2005

11/9-9/11: The Brave New World Order: Peace through Law - Beyond Power Politics or Peace through Empire - Rationale Strategy and Reasonable Policy

Harvey Rishikof

Patrick Bratton

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Criminal Law Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol50/iss3/7

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
11/9-9/11: THE BRAVE NEW WORLD ORDER: PEACE THROUGH LAW—BEYOND POWER POLITICS OR PEACE THROUGH EMPIRE—RATIONALE STRATEGY AND REASONABLE POLICY

Harvey Rishikof*
and Patrick Bratton**

I. 11/9-9/11: The Brave New World Order

Many had hoped that the end of the Cold War would produce a new world order and a peace dividend. Regrettably, international terrorism, international criminal networks, humanitarian disasters, failed states and rogue states, and finally, indigenous political insurgencies have combined to create in different regional areas of the world "a fluid mass of anarchy." In the latest report to reform the United Nations, six specific and interconnected threats to international peace were highlighted—"interstate conflict, civil war, economic and social unrest, weapons of mass destruction, terrorism and organized international crime." To some, the roots lie deep in the reactions to market globalism; to others, the collapse of restraint is a result of a clash of civilizations and militant religions. The United States' responses to the rise of this "brave new world" must be understood in the broader context of the increasing erosion between the traditional separation of international and domestic law and the military and civilian understanding of rights and responsibilities. As a preemptive

* Professor of Law, Chair, Department of National Security Strategy, National War College. The title is derived from the Conference and the last chapters in Raymond Aron, Peace and War (2003). The views expressed in this article are those of the authors and do not reflect the official policy or position of the National Defense University, the National War College, the Department of Defense or the U.S. Government.

** Ph.D. Graduate Student at Catholic University.


4. See Samuel P. Huntington, The Clash of Civilizations, Foreign Affs., Summer 1993, at 22 ("[T]he fundamental source of conflict in this new world will not be primarily ideological or primarily economic. The great divisions among humankind and the domination source of conflict will be cultural.").

(655)
or prevention approach to foreign policy begins to be institutionalized and operationalized, the procurement of information that can become "operational" has increasingly taken primacy.

Two political world historic events have shaped this emerging "brave new world" that inform and underscore our understanding of law and institutions. One event is a triumph of peace over war—the fall of the Berlin Wall on November 9, 1989 or as the European community refers to the day, "11/9." The other historic event was an act of naked violence over peace—the multi-pronged attack by a non-state actor on United States soil on September 11, 2001, or as Americans characterize the event, "9/11." Each event undermined what had been the status quo in two realms of power and law, resulting in a transition period affecting both realms domestically and internationally. We are still working our way through both transition periods of institutional and organizational change at the domestic and international levels.

The Cold War ended on 11/9, but the underlying problem of individual state power and sovereignty was not resolved. For many, the Cold War embodied the traditional state versus state competition in international relations, whereby the projection of force was viewed as divided into a bi-polar world between the United States and communism. The doctrines of containment and massive retaliation ensured mutually assured destruction through the use of nuclear weapons. Although economic power was viewed as multi-polar after the 1970s, with different states exerting different degrees of influence, such as Japan's waxing and waning of economic power, the projection of force by either of the two superpowers was held in check for fear of dire consequences.

To be sure, proxy wars were fought—Korea, Vietnam and Afghanistan—and each superpower claimed a sphere of influence over its satellite states, whereby domestic political regimes were monitored for appropriate economic and political policies. In Eastern Europe—Czechoslovakia, Hungary and Poland—when politics became too "western and democratic" force was used to maintain order. On the other hand, when Latin American countries—Cuba, Chile and Nicaragua—flirted with socialism and communist ties, actions were taken to either covertly, or overtly, contain or change the offending regime. In other regions, such as Africa and the Middle East, countries were aligned with each superpower (e.g., Israel and the United States, Iraq and Russia). Others played the superpowers off of each other for domestic advantage (e.g., Egypt).

The critical result was that in the Cold War, failed states were limited events, and/or possibilities, because there could only be client states in the bi-polar world. The fall of the Berlin Wall ended this balance of fear and created new room for states to fail, or for governments to be unable to exercise the legitimate monopolization of the use of force over a specific
geographical area. The Montevideo Convention on the Rights and Duties of States, however, establishes four characteristics of states. The Convention’s first article establishes: “The State as a person of International Law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States.”

This new possibility for domestic chaos and rogue states coexisted, while at the same moment there remained only one superpower, the United States, with the ability to exercise “full spectrum dominance” in the projection of force. In the immediate post-Cold War, the legacy organizations of collective security, such as the North Atlantic Treaty Organization (NATO), were reluctantly mobilized to respond to specific events of state failure in Bosnia and Kosovo, but these military operations caused significant strain between U.S. relations with its allies. Limited political objectives, restricted rules of engagement, the gap between American and European military technology and an ad hoc international tribunal system were understood to undermine joint NATO coordination. Moreover, the joint military action in the Balkans was not taken with U.N. approval, but under the authority of a regional security agreement. “Old Europe” from this perspective appeared to some to be a “middle power” jockeying to maintain advantage and strength through Cold War institutions. The veto power of China, Russia or even France in the National Security Council meant that the interpretation of the “just use of force” required their approval under the U.N. Charter.

In the wake of 11/9, what would be the new rules of international engagement when only one superpower remained, and the existing international regime of the United Nations seemed impotent in the face of regional regime collapses, acts of genocide in Rwanda and massive institu-


7. Id. art. 1. This section draws from the UNCTEC 2004 report, which is the simulation of the committees and specialized agencies of the United Nations, organized by students of Tecnológico de Monterrey, Campus Cuernavaca. See UNCTEC Report, Tecnológico de Monterrey, available at http://www.mor.itesm.mx/MNU/ICJ.doc (last visited Feb. 8, 2005).

8. The concept of “full spectrum dominance” is the ability to project force under the sea, on the sea, and over the sea and land in all forms of instrumentality. In sum, “full-spectrum dominance means the ability of U.S. forces, operating alone or with allies, to defeat any adversary and control any situation across the range of military operations.” Jim Garamone, American Forces Information Service, Joint Vision 2020 Emphasizes Full-Spectrum Dominance (June 2, 2002), available at http://www.defenselink.mil/news/Jun2000/n06022000_20006025.html.

9. U.N. Charter art. 27.
tional failures resulting in humanitarian crises of hunger, starvation and criminal activity as in Somalia?

It was against this evolving international background that the 9/11 attack took place and must be understood. The deadly act was perpetrated by non-state actors using terrorist tactics, in this case airplanes as bombs, to attack civilians to achieve a variety of previously stated political goals. Was this a criminal act, an act of war or some combination of the two? What was the appropriate domestic and international response? Immediately after 9/11, the Security Council passed a resolution condemning the action, and NATO, in an unprecedented action under its Article 5 power, pledged support to act under its charter.  

The issue became: was this an act of war, a criminal act or an act of armed struggle for liberation? Clearly, terrorism is a tactic employed for a political objective, unless fear and chaos is being pursued to achieve some form of nihilistic vision. The characterization of this terror event is significant, particularly in the context of the new international situation, because it shapes and continues to shape the institutions and instruments required to respond. How was the world to respond to non-state actors prepared to use weapons of mass destruction against civilians? Can states declare war on a tactic—The Global War on Terrorism? How could these non-state groups be deterred and how should they be prosecuted? In short, a host of questions and issues arose.

II. THE INSTITUTIONAL TERRORISM AND INTELLIGENCE FRAMEWORK: DOMESTIC AND INTERNATIONAL PERSPECTIVES

A. The Dominant Domestic View of the Central Intelligence Agency (CIA) Pre-11/9-9/11

Over time a series of actions were taken to craft new policies and new institutions as a response to these events. To appreciate the transition we are undergoing it is instructive to understand the terrorism and intelligence institutional framework “pre” and “post” the 11/9-9/11 worlds.

The National Security Act (NSA) of 1947 was the core institutional document that established the defense and intelligence agencies, prescribed authorities and created the Central Intelligence Agency (CIA) to fight the Cold War.  


https://digitalcommons.law.villanova.edu/vlr/vol50/iss3/7
between the Federal Bureau of Investigation (FBI) for domestic matters involving intelligence and the CIA for external intelligence matters.\textsuperscript{12} Under the NSA of 1947, the CIA would coordinate clandestine operations abroad, but intelligence would not be "centrally controlled" because the then existing departmental agencies, the FBI, the Office of Intelligence Research for the State Department, the Intelligence Division of the Army, the Office of Naval Intelligence, the Air Force Directorate of Intelligence and related signal intelligence offices remained independent.\textsuperscript{13} Lack of centralization and departmental autonomy fostered tension and competing points of view. Although this structure generated the traditional bureaucratic struggles over turf, the decentralization followed in the U.S. tradition of checks and balances to thwart too much governmental authority. Over the next fifty plus years, as the intelligence community grew to fifteen agencies, periodic attempts to create centralized budget and policy authority through presidential directives and legislation met with little success.\textsuperscript{14}

Until the 1990s, the last major presidential attempt to strengthen the CIA director's control as Director of Central Intelligence (DCI) was under President Ronald Reagan.\textsuperscript{15} Executive Order 12,333 gave the DCI a leading role in "developing budgets, reviewing requests for the reprogramming of funds, and monitoring implementation."\textsuperscript{16} Nevertheless, even with this authority, approximately eighty percent of the intelligence budget was still controlled by the Secretary of Defense.\textsuperscript{17} The tensions between the military's need for operations, the FBI's requirements for prosecution and "chain of custody" for evidence and the general need for a centralized control for intelligence was recognized and continued to cause friction.\textsuperscript{18} In the 1990s, this multi-layered tension was reflected in subsequent attempts to find a solution for intelligence problems—the Intelligence Organization Act of 1992, the 1995 Presidential Decision Directive 35 under President William Clinton and the Intelligence Renewal and Reform Act of 1996.\textsuperscript{19} As pointed out by Michael Warner, what has guided reform was the contradictory impulse of urging the DCI to exercise more control while limiting his freedom to allocate "national" resources

\textsuperscript{12} Id. (noting roles of CIA and Federal Bureau of Investigation (FBI) in relation to internal and external intelligence).

\textsuperscript{13} Id. (explaining that totality of intelligence is not centrally controlled).

\textsuperscript{14} Id. (noting failure to centralize administrative aspects of intelligence).

\textsuperscript{15} Id. (describing President Reagan's attempt to provide head of CIA with more overall administrative power).

\textsuperscript{16} Id. (defining role of CIA director under Executive Order 12,333).

\textsuperscript{17} Id. (finding that authority under Executive Order 12,333 did not carry with it control of intelligence budget).

\textsuperscript{18} Id. (noting tension between varying branches of government having competitive desires for intelligence resources).

\textsuperscript{19} Id. (listing recent attempts to reform administrative structure of intelligence).
among competing priorities.\textsuperscript{20} All the attempts of reform underscored the tension between "national" and "tactical" intelligence as viewed by the different component parts of the community.\textsuperscript{21} To some this lack of coordination served to protect bureaucratic turf and ensured lively debate over matters of policy.

B. The Dominant Domestic View of the FBI Pre-11/9-9/11

Post-1947, the United States had established a legal regime that clearly distinguished among criminal law enforcement, the laws of armed conflict and national security. This paradigm was established to keep in check the broad investigative powers of the FBI and the roles and missions of the CIA and the Department of Defense. Within this framework, since 1947, the agencies have over the years enjoyed periods of both cooperative and intensely competitive coordination.\textsuperscript{22} Yet, the increase of transnational crimes—"narcotics, terrorism, money laundering, economic espionage, and shipments of material for weapons of mass destruction"—created challenges to the old paradigm.\textsuperscript{23} Insurgencies, narco-sponsored governments and the intersection of guerrilla movements with the illicit trade of guns, drugs, diamonds, money laundering and terrorism began to unravel the traditional lanes of jurisdiction.\textsuperscript{24}

Post 1947, two critical documents shaped the FBI's mission and role in the area of national security and intelligence: the Foreign Intelligence Surveillance Act (FISA) and Executive Order 12,333.\textsuperscript{25} Under FISA, surveillance of agents of a foreign power was appropriate so long as the "primary purpose" was to obtain foreign intelligence information.\textsuperscript{26} And under FISA, records could be sought only "for purposes of conducting foreign intelligence" when the target was "linked to foreign espionage"

\textsuperscript{20} Id. (describing conflict between apparent authority granted to CIA director and lack of power to actually implement important choices).
\textsuperscript{21} Id. (noting tension between national and tactical intelligence within different intelligence branches of government).
\textsuperscript{22} See Mark Riebling, Wedge (2002).
\textsuperscript{24} See id. at CRS-3 (concluding that "the lines currently dividing law enforcement and security issues are blurred").
\textsuperscript{25} See Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811) (authorizing surveillance to obtain foreign intelligence); Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,942 (Dec. 8, 1981) ("The United States intelligence effort shall provide the President and the National Security Council with the necessary information on which to base decisions concerning the conduct and development of foreign, defense and economic policy, and the protection of United States national interests from foreign security threats.").
\textsuperscript{26} See FISA, § 102 (providing for authorized electronic surveillance directly "solely" at communications between foreign powers).
and an "agent of a foreign power." Actions and procedures were taken to ensure that FISA warrants would not be issued as a way to overcome weak "probable cause" warrants on the criminal side of the FBI.

Nevertheless, the fact that the FBI also functioned as the leading federal criminal investigative arm of the government sustained a culture of "prosecution" not "prevention." The classic reasons that usually have been proffered for the FBI's weakness in the national security area are that the FBI is primarily and culturally focused on making cases for criminal investigation. Thus, in the FBI's effort to maintain the integrity of the criminal prosecution, for evidentiary and chain of custody reasons, the FBI does not cooperate with the intelligence community. The FBI would not share its information due to fears of tainting the evidence. The second major criticism focused on the FBI's timidity and reluctance to aggressively pursue investigations in the counter-terrorism, counterintelligence and national security arenas due to a reluctance to revisit the years of abuse chronicled by the Church and the Pike Committees. The third and related criticism of the FBI has been a lack of a talented, effectively trained special agent cadre, and a failure to establish a modern computerized record keeping process to analytically process information in a coherent and timely manner. In short, the FBI "does not know what it knows" and when it knows it; it does not perform effectively. The conclusion was that the 1947 regime helped create a system whereby the FBI was to be a reactive institution that investigated crimes after the fact and did not prevent domestic crimes or international incidents from happening.

This classical view of the FBI argues that as an organization it was designed to be a law enforcement agency that investigates crimes and gathers evidence for criminal trial prosecutions. Prevention was never a priority, nor was national security the fast track for a career at the FBI.


29. Named for their respective chairmen, Senator Frank Church of Idaho and Representative Otis Pike of New York.

30. The latest issue over the FBI and computer records concerns the revelation that the $170 million spent on the new system to provide ready access to information on suspected terrorists may now have to be scrapped and restarted from scratch. See Nicholas G. Carr, Does Not Compute, N.Y. TIMES, Jan. 22, 2005, at A15 (claiming such software debacles are common occurrence in private sector).

Although there had been periodic, celebrated national security cases, this was not the focus of the organizational structure.

The recent celebrated cases, including: the laboratory investigation over whistle-blower Frederic Whitehurst's allegations, the shootings at Ruby Ridge, the Waco standoff in Texas, the Centennial Olympic Park bombing and the false Richard Jewel accusation, the investigation of Wen Ho Lee as a spy stealing nuclear secrets and finally the discovery of Robert Hanssen as a double-agent working for the Russians, all conspired to create a negative image of the Bureau as an ineffective counterintelligence agency. Successes such as the investigation and capture of Aldrich Ames, a double agent at the CIA, or the arrest and prosecution of Katrina Leung, an FBI source and Chinese double agent, have not done enough to counter the general sense that the FBI was not up to the task.

As reforms were instituted, the question remained whether the FBI would continue to be an organization where the dominant culture was that of a national elite police force that did not share its information and expertise easily with local law enforcement or other agencies. Special Agent Coleen Rowley's letter from the Minneapolis Field Office to Director Robert Mueller in February of 2003, cataloging a series of concerns about how the FBI's war on terrorism and the upcoming war with Iraq were affecting the FBI's credibility, encapsulated many of the popular concerns that the general public held about the FBI.32

Prior to the 11/9-9/11 transformation, the Supreme Court made critical distinctions between citizens and non-citizens in both domestic and international arenas.33 Historically, the FISA Court and the FBI organized its investigative bureaus around this distinction, as did the CIA and the Department of Defense. The same restraint that characterized the FBI in domestic investigations and was viewed as an appropriate curtailment on its power in the pre-11/9-9/11 era began to be interpreted as an institutional weakness. It is interesting to note that contrary to common belief, the FBI has had a long pre-9/11 tradition in counterintelligence and counter-terrorism, dating from the Palmer Raids in the 1920s to fighting saboteurs in World War II to anti-communism in the Cold War.34 At times


33. See Johnson v. Eisentrager, 339 U.S. 763, 768 (1950) (holding that alien enemies captured abroad were not entitled to writ of habeas corpus); Ex parte Quirin, 317 U.S. 1 (1942) (holding unlawful alien enemy combatants captured on U.S. soil could be tried before military tribunals).

this history has not been a model of restraint and professionalism, but the agency has been effective.\textsuperscript{35}

Similarly, there have been a number of legislative and presidential attempts to reform the CIA, to create fusion centers for coordination and consultative approaches and refocus for the evolving law enforcement and intelligence missions of the CIA. Some of these attempts have included: the Counter-terrorist Center in 1986 (CTC); the National Drug Intelligence Center in 1992 (NDIC); the Intelligence-Law Enforcement Policy Board and Joint Intelligence-Law Enforcement Working Group in 1994 (JICLE); the National Counterintelligence Policy Board and National Counterintelligence Center of 1994; the Antiterrorism and Effective Death Penalty Act of 1996 (allowing for the use of classified material in deportation hearings); and finally, Presidential Decision Directives (PDDs) 62 (Protection Against Unconventional Threats) and 63 (Critical Infrastructure Protection), which created the National Infrastructure Protection Center at the FBI in 1998.\textsuperscript{36} Yet despite all these valiant efforts to fuse the investigative and intelligence worlds, disjunction remained.

C. The Dominant Domestic View of the International Terrorist Legal Regime Pre-11/9/11

The collective security agreement of the United Nations supported and aided in the creation of conventions to combat terrorism. Terrorism could not be defined by the international body but specific acts of violence or theft were criminalized such as when aircrafts were hijacked, individuals were kidnapped or murdered, hostages taken, nuclear material stolen, ships pirated, plastic explosives misused, public spaces bombed, oil platforms attacked and financial institutions used for illicit activity.\textsuperscript{37} In short, twelve major multilateral conventions and protocols related to combating terrorism existed pre-11/9-9/11.\textsuperscript{38} These conventions were responses to

\begin{itemize}
\item \textsuperscript{35} See Kessler, The Bureau: The Secret History of the FBI, supra note 34, at 15-16 (discussing mass arrests of Palmer Raids based on random and indiscriminate information); Kessler, The FBI, supra note 34.
\item \textsuperscript{36} See Best, supra note 23, at CRS-14-24 (examining steps to coordinate law enforcement operations).
\item \textsuperscript{37} For further discussion on major multilateral conventions and protocols related to combating terrorism that existed pre-11/9-9/11, see infra note 38 and accompanying text.
\item \textsuperscript{38} Pre-11/9-9/11 conventions combating terrorism include the following: 1. Convention on Offences and Certain Other Acts Committed On Board Aircraft ("Tokyo Convention," 1963—safety of aviation): applies to acts affecting in-flight safety; authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, when necessary to protect the safety of the aircraft; requires contracting states to take custody of offenders and to return control of the aircraft to the lawful commander; 2. Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention," 1970—aircraft hijackings): makes it an offence for any person on board an aircraft in flight [to] "unlawfully, by force or
threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft" or to attempt to do so; requires parties to the convention to make hijackings punishable by "severe penalties;" requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; requires parties to assist each other in connection with criminal proceedings brought under the convention;
3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("Montreal Convention," 1971—applies to acts of aviation sabotage such as bombings aboard aircraft in flight): makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft; to place an explosive device on an aircraft; and to attempt such acts or be an accomplice of a person who performs or attempts to perform such acts; requires parties to the convention to make offences punishable by "severe penalties;" requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution;
4. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973—outlaws attacks on senior government officials and diplomats): defines internationally protected person as a Head of State, a Minister for Foreign Affairs, a representative or official of a state or of an international organization who is entitled to special protection from attack under international law; requires each party to criminalize and make punishable "by appropriate penalties which take into account their grave nature," the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations or the means of transport of such person; a threat or attempt to commit such an attack; and an act "constituting participation as an accomplice;"
5. International Convention Against the Taking of Hostages ("Hostages Convention," 1979): provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international governmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention;"
6. Convention on the Physical Protection of Nuclear Material ("Nuclear Materials Convention," 1980—combats unlawful taking and use of nuclear material): criminalizes the unlawful possession, use, transfer, etc., of nuclear material, the theft of nuclear material, and threats to use nuclear material to cause death or serious injury to any person or substantial property damage;
8. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, (1988—applies to terrorist activities on ships): establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established against international aviation; makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat or intimidation; to perform an act of violence against a person on board a ship if that act is
specific terrorist incidents and did not constitute a comprehensive anti-terrorism regime.\textsuperscript{39} The inability to separate terrorism from insurgency or political action stymied the international community. The law of armed conflict, however, was governed by the Hague Conventions (1907), the four Geneva Conventions (1949), the two Protocols to the Geneva Con-

likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships;

9. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988)—applies to terrorist activities on fixed offshore platforms: establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation;

10. Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)—provides for chemical marking to facilitate detection of plastic explosives, e.g., to combat aircraft sabotage: designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am 103 bombing); parties are obligated in their respective territories to ensure effective control over "unmarked" plastic explosive, i.e., those that do not contain one of the detection agents described in the Technical Annex to the treaty; generally speaking, each party must, among other things: take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives; prevent the movement of unmarked plastic explosives into or out of its territory; exercise strict and effective control over possession and transfer of unmarked explosives made or imported prior to the entry-into-force of the convention; ensure that all stocks of such unmarked explosives not held by the military or police are destroyed or consumed, marked or rendered permanently ineffective within three years; take necessary measures to ensure that unmarked plastic explosives held by the military or police, are destroyed or consumed, marked or rendered permanently ineffective within fifteen years; and, ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date-of-entry into force of the convention for that state;

11. International Convention for the Suppression of Terrorist Bombing (1997): (U.N. General Assembly Resolution) creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place;

12. International Convention for the Suppression of the Financing of Terrorism (1999): requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, though groups claiming to have charitable, social or cultural goals or which also engage in such illicit activities as drug trafficking or gun running; commits states to hold those who finance terrorism criminally, civilly or administratively liable for such acts; provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other states on a case-by-case basis. Bank secrecy will no longer be justification for refusing to cooperate.


\textsuperscript{39} For further discussion on major multilateral conventions and protocols related to combating terrorism that existed pre-11/9-9/11, see \textit{supra} note 38 and accompanying text.
ventions, the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Uniform Code of Military Justice (UCMJ) (1950), criminal law and customary law. A critical aspect in this area of the law on war and terrorism was the distinction between combatants and non-combatants, citizens and non-citizens.

Terrorists were perceived to have committed criminal acts. Traditionally a U.S. citizen committing an act of terrorism would be tried in the criminal courts, as was Timothy McVeigh for his bombing of the federal building in Oklahoma. Conversely, a U.S. citizen committing an act of terrorism during a war would be viewed as a traitor and tried for treason in the federal civilian courts. Members of the armed services would be under the UCMJ and under certain circumstances would be tried by military commissions. Those who did not follow the rules of war, such as spies, would not be afforded the protections of the conventions, and would fall under customary law. Further, all could be punished for “war crimes” if specific acts violated the agreed-upon norms. The history of trying spies by military commissions dates from the Revolutionary War and the trial of Major John Andre, Adjunct-General to the British Army, who was captured behind enemy lines out of uniform while using an assumed name on his way to an assignation with Benedict Arnold. Major Andre was hung after a swift battlefield adjudication. Subsequently, the Mexican War and Civil War introduced martial law courts, which helped establish precedents for the two war courts of World War II—Ex parte Quirin and Johnson v. Eisentrager—which President George W. Bush’s Military Order of November 13, 2001 used to authorize the current military commissions to try terrorists.

40. See Ex parte Quirin, 317 U.S. 1, 31 (1942) (holding that German spies during WWII could be tried before military tribunals).


42. See Stillman, supra note 41 (same).

43. See 317 U.S. at 31 (“Unlawful combatants are . . . subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”).

44. See 339 U.S. 763, 768 (1950) (holding that writ of habeas corpus does not extend to “an alien enemy who, at no relative time and in no stage of his captivity, has been within . . . [the United States] territorial jurisdiction”).

III. Post-11/9-9/11 Responses: Intertwining Domestic and International Legal Regimes and Military and Civil Institutions—The Challenges and Anomalies

A. The National Security Strategy

In the wake of 11/9 and 9/11, a new international U.S. National Security Strategy slowly evolved. This emerging strategy ran headlong into the regimes, doctrines and institutions that constituted the domestic and international order of the Cold War. The collective security regime envisioned by the United Nations and NATO was replaced by a concept termed the “coalition of the willing.”46 In the words of the 2004 U.S. Ambassador to the U.N., John C. Danforth:

While the U.N. is an important part of multilateralism, which is essential to U.S. foreign policy, it's very difficult to get strong resolutions passed. It's built for compromise and it's built for word-smithing. It's difficult to create real policies because of the ornate structure of multilateralism, at least the U.N.'s version of it.47

The coalition of the willing would be shaped by the problem to be solved, rather than the coalition shaping the way to solve the problem. The international institutions that had previously structured and legitimized action would now be sidelined, replaced by an evolving institutionalism of relations. This trend had been foreshadowed by the increasing reluctance of the United States to participate in the new regimes of the Kyoto Accords, the International Mine Convention, the International Criminal Court and the Anti-Nuclear Test Ban Treaty.

The new policy of the United States would require added muscular support. To that end, Secretary of Defense Donald Rumsfeld instituted a new philosophy of “transformation” for the U.S. military in 2000.48 This policy served to increase the tempo of change that had begun under the Revolution in Military Affairs (RMA) of the 1990s.49 Whereas 11/9 was viewed as the event that would provide a “peace dividend” and a drawing down of military forces, the ensuing state collapses in Africa and the


Balkans began to threaten the world order. Repeatedly, U.S. forces were being requested to perform military duties other than war—peacekeeping, state stabilization and quasi law enforcement.50 A new force structure was required for the new duties and threats. This newly transformed force would be more mobile, lethal, joint and technological, while projecting full spectrum dominance.51 In any traditional "force on force" engagement, the U.S. would have superiority and clear dominance whatever the terrain—sea, land, air or space. Rather than utilize the concept of adversarial containment, the logic would be to prevent adversaries from being allowed to reach a level of threat that could call U.S. dominance into question. There would be no more fair fights.

The issue that remained was how to successfully perform the function of destroying the military capacity of the enemy and then perform operations other than war. Now the borders of the U.S. became extended as troops positioned abroad in a "leaning forward posture," performing stabilization roles, became targets for insurgents.52 Taking the fight to these unstable political environments invited casualties until domestic order with domestic leadership could be established. The new strategy created new challenges and anomalies that the current legal authority and structures had to deal with.

B. The Use of Force: War or Military as Law Enforcement:
Warrant v. Prevention?

Internationally, the power of the U.S. to project force unilaterally and its dissatisfaction with joint military operations resulted in the new National Security Strategy of 2002.53 The strategy recognized that the United States possesses "unequalled . . . strength and influence" and that its power should be used to promote peace and free and open societies on every continent.54 The strategy of "preemption/prevention" was announced, and the invasions of Afghanistan and Iraq were undertaken.55

In the international system, who determines when self-defense is appropriate and what is the appropriate response? 9/11 called into question the international view of self-defense. Under the U.N. Charter, "[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not

50. See Rumsfeld, supra note 48 (announcing duties to be undertaken by U.S. forces in foreign conflicts in twenty-first century).
51. There has been some questioning of this light model in the wake of the difficulties securing post-conflict peace in Iraq.
52. See Rumsfeld, supra note 48 (asserting importance of nation utilizing military in leaning forward posture to deter national threats).
54. See id. (suggesting country should use powers to promote freedom).
55. See id. (characterizing terrorists and rogue states as imminent threats that require preemptive measures).
endangered” and “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

Yet, there remains an exception to those peace-bearing provisions, which states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The immediate world reaction to 9/11 was extremely supportive. A U.N. resolution condemning the act was passed within days, and NATO, for the first time in its history, evoked collective action under its charter. The invasion of Afghanistan, therefore, may be characterized as more of a “serving of a criminal warrant” than as a strategy of preemption or prevention in the pre-11/9-9/11 world. The 1989 invasion of Panama and the capturing/arresting of Panama’s Head of State Manuel Antonio Noriega—pursuant to an indictment—would be the model. Bringing Noriega to the United States and trying him in federal court for racketeering, drug trafficking and money laundering was the precedent allowing the military to serve the warrant. Although Noriega had not attacked the United States, he had violated U.S. law, so U.S. courts extended their jurisdiction to him.

In the case of Afghanistan, Osama bin Laden and al Qaeda took responsibility for 9/11. Operatives had used a hijacked plane as an instrument of violence in violation of the terrorist conventions. The immediate reaction of the U.S. government was to place bin Laden on the FBI’s Top

56. U.N. CHARTER art. 2, para. 3-4.
57. Id. art. 51.
60. See id. (listing Noriega’s numerous violations).
61. See id. (same).
Ten and request Afghanistan to extradite him to the United States.\textsuperscript{62} Afghanistan, under the control of the Taliban, refused to serve the warrant, thereby becoming complicit in the act of violence.\textsuperscript{63} Osama bin Laden clearly was intent on continuing his attack and using Afghanistan as his base of operations. Afghanistan, for all intents and purposes, had become a co-conspirator in the operations in its refusal to assist in the capturing and rendition of bin Laden. Contrary to the Noriega case, where there were no political undertones to the actions, terror was the goal of this violence. War was what bin Laden wanted to dignify the cause of jihad, and al Qaeda, being treated as a common criminal, would have denigrated the struggle. With U.N. support, the United States then invaded and began the process of state-building.

Iraq, on the other hand, given the continuing U.N. resolutions and the subsequent failure to recover evidence of weapons of mass destruction, is better understood as an act of prevention. The debate as to whether there was a "material breach" of the ongoing U.N. resolutions and that therefore no further resolution was required before an invasion could take place is a classic international law question of some debate.\textsuperscript{64} The issue of "preemption" turns on more technical questions. Preemption requires a degree of immediacy or immanency that leaves little time to respond. The original doctrine stems from the \textit{Caroline} case of the mid-nineteenth century, when Great Britain, then an imperial power, used force to destroy a U.S. ship.\textsuperscript{65} The British captain believed the U.S. boat was aiding and abetting an insurgency against its rule in Canada.\textsuperscript{66} Daniel Webster, the then Secretary of State, was outraged and in a series of letters stated that preemptive attack may be carried out only when the situation was instant and overwhelming, "leaving no choice of means and no moment for deliberation."\textsuperscript{67}

Part of the argument for preemption in the new National Strategy is that "intention" is collapsed into "capacity." In other words, when a state possesses WMD, it plans to use them in an offensive manner, which entitles the adversary to strike first. This creates an inherently unstable system.

\textsuperscript{62} See CNN, Accused Bombing Mastermind Still at Large (Oct. 8, 1999), at http://www.cnn.com/US/9910/08/embassy.bombing.01/ (stating that "[t]he U.S. . . . added [bin Laden's name] to the FBI's 10 Most Wanted List" and requested his extradition to U.S.).

\textsuperscript{63} See id. ("Taliban officials have rejected U.S. requests to extradite him.").

\textsuperscript{64} The best paper in defense of the U.S. position is by Nick Rostow, U.S. general counsel at the U.N. (manuscript with author).


\textsuperscript{66} See id. (reciting facts of \textit{Caroline} attack).

\textsuperscript{67} See id. (presenting legal basis for preemptive attacks at Council of Foreign Relations).
for any weak state possessor and may help explain Libya’s recent policy to discard its WMD capability.

IV. UNDERSTANDING NEW THREATS = NEW INSTITUTIONS: DOMESTIC AND INTERNATIONAL—BUT WHAT IS THE RIGHT INSTITUTIONAL FIX?

In 2002, Congress, with the impetus from the President, enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terror (USA Patriot) Act, fundamentally changing the “12,333/FISA” paradigm. In addition, a recent reinterpretation of FISA by the FISA appellate court recrafted the historic separation of criminal and intelligence matters. The fear has always been that the criminal side of the FBI would use the different standards of the FISA court to circumvent the probable cause procedures of criminal law. As a result, a search under FISA was to be approved only if the “primary” purpose of the investigation was to obtain foreign intelligence information. The test, however, was altered such that it now requires only a “significant” purpose, a clear lowering of the threshold. Next, the Department of Homeland Security was established to secure the borders and organize twenty-two separate agencies into a coherent institution. Finally, a National Director of Intelligence was created to coordinate the members of the intelligence community so the proverbial dots would be connected.

As part of the jurisprudential evolution of the law in the pre-11/9/11 world, different legal regimes and structures evolved for matters involving U.S. citizens at home and abroad. The structure was originally premised on the logic that threats involved states and that security was based on protecting liberties for U.S. citizens. The core threat was from the Soviet Union and China, and the penetration of society by communist spies.

69. See id. §§ 207, 214, 225 (altering FISA directly).
70. See In Re Sealed Case, 310 F.3d 717, 735 (Foreign Intel. Surv. Ct. Rev. 2002) (granting government use of foreign intelligence information gained from FISA surveillance to prosecute agents of foreign powers for foreign intelligence crimes “[s]o long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution”).
71. See id. at 725-27 (discussing “primary purpose” test).
72. See id. at 734 (“[T]he Patriot Act amendments clearly disapprove the primary purpose test. And as a matter of straightforward logic, if a FISA application can be granted even if ‘foreign intelligence’ is only a significant—not a primary—purpose, another purpose can be primary.”).
These “new threats” challenged the standing legal regimes and institutions. As the Supreme Court took up questions concerning these threats, old patterns reasserted themselves. The decision to use Military Commissions to try terrorists created a legal framework of prosecution that depended on status of citizenship, status as prisoner of war and location at time of capture.\(^{75}\) A Blue Ribbon panel was convened that recommended sweeping changes to the legal authorities and the national security institutions.\(^{76}\) As part of the new orthodoxy, it was widely believed that the National Security system was established to fight a military Cold War against communism and not a global insurgency of terrorism. Is the current NSA of the 1947 system totally inadequate to deal with the Global War on Terrorism? The dominant view that the structure was only set up for a conventional military confrontation with communism may be inaccurate. The “militarization” of the Cold War—the shift to more militarized containment of communism—came as a reaction, or over-reaction, to the Korean War when the United States became preoccupied with invasion scenarios. Before mid-1950, the Cold War as laid out by George Kennan, was not only a military struggle, but also one of public diplomacy, official diplomacy and economics.\(^{77}\) This was a strategy of selective containment that envisioned a long struggle against communism. It is important not to forget that the Cold War was also a global struggle against communist movements and insurgencies across the world, not only preparing to fight the Soviet Union on the plains of Germany. Or as Judge Richard Posner has recently reasoned in his critique of the 9/11 Commission Report:

The report bolsters its proposal with the claim that our intelligence apparatus was designed for fighting the cold war and so can’t be expected to be adequate to fighting Islamic terrorism. The cold war is depicted as a conventional military face-off between the United States and the Soviet Union and hence a 20th-century relic (the 21st-century is to be different, as if the calendar drove history). That is not an accurate description. The Soviet Union operated against the United States and our allies mainly through subversion and sponsored insurgency, and it is not obvious why the apparatus developed to deal with that conduct

---

\(^{75}\) See generally Steven R. Shapiro, The Role of the Courts In the War Against Terrorism: A Preliminary Assessment, 29 WTR FLETCHER F. WORLD AFF. 103, 107-13 (examining Rasul v. Bush, Hamdi v. Rumsfeld and Rumsfeld v. Padilla to illustrate importance of enemy combatant’s citizenship, status as prisoner of war and location at time of capture when determining individual’s constitutional rights).

\(^{76}\) See generally 9/11 COMMISSION REPORT, supra note 31, at 399-428 (recommending “significant changes in the organization of the government” including “unifying the intelligence community,” “strengthening congressional oversight” of security and “strengthening the FBI and homeland defenders”).

\(^{77}\) See George Kennan, The Sources of Soviet Conduct, FOREIGN AFFS., July 1947, at 566-82 (considering Soviet-American relations, particularly, great divide between each nation’s political and economic views and future international success of each nation’s policies).
should be thought maladapted for dealing with our new enemy.\textsuperscript{78}

The obvious question is what will the new institutional arrangements fix and what new problems will they create? Will the new institutional arrangements prove to be inadequate?

A number of sections of the Patriot Act have generated comment and controversy. Some sections serve only to update law enforcement power to meet the new requirements of technology; other sections have increased the discretionary power of the Department of Justice.\textsuperscript{79} Nevertheless, suspicion surrounds a number of provisions, and the state carries the burden to demonstrate that the new powers are effective and not being abused. Regardless of the view, privacy conceptions and state interventions are being redrafted.\textsuperscript{80} For example, the Patriot Act includes the following sections:

Section 215: Establishes the right of access without need for warrant and probable cause to private records (for example libraries). The FBI only needs to certify to a federal judge that the search is involved in protecting against terrorism.\textsuperscript{81}

Section 218: “Secret searches can now be authorized by a secret court without public knowledge or Department of Justice accountability, so long as the government can allege there is any foreign intelligence basis for the search.”\textsuperscript{82} The FISA court approved 1,228 applications for warrants in 2002, up from 934 in 2001 and 1,012 in 2000. (“The number of warrants issued was consistently below 1,000 throughout the 1990s.”).

\textsuperscript{78} Richard Posner, \textit{The 9/11 Commission: A Dissent}, N.Y. TIMES, Aug. 29, 2004, § 7, at 1 (criticizing 9/11 commission’s analysis and recommendations while asserting that current security model may not be “so bad”).


\textsuperscript{80} For a discussion on a number of areas of dispute, see Philip B. Heymann and Juliette N. Kayyem, \textit{Preserving Security and Democratic Freedoms in the War on Terrorism}, Harvard University (2004), \textit{available at http://www.ksg.harvard.edu/bcsia/longtermlegalstrategy} (last visited Feb. 4, 2005) (listing recommendations to ameliorate competing concerns of “democratic liberties and lawfulness” with “national security and government’s ability to prevent another terrorist attack”). \textit{See also} News Batch, \textit{Civil Liberties and the War on Terrorism}, \textit{at http://www.newsbatch.com/civilib.htm?} (last modified June 2005) (presenting provisions of Patriot Act subject to most controversy).

\textsuperscript{81} See Lithwick & Turner, \textit{supra} note 27 (examining section 215, which essentially allows FBI to conduct “warrantless records searches”); USA Patriot Act, § 215.

Section 207: Lengthens FISA surveillance to 120 days and information gathered can be used in prosecution.  

Section 213: Extends FISA searches ("sneak and peek" unannounced searches) to criminal investigations not only espionage and terrorism.  

Section 206: Authorizes roving wiretaps (under FISA only specific phones).  

Internationally, the United Nations passed new resolutions condemning terrorist acts and expressing its "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations," and established new regimes preventing, criminalizing and advocating the suppression of any financial support of terrorism. Similarly, the European Council and Commission adopted new legislation to combat terrorism in general. The continuing international issue, however, is who legitimizes the use of force in self-defense

83. See Lithwick & Turner, supra note 82 (presenting prolonged duration of warrants under section 207); USA Patriot Act, § 207.  
84. See Lithwick & Turner, supra note 82 (allowing state to perform secret searches of one's home and property without prior notice); USA Patriot Act, § 213.  
against terrorist groups in the international arena? Arguments can be made for the United Nations Security Council, the International Court of Justice, the North Atlantic Treaty Organization and the nation-state and its legislature. The post-11/9-9/11 world has not achieved clarity or consensus on this vital question of collective security for the projection of force. The United States, in their National Security Strategy, and the United Nations have taken differing views on the matter.88 Only time will sort out the question, but significant international issues flow from this lack of agreement.

A. Lack of Consensus Has Consequences: Prosecutions, Interrogations and Occupations

“As you have said, the war against terrorism is a new kind of war.”89 In a memorandum to President Bush, Alberto R. Gonzales, counsel to the President, commented on the changing conditions of modern-day war and further stated that “[t]he nature of the new war places a . . . high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians.”90 Gonzales concluded in stark terms: “In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”91 In essence, new rules for jus in bello.

Gonzales also argued that dropping Geneva would allow the President to “preserve his flexibility” in the war on terror.92 His reasoning? One had to be clear about the non-application of the Geneva Conventions; otherwise, U.S. officials might be subject to war-crimes prosecutions under the Geneva Conventions and the War Crimes Act.93 Gonzales said


90. See id. (presenting view that war against terror requires means of prisoner treatment not previously encountered).

91. See id. (stating “that Geneva Convention III on the Treatment of Prisoners of War does not apply to the conflict with al Qaeda”).

92. See id. (explaining that decision to find Geneva Conventions inapplicable to Taliban preserved President’s flexibility to quickly obtain information from detainees, “eliminates any argument regarding the need for case-by-case determinations of POW status” and avoids “foreclosing options for the future, particularly against nonstate actors”).

93. See id. (explaining that finding Geneva Conventions inapplicable “[s]ubstantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)”).
that he feared “prosecutors and independent counsels who may in the future decide to pursue unwarranted charges” based on a 1996 U.S. law that bars “war crimes,” which were defined to include “any grave breach” of the Geneva Conventions.94 As to arguments that U.S. soldiers might suffer abuses themselves if Washington did not observe the conventions, Gonzales “argued wishfully to Bush that ‘your policy of providing humane treatment to enemy detainees gives us the credibility to insist on like treatment for our soldiers.’”95

As reflected in Gonzales’s memo, the position to find the Conventions inapplicable was not universally held by all the government’s attorneys. The state department and many judge advocate generals requested that the decision be reconsidered.96 Whether a combatant would fall under the Conventions turned on whether the detainee was “lawful” or “unlawful.”97 “Unlawful combatants” fall under the Third Geneva Convention, ratified by the United States in 1955.98 Although, as “unlawful combatants” their rights diminish substantially, captives still enjoy due process rights as stipulated by the 1977 First Additional Protocol to the Geneva Convention—a Protocol that the United States has not ratified.99

Prisoners of war must be humanely treated at all times. Any unlawful act that causes death or seriously endangers the health of a prisoner of war is a grave breach of the Geneva Conventions. Under Convention III, Article 13, in particular, prisoners must not be subject to physical mutilation, biological experiments, violence, intimidation, insults or public curiosity.100 What became the gravaman for the new regime of excluding “unlawful combatants”.

94. See id. (promoting idea that adherence to Geneva Conventions leaves public officials open to criminal prosecution through “misconstruction or misapplication of Section 2441”).
96. See, e.g., Barry, supra note 95 (stating that Colin Powell “hit the roof” upon reading Gonzales memo).
97. For a discussion of the Geneva Conventions, see infra note 98 and accompanying text.
100. See GCIII, supra note 98, art. 13 (commanding humane treatment of prisoners of war); id. art. 22 (stating that prisoners of war must be interned on land,
lawful combatants" was the need for "information." Information, "actionable information," became the key to prevention of acts of terror.101

Since this memo, a world of events has occurred—Camp Guantanamo, Abu Ghraib, Hamdi v. Rumsfeld, Rasul v. Bush and Padilla v. Bush.102 This is not to argue that this memo led directly to the abuse of detainees or was the impetus to a "torture narrative," but rather that the memo crystallized the issue of how the post-11/9-9/11 world should confront terrorism: How should the new rules be made and applied? What was the relation of domestic law to international law?103 How had the traditional jus ad bellum and jus in bello traditions been modified?

The debate of presidential power has now been joined, and debates over military prosecution, coercive interrogation and the appropriate role of the federal courts in war have been fierce. The rights of non-citizens

and only in clean and healthy areas); id. art. 25 (stating that prisoners of war are entitled to same treatment given to country's own forces, including total surface and cubic space of dormitories, fire protection, adequate heating and lighting and separate dormitories for women); id. art. 26 (stating that prisoners of war must receive enough food to maintain weight and to prevent nutritional deficiencies, and that food must not be used for disciplinary purposes); id. art. 27 (stating that prisoners of war must receive adequate clothing, underwear and footwear, and that clothing must be kept in good repair and prisoners who work must receive clothing appropriate to their tasks); id. art. 29 (stating that prisoners of war must have adequate sanitary facilities, with separate facilities for women prisoners); id. art. 30 (stating that prisoners of war must receive adequate medical attention); id. arts. 82-88 (stating that prisoners of war must receive due process and fair trials); id. art. 87 (stating that collective punishment for individual acts, corporal punishment, imprisonment without daylight and all forms of torture and cruelty are forbidden). The Convention discussed interrogation of prisoners of war as follows:

INTERROGATION OF PRISONERS OF WAR

Prisoners of war are only obligated to provide names, ranks, date of birth, army, personal or serial identification numbers or equivalent information. Failure to do so may result in loss of special privileges.

No physical or mental torture, nor any other form of coercion may be inflicted. Prisoners who refuse to answer questions may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind.

Prisoners of war must be questioned in a language they can understand.

Id. art. 17.

101. See Gonzales, supra note 89 (explaining need to find Geneva Conventions inapplicable so as to have ability to "quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American[s]").


versus citizens have been sharpened. The role of presidential findings, covert action versus accountability and the need to register all detainees pursuant to the Conventions has framed the discussion of the war against terrorists. Location of capture and detention of a detainee—the United States, a battlefield or a third country—has sparked issues of what rights legitimately vest. The laws of armed conflict, criminal law, constitutional law, immigration rights and international law have all collided and continue to collide in cases with national security policy. Strong positions are taken: “indefinite detention without charge of American citizens is unconstitutional” or “detention of American citizens in military facilities violates federal law.”

Debates over what constitutes “stress positions” versus acts “specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm” are closely analyzed. One Department of Justice memo argued that the only “severe” pain not permitted under the Conventions was “excruciating and agonizing” pain, or pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function . . . or even death,” or mental pain that resulted in “significant psychological harm of significant duration.” This questionable legal opinion was then superseded approximately two and a half years later. The subsequent memo specifically rejected such a definition of pain.


105. See United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Jul. 16, 1994), at http://www.hrweb.org/legal/cat.html (defining torture). This U.N. report defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id.


108. See id. (utilizing term “severe physical suffering” rather than “severe physical pain” to define torture).
But the issue still remains—what constitutes appropriate techniques of interrogation in this new world? Under Convention III, Article 17, one is obligated to provide name, rank and date of birth, army, personal or serial identification numbers or equivalent information. Failure to do so may result in loss of special privileges. Imagine, however, if interrogators would be able to secure reasonably reliable information from their detainees without harsh sleep deprivation, physical threats, sexual humiliations or other techniques. The past decade has seen revolutions both in brain-scanning technologies and in drugs that affect the brain’s functions.

Functional Magnetic Resonance Imaging (MRI) brain scans, for example, have improved so dramatically that they can now produce high-resolution movies of brain activity. Functional MRIs can measure how the brain reacts when asked certain questions, such as, “Do you know Mr. X?” or “Have you seen this man?” When you ask someone a question, the parts of the brain responsible for answering will cause certain neurons to fire, drawing blood flow. The oxygen in the blood then changes the brain’s magnetic field so that a neural radio signal emitted becomes more intense. Functional MRI scanners detect and calibrate these changes. And by comparing the resulting images to those of the brain at rest, a computer can produce detailed pictures of the part of the brain answering or not answering the question—in essence, creating a kind of high-tech lie detector.

Concurrent with these strides in brain-imaging, scientists are learning more about how drugs influence the brain. Pharmaceuticals like Paxil, Zoloft and Prozac have now been in general use long enough that neuroscientists are beginning to observe how they affect brain behavior and individual responses to conversation and questions. It now appears that there are safe drugs that reduce conversational inhibitions and the urge to deceive.

In many obvious ways, these pharmaceutical and imaging methods would represent a vast improvement—both morally and practically—over...
those traditional interrogation techniques that have become so distasteful to us today. The traditional techniques depend overwhelmingly on coercive combinations of fear, disorientation and pain. The technological approach does not, and is inherently more humane.

Of course, the advent of these new drugs and brain-scanning techniques does not remove the moral questions about whether they should be used on detainees. In American criminal proceedings, the state can legally draw blood, take fingerprints and obtain DNA for testing, but no more. POWs and unlawful combatants are in criminal systems that typically offer less-stringent protections. Interrogation methods based on non-consensual and passive medical interventions would thus give rise to criticism. Even if torture and abuse were effective interrogation tactics, they intrinsically undermine the values American society stands for. By contrast, using minimally invasive technologies explicitly designed not to be harmful represents values that can be defended both at home and abroad. Under the current Conventions, however, all these techniques would be unlawful.

V. Conclusion

We are currently responding to this “brave new world” in the wake of 11/9 and 9/11. The solutions are reshaping the distinction between domestic and international, military and civilian, citizen and non-citizen, law enforcement and intelligence, and ultimately, our understanding of the relation between national security and privacy. Some of the critical proffered organizational and programmatic solutions to these new threats have been the following: 1) the USA Patriot Act which fundamentally changed the “12,333/FISA” paradigm, among other things; 2) the creation of the Homeland Security Department and the transfer of former FBI functions such as the National Infrastructure Protections Center (computer security) to the new department; 3) the reorganization of the FBI by Director Mueller in 2002-2003 with renewed emphasis on a network of “FBI-local police” Joint Terrorism Task Forces; 4) the creation of new joint terrorism task force organizations such as the Terrorist Threat Integration Center (TTIC) at the CIA, now to become the National Counterterrorism Center; 5) the new “National Intelligence Plan” by the Department of Justice to tie together local and state law enforcement agencies for terrorist-related information gathering; 6) the announcement of our new National Security Strategy of “preemption” and the idea of “coalitions of the willing;” 7) the creation of military commissions to combat terrorists; and finally, 8) the creation of a czar, or director, to control all counterintelligence issues and members of the intelligence community—from domestic law enforcement to military intelligence. In addition to

118. See Jeff Stein, Is Homeland Security Keeping America Safe, CQ WEEKLY, June 14, 2003, at 1486-87 (examining revised homeland security regulations). For a detailed analysis of the issues surrounding the creation of the Director of National
these reorganization reforms, one more proposed change is still being


- Creates the new position of director of national intelligence, separate from the CIA director, to direct and manage the activities of agencies across the intelligence community and serve as the principal adviser to the president for intelligence concerns. The director will also have authority over much of the intelligence budget.
- Changes the structure of the National Counterterrorism Center, which was established last August by executive order from President Bush. Previously, the center was part of the CIA, with its director appointed by the CIA director. Now, the president will appoint the center’s director, with confirmation by the Senate. The center is designed to analyze and interpret intelligence information related to terrorism and to conduct strategic planning for counterterrorism activities.
- Requires intelligence, law enforcement and homeland security agencies to share information, mandating links between federal, state and local agencies and the private sector, as well as creating common standards for issuing security clearances and classifying information.
- Requires the Department of Homeland Security to test a new advanced screening system for airline passengers; upgrade baggage screening procedures and security in baggage areas; upgrade air cargo security; improve training for federal air marshals; upgrade explosive detection systems; and develop other advanced detection equipment at airports.
- Requires DHS to explore new technologies to deal with possible transportation threats, such as an air defense system to protect planes from ground-launched missiles; blast-resistant cargo and baggage containers; and biometric identification for airport access.
- Establishes mandatory penalties for possession or trafficking in missile systems designed to destroy aircraft.
- Strengthens visa application requirements and establishes a visa and passport security program within the State Department.
- Requires DHS to develop a system to use biometric data to track people entering and exiting the United States.
- Adds 10,000 full-time border patrol agents and 4,000 new investigators for Immigration and Customs Enforcement over the next five years, as well as increasing by 40,000 the number of detention beds available to house aliens awaiting deportation.
- Requires federal agencies to establish minimum standards for issuing driver’s licenses and birth certificates, and requires DHS to establish standards for ID used to board airplanes. However, states will not be prevented from issuing driver’s licenses to illegal immigrants.
- Beef up efforts to go after terrorist financing, including more funding to combat money laundering and financial crimes and more authority to track cross-border financial transactions.
- Creates an independent Privacy and Civil Liberties Board, made up of private citizens appointed by the president, to examine executive branch policies to make sure they don’t violate privacy and civil liberties.
- Allows grand jury information, which is normally secret, to be shared with government officials in order to prevent or respond to terrorist threats.
- Creates a National Counter-proliferation Center to address threats from international weapons proliferation.
hotly debated: the proposed creation of a new domestic intelligence organization to effectively pursue national security issues along the lines of the British MI5.119

One way to summarize the previous discussion is to create a chart:

<table>
<thead>
<tr>
<th>Issue</th>
<th>Pre or Post 11/9-9/11</th>
<th>Domestic Institutional/Intelligence</th>
<th>International Institutional/Regime</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Post</td>
<td>Preemption/Prevention Primacy of Domestic Law over UN</td>
<td>Security Council (The oil platforms case) – &quot;Anticipatory Self-defense&quot; Art. 51</td>
</tr>
<tr>
<td>Jus ad Bellum</td>
<td>Post</td>
<td>Full Spectrum Dominance/Leaning Forward/MOOTW Self-Defense Domestically Defined</td>
<td>“Coalition of the Willing” “Multilaterism-US centered”</td>
</tr>
<tr>
<td>POWS Detention/Prosecution</td>
<td>Pre</td>
<td>Constitution, Court System, World War II model; UCMJ</td>
<td>Geneva Convention III Protocol II</td>
</tr>
<tr>
<td></td>
<td>Post</td>
<td>Patriot Act, Domestic Military Tribunals, Customary Law</td>
<td>International Tribunals/ICC</td>
</tr>
</tbody>
</table>

- Creates an Intelligence Directorate within the FBI to restructure the agency’s intelligence capability. Intelligence personnel will also be placed in FBI field offices.
- Requires the FBI to update its information technology systems and report its progress to Congress.
- Requires DHS to devise a plan to patrol the U.S-Mexican border with remotely piloted aircraft and to test advanced technology—including sensors, video and unmanned aircraft—to secure the U.S-Canadian border.
- Makes smuggling aliens into the United States a federal crime and establishes and Human Smuggling and Trafficking Center.
- Criminalizes possessing or trafficking in weapons of mass destruction.
- People who perpetrate terrorist hoaxes can be prosecuted and forced to make reimbursement for response costs.
- Non-citizens who receive military-type training from designated terrorist organizations can be deported.
- Creates watch lists for passengers on ships.
- Upgrades security features of pilot licenses.
- Requires the General Accountability Office to study potential weaknesses in the U.S. asylum system.

But the chart remains in flux. The “Brave New World” has forced all of us to rethink our pre-11/9-9/11 approaches to many fundamental questions. This is more than an academic exercise, because policy options are implemented based on these new legal formulations. Our grandchildren will judge us by our debates and decisions on these issues. Will international legal norms or domestic legal norms triumph? Time will reveal the answer.