

Balancing Civil Liberties and Civil Defense in an Age of Super-Terrorism

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“Are terrorists in Michigan?” Jim Zoss, Battle Creek emergency services director, asked a group Wednesday. “Yes. Don’t think for moment they are not here. And any one of these guys could be in your neighborhood” (Battle Creek [Michigan] Enquirer, February 14, 2002).

Things change. For those interested in the policy of emergency preparedness planning, the attack on the United States of September 11, 2001 has focused public attention on a subject that had been relegated to the academic sub-discipline of security studies. Today, newspapers and television news channels are filled with self-anointed experts on “asymmetric warfare,” “civil defense” (currently re-articulated as “homeland defense”), weapons of mass destruction (WMD), and grand strategy against global terrorism.¹ However, there is long-lived and robust public policy literature (much of it dating back to the late 1940s) on all the aforementioned “new” problems. This essay is part of a larger project co-authored with Thomas Raven. We have jointly written and presented an earlier treatment on this subject and we are now working separately on specific areas of interest.² This piece will deal specifically with the civilian defense and the problem it poses for civil liberties in the United States. In a security environment where non-

¹ In this paper I use the term WMD to include the use of “conventional weapons” that can have the same mass casualty effects that chemical, biological, radiological, and nuclear weapons (CBRN) can have. In this broad use of the term WMD, the paper is less precise than some studies that view the term WMD as potentially misleading. In general, then, super-terrorism is defined as an attack on civilians with the intent to cause a serious disruption to the social order of the United States, including mass destruction, death and panic. In this sense, an attack of catastrophic terrorism (super-terrorism) entails weapons of enormous lethality; for example, such as those used on September 11, 2001 by members of Al Qaeda.

²See for example, Andrew D. Grossman and Thomas J. Raven, “The Past as Prologue: Policy Planning, Civil Liberties, and Civil Defense in the Age of Super-Terrorism,” presented at the 2000 Annual Meeting of the American Political Science Association, Washington D.C., September 3, 2000. Although I am solely responsible for errors in this particular essay, my co-author remains a full partner in the larger project. Additionally, some sections of this essay draw heavily on chapter five of my book, Andrew D. Grossman, *Neither Dead Nor Red: Civilian Defense and American Political Development During the Early Cold War* (New York: Routledge, 2001).

state actors will kill more civilians in the United States and around the world, the question of how to balance civil liberties with civil defense programs becomes acute. I offer no definitive answer to this puzzle. In this essay I provide a brief policy history of civil defense, a warning about nebulously declared “states of emergencies” and legislative behavior (or lack thereof), and the problems that might arise for civil liberties in current emergency planning.

A Caveat

In December 1999, The Rand Organization reported to the President and the Congress an assessment of the threat of super-terrorism with WMD. The authors of the report wrote a prescient executive summary that read in part:

The possibility that terrorists will use “weapons of mass destruction (WMD)” in this country to kill and injure Americans, including those responsible for protecting and saving lives, presents a genuine threat to the United States. As we stand on the threshold of the twenty-first century, the stark reality is that the face and character of terrorism are changing and that previous beliefs about the restraint on terrorist use of chemical, biological, radiological, and nuclear (CBRN) devices may be disappearing. Beyond the potential loss of life and the infliction of wanton casualties, and the structural or environmental damage that might result from such an attack, our civil liberties, our economy, and indeed our democratic ideals could also be threatened. The challenge for the United States is first to deter and, failing that, to be able to detect and interdict terrorists before they strike.³

³The Rand Organization, “First Annual Report to the President and The Congress of the Advisory Panel to Assess Domestic Response Capabilities For Terrorism Involving Weapons of Mass Destruction,” December 15, 1999, p.vi. See also *Report of the National Commission on Terrorism*, Pursuant to Public Law 277, 105th Congress, “Countering The Changing Threat of International Terrorism.” <http://www.rand.org/organization/nsrd/terrpanel> and <http://www.fas.org/irp/threat/commission.html>.

The authors of the Rand Organization report were correct in their assessment that an attack of super-terrorism was an immediate danger to the United States.⁴ Although on September 11, 2001, weapons of mass destruction (nuclear, biological, radiological, and chemical weapons) WMD were not, in a strict technical sense, employed against the United States by Al Qaeda; using two fully fueled Boeing 767 airliners as cruise missiles had the same fire and blast effects in New York City as a low-yield nuclear weapon would have had. Those of us who, as the Rand report suggests, believed that terrorist organizations would be deterred from crossing certain thresholds of lethality were wrong and must now adjust our positions accordingly.⁵ Even so, many of the problems I have written about—*simultaneously* managing states of emergency, preempting acts of terror, and protecting liberal-democratic structures within the United States’ constitutional framework—remain unchanged, even though super-terrorism is a very real and present danger.

⁴See for example Brian Jenkins, *International Terrorism: A New Mode of Conflict*, Los Angeles, CA: Crescent Publications, 1975). For more current concerns, see Ashton Carter, John Deutch, and Philip Zelikow, “Combating Catastrophic Terrorism,” *Foreign Affairs* 77 (November/December 1998):80-94; Charles L. Mercier, Jr., “Terrorists, WMD, and the U.S. Army Reserve,” *Parameters* 17 (August 1997):98-118; Chris Seiple, “Consequence Management: Domestic Response to Weapons of Mass Destruction,” *ibid.*, 119-27. As a general overview of the key issues regarding terrorism and WMD, see Glenn E. Schweitzer with Carole C. Dorsch, *Superterrorism: Assassins, Mobsters, and Weapons of Mass Destruction* (New York, NY: Plenum Press, 1998); Richard A. Falkenrath, Robert D. Newman, and Bradley A Thayer, *America’s Achilles’ Heel: Nuclear, Biological, and Chemical Terrorism and Covert Attack* (Cambridge, MA: MIT Press, 1998). In general, see *Planning the Unthinkable: How New Powers Will Use Nuclear, Biological, and Chemical Weapons* edited by, Peter R. Lavoy, Scott D. Sagan, and James J Wirtz (Ithaca, NY: Cornell University Press, 2000); Bruce Hoffman, “Terrorism Trends and Prospects,” in *Countering the New Terrorism* (Santa Monica, CA: Rand, 1999), pp. 7-38.

⁵Two examples of the so-called “taboo” on WMD and thresholds of lethality can be found in the following: Richard M Price, *The Chemical Weapons Taboo* (Ithaca, NY: Cornell University Press, 1997), esp. pp.134-176; Nina Tannenwald, “The Nuclear Taboo,” *International Organization* 53 (Summer 1999): 433-488.

This essay is *not* an argument against emergency preparedness planning, civilian defense, and forceful proactive measures to combat super-terrorism. On the contrary, the threat of super-terrorism using WMD will become more likely over time, and the need for a comprehensive and effective public policy of emergency planning and preparedness is absolutely essential for the United States.⁶ What the essay does argue is that if policy planning follows the past preparedness planning schemes, there is a *potential* both to fail at stopping further attacks on the United States and to undermine civil liberties. In other words, poorly conceived policy planning could produce the unintended consequence of undermining the very thing we seek to protect: an open, free, and safe liberal democracy. I suggest that emergency preparedness planning is following a pattern (a causal logic) of implementation that was developed during the early Cold War; hence, current planning is neither new, nor does it have a great track record in terms of success.

Why Policy History Matters: Some Lessons From Early Cold War Civil Defense Planning

The current discussion about civil defense exhibits a surprising ahistoricity. There is long and idiosyncratic early post-World War II history of civilian defense planning in the United States. Many of the plans related to civilian defense and emergency preparedness that are being promulgated today have been tried with little success in the recent past. Some plans, those that relate to panic prevention, which were relatively successful in the early 1950s, are being lifted

⁶ See for example, Stephen E. Flynn, “America the Vulnerable” *Foreign Affairs* 81 (January/February 2002): 60-74.

from early Cold War civil defense manuals.⁷ Because current planning is more intense than in 1950-51, some contemporary planners dismiss postwar civilian defense planning as an artifact from a different era, with little to do with current emergency preparedness policy. This is both an historical and logical mistake. Allow me to list just a few of the difficulties that early civil defense programs encountered and ask the reader to consider if these problems bear, as one scholar has suggested, *only* “superficial resemblance” to issues that current planning must resolve.⁸

- 1). The lack of statutory authority for the administrator of the civil defense agency;
- 2). The problem of federalism, central-state authority, and state expansion;
- 3). The problem of jurisdictional overlap between internal security agencies;
- 4). The inability to assess and measure either success or failure;
- 5). The collapse of the distinction between external and internal threats;
- 6). The granting of enormous discretionary power to unelected officials;
- 7). The problem of funding;
- 8). The problem of training;
- 9). The problem of panic;
- 10). The problem that *post-attack* civilian defense against WMD does not work;
- 11). Finally, that civil defense/home front security becomes the *problem of preemption* which raises civil liberty issues inside a liberal-democratic state.

⁷In general, see (and compare with public statements today) the narrative from the United States Federal Civil Defense Administration, Annual Report 1952 (GPO: 1952): 41-101. During the early Cold War *Project East River* dealt specifically fear and panic and how these emotions can be managed for purposes of civilian defense and homeland defense. Nothing discussed to date indicates that the Office of Homeland Security (OHLS) and the Federal Emergency Management Agency’s (FEMA) plans for civilian defense and homeland security are doing anything new regarding the issue of “individual vigilance” and preparedness planning. In fact, as noted above, these agencies have lifted the early Cold War model for civilian defense planning (almost unaltered) and updated it in a cursory form for contemporary use. See National Archives, National Security Resources Board, Records Group 304, Box 19, Project East River Folder, “Information and Training for Civil Defense,” *Project East River*, Part IX, specifically, “Panic Prevention and Control,” Appendix IXB, pp. 55-65.

⁸ For an example of the kind of ahistorical analysis that I am discussing here, see Richard A. Falkenrath, “Problems of Preparedness: U.S. Readiness for Domestic Terrorist Attack,” *International Security* 25 (Spring 2001):147–86, quote on p. 147.

Three months after the September 11th attack, each of these issues pose significant obstacles for the newly created Office of Homeland Security (OHLS), its director Tom Ridge, and his staff.⁹ Bearing much more than a “superficial resemblance” to current planning, the early Cold War civil defense program is a *crucial case* of a past public policy established for much the same reasons that the OHLS has been created.

The early Cold War period, for the United States, was a historical moment in which domestic emergency planning was shaped by the realities of the postwar international system. Similarly, in the post-Cold War era, the United States is confronted with changes in the international system that shape the way planners define national security: globalization, democratization, and Cold War bi-polarity have been replaced by regional powers, violent non-state actors and organizations. In response to the Soviet Union’s successful test of an atomic device in 1949 and the start of the Korean War in June 1950, the Congress with the support of the Truman Administration created the United States Federal Civil Defense Administration (FCDA).¹⁰ The FCDA was the “home-front security” agency of the early Cold War. Instructed by the Congress to develop an array of plans to handle biological, chemical, and nuclear attack, the FCDA also had an important pedagogical role: to train American citizens how to be vigilant

⁹The Office of Homeland Security was created when President George W. Bush signed Executive Order 13228, October 8, 2001. The ex-Governor of Pennsylvania, Tom Ridge, is the director of the agency. Regarding potential problems with policy implementation, see “Ambition, Realities Clash For Ridge: Homeland Security Chief May Lack Means To Implement Major Initiatives,” *The Washington Post*, January 23, 2002.

¹⁰Civil Defense Act of 1950, Public Law 920, 81st Congress, 2nd Session. See *Congressional Record*, 81st Cong., 2nd sess., pp. 16825, 16841-43. For a complete text of the original Federal Civil Defense Act and the various amendments that were attached over the years, see Federal Civil Defense Administration, “The National Plan For Civil Defense Against Enemy Attack” (Washington D.C.: GPO, 1956), pp. 77-103. See esp. section 301 of the Civil Defense Act of 1950.

and prepared for any kind of emergency. Similarly, the OHLS is considered by President Bush and his national security planners as a super-agency that will train citizens and law enforcement about individual and community vigilance and self-protection against terrorism.¹¹ However, there is little in current planning (at least that which is public) to suggest that the OHLS will be any more successful than the FCDA was at home-front emergency preparedness.

Why? In the United States, civil defense and emergency planning programs exhibit two problems which make policy implementation difficult. First, civilian defense planning creates contradictions between publicly rehearsed planning, and the secret planning for post-attack “clean-up” operations. Second, emergency law-making creates constitutional gray areas that arise when legislation is driven by fear and then promulgated by presidential executive order. Laws propelled by crisis tend to produce bureaucratic duplication in which various agencies fight for money and jurisdiction.¹² When the stakes are high, as they are today, cross-jurisdictional infighting and unclear mandates as a result of highly discretionary laws will inevitably impinge on civil liberties. In early December 2001, there were as many as five thousand citizens and non-citizens of Middle Eastern background under suspicion or in detention in the United States.

¹¹ The Office of War Mobilization and its postwar incarnation as the Office of War Mobilization and Reconversion was directed by James F. Byrnes. Under his leadership, the agency rationalized the chaos created under Donald Nelson’s leadership of the War Production Board. The OHLS is purposely modeled on the OWM. President Bush believes he has found his James Byrnes in Tom Ridge. See Harold C. Relyea, “Homeland Security: The Presidential Coordination Office,” *Congressional Research Service* (October 10, 2001):1-12. For some general background on the OWM, see Richard Polenberg, *War and Society: The United States, 1941-1945* (New York: J.B. Lippincott Co., 1972), pp. 227-28.

¹²In the state-formation and public policy literature, crisis-driven bureaucratic growth and its post-crisis aftereffects are often referred to as the “ratchet effect.” See Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York, NY: Oxford University Press, 1987). In particular see Figure 1 in this essay and Appendix A in, “First

Perhaps some of these people, maybe even a large percentage of them, were justifiably under investigation, but clearly not all were part of a network of “sleeper cells” inside this country. The number of detainees and investigations were a result of different agencies working the same problem, but under different standards and interpretations of current law.¹³ As more agencies are created for homeland security and as we move further away in time from the attack of September 11, the criteria for defining (in a legal sense) a “potential terrorist,” a “sleeper cell,” or “subversive” will expand, increasing the *potential* for undermining civil liberties. In short, striking the balance between civil liberties and civil defense has proven especially vexing in the United States where overt central-state expansion is politically risky and, given constitutional constraints, structurally difficult to achieve. Finding a balance becomes even more difficult when one considers the antinomies of home-front security and civilian defense planning.

Annual Report to the President and The Congress of the Advisory Panel to Assess Domestic Response Capabilities For Terrorism Involving Weapons of Mass Destruction,” pp. 83-96.

¹³One argument in favor of casting the net wide after the attack of September 11 is that a massive sweep inside the country is absolutely necessary for national security reasons. The lethality of modern weapons and the willingness of terrorist groups to use them simply demand a new way of thinking about anti-terrorism and preemptive defense. Hence, one consequence that we may have to learn to live with, is that some innocent people will be trapped in domestic anti-terrorism programs. This logic, however, is a lot like the old military aphorism: “kill’em all and let God sort them out”: it may work, but it surely is not an optimal way to maintain liberal-democratic freedoms over the long-term. For current discussion see the editorial “Non-citizens and civil liberties,” *Chicago Tribune*, December 9, 2001; Jodi Wilgoren, “Swept up in a Dragnet, hundreds Sit in Custody and Ask, Why?” *New York Times*, November 25, 2001; Tamar Lewin, “Cleared After Terror Sweep, Trying to Get His Life Back,” *New York Times*, December 28, 2001. For an interesting comparative analysis (using Ireland and Great Britain as case studies) that suggests how ad-hoc emergency planning poses a problem for civil liberties, see Laura K. Donohue, “Temporary Permanence: The Constitutional Entrenchment of Emergency Legislation,” *Stanford Journal of Legal Studies* 1 (December 1999):35-72. In general see Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response* (London: Frank Cass, 2000), esp. pp. 94-123.

The Paradoxes of Civilian Defense Planning

For a moment imagine the following: It's 2:00 p.m. on a beautiful Saturday afternoon in a moderate-sized town in the Midwest and most folks are enjoying themselves as they go about their weekend business. By 4:00 p.m., however, the emergency rooms in the town's two hospitals are unusually busy as people of all ages become ill with what at first seems like a localized outbreak of "summer flu." Within the next five days, events spin out of control, as people begin to die at rates reaching 90 percent after they seemed to be getting better.

Additionally, the "first responders," the local nurses, doctors, and emergency personnel, have been infected and they, too, begin to get ill and die in large numbers. The governor of the state declares an emergency; the President of the United States does the same. The Centers for Disease Control (CDC) and the Federal Emergency Management Agency (FEMA) and the newly created OHLS mobilize all their resources to respond to the growing emergency. Within five days, it becomes clear to the experts that an act of "super-terrorism" with an unknown, infectious biological agent had taken place.

As FEMA activates a civil-defense plan, and the CDC mobilizes its medical experts, the government attempts to contain mass panic. Unfortunately for their plans, the general public has been glued to its television sets, getting a minute-by-minute analysis by the "experts" detailing the gruesome effects of biological weapons. What does civil defense mean under such circumstances in the affected town and surrounding areas? Not very much, at least not very much that is good. The national public gets its first taste of civilian defense against super-terror:

martial law, quarantines, and perhaps even mass hospices where people will be given palliative treatment as they await slow and agonizing death.¹⁴

This hypothetical example illustrates the paradox of civilian defense and emergency planning. There is a public posture on emergency planning and civil defense and there is the more horrifying reality of what civil defense actually means in practice. Current discussion about preparedness for an act of super-terrorism focuses on the training of emergency service “first responders.” Much of this training takes place in public, with newspaper coverage and community discussions, funding, and support. For all intents and purposes, however, this is civil defense as public relations and panic prevention; it does not touch on the reality of post-attack operations. The attack of September 11 tragically illustrated what planners have known since the early 1950's: first responders are usually the first casualties in an attack, especially surprise attacks. Today both FEMA (currently the main agency in charge of civilian defense) and the newly created OHLS have the same problem that the government and the FCDA had in the early 1950s: a successful WMD attack will so effectively disrupt the social and economic order that *post-attack* civil defense becomes highly problematic. This fact raises two important questions: why have any civil defense planning at all? and what is the ultimate purpose of this planning if post-attack civilian defense against super-terror would be so difficult?

In a slightly different way, these two questions arose in the Truman Administration especially during the FCDA's first full year of operation in 1952.¹⁵ Today, emergency

¹⁴This hypothetical example is taken, with some changes, directly from Grossman, *Neither Dead Nor Red*, pp.121-22.

¹⁵The main difference in how these two questions were framed and then handled turns on the fact that in 1952 the Soviet Union was viewed by FCDA planners as the threat and thus civilian defense planning focused on strategic nuclear war and its consequences. Today, the

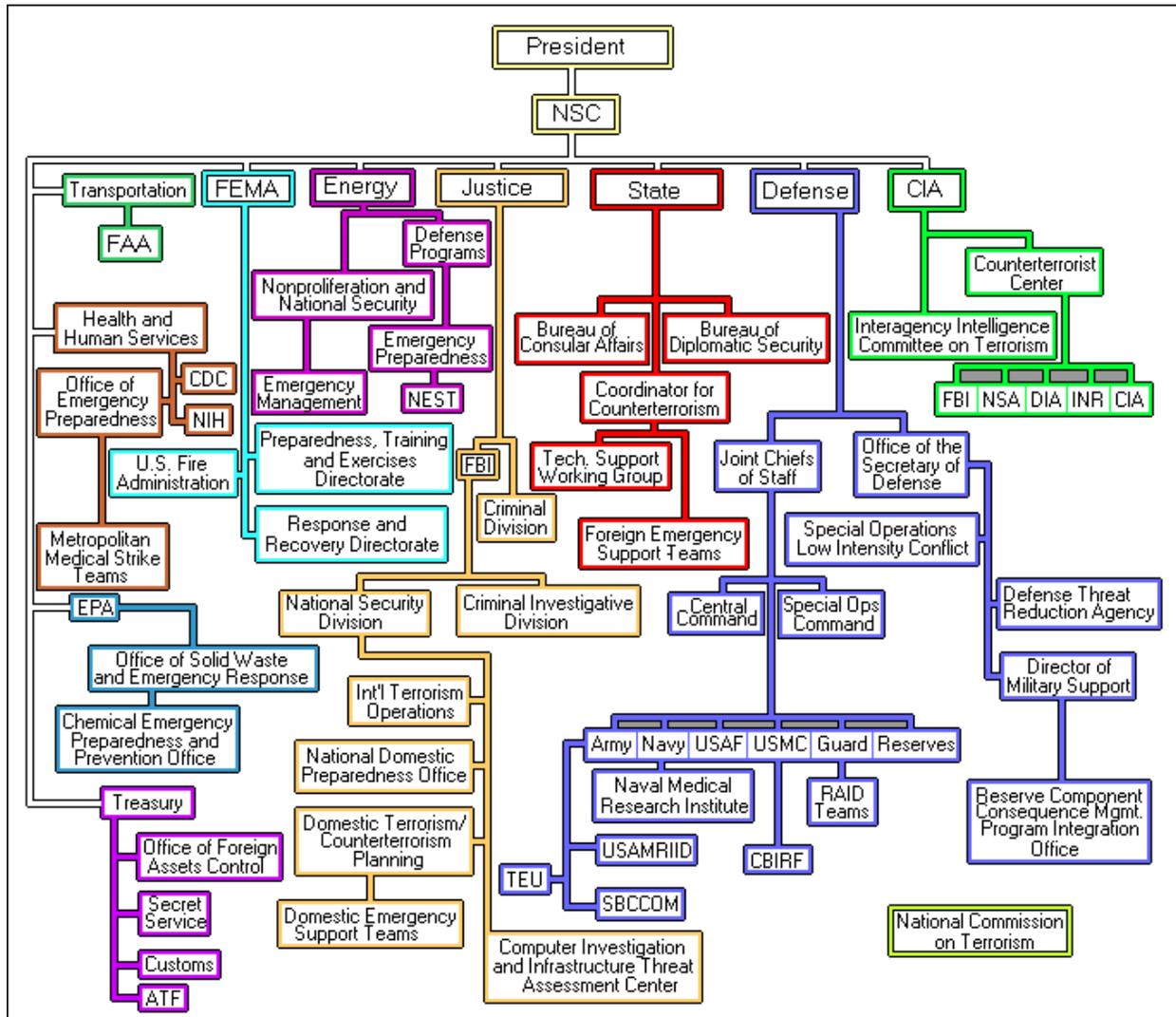
management planners answer both questions in the same fashion as their early 1950s counterparts. Regarding the first question, post-attack training and public displays of readiness are instruments for the management of panic and the supervision of public morale. The answer to the second question about the ultimate purpose of emergency planning intersects with a more pragmatic strategy of policy planners: to deploy a civilian defense apparatus for *preempting* an attack. In this view, civilian defense exists to stop an occurrence of terrorism *before* it takes place, not clean up after an attack. On October 8, 2001, the OHLS was tasked with rationalizing civilian defense planning and preempting terrorist attacks but, as Figure 1 clearly illustrates, there are already numerous other federal agencies engaged in this specific assignment.

As policy, this ad hoc approach to emergency management raises issues for civil liberties, as agencies, with different competing interpretations of what their jurisdiction is, move to carry out preemptive measures to stop acts of terrorism.¹⁶ Profiling schemes for purposes of law become one method of law enforcement. Under certain circumstances, profiling may not only be legal, but an efficient means of capturing criminals. On another level, however, the problematic nature of profiling is well known and represents a shift to a new form of jurisprudence, one based on the statistical probability of subgroups breaking the law as against individually grounded probable cause. Such “actuarial jurisprudence” results in the presumed guilt of targeted

United States government is concerned with non-nation-state actors using weapons of mass destruction or, so-called, “rogue states” using these weapons. Current planning for FEMA, the OHLS, and other national security agencies is thus a more complicated policy problem.

¹⁶The creation of the OHLS is an attempt to centralize planning. However, the director, Tom Ridge, like his predecessors in the FCDA (and its follow-on agencies), has no statutory authority to rationalize preparedness planning.

Figure 1



Source: Monterey Institute of International Studies: Center for Nonproliferation Studies

subgroups, who must prove their innocence, not the other way around.¹⁷ As legal theorist Ronald Dworkin has recently argued, more elegantly than I can here, the application of a form of actuarial jurisprudence poses fundamental questions about how far we want to limit liberalism in the name of anti-terrorism:

The Justice Department has now detained several hundred aliens, some of them in solitary confinement for twenty-three hours a day. None of them has been convicted of anything at all, and many of them have been charged with only minor immigration offenses that would not by themselves remotely justify detention. It has refused repeated efforts on the part of journalists, the ACLU, and other groups to even identify these detainees. So our country now jails large numbers of people, secretly, not for what they have done, nor even with case-by-case evidence that it would be dangerous to leave them at liberty, but only because the fall within a vaguely defined class, of which some members might pose a danger.¹⁸

Additionally, preventive civilian defense, during the Cold War, as now, has entailed agencies charged with *external* security becoming closely involved with *internal* security. The policy change is defended on the grounds that the modern era of super-terrorism demands fundamental changes in the way we conceive of internal and external threats to national security.

“The charter of the Central Intelligence Agency expressly denies the spies any domestic police powers... So the boundaries were drawn at the dawn of the cold war. The C.I.A. would find out what was going on outside the United States—and so prevent a second Pearl Harbor. The F.B.I. would work inside the United States to catch criminals and foreign agents. That once bright line has blurred since Sept. 11. Congress has given the C.I.A. new legal powers to snoop on people in the United States – not limited to investigating groups like Al Qaeda. It has been granted these new powers, along with

¹⁷I would like to thank William Rose for sharing these ideas with me. For a systematic analysis of the potential consequences of widespread profiling, see William Rose, “Crimes of Color: Risk, Profiling and the Contemporary Racialization of Social Control,” conference paper delivered at the Faculty Research Symposium, Center for Interdisciplinary Study in History and Culture, Albion College, February 6-8, 2002.

¹⁸ Ronald Dworkin, “The Threat to Patriotism,” *The New York Review of Books*, (February 28, 2002): 44.

billions of dollars, without any public post-mortem into how all these guardians of national security failed to protect against the September attacks.”¹⁹

Given the new threat assessment, bureaucracies such as the Department of Defense (DOD), Department of Justice (DOJ), and first-response agencies such as OHLS, FEMA, and CDC must conflate, even more than did the FCDA in the early 1950s, both internal and external security in order to carry out a preemptive civilian defense against terrorism.

One of the lasting legacies of the Cold War mobilization is the institutional and administrative capacity to carry out internal surveillance. This institutional capacity, which is being resuscitated with some zest in the wake of the attack of September 11, has become more potent with the advent of modern computer technology, sophisticated surveillance techniques, and state-of-the-art data warehousing technology. In the early 1950s, the Cold was viewed by national security elites and the general public as a type of “real” war. Today, the “war on terrorism” focuses public attention in the same manner that the Cold War focused attention in 1950-51 with one very important difference: the United States has been attacked. Nevertheless, the current emergency itself remains nebulous, not only in terms of its legal definition, but with respect to its intensity. There has been no statutory declaration of war; instead, a “war on terrorism” has been declared, but what this actually means is an open question, one that in a lot of ways makes no sense. As Michael Howard has recently written, “To declare war on terrorists,

¹⁹“The C.I.A.’s Domestic Reach,” *New York Times*, January 20, 2002.

or even more illiterately, on terrorism is at once to accord terrorists a status and dignity that they seek and that they do not deserve.”²⁰ The war on terrorism is much like the Cold War, both a hot war and a shadow war, open-ended, its success its end ultimately unknown.²¹ Thus, in both time periods, planners use the language of war to define domestic emergency planning policies and to mobilize support for those policies.²² At the end of the day, long-term emergency planning drives policy planners to conceive of the military as the key to internal policing, although this planning inevitably runs up against the post-Reconstruction Posse Comitatus Act of 1878, which forbids the kind of role that policy planners envision for homeland security.²³

²⁰ Michael Howard, “What’s in a Name? How to Fight Terrorism,” *Foreign Affairs*, 81 (January/February 2002): p. 8. The constitutional questions that result from this problem are becoming part of a public debate about homeland security and the war on terrorism. See, for example, “There’s a Small Matter Of Checks and Balances,” *New York Times*, January 27, 2002.

²¹ Undermining the Taliban and Osama bin Laden’s Al Qaeda organization in Afghanistan is one way to measure success. This facet of the United States’s response has gone well and looks to be a success. However, military engagement in Afghanistan does not seem to be the beginning or the end to the United States’ larger strategy to combat terrorism. It is the indeterminacy of how the war on terror will play out that makes current events comparable to the early Cold War period.

²² The leadership of the United States has, for all intents and purposes, declared war on a noun. In addition, the UPA does not define the noun (that is left to the discretion of Executive Branch in this particular legislation). As a result, potentially serious constitutional questions arise. The problem of terrorism and its definition becomes important in liberal states where law is the foundation on which, for example, anti-terrorist jurisprudence rests. Without stipulating what key terms actually mean, laws can become profoundly indeterminate; perhaps, even worthless under conditions such as a “state of emergency.” For a superb overview of this issue, see H.H.A. Cooper, “Terrorism: The Problem of Definition Revisited,” *American Behavioral Scientist* 44 (February 2001): 881-893.

²³ A reconstruction-era criminal law proscribing use of the Army (later, the Air Force) to “execute the laws” except where expressly authorized by Constitution or Congress. Limit on use of military for civilian law enforcement also applies to Navy by regulation. Dec '81 additional laws were enacted (codified 10 USC 371-78) clarifying permissible military assistance to civilian law enforcement agencies--including the Coast Guard--especially in combating drug smuggling into the United States. Posse Comitatus clarifications emphasize supportive and technical

Using the military as an internal policing force was considered during President Clinton's administration, especially after the first World Trade Center bombing in 1993; currently, military jurisprudence and troops are being considered by the Bush Administration as tools of preemptive defense.²⁴ If current planning remains similar to early Cold War planning—and there is little to suggest otherwise—over time some of our civil liberties will become a casualty of emergency planning.²⁵

assistance (e.g., use of facilities, vessels, aircraft, intelligence, tech aid, surveillance, etc.) while generally prohibiting direct participation of DOD personnel in law enforcement (e.g., search, seizure, and arrests). See the "*Posse Comitatus Act*" (18 USC 1385). For a detailed analysis of the Posse Comitatus Act that specifically outlines the problems for current planning, see Gregory D. Grove, "The U.S. Military and Civil Infrastructure Protection: Restrictions and Discretion under the Posse Comitatus Act," Working Paper, *The Center for International Security and Cooperation, Stanford University*, (October 1999). For additional information see: <http://www.uscg.mil/hq/g-cp/comrel/factfile/Factcards/PosseComitatus.html> and <http://www.rand.org/publications/MR/MR1251/MR1251.AppD.pdf>

²⁴See for example, "Pentagon Plans Domestic Anti-Terrorist Team," *Washington Post*, February 1, 1999, p. A2. "Pentagon Plans New Command for the U.S.," *Washington Post*, January 27, 2002. The use of military tribunals under certain, still undefined, conditions was authorized by the 107th Congress, see Public Law 107-40, 115 Stat.224, sections 821 and 836 of title 10, United States Code. For more on the power of the Executive to order military tribunals, absent a formal congressional declaration of war (and even with a formal declaration of war) as well as other executive war power prerogatives, a set of important Supreme Court decisions have considered this issue and represent the basis for different interpretations of executive power. See *Ex parte Merryman*, 17 Fed. Cas. No. 9487 (1861); *Ex parte Milligan*, 4 Wallace 2, 71 U.S. 2 (1866); *Ex Parte Quirin*, 317 U. S. 1 (1942); *Korematsu v. United States*, 323 U.S. 214 (1944); *Duncan v. Kahanamoku*, 327 U. S. 304 (1946).

²⁵Maybe this is the price we will have to pay for security. However, it is essential that Congress pass the necessary statutory rule-of-law standards, perhaps with sunset clauses, and not simply allow the executive carte blanche in the area of internal-domestic security matters. For an argument in favor of a more aggressive, executive-centered approach, see "Testimony of Attorney General John Ashcroft, Senate Committee on the Judiciary," December 6, 2001 See <http://www.usdoj.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm>

The Problem of Discretionary Power and Emergency Preparedness Planning

In response to the attack on September 11, 2001, the United States Congress passed the United States Patriot Act of 2001 (UPA) on October 24, 2001 and President Bush signed it into law.²⁶ A comprehensive piece of emergency legislation that is based on the 1996 Anti-Terrorism and Death Penalty Act (ATA), the legislation is sweeping in its scope and its potential to undermine civil liberties.²⁷ Clearly, there is tremendous public support for the legislation, and perhaps much good will evolve from it. However, I am doubtful. If civil liberties depended on public opinion polls, many of the protections that we have come to expect would not exist. Post-September 11 public opinion polls do demonstrate the degree to which the American public is willing (as of this writing, at least) to accept fundamental legal changes regarding internal security (see Table 1).

Although a close analysis of the polling data suggests that the polity, understandably, conceives of emergency jurisprudence as an abstraction (as it did in the early 1950s), the recent polls are definitive in portraying the kind of public support that underpins the UPA. Even though the Congress has passed resolutions of the most sweeping discretionary kind, granting the President enormous leeway in the establishment of security measures to preempt terrorism, the

²⁶See HR 3162, 107th Cong., 1st sess., October 24, 2001. The vote count was 357 yea, 66 nay, with 9 members not voting.

²⁷For a more detailed analysis of the ATA, see Grossman and Raven, “The Past as Prologue.”

Table One

1). “Allowing investigators to tap into voicemail and e-mail messages with just a search warrant, rather than a court order.”

	N	Percentage
Support	451	75.66
Oppose	133	22.01
Don't know	20	3.34
Total	604	100.00

2). “Allowing the government to deport or indefinitely detain any foreigner in this country who is suspected of supporting any organization involved in terrorism.”

	N	Percentage
Support	528	86.68
Oppose	77	11.81
Don't know	9	1.52
Total	608	100.00

3). “Allowing prosecutors to share secret grand jury information with the CIA and other national security agencies.”

	N	Percentage
Support	469	77.25
Oppose	98	16.09
Don't know	40	6.66
Total	607	100.00

4). “Do you think the terrorist attacks will make people more willing to make personal sacrifices for the good of the country, or not?”

	N	Percentage
Yes	1090	89.98
No	101	8.38
Don't know	20	1.65
Total	1212	100.00

Source: ICPSR Inter-university Consortium for Political and Social Research, ABC News/Washington Post Terrorist Attack Poll # 4, September 2001. ICPSR 329.

poll data suggest that the President has the full support of the American people.²⁸ There is, of course, nothing new about the phenomenon of “rallying around the flag,” and it is perfectly understandable. The citizens of this country seem prepared to make fundamental changes to protect themselves and the nation from future acts of super-terrorism, but they are unaware—in fact we are all unaware—of exactly what those changes will entail. More to the point, reacting to public opinion in times of crisis is not the basis on which sound long-term public policy should rest. However, the policy history of emergency preparedness planning does exactly this, for it is primarily driven by public outrage or shock related to specifically identifiable key events. Since the early Cold War this has been the case for emergency preparedness planning and, hence, the law-making that follows moments of crisis has been keenly sensitive to public

²⁸These data come from September polling within weeks of the September 11, 2001 attack and illustrate tremendous support for the President and administration policies. However, even within these early polls, the data suggest that there are potential weaknesses in support for sweeping changes in internal security measures. While the poll data establish very high levels of support for sacrifice, when “sacrifices” are specifically defined and personalized (i.e., “are you willing to give up x?”), support drops off. More important, civil liberties remain an abstraction for most citizens, including those that are included in the poll data here. Data for Table 1 were developed from ABC News/The Washington Post Terrorist Attack Poll # 4, September 2001

opinion. The result: highly discretionary legislation that is indeterminate with regard to definitions, standards, authority, and agency jurisdiction and shifts substantial power to the Executive Branch.

Congress, not the President, is the culprit here. From the New Deal to the present, Congresses (both Republican and Democrat) have been strongly disposed to evade direct responsibility by granting more and more discretionary power in legislation.²⁹ This is especially true in the area of emergency planning, where Congress repeatedly shirked its responsibility by refusing to use statutory rule-of-law of standards in its legislation. Three issues are important here with respect to implementation of domestic preparedness planning for anti-terrorism: Congressional resistance to statutory rule-of-law standards especially as they relate to war-making; federalism, which favors decentralized public policy schemes; and, the effect of the first two factors: bureaucratically confused implementation of public policy.

Uncertain States of Emergency and Law-Making

There is no argument that an act of war was committed against the United States on September 11, 2001. Excluding the Civil War period, the events of September 11 were the first attacks on the continental United States since the War of 1812, when the British Army burnt most of the White House to the ground. But is the United States at war? Congress's legislative response to the attack of September 11 was not a formal declaration of war, which would have defined in precise statutory language the responsibilities of war-making; instead, Congress passed Public

ICPSR # 3295, Inter-university Consortium for Political and Social Research, Ann Arbor MI, 2001.

Law 107-40. Ostensibly because non-state actors were behind the attack on the United States, and because it is a problem to statutorily declare war upon non-state actors, Congress gave the President maximum discretion to carry out both internal and external national security operations. Hence, Congress skirted its obligation to establish criteria for making war.³⁰ Public Law 107-40 offers the following power to the Executive branch:

“That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”³¹

According to this language, the President not Congress decides what delimits “appropriate” force. Additionally, the standards by which adversaries are defined is sweeping, the language is purposely indeterminate in order to allow the President as free a hand as possible in the war on terrorism, and finally, there are no criteria for the use of force in Public Law 107-40. Internal security and civil defense fall under the rubric of Public Law 107-40 and the UPA. In both pieces of legislation, Congress adopted the same open-ended, highly discretionary framework it used in 1996 in the ATA, as it did more than half a century ago during the early Cold War. The combination of Public Law 107-40 and the UPA is a recipe for redundant bureaucratic growth

²⁹For an classic analysis of discretionary power and its potential consequences for liberal democratic processes and American political development, see Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2nd ed. (New York: W.W. Norton, 1979).

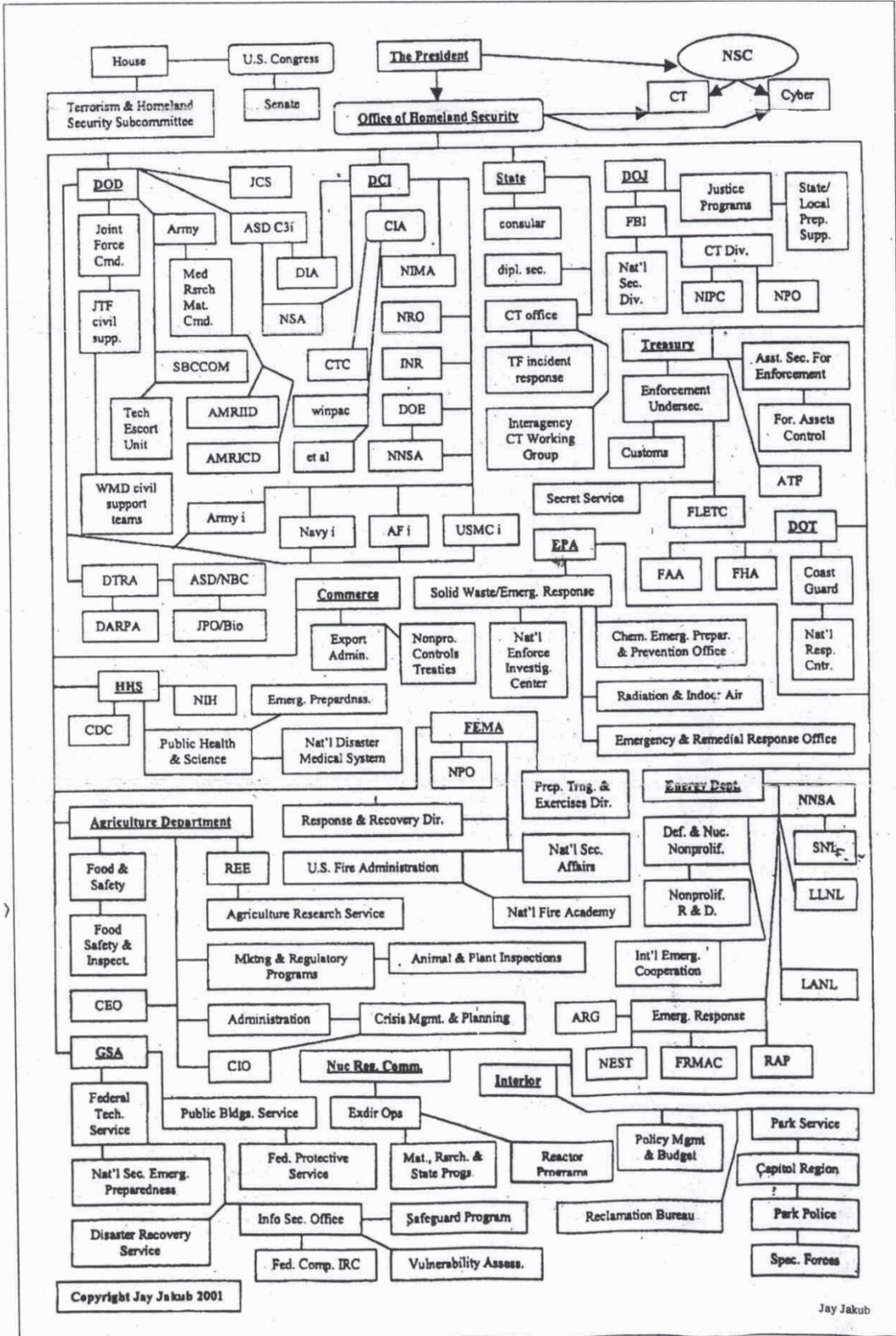
³⁰The balance of war powers between the Executive Branch and Congress is an area of intense debate and scholarly research. My argument that Congress eschewed its responsibility is but one side of a more complex argument about American political development, constitutional law, and the growth of presidential power. For a superb overview of this subject, which takes into account various standpoints on these questions, see Louis Fisher, *Presidential War Power* (Lawrence, Kansas: University of Kansas Press, 1995). On the particular of the UPA, see Dworkin, “The Threat to Patriotism,” pp. 44-49.

and disarray. As new preparedness planning schemes against super-terrorism are prescribed, a race develops between new line agencies (which are multiplying as fast as new threat assessments can be made) staffed by unelected specialists with wide-ranging discretionary power. The potential to fail at anti-terrorism and to undermine civil liberties increases with the zealous reaction of each new agency to political pressure to act swiftly. In addition, both old and new agencies will act more aggressively as they seek to remain relevant in the overall policies of anti-terrorism and civilian defense. In an attempt to make this point in a effective manner before Congress, Tom Ridge's staff at the OHLS prepared a new flow chart of what to expect (see Figure 2) if the director was not granted statutory authority to streamline the emergency preparedness bureaucracy. Compare Figure 1 above, which is the current organizational structure of emergency preparedness, to what experts think will obtain once OHLS gets underway within the next year. The results are stunning.

For both operational and political considerations, the Congress is resistant to even minimal statutory rule-of-law standards. Operationally, there is a rational motive to allow specialists under the direction of the President and his national security staff to handle the implementation of emergency legislation. After the attack of September 11, the 107th Congress opaquely defined the state of emergency and in essence said: "let the experts handle the problem." The question of whether the emergency had to be so broadly defined was not

³¹Public Law 107-40, 107th Congress, September 18, 2001.

Figure 2



Source: Jay Jakob, *The New York Times*, November 4, 2001

addressed in the deliberation surrounding Public Law 107-40. Whether a post-attack emergency ought to be narrowly or broadly defined is open to debate and there are learned arguments that purposeful ambiguity with which the 107th Congress has defined the current crisis rests more on a *political* rather than on an operational rationale.

As Theodore Lowi has shown in his study of U.S. policy planning, vague law-making serves a number of key purposes.³² First, indeterminate lawmaking offers political cover for legislators. Everyone can take credit for successes while disavowing anything that might go wrong with the implementation of policy. When it comes to the potential threat of super-terrorism and the use of WMD, no political leader wants to be accused of having been “slow” to pass civil-defense and emergency preparedness legislation. Second, as noted above, diffusely written legislation allows for extremely broad discretion. Third, the writing of legislation that *is not* grounded in statutory rule-of-law standards permits interest groups to carve out new niches for their programs. Even when compared to the policy history of the Cold War era, the bureaucracy engaged in current planning for super-terrorism is astonishing (see Figures 1 and 2). Given the kinds of organizational, command, and control structures that have developed, one is left wondering if these agencies could possibly function efficiently if there were an actual emergency. Considering the consequences of the September 11th attack and the subsequent

³² Lowi, *End of Liberalism*. Lowi depends heavily on both Max Weber and F.A. Hayek for his analysis of discretionary power and its potential for undermining liberal democratic political and administrative structures. See for example, Max Weber, *Economy and Society*, vol.2, ed. Gunther Roth and Claus Wittich (Berkeley: University of California Press, 1978), esp. pp. 990- 1005. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), pp. 205-233; Hayek, *Law, Legislation and Liberty*, vol.1 (Chicago: University of Chicago Press, 1973), pp.55-71; 124-144. For a systematic argument that questions over reliance on strict statutory rule of law standards in American politics see, Richard F. Bensen, “Creating the Statutory State: The Implications for a Rule of Law Standard in American Politics,” *The American Political Science Review*, 74 (September 1980): 734-244.

appearance of letters laden with anthrax, the answer is no.³³ If there is any validity to the bureaucratic politics model of Graham Allison, it is doubtful at best that under the present bureaucratic arrangements, preparedness planning and anti-terrorism can perform in an emergency.³⁴ Furthermore, the ad-hoc organizational structure of current emergency planning will, even as an unintended consequence, erode individual civil liberties in the name of trying to preempt future acts of super-terrorism.

The Bush Administration would like the OHLS to function as the lead agency that will rationalize the implementation of emergency planning. Accordingly, the OHLS has been conceived by policy planners as a contemporary version of a World War II mobilization agency: the Office of War Mobilization (OWM).³⁵ However, there is a significant difference between how the OWM was established and how the OHLS has been set up: the former was created as a result of a congressional declaration of war, and the latter has come about as a result of an executive order which evolved out Public Law 107-40. I think this distinction is important for policy implementation. Since Public Law 107-40 and the UPA *purposely* eschew statutory rule-of-law standards, the OHLS is left in both a bureaucratic and legal limbo in comparison with its

³³For an recent overview of the almost complete failure of many of the agencies outlined in Figure 1 to respond to the anthrax terror, not to mention what they would have done had a more virulent agent been used in a systematic attack, see “Anthrax Missteps Offer Guide to Fight Next Bioterror Battle,” *New York Times*, January 6, 2002.

³⁴For a restatement of his classic bureaucratic politics model see Graham Allison and Philip Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis*, 2nd ed. (New York: Longman, 1999). In an attempt to streamline civil-military relations and downplay the focus on specialized military operations in times of domestic emergency, the Clinton administration moved to rationalize some emergency procedures. See, for example, “Military Terrorism Operation has as Civilian Focus,” *New York Times*, January 9, 2000, p. A-16. On specialized military units see, “New Unit’s Dress Rehearsal for Disaster,” *New York Times*, February 14, 2000, p. A-20.

World War II predecessor, the OWM. Taken as a whole, both 107-40 and the UPA offer us something between a formal declaration of war and routine legislation, raising constitutional questions regarding jurisdiction and executive power. Historian Jake Rakove has recently remarked on this very issue: “As a matter of constitutional theory, we should be very nervous about unilateral executive pronouncements that don’t rest on firm authority. As a matter of politics, it is always better for presidents to seek consent, which was the issue in the Vietnam War.”³⁶ Because there really is “no firm authority,” i.e., a congressionally-set standard for the war against terrorism, the OHLS will follow in a long line of postwar civil defense agencies that have run headlong into obstacles related to federalism and political problems associated with central-state expansion.³⁷

Emergency planning and federalism:

The Bush Administration conceives of the OHLS as a federal super-agency that will rationalize the bureaucratic, administrative, and organizational overlap in emergency preparedness agencies that is illustrated in Figure 1. Ultimately, OHLS is expected to implement an effective anti-terrorist operation grounded on the principle of preemptive civilian defense. However, the conditions under which this process can take place are unclear. The director has no authority to

³⁵See Relyea, “Homeland Security.”

³⁶Quoted in “There’s a Small Matter Of Checks and Balances,” *New York Times*, January 27, 2002.

³⁷Like the director of the FCDA in 1951, director of the OHLS Tom Ridge has already alienated key members of Congress. This stems, in part, from his inexperience in Washington, but to a larger degree it is due to the fact that the OHLS is an agency without real power. See Joel Brinkley and Philip Shenon, “Ridge Facing Major Doubts on His Ability,” *New York Times*, February 7, 2002.

exercise “real” power, i.e., to cut or expand the budgets of the agencies under his purview. In fact, it is not even apparent what agencies are within the jurisdiction of the OHLS. Additionally, the director of the OHLS does not have the ability, independent of Congress or the President, to impose emergency planning and implementation standards on state or local governments. This last point is very important when one considers the comprehensive nature of national emergency planning for super-terrorism. Without the power to force standardization within the states, any new system of civilian defense and internal security will not only duplicate itself at the sub-national level; the proliferation of agencies will work at cross-purposes. Consider the organizational structure depicted in Figure 1, multiply it by 50, and then duplicate it in one form or another for every moderate-sized town in the United States. Now consider that every town is not only interested in civilian defense and internal security, but also in new fire trucks, police cruisers and equipment of all types; new budget lines that lead directly to Washington D.C. and by-pass the local tax-payer are very attractive. Additionally, every town has its share of home-grown “experts” that would like to do things their way when it comes to civilian defense and anti-terrorism.³⁸

³⁸This process of “free-lance” emergency preparedness planning has already begun: the state of Michigan recently proposed its own “Terrorism Act.” The proposed state law is far more draconian than the UPA, while at the same time duplicating most of what the UPA seeks to achieve. This is what happened during the Cold War in both the civil defense program and the Truman Loyalty Program. See *Detroit Free Press*, “Terrorism Act: Michigan’s Proposal has Liberty-limiting Flaws,” February 4, 2002.

From a policy history perspective, early Cold War civil defense planning and anti-subversive campaigns offer us examples of how current domestic security planning against super-terrorism might unfold. Two early Cold War programs illustrate how issues of federalism can hamper policy implementation: the FCDA, which could not rationalize civil defense planning as effectively as it had hoped at the state level (especially in the South); and the anti-subversive loyalty campaign of the Truman Administration, which resulted in various states and local governments setting their own standards for what a subversive was.³⁹ The FCDA could not centrally plan without colliding with constitutional issues related to federalism. The Truman Loyalty Program and its legal basis in a highly discretionary executive order had the *unintended consequence* of becoming a witch-hunt. If we translate the term “subversive” into the term “terrorist” we can see the problem that arises in moments of crisis and emergency. The potential for abuse of civil liberties is substantial. Without clear standards as to what constitutes a *potential* terrorist, the same kinds of organizational confusion that surrounded anti-subversive internal security planning during the early Cold War more than likely will repeat themselves. With regard specifically to the issue of federalism, the question as to whether or not the states should have the discretion to create agencies that duplicate or, perhaps, go further than the federal government’s plans for homeland security move to the fore in policy implementation. The answer to this question has been complicated by the 107th Congress’s passage of the UPA because central-state expansion that supercedes states’ rights usually rests on legislation more substantial than that of either 107-40 or the UPA. In short we are, to coin a phrase, “back to the future:” the indeterminacy of the early Cold War is now the indeterminacy of the war on

terrorism. There is an irony here: on the one hand, planning to fashion the OHLS after the OWM is a brilliant piece of policy planning, as the OWM was very successful; on the other hand, the lack of the historical sensibility on the part of current planners as to *why* the OWM was successful, is astonishing. In order to make the OHLS a super-agency with the kind of authority that the OWM had, the new agency must garner the undisputed credibility that the OWM had during World War II. Only after such political and legal legitimacy is actualized can the OHLS exercise the kind of power the OWM exercised at the sub-national level without interference from state and local governments. What was the basis for the legitimacy of OWM? A congressional declaration of war. Once the Congress did its constitutional duty, many executive orders were promulgated, for good and ill, by President Roosevelt (including the use of military tribunals and the forced relocation of American citizens of Japanese descent), but these executive orders flowed naturally from the constitutional power the president assumes after a declaration of war and national emergency has been declared by the United States Congress. Six months after the attack of September 11, emergency planners in Washington D.C. are in the same jurisprudential nether world that obtained during the early Cold War. Given current circumstances, OHLS will lose its legitimacy, as did the FCDA, as it inevitably crosses interagency jurisdictional lines and then encroaches on individual states' rights in its attempt to streamline internal security planning. The search for individual terrorists will mirror the search for Cold War subversives (perhaps it already has). As public policy, this does not bode well for emergency planning against super-terrorism and, ominously, it does not bode well for the protection of civil liberties either.

³⁹For more on the FCDA, see Grossman, *Neither Dead Nor Red*, pp. 69-106. On the Truman Loyalty Board and its consequences, see Eleanor Bontecou, *The Federal Loyalty-*

Conclusion

The easy thing to do in an essay or a debate is to point out weaknesses and to level criticism. I have done both in this paper. It is more difficult to offer answers to criticisms. In the introduction I noted that I did not have the answer to the fundamental puzzle that frames this work: how can liberal democracy tighten up internal security to combat super-terrorism and not undermine civil liberties and other democratic ideals? I still don't have the answer; perhaps there is no way during such times to actually strike a good balance between internal security and civil liberties. However, it is the job of the Congress, not the Executive Branch, to clearly stipulate *in law* the parameters which define a state of emergency and, hence, clarify the difference between a "state of emergency" and the norm. Furthermore, these stipulations can have limited discretionary power attached to them (or not) and then can have the kind of legal specificity that establishes policy guidelines that are precise and attached to the specific members who voted for them. Thus, I contend that Congress should be responsible for delimiting the war on terrorism and for managing its domestic consequences. Postwar Congresses, from the 80th to the 107th, have abandoned strict statutory rule-of-law standards in public policy in general and, in particular, in times of extended crisis such as the Cold War and the current war on terrorism. It is quite plausible that a central-state super-agency such as the OHLS might have to act as the OWM did during World War II, but perhaps for a much longer period and with greater power. As Ashton Carter has persuasively argued, policy planners may have to conceive of a whole new architecture of government to handle the threat of super-terrorism.⁴⁰ These kinds of fundamental

Security Program (Ithaca, NY: Cornell University Press, 1953).

⁴⁰ Ashton B. Carter, "The Architecture of Government in the Face of Terrorism," *International Security* 26 (Winter 2001/02):5-23; Philip B. Heymann, "Dealing With Terrorism:

changes require a robust, activist Congress that will establish clear guidelines for such changes. Put another way, if one has to give up certain freedoms because the threat of super-terrorism, then those freedoms should be circumscribed by the United States Congress, not by presidential executive order.⁴¹

Unfortunately, I do not think Congress will pass emergency legislation that centralizes planning and uses strict statutory rule-of-law standards. I do not think that emergency planning will differ very much from the planning that has gone on in the past. More money will be spent, but the framework for civilian defense and preparedness planning will remain as it long has been: misunderstood and stymied by federalism. If the current crisis remains open-ended, as President Bush and most policy planners anticipate, then civil liberties ultimately will be undermined by overzealous internal security agencies trying, as best they can, to do good. Because OHLS will not be given the kind of power and clear guidelines it actually needs from the Congress, it will probably fail at stopping another act of catastrophic terrorism. In sum, this paper argues that current planning is based, even as planners suggest otherwise, on past early Cold War civil defense schemes. As the Washington, D.C. saying goes about policy planning czars such as Tom Ridge: “The barons ignore them, and eventually the peasants kill them.”⁴² The newly created OHLS will end up as did the FCDA: an agency that is ignored by the barons—the other emergency planning agencies and the Congress—and killed by the peasants—the fifty

An Overview,” *International Security* 26 (Winter 2001/02): 24-38; Flynn, “America the Vulnerable,” pp. 68-74.

⁴¹On the need for tightly written legislation delimiting laws in emergency, see Donohue, “Temporary Permanence.”

⁴² Quoted in Carter, “The Architecture of Government,” p.12.

states and hundreds of localities that are already planning their own version of civilian defense in the age of super-terrorism. I hope I am wrong.