

# Balancing U.S. National Security Interests Between Our Constitutional Framework and the Challenges of the 21st Century

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## **INTRODUCTION**

The United States was founded on Enlightenment principles of human rights that include “life, liberty and the pursuit of happiness” according to the Declaration of Independence.<sup>1</sup> Foreign policy and national security concerns are key to understanding the Declaration.<sup>2</sup> These principles were codified in the U.S. Constitution, which substantively addressed those concerns — especially once the ten amendments known as the Bill of Rights were added. And any reader of the Declaration of Independence and the Constitution (Amendments 1 and 10, in particular) will see that liberty was emphasized as much as security.<sup>3</sup>

Until the second half of the 20th century, when Cold War apocalyptic (nuclear) fears took center stage, Americans were largely risk-takers with a vibrant pioneer and entrepreneurial spirit. But the comforts brought by technology, longer life spans, and a growing sense of entitlement, coupled with the trauma of military (Japan) and terrorist

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<sup>1</sup> The Declaration of Independence” in Paul R. Viotti, 2005. *American Foreign Policy and National Security: A Documentary Record* (Upper Saddle River, NJ: Pearson Prentice Hall), 7.

<sup>2</sup> *Ibid.*, 6.

<sup>3</sup> *Ibid.*, 29-30.

(al Qaeda) attacks on U.S soil, have led Americans to demand more from their government — more protections, more predictability, and fewer opportunities to experience loss or failure. The tradeoff has been substantial encroachments on individual liberty and privacy, because liberty and security are inversely proportional to each other.<sup>4</sup>

America's national security policy must address various 21st century challenges, but it must do so within a constitutional framework of federalism and separation of powers established by our founders in order to address and anticipate not only current, but future, needs and problems. As such, it is seldom an efficient, streamlined process. But before discussing how this framework affects the conduct of national security policy, it is important to understand why the United States was established as a constitutional republic instead of a pure democracy.

As stated in "The Federalist Papers" by constitutional architects and apologists James Madison and Alexander Hamilton, "... democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."<sup>5</sup> This historical assessment was shaped by their worldview, which contained a belief in the depravity of humanity.<sup>6</sup> By contrast, republics

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<sup>4</sup> Class notes: Homeland Security, Civil Society, and Human Rights (Professor Paul Viotti, the Josef Korbel School of International Studies, Spring 2010).

<sup>5</sup> Federalist Paper No. 10, in Paul R. Viotti, *American Foreign Policy and National Security: A Documentary Record* (Upper Saddle River, NJ: Prentice Hall, 2005), 36.

<sup>6</sup> Class notes, U.S. National Security Policy (Professor Paul Viotti, the Josef Korbel School of International Studies, Fall 2010).

“refine and enlarge the public views, by passing them through the medium of a chosen body of citizens....”<sup>7</sup>

In particular, Madison was concerned about how special interests in a context of liberty lead to factions — and the potential for a powerful faction to overrun minority interests. He wanted to protect the rights of the “haves” (a relatively small group) against the “have nots.” The challenge was creating a government that would rein in the governed and yet remain controlled itself.<sup>8</sup> While Madison saw the need to restrain factions, he did not want to restrict liberty any more than necessary. The solution, as he saw it, was federalism coupled with separation of powers<sup>9</sup> because “enlightened statesmen will not always be at the helm.”<sup>10</sup>

In the Federalist Papers (particularly 10 and 51), Madison and Hamilton provided the rationale and justification for a compound republic — one characterized by federalism and separation of powers in order to restrain what they saw as the inherent depravity of humankind.<sup>11</sup> This republic needed to be built within the framework of a constitution so that its components would be permanently and specifically established. Federalism is a vertical division of powers between the central (federal) government and the states. The states consequently divide power among counties, municipalities and any number of districts.<sup>12</sup> This successfully restrains factionalism, but it’s very

<sup>7</sup> Viotti, *American Foreign Policy and National Security*, 39.

<sup>8</sup> *Ibid.*, 42.

<sup>9</sup> Class notes, U.S. National Security Policy, and Viotti, *American Foreign Policy and National Security*, 38.

<sup>10</sup> Viotti, *American Foreign Policy and National Security*, 38.

<sup>11</sup> *Ibid.*, 36 and 40.

<sup>12</sup> *Ibid.*, 39, and Class notes, U.S. National Security Policy.

difficult to be transformative in American politics because our government can only be changed slowly, in incremental stages, and with considerable difficulty.<sup>13</sup>

The second aspect of the compound republic, separation of powers, is a horizontal division. Within it, there are two types of separation: three branches of government (executive, legislative, and judicial) and two branches of the national legislature (Congress) — the House of Representatives and the Senate. All 50 states except Nebraska adopted this pattern. Specifically, No. 51 of the Federalist Papers "... provides a justification for separation of powers among separate branches ..."<sup>14</sup> Through checks and balances, a compound republic works to constrain government and allows the flowering of liberty; the downside is that it bogs things down in the absence of a crisis that brings everyone together.

U.S. national security policy is formed at the intersection of five loci: (1) the President, (2) the cabinet departments, (3) the National Security Council, (4) the intelligence community, and (5) Congress.<sup>15</sup> Our national security policy cannot be properly understood, however, unless we have a grasp of how federalism and separation of powers, as discussed in Federalist Papers 10 and 51, affect (1) civil-military relations, (2) operations of the intelligence agencies, and (3) allocation of resources in the defense budgetary process. So the remainder of this essay will discuss each of these areas. Currently, our primary national security objectives are:

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<sup>13</sup> Class notes, U.S. National Security Policy.

<sup>14</sup> Viotti, *American Foreign Policy and National Security*, 41.

<sup>15</sup> Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Washington, D.C.: CQ Press, 2009), 181.

- “To be able to prevail in two major regional wars at once ...;
- To sustain global presence to shore up allies, deter aggressors, help preserve great-power peace, and discourage nuclear proliferation;
- To address other types of problems such as terrorism, civil conflict, and postwar stabilization and reconstruction;
- To protect the American homeland against direct attack.”<sup>16</sup>

### **Civil-Military Relations**

In Federalist Papers 1 and 6-9, Hamilton discussed civil-military relations and his concerns about the threat a standing army could pose to civil liberties and society. He pointed out that “frequent war and constant apprehension ... will infallibly produce (a standing army).”<sup>17</sup> Hamilton’s concerns were legitimate for his time, but he could not foresee the impact of American hegemony (especially military superiority), technological advances, and rapid globalization on the role and readiness of the American military.

A standing army is now necessary because “for key regions, continual presence is the best way to show resolve — and it is also the only means of dependably having enough combat power available to respond quickly to suddenly developing crises.”<sup>18</sup> Nonetheless, Congress has not authorized a draft since the Vietnam War. As a result, the U.S. military is severely strained with the challenges of the wars in Iraq and Afghanistan, a deterrence posture with North Korea and Iran, and the need to maintain a presence in many other countries where we have allies and interests.<sup>19</sup>

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<sup>16</sup> Michael E. O’Hanlon, *Budgeting for Hard Power: Defense and Security Spending Under Barack Obama* (Washington, D.C.: Brookings Institution Press, 2009), 12.

<sup>17</sup> Viotti, *American Foreign Policy and National Security*, 49.

<sup>18</sup> O’Hanlon, 16.

<sup>19</sup> *Ibid.*, 29.

The idea of civilian supremacy over the military is well engrained in the military; however, it would still be possible (even if unconstitutional) for a coup to take place if a contingent within the military became convinced that the country was being led over a cliff (the plot device of the movie *Seven Days in May*). Therefore, we do not allow our generals to serve more than 35 years: to prevent them from establishing a political power base (and, to a lesser degree, to let young officers move up through the ranks). Retired Air Force colonel and Josef Korbel School Security Studies professor Paul Viotti's view of civil-military relations is that the military should not identify itself as separate from the society from which it is drawn, and those who serve in it are merely citizens who happen to be in the military.<sup>20</sup>

**Effect of federalism:** The U.S. military has no right to intervene in state or local matters unless directly ordered by the President. Therefore, law enforcement and emergency response are handled on the local and state levels (through the police and the National Guard) and — in the event of a major disaster — the Department of Homeland Security. One downside of federalism is that our military is very limited in its ability to respond rapidly to domestic crises, and “procedures for helping the National Guard organize regionally, so that neighboring states may help each other ... in major crises ...” are relatively ineffective.<sup>21</sup>

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<sup>20</sup> Class notes, U.S. National Security Policy.

<sup>21</sup> Lowenthal, 109.

Because there is not a clear process for oversight of civil-military relationships, conflict-of-interest regulations must be developed to prevent future scandals where a military official rewards a defense contractor with a major contract and then receives employment in that same company.<sup>22</sup>

**Effect of separation of powers:** Federalist Paper 51 discusses the individual roles of the three branches with regard to the military and war-making.<sup>23</sup> Article 1 of the Constitution states that raising money for defense is function of the House of Representatives (no taxation without representation), and Article 2, section 2, explains that the President is commander-in-chief of the armed forces and our chief diplomat.<sup>24</sup> The President has the power to make war, and Congress has the power to declare war. However, the United States has not declared war since 1941 even though, ironically, we've gone to war a number of times. Presidents have simply made war, and Congress has funded each one without a formal declaration.<sup>25</sup>

The growing power of the executive branch post-9/11 was certainly anticipated by Hamilton's statement that "it is of the nature of war to increase the executive at the expense of the legislative authority."<sup>26</sup> At the same time, all three branches of government are sufficiently involved in keeping a civil-military balance that the United

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<sup>22</sup> *Ibid.*, 81.

<sup>23</sup> Viotti, *American Foreign Policy and National Security*, 41-43.

<sup>24</sup> The Secretary of State's diplomatic role is subordinate to that of the President.

<sup>25</sup> Class notes, U.S. National Security Policy.

<sup>26</sup> Viotti, *American Foreign Policy and National Security*, 50.

States probably is less in danger of an out-of-control military presence than virtually any other military power in the world.

The President develops the defense budget with the help of his cabinet and the Joint Chiefs of Staff. Congress then decides what it will — and will not — pay for, and has military oversight committees in both houses. And the Supreme Court occasionally reviews, and rules on, cases involving the military (e.g., more recently, habeas corpus and human rights violations involving Guantanamo detainees).

The last time the Supreme Court truly encroached on the executive branch, however, was at the beginning of President Franklin Delano Roosevelt's New Deal. The Court did not approve of all the New Deal offices President Roosevelt wanted to open and fund, so they declared them unconstitutional. So FDR went to Congress to ask it to vote for an increase in the number of justices (so he could put in his own men and change the polarity of the court). While Congress did not comply, the Court got the message and gave FDR no more grief about his New Deal plans.<sup>27</sup>

### **Operations of the Intelligence Agencies**

Creating an effective homeland security strategy for defense and response has been difficult for at least several reasons: The president's primary arena of responsibility is foreign policy and national security; Congress is responsible for domestic policies; and as each state came into the Union, it retained its sovereignty in various ways.

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<sup>27</sup> Class notes, U.S. National Security Policy.

**Effect of federalism:** States have a voice in foreign policy and national security through their governors, state legislatures and U.S. senators. Intelligence gathering must take place with the cooperation and coordination of local, state, and federal officials and agencies. At the very least, this requires agreement about process, levels of authority, and crisis communication.

Before 9/11, intelligence and homeland defense coordination and communication between the local, state, and national levels of government was practically nonexistent.<sup>28</sup> But since then, "Joint Terrorism Task Forces have been established by the FBI in 100 of [America's] major cities [and] ... some forty state or regional fusion centers ... have been created to integrate and share information with the federal government and within their states on terrorism-related activities, persons, and issues."<sup>29</sup>

While response coordination and communication was a fiasco during Hurricane Katrina in 2005, significant progress has been made: "Most governments at all levels across the United States have now complied with requirements under the National Incident Management System to create communications channels and base coordination plans for responding to important catastrophes."<sup>30</sup> As true federalism has given way to an increasingly powerful centralized government, local governments often shirk their responsibilities. As a result, "with the exception of New York City, Washington, D.C.; Los Angeles; and one or two other major urban areas, cities do not

<sup>28</sup> Korb staff held three meetings on "homeland defense" before 9/11. The feds were exclusively focused on national defense, while Professor Paul Viotti and others offered the perspective of state and local defense.

<sup>29</sup> Lowenthal, 105.

<sup>30</sup> *Ibid.*, 106.

take the terrorism threat very seriously and do not devote many key police resources to address it."<sup>31</sup>

Issues related to loss of individual liberties, including personal privacy, continue to generate heated disagreement. For example, the FBI is preparing to create a massive computer database of people's physical characteristics in order to better identify criminals and terrorists. Kimberly Del Greco, the FBI's Biometric Services section chief, said adding to the database is "important to protect the borders to keep the terrorists out, protect our citizens, our neighbors, our children so they can have good jobs, and have a safe country to live in." But the project raises major privacy concerns. Barry Steinhardt of the American Civil Liberties Union says, "It's the beginning of the surveillance society where you can be tracked anywhere, any time, and all your movements and eventually all your activities will be tracked and noted and correlated."<sup>32</sup>

While it is important to make sure that our constitutional rights are upheld (the 4th Amendment in the Bill of Rights is particularly in view here), privacy laws often create more problems than they prevent. For example, concerns about privacy and states' rights are preventing the use of biometric and digitization technologies that would help make identifying people more reliable in states where such processes are weak. Former

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<sup>31</sup> *Ibid.*, 117.

<sup>32</sup> CNN, quoted in "Koenig's Eye View from the White House" (11/12/10).

Secretary of Homeland Defense Michael Chertoff challenged these concerns when he opined that identity theft is the primary threat to privacy.<sup>33</sup>

And a Nov. 12, 2010, article in *The New York Times*, "I.R.S. Sits on Data Pointing to Missing Children," details how certain federal regulations regarding release of personal information, not to mention judicial rulings on personal privacy rights, are preventing parents of abducted children from obtaining information crucial to locating these children. And it all comes down to whether the abduction is logged as a federal crime rather than a state or local crime.<sup>34</sup>

**Effect of separation of powers:** Authority for national security policy "... is separated primarily between the executive and legislative branches with relatively more authority on foreign policy ... in the Senate."<sup>35</sup> Specifically, the Senate "... assumes a prominent role ... for policy and national security matters."<sup>36</sup> But it is the executive branch where it all coalesces.

Just nine days after the 9/11 attacks, President George W. Bush created a cabinet-level homeland security office and outlined a multifaceted global plan for combating terrorism. This approach included military, diplomacy, intelligence, law enforcement, and financial sectors.<sup>37</sup> Unfortunately, to date the Homeland Security

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<sup>33</sup> O'Hanlon, 123.

<sup>34</sup> "The law forbids the I.R.S. from turning over data from tax returns unless a parental abduction is being investigated as a federal crime and a United States district judge orders the information released. But the vast majority of parental abduction cases are investigated by state and local prosecutors, not as federal crimes, say investigators and missing children's advocates. Even when the F.B.I. does intercede in parental abduction cases, requests for I.R.S. data are rarely granted."

<sup>35</sup> Viotti, *American Foreign Policy and National Security*, 41.

<sup>36</sup> *Ibid.*, 36.

<sup>37</sup> *Ibid.*, 244.

Council in the White House "... remains insufficiently integrated with other key agencies [including] ... the National Security Council."<sup>38</sup> After 9/11, there was the idea that the Department of Homeland Security would handle the "home game," and the Department of Defense the "away game." But homeland security encompasses both — and is the single whole we seek to maximize. "Homeland defense" doesn't capture the diplomatic component.<sup>39</sup>

There is no doubt about the growing intrusions by our intelligence agencies into our private lives — and the sometimes negative impact of those on innocent citizens. Some 80 years ago, Supreme Court Justice Louis Brandeis foresaw the day when technology would overtake the law, writing, "Subtler and more far-reaching means of invading privacy have become available to the government ... Can it be that the Constitution affords no protection against such invasions of individual security?" Brandeis went on to answer his own question, quoting from an earlier Supreme Court decision, *Boyd v. U.S.* (1886): "It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his infeasible right of personal security, personal liberty, and private property."<sup>40</sup>

Intelligence gathering on the part of federal agencies — especially the National Security Agency (NSA) — may be violating the Constitution. Since 9/11, the NSA has expanded its reach and criteria for selecting targets for watch lists — lists which are not

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<sup>38</sup> O'Hanlon, 109.

<sup>39</sup> Class notes, U.S. National Security Policy.

<sup>40</sup> James Bamford. "Big Brother Is Listening," *The Atlantic Monthly* (April 2006), 68.

vetted to remove innocent individuals even though the fallout from being on one of those lists can be considerable — including, but not limited to, difficulty obtaining employment, loans, or a security clearance; and restrictions on travel.<sup>41</sup> Unfortunately, the one branch tasked with bringing intelligence gathering in line with the Constitution — the Supreme Court — has not yet sought to do so. And this passivity may cost us dearly.

In my opinion, only those threats which are considered to be national (or multinational) in scope should justify the kinds of surveillance and information-gathering that could violate the Fourth Amendment — whereupon obtaining warrants in a timely manner must be required in order to prevent “warrant-less” activities from becoming the rule rather than the exception. If your name ends up on an NSA surveillance list, no matter how innocent of wrong-doing you may be, it will be there forever.<sup>42</sup> Therefore, if you are denied employment, boarding a plane or train, a security clearance, or whatever, there should be a process in place to determine if the denial is legitimate (i.e., is your name in an intelligence database somewhere for the wrong reasons?). As former Sen. Frank Church (D-Idaho) warned in 1975:

“...[I]f a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back, because the most careful effort to combine together in resistance to the government, no matter how privately it is done, is within the reach of the government to know. Such is the capacity of this technology.”

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

Sen. Frank's warnings led Congress to enact the Foreign Intelligence Surveillance Court (FISA) in 1978. And yet, disturbingly, former President George W. Bush signed an executive order in 2001 to *remove oversight* of the NSA by the FISA:<sup>43</sup>

"[U]nder the new procedures put into effect by Bush's 2001 order [President Bush secretly decided that fall that the NSA would no longer be bound by the Foreign Intelligence Surveillance Court], warrants do not always have to be obtained, and the critical decision about whether to put

an American on a watch list is left to the vague and subjective 'reasonable belief' of an NSA shift supervisor."<sup>44</sup>

Nonetheless, Congress has a constitutional mandate<sup>45</sup> to oversee intelligence. And "the essence of congressional oversight is the ability to gain access to information, usually held by the executive, which is relevant to the functioning of the government."<sup>46</sup> As such, Congress has eight levers<sup>47</sup> that empower its oversight:

- Control over the budget for the entire federal process
- Hearings — both open and closed
- The ability to confirm or reject nominations
- Ratifying — or refusing to ratify — treaties
- Reporting requirements on the executive branch
- Investigations and reports
- "Hostages" — withholding action on issues important to the executive branch
- Mandatory advance notice of covert action

### **Allocation of National Resources in the Defense Budgetary Process**

It is a wonder that the tedious defense budgetary process succeeds year after

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<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, 66.

<sup>45</sup> Article I, Section 8, paragraph 18 of the Constitution.

<sup>46</sup> Lowenthal, 205.

<sup>47</sup> *Ibid.*, 205-212.

year when you consider all the see-sawing that takes place between the executive and legislative branches plus cabinet members, service branches, defense contractors, and lobbyists all thrown into the mix. But, somehow, it does. That said, it is rarely efficient or cost-effective. The U.S. budget is a window into U.S. policy is. Watch where the dollars go, and you will know what the policy is — specifically, money allocated to:

- Personnel and procurement
- Research, development, test and evaluation (technology/weapons systems)
- Operations and maintenance<sup>48</sup>

**Effect of federalism:** In 1961, in President Dwight D. Eisenhower's farewell address on radio and TV, he expressed concern about the rise of a new military-industrial complex — specifically, its increasing influence and the centralism of R&D related to government contracts.<sup>49</sup> He pointed out that because WWII had proven that the U.S. could no longer risk “emergency improvisation of national defense,” the U.S. felt compelled to create a vast and permanent armaments industry. But this brought the risk that this huge military-industrial complex would, over time, acquire too much influence in government and that “public policy could ... become the captive of a scientific-technological elite.”<sup>50</sup> In other words, once the war-making machine was turned on, there might be no way of turning it off (or, at least, backing off on the throttle).

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<sup>48</sup> Class notes, U.S. National Security Policy.

<sup>49</sup> Viotti, *American Foreign Policy and National Security*, p. 220.

<sup>50</sup> *Ibid.*, 221.

Eisenhower warned that “only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.”<sup>51</sup>

Unfortunately, this massively powerful machine has only continued to grow.<sup>52</sup> Even current Secretary of Defense Robert Gates recently warned against “... ‘next-war-itis’ among military planners” while asserting that “... America’s civilian institutions of diplomacy and development have been chronically undermanned and underfunded for far too long.”<sup>53</sup>

But federalism’s ability to restrain the military-industrial complex is muted at best. Many local and state governments have a powerful vested interest in maintaining the massive defense contracts that have come out of the burgeoning military-industrial complex. Specifically, the arrival or departure of defense contractors can make or break a smaller city — and impact the culture and financial stability of a larger region.

**Effect of separation of powers:** After 9/11, President Bush launched his “war on terror”<sup>54</sup> by sending a budget to Congress that included the largest defense budget in two decades because “... the price of freedom and security is ... never too high” and it was clear that increased intelligence collection and analysis would be needed.<sup>55</sup> Bush

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<sup>51</sup> *Ibid.*

<sup>52</sup> The Pentagon budget now “exceeds the cold war average in real -dollar or inflation-adjusted terms ...” (O’Hanlon, 2.)

<sup>53</sup> *Ibid.*, 1.

<sup>54</sup> As Professor Paul Viotti at the Josef Korbel School of International Studies has pointed out, this is a misnomer. You cannot make war on a tactic — and terror is a tactic.

<sup>55</sup> Viotti, *American Foreign Policy and National Security*, 245-246.

said this would include a military that is "... ready to strike at a moment's notice in any dark corner of the world."<sup>56</sup>

Separation of powers can help ensure that the defense budget remains accountable and avoids exponential growth. After all, the executive branch allocates, and the legislative branch appropriates (with a lot of heavy-handed lobbying efforts thrown into the mix by K Street — comprised of the military-industrial complex and all the other lobbies). The "Iron Triangle" refers to (1) K Street, (2) Congress (members of the Armed Services Committee and their staffs, who the lobbyists cultivate), and (3) the Department of Defense. When they all agree, it is very difficult to break this triangle. And as long as rapid, global military response remains a necessary capability of the United States, our executive branch "... will have to spend a great deal of time and money on national security, hard power, and war."<sup>57</sup>

Therefore, an idea that's gaining popularity proposes "... that the Department of Defense be guaranteed a budget equal to at least 4 percent of the nation's gross domestic product (GDP)..." The concern, of course, is that "... it would amount to conferring quasi-entitlement status upon the nation's military establishment."

But as conflict deterrence and resolution evolve among advanced nations, there is certain to be a significant impact on the use and growth of the military. Even a number of our military leaders and secretaries of defense now advocate "restraint in

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<sup>56</sup> *Ibid.*, 245.

<sup>57</sup> O'Hanlon, 3.

the use of force” and “the eventual elimination of all nuclear weapons on the planet.”<sup>58</sup>

Instead of a zero-sum approach to conflicts (actual or threatened), we seem to be moving toward more of a win-win paradigm that emphasizes using our military as much for reconstruction and nation-building as for fighting.

## **CONCLUSION**

On September 11, 2001, Islamic terrorists from a little-known organization by the name of Al Qaeda flew American jetliners into the World Trade Center towers in New York City and the Pentagon. For the first time since the War of 1812, the continental U.S. had been attacked — and by combatants engaging in asymmetrical warfare (neither state-sponsored nor using conventional weapons). The panicked and outraged Bush Administration, scrambling to figure out how to protect America against further (and possibly much worse) attacks, invaded two countries believed to be holding weapons of mass destruction (Iraq) and serving as the training ground for Al Qaeda (Afghanistan) and launched what has come to be known, unfortunately, as “the war on terror.”

The casualties of this ongoing offensive action have not just been thousands of American soldiers and hundreds of thousands of civilians and combatants in Iraq and Afghanistan but, also, 220 years of American moral leadership with regard to “the laws of war,” the treatment of enemy combatants, *habeas corpus*, due process, and the liberty and privacy of American citizens.

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<sup>58</sup> *Ibid.*, 2.

Alexander Hamilton warned about this — the executive branch becoming too strong — in Federalist Papers 1 through 9.<sup>59</sup> As an example of how separation of powers should work when an imbalance occurs, the Supreme Court (judicial branch) has adjudicated certain cases arising out of the G.W. Bush Administration's "war on terror" — specifically, violations of the U.S. Constitution and Geneva Conventions.

Nonetheless, based on how the Supreme Court has ruled on executive and legislative powers historically, the U.S. has ended up with a very strong executive branch, with many powers traditionally retained by sovereigns — especially those of foreign policy leadership and national security.<sup>60</sup> Wars and terror attacks have done more to expand executive power than any other single factor. With regard to security, President G.W. Bush's post-9/11 U.S. National Security Policy made three points (also known as "the Bush Doctrine" that reinforced the "unitary executive" principle and continue to drive American foreign policy (even if these are contested by various parties):

- The case for preemption.
- The importance of maintaining American military superiority.
- The willingness to engage in unilateral action, if necessary.<sup>61</sup>

The challenge we face now as a nation is that liberty and security are inversely proportional to each other. If we want more security, we will need to give up some of our liberty. Likewise, to retain the same level of liberty, we will need to live with less

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<sup>59</sup> Viotti, *American Foreign Policy and National Security*, 43-60.

<sup>60</sup> Class notes, U.S. National Security Policy.

<sup>61</sup> Viotti, *American Foreign Policy and National Security*, 244.

security. Once our current recession is over, there will be a big push to cut costs as a nation. The challenge then, as Michael O'Hanlon points out, will be to figure out how to maintain a strong and effective program of national security — especially since homeland security is still underfunded.<sup>62</sup>

Our founding fathers — Madison and Hamilton, in particular — frequently expressed concerns about standing armies and an overly powerful executive branch. America's role as "policeman" of much of the world, the two wars we are fighting, and our increasingly vigilant national security efforts to prevent another 9/11 (or worse) bring to mind Hamilton's assertion that "the continual necessity for [the military's] services enhances the importance of the soldier [and, we might add, surveillance and intelligence], and proportionately degrades the conditions of the citizen [loss of individual liberties and privacy]."<sup>63</sup>

There are no easy answers to the trade-offs between liberty and security. However, our compound republic — with its balancing components of federalism and the tripartite separation of powers — can help us avoid veering too far in either direction. The following steps would help us to do so:

First, we must utilize the constitutionally mandated checks and balances in our federal government to corral the executive branch and warrant-less surveillance activities, in particular. We have a governmental framework and legal system that will

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<sup>62</sup> O'Hanlon, 5.

<sup>63</sup> Viotti, *American Foreign Policy and National Security*, 51.

protect our rights if they are allowed to operate as designed. We need to enforce the Bill of Rights — especially the 4th, 5th, 6th, and 8th Amendments (all of which were greatly weakened through the spurious legal memos produced during the Bush Administration about torture and CID, along with the hidden and largely unaccountable activities of our intelligence agencies, especially the NSA).

Second, legislative oversight and judicial review<sup>64</sup> both must be strengthened to ensure that all intelligence gathering services operate within the constraints of the Constitution — specifically, the Bill of Rights. Congress, which is tasked with domestic oversight, has been slow to address the expansion of Fourth Amendment violations (through the Patriot Act, post-9/11) such as “sneak-and-peek” warrant-less searches by law enforcement personnel, widespread use of signals intelligence (SIGINT), and massive government requests for private citizens’ records.

Third, DHS should begin planning where it wants to be in five years, ten years, and more. This would entail an efficient federal “umbrella” with plans and responses targeted to begin at the lowest level possible — with clear-cut plans for expanding response upward (local-state-federal-multinational). The redundancies and dead ends still in place due to the hurried merging of many different agencies and processes post-9/11 need to be systematically eliminated. An efficient communications network that continuously links local, state and federal homeland security personnel is essential —

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<sup>64</sup> Paul Viotti, “Toward A Comprehensive Strategy for Terrorism and Homeland Security,” in Paul Viotti, Michael Opheim, and Nicholas Bowen, *Terrorism and Homeland Security: Thinking Strategically About Policy* (New York: CRC Press, 2008), 11.

and must be coordinated from the top. And all states should be required to maintain a homeland security office, staff, and strategy that complies and coordinates with DHS priorities, response plans, and communication processes.

Fourth, training for our police officers, National Guard, and military personnel should include instruction in the Bill of Rights and human rights legislation — so they will be prepared and motivated to be guardians of a just society.

Fifth, we need to determine what threats — whether from natural disasters or terrorist plots — truly threaten the United States as whole. Then we need to prioritize these threats. The answers will determine our security priorities, allocation of resources, and communication and response strategies. Those that do not threaten the continued existence of the U.S. (e.g., a biological, nuclear, or EMP attack capable of killing millions of Americans or bringing down our infrastructure for an extended period of time) should not become reasons for sublimating liberty to security.<sup>65</sup>

Sixth, those accused of terrorist activities — whether domestic or foreign — deserve to be treated according to the international statutes of human rights that the U.S. has signed, along with those rights guaranteed by the Bill of Rights.

While the fact that the U.S. has managed to escape another 9/11 (or worse) in the last nine years may be due more to the patience and willingness to wait on the part of terrorist groups,<sup>66</sup> we cannot discount the fact that at least part of our homeland

<sup>65</sup> Robert H. Dorff, “The Search for National and Homeland Security” in *Terrorism and Homeland Security*, 28.

<sup>66</sup> “[T]he eight years that passed between the first and final attacks on the World Trade Center show that even long lulls in violence within the United States cannot automatically be attributed to successful prevention.” (David Goldfisher, “Assured Vulnerability: Homeland Security and the Cold War Legacy of Defenselessness,” in

security strategy has been effective. A handful of would-be terrorists (including the Shoe Bomber [Richard Reid], the RDD Bomber [José Padilla], the Underwear Bomber [Umar Farouk Abdulmutallab], the Times Square Bomber [Faisal Shahzad], and the recent airline package bomb attempt originating in Yemen) have either been preempted by security measures or lacked the competence to effect successful missions.

Americans — and politicians, in particular — often complain about the inefficiencies and obstacles created by the American government and our political process. However, as political commentator George Will astutely pointed out recently on “This Week”: “Gridlock is not an America problem, it’s an American *achievement*. The founders of this country didn’t want an efficient government, they wanted a *safe* government.”<sup>67</sup>

Security must not be allowed to trample liberty. It is important to remember how soul-deadening and oppressive such highly “ordered” societies as Nazi Germany, the Soviet Union, and Pinochet’s Chile were — and North Korea still is. We need to restrict security when it encroaches too much on liberty. The only exception should be the security necessary to prevent an WMD being activated on American soil or an EMP in our skies.

Yes, the more liberty, the more risk; but the only ones who face no risk are the dead. While our country’s primary existential focus is on the threat of more attacks

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Viotti, Opheim, and Bowen, *Terrorism and Homeland Security*, 44).

<sup>67</sup> George Will, “This Week,” October 31, 2010.

from our enemies, we must never forget that if we are not vigilant to protect and maintain the framework of our constitutional republic, our own government could one day become the biggest threat to every American's "life, liberty, and ... pursuit of happiness."