back. No increase in state power is recorded when executive proposals were completely rejected and the status quo was maintained.

Following this definition, the growth of state power in the United States since September 11th has been quite minimal.⁶ In 2 of our 7 cases there was no expansion of state power whatsoever. In 4 of the 7 cases, we measure only minor increases in state power, and in only one case, the USA Patriot Act, was there actually a major expansion of executive branch authority.

The status quo was maintained in the cases of The Pentagon's Total Information Awareness Program (TIA), and cyber security. In these examples, non-executive actors effectively thwarted attempts by the executive to expand the scope of state authority. Total Information Awareness was shut down by Congress and the US National Cyber Security Strategy was watered down to the point of meaninglessness by private interest groups.

In four other cases we did see increases in state power, but these increases were fairly minor relative to both the scale of initial proposals and the expressed concerns of critics. First, TSA was large in terms of manpower and budget, but the responsibility for screening air travelers is a trivial power and moreover, the legislation was composed so as to permit a gradual return of this function to the private sector. Second, the executive authority to indefinitely detain terrorist suspects, while far from trivial, has been

⁶ See graphic 1.

substantially circumscribed by judicial branch rulings. Next, the creation of the Department of Homeland Security (DHS) is an example of reorganization without empowerment. The new department simply consolidated 22 agencies into a single department without granting the new department any major new authorities not already enjoyed by the component agencies. Moreover, DHS actually constrained executive ambition by moving the responsibility for coordinating homeland security from the White House and placing it under Congressional scrutiny. Finally, in domestic intelligence gathering, proposals for a new domestic CIA were rejected in favor of reorienting the focus and slightly augmenting the authority of the FBI.

Only in the case of the USA Patriot Act do we see a major increase in state authority, and even in this case, that increase has been subject to sustained judicial and congressional scrutiny as well as broad-based resistance by local jurisdictions.

	CHANGE IN THE LEVEL OF STATE POWER		
	MAJOR INCREASE	MINOR INCREASE	NO INCREASE
TIA			X
Cyber Security			X
TSA		X	
Prisoner Detention		X	
DHS		X	
Domestic Intelligence		X	
Patriot Act	X		

The Explanation: Domestic Politics.

Given that a major increase in the scope of executive power is what we should have expected in the wake of a security crisis, what has driven the relative weakness of the American state’s response to foreign terrorism on domestic soil?

American antipathy to state power is quite familiar and has a long history. In fact, anti-statism was consciously baked into the American political system at the nation’s birth. The founders were concerned to constrain the unilateral authority of the President to make war. Although they recognized the efficacy of a unitary commander-in-chief, they assigned to the Congress the power to “raise and support” armies, a navy, and nationalized state militia.⁷ Writing to Thomas Jefferson, James Madison noted “what the History of all [governments] demonstrates, that the [executive] is the branch of power most interested in war, [and] most prone to it.”⁸ As the primary author of the US Constitution, Madison’s impulse was thus to create an “anti-statist” state, a system of

⁷ Article I, section 8, of the US Constitution

⁸ Quoted in Arthur Schlesinger, *The Imperial Presidency* (Boston: Houghton-Mifflin, 1973), page 5, and cited by Friedberg (2000), *op. cit.*, page 17.

overlapping institutions with shared powers, in order to provide “great security against a gradual concentration of several powers” in the executive branch.⁹

We argue that the anti-statist character of US homeland security policy is the result of three enduring aspects of America’s domestic political structure—the division of power at the federal level between three co-equal and overlapping branches, the relative ease with which non-governmental interest groups circumscribe the state’s capacity to regulate or monitor private transactions, and the intensity with which guardians of the state’s purposely fragmented institutions guard their organizational turf. Solely and in combination, these three persistent aspects of US political life, designed by the nation’s founders to impede the concentration of state power, have substantially shaped the contemporary state’s pursuit of “homeland security.”¹⁰

The Madisonian Impulse vanquishes the “Homeland Security State”

Consistent with theoretical expectations and conventional wisdom, the United States did respond to the September 11th terrorist attacks with a number of proposals to expand executive power to combat the terrorist threat. Plans for “Total Information Awareness” through the systematic data mining of public and private records on American citizens and government-mandated investments in private sector cyber security proved no match for the Madisonian impulse which they provoked however. In these cases, the legislative branch and private interest groups, respectively, recoiled in response to the specter of executive aggrandizement and utterly derailed the administration’s initial plans.

Total Information Awareness

To accelerate the development of technologies to fight the war on terror,¹¹ the Bush administration launched the Total Information Awareness (TIA) project, a military research effort led by retired Admiral John Poindexter, the former Reagan national security advisor who had also been a key figure in the Iran-Contra scandal. Living up to its Orwellian moniker, TIA presaged a technological cornucopia for government snoops, a set of software tools that would enable federal law enforcement officials program computers with transaction patterns thought to indicate terrorist activity then rapidly scan and combine information from multiple public data sources—medical and academic

⁹ Federalist No. 51 “On a Just Partition of Power,” cited by Friedberg (2000), *ibid.*, page 17.

¹⁰ For an excellent discussion of the causes of counterterrorism policy in Germany and Japan see Peter Katzenstein, “Coping with Terrorism: Norms and Internal Security in Germany and Japan,” in *Ideas & Foreign Policy*, eds. Judith Goldstein and Robert Keohane (Cornell, New York: Cornell University Press, 1993) pp. 265-296.

¹¹ The technologies needed to wage the war on terrorism, particularly on the domestic front, are quite different from the technologies that were needed to wage the Cold War. Whereas the key to Cold War military strategy was the maintenance of an effective nuclear deterrent, which manifested itself in the government’s investment in large, diverse weapons platforms from which to launch a retaliatory strike, the key to homeland security is effective intelligence and target protection. This necessitates stepped-up investment in sensory computer interfaces, data mining and pattern recognition tools, surveillance systems and anti-hacking software.

records, bank accounts, email, Internet visits, phone bills, work permit applications, credit card purchases, car rental records, airline travel reservations, etc. Suspicious transaction patterns would then presumably trigger the kinds of secret surveillance on US citizens and resident aliens that was now legally permitted under the USA Patriot Act.

It did not take long for Madison's design to kick in and for Congress to assert its power to constrain executive authority by first curtailing and then eliminating the entire Total Information Awareness project (by then renamed the Terrorist Information Awareness project).

TIA initially aroused the ire of civil libertarians on both the left and the right of the political spectrum. They objected especially to the absence of congressional oversight in the face of a military project that aimed at facilitating massive and continuous surveillance, by government agents, of Americans' confidential personal transactions. In response, Congress first required the Defense Department (DOD) to submit a report on the privacy and civil liberties implications of the technologies under study. In reaction to the report, Congress enacted a requirement that DOD submit all TIA technology prior to deployment for congressional review.

The death knell for the program came with the revelation of a TIA project called "FutureMAP," which would have invited online betting on the probability of terrorist events. Although it was meant simply as an effort to explore the utility of market-like mechanisms for eliciting and aggregating good intelligence information, the implication that market participants might profit from correctly predicting assassinations and other deadly assaults gave the project a ghoulish cast. Although Congress chose to continue funding for some of the technologies under study, federal funding for TIA was halted, promoting the will of Congress over the prerogatives of the executive branch.

Enhancing Computer Security to Protect Critical Infrastructures

In the anxious months just following al Qaeda's attacks on the Pentagon and the World Trade Center (and the unattributed anthrax attacks little more than a month later), Americans felt shaky and exposed. The terrorists had used electronic fund transfers to finance the 9/11 operation and had used e-mail and the Internet to communicate, as well as public infrastructure to carry out their attacks. Consequently, public attention was drawn to the susceptibility of various types of critical infrastructure—water and power systems, communications, transportation, financial and emergency response systems—to cyber as well as physical attack.

Americans had already been alerted to the vulnerability of critical infrastructures to security breaches in interconnected computer networks in the 1990s. The explosive growth of the Internet had linked more than 100 million computers, exposing hundreds of thousands of machines to various types of cyber attack any hour of the day or night. A series of high-profile viruses such as Melissa and the Love Bug garnered significant

media attention.¹² During that period the Clinton Administration prepared an initial “National Plan for Information Systems Protection.” Released in January 2000; it was developed under the direction of Richard Clarke, a staff member of the National Security Council.

Exactly one week after September 11, the Nimda “worm” (a virus-like program that replicates itself), infected and shut down 100,000 computers within 24 hours. In response, President Bush issued Executive Order 13231 establishing a more focused effort to protect information systems related to critical infrastructures. Development of the Bush Administration’s new cybersecurity strategy was also directed by Clarke, who had already gained widespread attention with his warning that the US risked “a digital Pearl Harbor” if strong steps were not soon taken to improve computer security.¹³

A draft of the Bush Administration’s new national cybersecurity strategy was released in time for the first anniversary of the al Qaeda attacks in September 2002. It contained several features aimed specifically at overcoming disincentives to private investment in computer security. Although the strategy was designed to leave implementation in private hands, it employed a combination of regulatory tools to align private incentives with the public interest.

One draft section would have required private IT firms to tell the federal government, about the security flaws in their software products or the security vulnerabilities of their internal networks. In order to facilitate industry-wide sharing of this and other pertinent security information, another draft section of the national strategy proposed that the industry develop government-mandated standards for system interoperability. A related provision would have mandated security testing to expose security vulnerabilities in products and systems before terrorists are able to exploit them. Periodic testing would have been used to ensure that systems and software complied with new industry-wide security standards.

Another section of the draft proposed that IT firms be required to pay into a national fund to help the federal government pay for installing security enhancements to the Internet. Clarke had been quoted as saying that an ISP selling high-speed Internet access without protective software was like “selling a car today without a seat belt”; according to the draft, Internet service providers would be required to distribute firewall and anti-virus software to their customers. The draft even raised the notion of creating a secure new

¹² This was also the period during which much media-hyped attention was directed at the looming “crisis” that might be caused by “the Y2K problem,” the concern that major computer-controlled systems and infrastructures might go haywire if internal clocks were to mistakenly interpret the date January 1, 2000 as January 1, 1900.

¹³ Many computer security experts question the “Pearl Harbor” analogy, believing there are easier targets for terrorists to attack and that there is too much redundancy in most of computer-operated infrastructures for them to fail completely or for long. There is, however, a strong consensus that a terrorist cyberattack is possible, probably as an adjunct to another physical attack. Many cyber attacks are now almost completely automated; they can also be embedded with “sleeper” commands that could conceivably be pre-programmed to coordinate a cyber attack with a physical terror attack on some future date.

government communications network separate from the Internet that would make the computer systems that control critical infrastructures less vulnerable to terrorist attack.

The draft also recommended that wireless networks be shut down entirely until their security could be demonstrably improved. Wireless communications are especially difficult to secure; Clarke had been quoted as calling them “inherently” insecure. As cell phones and wireless Internet connections became more pervasive, the draft noted, the insecurity of these networks could leave critical systems vulnerable to attack.

Most important, perhaps, the draft recommended that steps be taken immediately to assign clear legal liability for computer security breaches. Software producers or networks owners would be made legally accountable for damages caused by security breaches traced to their products or systems. Among other improvements, this provision would presumably create a strong new economic incentive for Internet service providers to screen data traffic for evidence of possible attacks.

True to form, once again, an executive security initiative was soon to be thwarted by America’s political institutions. In this case, the system’s openness to the influence of private interest groups prevented the expansion of state authority. The draft strategy had proposed a combination of government regulations and mandatory technical standards to overcome the economic disincentives to investment in expensive security enhancements. IT industry leaders insisted that the government should encourage—but not mandate—improved computer security solely through its procurement decisions. “The government [should] settle on a set of standards for their own use, but not dictate a set of standards,” said Symantec Corporation’s CEO John Thompson in a teleconference with the Advisory Council.

The Business Software Alliance (BSA) would not go even that far in the direction of inviting government intervention. The BSA objected to the notion of a federal certification program, or even a “seal of approval” program for security products and strongly resisted the notion of a new standards setting organization. “We can foresee only duplication of existing efforts or, of more concern, government-guided efforts at regulation from such a body, either directly or through the migration of procurement specifications.”

Other IT industry leaders argued that regulations such as strengthened liability, mandatory interoperability, and imposition of due care standards would reduce incentives for innovation in the fast-moving IT sector. They objected that mandatory information sharing about security flaws would open them up to lawsuits for violations of privacy or antitrust laws. They flatly rejected the notion of mandatory contributions to a fund that would identify and address security enhancements to the Internet. Such a fund, wrote the BSA in its comments, “could become a hidden tax on industry and a mechanism for aggressive regulation.”

Under intense industry pressure, the White House announced that delivery of the draft recommendations to the president would be delayed for two months to allow for

additional “public comment.” During those two months, all of the government mandates were dropped. Information sharing and interoperability requirements, assignment of liability for IT security breaches, mandatory industry contributions to a national computer security fund, and restrictions on the use of insecure wireless networks all disappeared from the draft. By the time the final National Security to Secure Cyberspace was released in February 2003, it depended instead on exhortation and, to a lesser extent, on the indirect impact of government procurement. Even then, individual federal agencies were left free to set their own possibly inconsistent security requirements.

Homeland Security Tempered by Madison’s Design.

The majority of cases under study follow a similar pattern. Initially, terrorist attacks motivated government attempts to augment state power, but these early movements toward executive aggrandizement drew fierce resistance from other branches of government, threatened to alter the pecking order of bureaucratic actors within the executive branch, and/or undermined the autonomy of private interest groups. When proposals finally emerged from the political dogfight they were sapped of their pre-fight grandeur. In aviation security, prisoner detention, the battle over the creation of the Department of Homeland Security, and domestic intelligence the growth of state power was constrained by America’s domestic political institutions.

Aviation Security

Perhaps the highest profile expansion of state power in the wake of September 11 was at the nation’s airports, most visibly in the creation of the Transportation Security Administration (TSA) and the consequent federalization of the large workforce that performs security screening at US commercial airports. Yet, when one examines the evolution of the legislation that created TSA, and its first years of implementation, one again discerns the countervailing effects of America’s institutionally-embedded anti-Statism.

Prior to September 11, most airlines contracted out security screening services to private security firms such as Argenbright Security, International Total Services, and Globe Aviation Services. The airline with the most flights leaving or arriving at a particular concourse was normally responsible for hiring screeners for that concourse; sometimes airlines jointly hired them. Security standards were promulgated by the Federal Aviation Administration (FAA), which occasionally sent agents to test the system; this was basically the entire extent of the federal role.

After the terrorist attacks, calls sounded immediately in the media and the halls of Congress for a federal takeover of airport security. The September 11 hijackers had scouted their targets carefully, taking the flights repeatedly to count passenger loads and test airline security. The fact that nineteen hijackers, four of them wanted by law enforcement officials, had been able to board four transcontinental flights armed with

razor-sharp box cutters, was enough to convince the United States Senate to vote one hundred to zero on October 11, 2001 to federalize airport screening.

However, by the time the more conservative House of Representatives debated the bill several weeks later, the forces of anti-Statism had re-emerged. Arguing against the creation of a new federal bureaucracy that would employ more personnel than the US Departments of Labor and Housing and Urban Development combined, House Republicans passed a bill that mandated only federal supervision of private-contract screeners, not a wholesale nationalization of the enterprise. With public pressure mounting on both sides to find a compromise, a House-Senate conference produced a final bill that provided for federalization, at least in the short term.

The compromise legislation included a significant escape clause, which allowed an opportunity for airport security to return to private hands. The Airport Screener Privatization Pilot Program (PP5) granted exceptions from the federal program to five of the nation's airports (Jackson Hole, Kansas City, Rochester, San Francisco, and Tupelo). Under the PP5 Program, the screening of passengers was carried out by the personnel of private companies under contract with the TSA. US airports were then able to compare the results of the pilot and federal programs and are granted permission to opt out of federalized screening after only two years.

In April 2004, the evidential basis for opting out was provided when Congress reviewed the results of studies performed by the General Accounting Office (GAO), the Inspector General of the Homeland Security Department, and BearingPoint, a consulting firm hired by TSA. The reports indicated that both private and public screeners were performing below expectation, but that the private screeners performed as well, if not better, than TSA screeners. The report also argued that the effectiveness of the private screeners in the pilot program was hampered by heavy TSA involvement that limited private initiative.¹⁴

At the time of writing, in April 2005, TSA is conducting a nationwide contracting process that will qualify prospective private screening companies to sign contracts with individual airport authorities and begin replacing TSA screeners as early as May 2005. As of yet, no airports have filed applications to opt out of the federal program, but industry insiders are predicting that, perhaps, 30-40 airports ultimately will choose to return to commercial screeners.¹⁵

¹⁴ Committee on Transportation & Infrastructure Aviation Subcommittee. "Hearing on A Review Of The Airport Screener Privatization Pilot Program (PP5)." April 22, 2004. available at <http://www.house.gov/transportation>. Similar conclusions were reached in a follow-up report released a year later, noting that, despite the federalization of most passenger screeners, airport security at passenger checkpoints had not measurably improved since 9/11.

¹⁵ Jacob Goodwin. "Will US Airports Revert to Commercial Screeners?" *Government Security News*. Available at http://www.gsnmagazine.com/dec_04/us_airports.html.

Definition and Detention of “Enemy Combatants”

In the months that followed the September 11th attacks, the Bush administration proceeded to assert the unilateral right of the president, under the commander-in-chief clause of the US Constitution, to designate both US citizens and non-citizens as “enemy combatants.” Such a designation (derived from a single World War II-era legal case) could subject an individual to indefinite detention, without meaningful access to legal counsel, before being tried before a military tribunal. Prior to trial, the president would not have to show a civilian (or military) court any criminal evidence. Similarly, non-citizens suspected (but not convicted) of immigration violations could be detained indefinitely and ultimately deported after immigration hearings that were closed to both press and public. Thousands of mostly Middle Eastern and South Asian immigrants were subsequently called in for questioning, and hundreds were detained, under the new rules.

Once again, the expansion of executive power in this area did not go unchallenged. The Judicial branch began its counteroffensive against executive detention authority in the cases of two enemy combatants and US citizens, Yaser Esam Hamdi and Jose Padilla. In early January 2003, the Supreme Court dealt an initial blow to executive privilege and decided to hear the case of Yaser Esam Hamdi. The Bush administration had pressured the Supreme Court not to hear the case of Hamdi, a dual US and Saudi citizen who was arrested in combat in Afghanistan and transferred first to Guantanamo Bay, Cuba and then to a Navy brig in Charleston, South Carolina.

In late June 2004, the US Supreme Court heard the Hamdi case and rejected the Bush Administration’s assertions that the president had unilateral authority as commander-in-chief to detain “enemy combatants” indefinitely without charge or trial or access to legal counsel. “Due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker,” the Court held, ruling 8-1. In the words of Justice Sandra Day O’Connor, “a state of war is not a blank check for the president when it comes to the rights of the nation’s citizens.” The Court also noted, significantly, that the president’s authority to label someone an “enemy combatant” was not inherent in the constitution, but was rather an authority bestowed on him by Congress, through specific legislation.

Moreover, in a second case, the Court ruled 6-3 that foreigners being held by the United States as enemy combatants also had the legal right to challenge their detention in American courts, again effectively repudiating the notion of unilateral presidential authority in conducting the war on terrorism.¹⁶

After suffering defeat at the hands of the Supreme Court, the Bush administration decided not to press criminal charges against Hamdi and in September 2003 he was released from custody and flown home to Saudi Arabia.

¹⁶ Linda Greenhouse, “Justices Affirm Legal Rights of ‘Enemy Combatants’,” *New York Times*, June 29, 2004, p. A1.

The case of Jose Padilla followed a similar course. Padilla was an American citizen arrested at Chicago's O'Hare airport on suspicion of intent to detonate a shoe bomb and was also transferred to a military brig in Charleston, South Carolina. In December 2003, a United States Court of Appeals ruled that the President lacked the statutory and constitutional authority to indefinitely hold a US citizen arrested on US soil. The court held that Mr. Padilla must be released from custody within 30 days. Not yet willing to concede defeat, the Bush administration appealed the decision.¹⁷

Again a court ruling contravened the administration's wishes. In February 2005, a federal district judge in South Carolina ruled that the Bush administration had greatly overstepped its authority in detaining Mr. Padilla for nearly three years without charging him with a crime and ordered that he be released within 45 days. The government immediately vowed to appeal the decision. Should the government again lose on appeal, it would be forced to file criminal charges against Padilla or release him. Mr. Padilla's defense attorney understood the significance of the ruling immediately noting that "it is confirmation that the Constitution is alive and well and kicking."¹⁸

In sum, while the executive branch took early initiative to increase its powers of detention to fight the War on Terror, the federal judiciary has steadily and successfully fought to limit the executive's ability to designate prisoners with enemy combatant status. Executive powers of detention are on the retreat and may yet be returned to the pre-911 status quo.

Department of Homeland Security

America's aura of geographic impregnability was incinerated along with the other victims of September 11, 2001.¹⁹ President George W. Bush responded quickly to the public's new sense of vulnerability by creating both a Homeland Security Council and an Office of Homeland Security (OHS) within the White House. OHS was meant to provide the president with additional staff resources to oversee the executive agencies responsible for protecting more than 285 million people, spread out over 3,717,792 square miles, and

¹⁷ David Stout. "Supreme Court Expands Review of Enemy Combatant Cases." *New York Times*. January 9, 2004.

¹⁸ Neil A. Lewis. "Judge says US Terror Suspect Can't be Held as an Enemy Combatant." *New York Times*. February 28, 2005; Phil Hirschrom. "Federal Judge: Charge Padilla or Release Him." *CNN.com*. March 1, 2005.

¹⁹ In opinion surveys taken immediately after the attacks, 71 percent of Americans expressed some fear that they themselves would be affected at home or at work by a subsequent terrorist strike. Specifically, 86 percent believed there would be more anthrax attacks, 72 percent believed there would be an attack using another biological weapon like smallpox, 83 percent thought there would be an attack using a car or truck bomb, 41 percent thought there would be a nuclear terrorist attack, 59 percent believed there would be an attack on the water supply, and 55 percent believed there would be an attack on the food supply. Source: *The NPR/Kaiser/Kennedy School National Survey on Civil Liberties*, conducted between October 31 and November 12, 2001.

enclosed by nearly 20,000 miles of border.²⁰ To do this job, OHS would have to coordinate the activities of more than 40 federal agencies, as well as federal relations with state and local governments, and the private sector. The president did not seek congressional authorization for the creation of the new office, not an unheard of maneuver in the history of executive-legislative relations. However, he subsequently refused to let his OHS director, former Pennsylvania governor Tom Ridge, testify before Congress on the administration's homeland security plans, a refusal that significantly heightened institutional tensions between Congress and the White House.²¹ The president justified this refusal by citing the separation of powers, which he interpreted as the right of the executive as commander-in-chief to make unilateral decisions regarding homeland security without seeking judicial review or congressional advice.

Congress chafed under the President's attempted end-run around legislative oversight. As an advisor to the President, Ridge was not subject to congressional approval and could not be compelled to testify in Congress. Moreover, since OHS was located in the executive office of the President, Congress had no oversight powers over the new office.

Only three days after the creation of OHS, Sens. Joseph Lieberman (D-Conn.) and Arlen Specter (R-Pa.) introduced legislation to establish a Cabinet-level department of homeland security, based largely on the recommendations of the Hart-Rudman Commission. These proposals were soon followed by a number of congressional hearings on homeland security and intense criticisms in the national press over the government's failure to prevent 9-11.

In late April of 2002, the Bush administration sensed defeat and decided to seize the initiative back from Congress; it formulated and put forth its own proposal for a cabinet-level Department of Homeland Security. After months of debate in Congress and substantial revisions, the new Department of Homeland Security was created in January 2003. DHS, unlike the White House office, would be subject to congressional authorization and appropriations, administrative oversight, and legislative vetting of top appointments. As a federal official subject to congressional confirmation, the DHS Secretary, former governor Ridge, could be compelled to testify before Congress.

The establishment of the new cabinet department was the most visible reorganization of executive bureaucracies, but the creation of DHS did not ultimately expand federal power much; more sweeping attempts at reorganization were considered but beaten back, and the new department comprised mostly federal agencies that already existed before the terrorist attacks.

More importantly, the transformation of OHS into DHS was also a direct rebuke to the president's initial assertion of unilateral Presidential authority over the development and

²⁰ Among the other potential domestic targets now thought to need protection from terrorist attack were more than 2,800 power plants (104 of them nuclear), 170,000 water systems, 190,000 miles of natural gas pipelines, and at least 463 skyscrapers (each more than 500 feet tall).

²¹ Alison Mitchell, "Letter to Ridge is Latest Jab in Fight over Balance of Powers," *New York Times*, March 5, 2002, p. A8.

coordination of federal homeland security policy. Congress asserted its oversight and appropriations authority over the executive branch.

The Organization of Domestic Intelligence Gathering

As the 'war strengthens states' tradition might anticipate, the attacks of September 11, and the evident failure of either the FBI or the CIA to stop them, generated significant pressure to strengthen the federal government's ability to gather domestic intelligence. The most controversial of these proposals envisioned an American version of Great Britain's MI5, basically a domestic version of the CIA. Yet, despite substantial political support for the idea just after the attacks, momentum toward the creation of a consolidated domestic spy agency slowed in the face of blistering opposition by civil libertarians and rival bureaucracies within the US national security establishment. In the end, the option of organizing a centralized domestic intelligence service (as either a stand-alone agency or a new division within the FBI) was rejected.

The forces pushing for the creation of a domestic intelligence agency in the United States after September 11 included an array of prominent journalists, academics, and politicians. The idea received national attention in June 2002 when Senator Bob Graham (D-Fla), then chairman of the Senate Intelligence Committee, proposed it. The idea quickly generated headlines. The New York Times devoted a handful of articles to the subject. Leading intellectuals became proponents of the proposal, as did prominent politicians.²² Former CIA Director John Deutch proposed stripping the FBI of its intelligence and counter terrorism divisions and creating a Domestic Intelligence Agency which "would report and be responsible to the director of Central Intelligence, just as the CIA is today...The principle advantage of this arrangement would be that it would permit integration of domestic and foreign intelligence efforts to combat terrorism." Former Deputy National Security Adviser James Steinberg echoed Deutch's comments, calling for "a domestic security agency which is separate from the FBI and law enforcement."²³

By the fall of 2002 the idea was under serious consideration by both Congress and the Bush administration. In early November, Tom Ridge, at that point still director of the White House Office of Homeland Security (OHS), traveled to London to be briefed on the operations of Britain's MI5. Later that month, President Bush convened a meeting of his administration's principal national security officials to discuss the possible creation of a US agency modeled on MI5. In December a joint congressional committee on intelligence recommended that Congress study the idea. In sum, a little more than one

²² Stephen Van Evera, a renowned scholar of international security at the Massachusetts Institute of Technology, argued in favor of the idea, as did North Carolina Senator John Edwards, who made the creation of a domestic intelligence agency the centerpiece of his national security platform in his bid for the 2004 Democratic presidential nomination.

²³ Commission Hearings from the National Commission on Terrorists attacks upon the United States. Tuesday Oct. 14, 2003; available at www.9-11commission.gov/archive/hearing4/9-11commission_hearing_2003-10-14.htm last accessed June 30, 2004.

year after the terrorist attacks on Washington DC and New York, the proposal to establish a domestic intelligence agency had drawn the attention and/or support of a diverse group of influential figures in government, academia and the US national security policymaking community.

In the meantime, FBI Director Robert Mueller set about reorganizing the FBI to supplement the bureau's traditional focus on law enforcement with a new division devoted to counterterrorist intelligence. Among Mueller's initiatives was the creation of a National Joint Terrorism Task Force at FBI headquarters, including a round the clock Counterterrorism Watch Center. Mueller also established sixty-six satellite Joint Terrorism Task Forces across the US to work with state and local law enforcement officials to uncover and disrupt terrorist plots. New rapid reaction counterterrorist "Flying Squads" were created to enable the FBI to deploy agents to the field at a moment's notice in response to a terrorist strike.

In May 2002 the Justice Department introduced a number of changes to its Attorney General Guidelines that unshackled the FBI in order to advance Mueller's organizational initiatives. The Guidelines had been introduced in the 1970s in response to perceived FBI abuses in the last decades of the J. Edgar Hoover era, which included spying on law abiding civil rights activists and anti-war protestors. The revised Guidelines gave the FBI greater freedom to pursue investigations before a crime had been alleged, to purchase data mined by private companies from public databases, and to conduct secret surveillance of domestic political and religious organizations.

As had been the case with respect to the USA PATRIOT Act, the American Civil Liberties Union played the role of the canary in the coal mine, mobilizing early opposition to both the proposed domestic spy agency and the FBI's new ambition to "own" the state's expanding apparatus for conducting surveillance on resident aliens and American citizens. In a series of press releases in early 2002, the ACLU argued that the creation of a domestic intelligence service would unconstitutionally undermine Americans' civil liberties. Concern about potential conflicts between domestic intelligence gathering and fourth amendment rights was not confined, however, to liberals and other traditional supporters of the ACLU. A senior Bush administration official was quoted in *The New York Times* as saying "My worry is a constitutional one—it's better to leave domestic surveillance with the FBI, whose history has evolved under the close scrutiny of the Congress and constitutional scholars."²⁴

For others the growing opposition to an American US MI5 was motivated less by principle and more by bureaucratic politics. The creation of a new domestic spy agency would presumably drain resources and prestige from existing departments who were themselves interested in gathering domestic intelligence. The major bureaucratic players in the field of national security, the Department of Defense, the FBI, and the new Department of Homeland Security, soon vigorously opposed the creation of a new spy agency that could preclude the expansion of their own roles in the counterterrorism war.

²⁴ Don Van Natta, Jr., 'Intelligence Critics Urge U.S. to Look to British Spy Agency,' *New York Times*, July 26, 2003.

Secretary of Defense Donald Rumsfeld, for example, hoped to secure greater clout for the Pentagon in this area and opposed the creation of the new agency. "In a move widely viewed as an effort by Mr. Rumsfeld to consolidate his control over the military's vast and unwieldy intelligence bureaucracy, he... won Congressional approval to establish a new position, the under secretary of defense for intelligence."²⁵

Tom Ridge, who by late November 2002 had become Secretary of the new US Department of Homeland Security (DHS), also became an outspoken critic of the proposed domestic intelligence agency. In public, Ridge cited constitutional law as a reason for doubting the feasibility of establishing a spy agency within US borders. Ridge proposed that for the time being the task should remain with the FBI. But Ridge also had powerful organizational motives to derail the spy agency proposal. In October 2002, a separate bipartisan panel of high-technology experts and former intelligence officials had recommended that the proposed Homeland Security Department take over collection and analysis of intelligence from the FBI. DHS was also to be charged with coordinating the sharing of intelligence collected from all other government agencies. Moreover many of the existing agencies that would now comprise DHS, including Customs and the Immigration and Naturalization Service (INS), already had their own intelligence divisions. Thus, the new department already possessed a domestic intelligence gathering capability that fell entirely under the DHS Secretary's span of control.

In the face of stiff opposition, FBI Director Mueller lobbied vigorously to maintain and augment the FBI's intelligence gathering responsibilities. Mueller called the creation of a new spy agency "a step backward in the war on terror." In testimony delivered to Congress and at the November 2002 meeting of national security officials in the White House Situation Room, Mueller asserted that the collection of counterterrorist intelligence had become the FBI's number one priority. Mueller also lobbied former Virginia governor James Gilmore, whose independent commission was investigating the intelligence failures that led up to 9/11.²⁶ The Gilmore commission responded by releasing an influential report in November 2002 recommending against the creation of a new domestic intelligence agency

In the end, a domestic CIA failed to materialize. The FBI was not discouraged from improving its domestic surveillance capability, and the other federal security agencies, including the new Department of Homeland Security, were satisfied that their own pieces

²⁵ David Johnston, 'Administration Begins to Rewrite Decades – Old Spying Restrictions'; *New York Times*, November 30, 2002

²⁶ Despite Mueller's efforts, many independent analysts regarded the FBI's foray into counterterrorist intelligence as doomed to fail. They argued that the FBI was ill-equipped to remake itself as a spy agency. John MacGaffin, former associate deputy director of operations of the CIA, summed up the critique, citing unbridgeable "cultural differences" between organizations devoted to intelligence gathering and organizations, such as the FBI, that were traditionally devoted to law enforcement. Law enforcement agencies are reactive, structured to catch and to prosecute people who have already committed a crime. In contrast, effective intelligence agencies are proactive, collecting information (and protecting sources) that can help them prevent the crime from occurring in the first place. Gary Thomas, 'CIA Identity Flap Sparks Debate Over Need for New Domestic Intelligence Agency', available at [www.iwar.org.uk/news - archive/2003/09-30-5.html](http://www.iwar.org.uk/news-archive/2003/09-30-5.html), September 30, 2003.

of the domestic intelligence gathering responsibility had not been taken away. In sum, the values of clarity and efficiency in the state's anti-terrorism effort were trumped by the typically rigorous defense of bureaucratic turf and the traditional American antipathy to expanded state power.

The Persistence of American Anti-Statism.

The Bush administration's repeated assertions of unilateral presidential power to battle domestic terrorism, without congressional authorization or judicial review, conform to expectations based on theory and historical experience that centralized state power will strengthen in response to a domestic crisis, particularly a war crisis. Even the case that provides the strongest evidence of the "expected" state response to a domestic crisis, simultaneously demonstrates the strength and persistence of American institutions designed to frustrate such responses.

The USA PATRIOT Act

Prior to September 11, 2001, the US Department of Justice had been the lead federal agency for domestic terrorism. When evidence surfaced soon after 9/11 that two Justice Department agencies, the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Service (INS), had mishandled evidence that might have uncovered the 9/11 plot, officials at Justice drafted the USA PATRIOT Act. Invoking the president's declaration of a national emergency, the PATRIOT Act permitted expanded access by federal law enforcement officials to Americans' medical, financial and academic records. Americans' email and Internet activity could now be secretly monitored "for intelligence purposes" rather than for probable cause, and the decision to investigate would be made by federal law enforcement officials, not courts. Federal law enforcement officials could also direct libraries and/or bookstores to surrender records pertaining to a citizen's choice of reading materials. They were granted virtually complete discretion over the designation of domestic political and religious groups as terrorist organizations. All of these activities could be undertaken without any requirement to notify either the suspect individuals or the suspect organizations that they were under investigation. In the panicked post-9/11 environment, the USA PATRIOT Act was passed with limited debate by substantial, bipartisan majorities in both houses of Congress. It was signed into law by President Bush on October 26, 2001, just six weeks after the terrorist attacks.

Taken together, these early legal and organizational initiatives of the Bush Administration marked a significant effort to centralize and expand the powers of the state.

But this is not, as they say, the end of the story. After its initial enactment, this most visible expansion of executive power quickly sparked the smoldering embers of American anti-Statism. At first, this occurred in the form of ideological criticisms by a rare coalition of prominent activists on both the liberal left and the libertarian right. Then the Madisonian design kicked in. The judicial branch of the federal government asserted

its independent claim, as a separate and co-equal branch of government, to review the executive's unilaterally imposed homeland security initiatives.

Early objections were sounded by an unlikely coalition of liberal and conservative advocacy groups. Organizations ranging from the traditionally liberal American Civil Liberties Union and People for the American Way to the politically conservative Gun Owners of America and Americans for Tax Reform decried what they viewed as an unconstitutional violation of fourth amendment protections against unreasonable search and seizure. By February 2004, mainstream public opinion was moving in the same direction. Only 43 percent of Americans surveyed that month thought the USA PATRIOT Act was "about right" on civil liberties, and another 26 percent said it went "too far." When citizens were given detailed information about specific provisions of the Act, opinions of the law turned much more negative: 70 percent said they opposed provisions allowing federal agents to secretly search citizens' homes; 51 percent opposed the law's requirements that hospitals, airlines, bookstores, universities and libraries secretly turn over records to FBI agents on request. By this point, members of Congress in both parties were openly questioning the wisdom of extending provisions of the PATRIOT Act that were due to expire in 2005, so much so that both the president and the attorney general felt compelled to mount a public defense of the law.

The federal judiciary has unquestionably asserted its *right* to rule on the constitutionality of the USA PATRIOT Act and a host of other Bush administration initiatives that effectively expand the power of the state and/or further concentrate the state's powers in the executive branch. Indeed, both Congress and the courts have since reserved the right to revise or reject the entire edifice of law and policy constructed by the Bush administration in response to September 11.

Each of the Bush administration's assertions of unilateral authority to respond to the terrorist threat has provoked substantial political and institutional resistance. Whatever the outcome of current court challenges to the USA PATRIOT Act and congressional debates about revising the Act and extending provisions that are set to expire in 2005, the Bush administration's unilateralism has been curtailed by the separation of powers that embodies the traditional American antipathy to concentrated state power.

Conclusion

In the first year after the terrorist attacks of September 11, 2001, many analysts presumed that the need to safeguard the US homeland against further attack would lead inevitably to expanded powers and a larger role for the American state. Indeed, as we have discussed, several proposals were made and some initiatives were actually undertaken to accomplish just that end. Yet despite the alarms sounded by civil libertarians from both ends of the political spectrum, the anti-Statist mechanisms designed into America's domestic institutions have proven remarkably robust, even in a situation of constant danger.

Three features of the Madisonian design have triggered more or less automatic resistance to a significant expansion or further concentration of state power: the separation of powers at the federal level among the three co-equal branches, the openness of the governance system to interest group pressure, and the fragmented nature of the state bureaucracy. In the first case, Congress and the judiciary have reflexively asserted their institutional prerogatives against declarations of unilateral presidential authority. In the second case, private interests have successfully resisted proposed government mandates, preserving instead a degree of freedom for industry self-regulation. In the third case, the proliferation of agencies with partially overlapping missions virtually guarantees that a high profile area like homeland security will attract multiple turf-conscious players.

While America's domestic institutions have recoiled against extreme aggregations of power, they have also complicated the establishment an effective homeland security policy. At present, domestic intelligence is still collected by several different agencies whose computers and personnel barely communicate; assessments of airport screeners conclude that both private and public screeners are underperforming, and computer security remains in the hands of corporations that face inadequate incentives to invest in securing their systems against terrorist infiltration.

Based on history and recent events, Americans can be reasonably confident that Congress and the courts will once again curb most of the excesses committed by government officials in the name of homeland security. The real challenge for the US government in countering the terrorist threat is not how to prevent the rise of a chimerical police-state. It is, rather, how to regulate incursions by private companies into the personal affairs of American citizens and simultaneously turn the scores of disconnected actors that actually comprise the US homeland security system—large and small, public and private, federal, state and local—into a network of highly communicative sensors able to detect, describe and ultimately destroy a highly adaptive, shape-shifting enemy.