

Copyright
by
Jennifer Michelle Bean
2008

All statements of fact, opinion, or analysis expressed are those of the author and do not reflect the official positions or view of the U.S. Government or any U.S. Government agency. Nothing in the contents should be construed as asserting or implying U.S. Government authentication of information or U.S. Government endorsement of the author's views. This material has been reviewed by the U.S. Government to prevent the disclosure of classified information.

The Dissertation Committee for Jennifer Michelle Bean Certifies that this is the approved version of the following dissertation:

**Institutional Response to Terrorism: The Domestic Role of the Military
in Consolidated Democracies**

Committee:

Zoltan Barany, Supervisor

Henry Dietz

Rob Moser

Ami Pedahzur

Bruce Hoffman

**Institutional Response to Terrorism: The Domestic Role of the Military
in Consolidated Democracies**

by

Jennifer Michelle Bean, B.A.; M.A.

Dissertation

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Doctor of Philosophy

The University of Texas at Austin

December, 2008

Dedication

I dedicate this work to my parents and the rest of my family who have always believed in my abilities, nurtured my intellectual curiosity, and encouraged me to follow the path in life that brings me the most happiness and joy.

Acknowledgements

I would like to acknowledge the unwavering support of my dissertation supervisor, Zoltan Barany, without whom this work would never have come to fruition.

Institutional Response to Terrorism: The Domestic Role of the Military in Consolidated Democracies

Publication No. _____

Jennifer Michelle Bean, Ph.D.

The University of Texas at Austin, 2008

Supervisor: Zoltan Barany

Terrorism, as an act of war, has produced new challenges for states and their militaries in the modern era. A typical response for governments that face a terrorist threat is to reassess their institutional posture toward handling such assaults on their territorial sovereignty, to include a redefinition of the conditions under which their militaries may be used to defend and protect domestic interests. This study aims to determine the conditions under which and to what degree a civilian authority's restructuring of its counterterrorism policy alters civil-military relations within that state, specifically examining the institutional and constitutional constraints under which governments formulate their military's role in counterterrorism policy; the type of institutional arrangement that seems most conducive to a powerful military role in a state's counterterrorism policy; and an exploration of the expansion of military authority in response to terrorism in the United States, Israel, the United Kingdom, and Spain. I argue that democratic states will expand the role and responsibilities of their militaries

into what were formerly civilian areas of responsibility as a key tool in the implementation of their counterterrorism policy when military authority is only loosely circumscribed by state constitutional and legislative documents; the military has a history of strong participation in the formulation (versus simply implementation) of a state's national security doctrine; and the military maintains an exalted role in national history and is viewed by the citizenry as a core institution of national identity, and the government is facing both high internal and external threat levels. This study is based on the assumption that institutional arrangements play a significant role in the policymaking process, employing the paradigm of Historical Institutionalism to explain how changes within institutions alter civil-military relations in the context of counterterrorism policy, and vice versa.

Table of Contents

INTRODUCTION & LITERATURE REVIEW	1
Chapter 1: Introduction	1
Research Sub-Questions	4
Argument & Related Hypotheses	8
Relevant Literature	12
Justification of Cases	17
Methodology	23
Significance & Future Research Agenda	27
Chapter 2: Civil-Military Relations, Terrorism and the Democratic State	29
Defining Civil-Military Relations	29
Civilian Monitoring Mechanisms	33
Military Influence on Civilian Policy	36
The Military and Counterterrorism Operations	39
THE INDEPENDENT VARIABLES	44
Chapter 3: Institutional Parameters for Military Participation in Domestic Counterterrorism Activity	44
The United States	45
Israel	72
The United Kingdom	94
Spain	111
Conclusions	125
Chapter 4: Historical Experiences as Critical Junctures in Counterterrorism Policy	129
The United States	133
Israel	154
The United Kingdom	165
Spain	174
Conclusions	184
Chapter 5: The Policy Entrepreneur and the Military's Role in Counterterrorism Policy	187
The United States	188
Israel	210
The United Kingdom	233
Spain	245
Conclusions	254
Chapter 6: Military Courts as a Counterterrorism Tool	257
The United States	257
Israel	293
The United Kingdom	308
Spain	312

Conclusions	314
CONCLUSION	318
Chapter 7: Findings, Policy Implications and Future Research	318
The Empirical Findings	320
Future Challenges for Counterterrorism Policymakers	326
Future Research	329
BIBLIOGRAPHY	332
VITA	348

INTRODUCTION & LITERATURE REVIEW

Chapter 1: Introduction

Terrorism, as an act of war, has produced new challenges for states and their militaries in the modern era. The utilization of terrorism and potential terrorist threats as a justification for war is highly complex. In wars against “terror” there is no clear ending, as a state’s apparent defeat of one enemy will not necessarily prevent further threats from other enemies whose primary tool of warfare is also terror. The capacity of nonstate actors to carry out military strikes—indeed sustained violent campaigns—threatens “to offset in the profoundest way the military capacity of any state, even the most powerful, to mount a conventional war or conventional defense against attack.”¹ As a result, the concept of terror has been used to justify a range of tactical responses at the state level, often without any clear rationale for how such counterterrorism initiatives might reduce or permanently eliminate the threats facing a given state actor. In this manner, the advent of terrorism may, as with the nuclear revolution, constitute another turning point in the way wars are fought.

A typical response for governments that have recently faced (or feel they may soon face) terrorist activity, either on their own soil or on state installations abroad, is to reassess their institutional posture toward handling such assaults on their territorial sovereignty. In addition to redefining the responsibilities of myriad government agencies in developing a coordinated counterterrorism response, states may also redefine the conditions under which their militaries may be used to defend and protect domestic interests, in effect reformulating national security doctrine to better address the disruption

¹ Margolis, Joseph. April 2004. “Terrorism and the New Forms of War.” *Metaphilosophy*. 35:3, 402-13, p. 403.

of terrorist activity. In consolidated democracies, the military may become involved in activities that it previously would have avoided, as counterterrorism policy requires levels of implementation and training that are often distinct from those that govern conventional warfare. History is replete with examples in which imminent threats to a state's citizenry or territorial sovereignty induced a substantial transformation of the state. With this in mind, my research question may be stated as:

Under what conditions and to what degree will a civilian authority's restructuring of its counterterrorism policy alter civil-military relations within that state? Specifically, how do government responses to the need to defend the state against terrorist activity affect civil-military relations?

It has been said that "the soldiers and statesmen engaged in counterinsurgency campaigns best resemble participants in a three-legged race: even when declaring themselves to be on the same side and headed in the same general direction, the pair of runners seem constantly to be out of step and in danger of tripping each other up."² Low-intensity conflicts, which often characterize fights against terrorist elements, generate significant problems between civilian authorities and military leaders. Not only is the battlefield—domestic state territory—a defining characteristic of both the civilian and military spheres, the enemy is part of the population with whose defense both the civilian authority and its military are charged. It could be assumed that this overlap of geographic responsibilities would be an advantage in the pursuit of an effective counterterrorism policy. However, numerous historical examples illustrate that this is not always the case. Conflicts of interest faced by members of both the military and the political class are often more numerous and pervasive under such circumstances than in conventional international warfare.

² Cohen, Stuart. Spring 2003. "Why Do They Quarrel? Civil-Military Tensions in LIC Situations." *Review of International Affairs*. 2:3, 21-40, p. 22.

Much of the current terrorism literature explores the argument that the threat of terrorism may necessitate the garrisoning of society through an enhancement of the roles of military and police organizations, as Harold Lasswell warned in the mid-1930s.³ Despite the unlikelihood of such an extreme occurrence, the potential for society to be moved in that direction does indeed exist. State responses to terrorism both necessitate and are defined by the crossing of the already ambiguous boundaries of authority claimed by those working to maintain national security and civil liberty protections, especially at the local level. “Such emergencies merge national security, law enforcement, and emergency management and thus invoke legal authorities that permit and prohibit different kinds of conduct by the military under different circumstances.”⁴

This mingling of responsibilities between the civilian and military spheres in pursuit of an effective counterterrorism policy is precisely what we have seen in both of the primary cases of this study, the United States and Israel. The state of Israel has had extensive experience involving its military in counterterrorism activities since its inception in 1948, and even prior to independence in the form of militia activity. For the United States, September 11, 2001, proved to be a watershed event in the country’s history, ushering in a massive reorganization of the American counterterrorism infrastructure. As a result, it is apparent that the state has enhanced its use of power, though questions remain as to the specific mechanisms involved in this expansion and whether these enhancements are appropriate. Israel, in contrast, has virtually always existed in a state of alert, with counterterrorism initiatives maintaining a consistently high place on the national agenda no matter which political party is in power.

³ See Lasswell, Harold. January 1941. “The Garrison State.” *American Journal of Sociology*. 46:4, 455-68, and Lasswell, Harold. 1950. “The Universal Peril: Perpetual Crises and the Garrison-Prison State,” in Lyman, Bryson, Louis Finkelstein, and R.M. ManIver, eds. Perspectives on a Troubled Decade: Science, Philosophy, and Religion, 1938-1949.

⁴ Falkenrath, Richard, Robert Newman, and Bradley Thayer. 1998. America’s Achilles’ Heel: Nuclear, Biological, and Chemical Terrorism and Covert Attack. Cambridge, MA: The MIT Press, p. xxi.

RESEARCH SUB-QUESTIONS

It has been said that “[o]ne of the weaknesses in the civil-military relations literature is that there are relatively few efforts to systematically compare explanatory factors or to identify the conditions under which one set of factors has more explanatory leverage than another.”⁵ This study remedies this oversight by identifying the conditions under which militaries may gain more influence vis-à-vis their civilian authorities in the context of counterterrorism. In order to arrive at conclusions regarding the broader implications of terrorism on civil-military relations in the United States and Israel, three subtopics will be addressed.

1) What are the institutional and constitutional constraints under which governments formulate their military’s role in counterterrorism policy?

The civilian side of the research question will be examined in this section. Primarily through archival research, I describe what the United States government’s counterterrorism infrastructure looked like prior to the post-9/11 reorganization. I then discuss how the U.S. government has responded to terrorism through institutional change, emphasizing the constitutional and legal restraints on U.S. government decisions regarding the manner in which institutions would be utilized under that reorganization. One of the primary aims of the massive American institutional reform was to encourage (and indeed force) the cooperation of numerous agencies, including the military. I assess the degree to which the military has been integrated with its civilian counterparts as a response to the U.S. government’s increasing emphasis on terrorism.

Next, I discuss Israel’s civil-military institutional composition as it relates to national security in the context of counterterrorism. As mentioned previously, Israel has been developing and instituting counterterrorism policy since its inception as a state, and

⁵ Feaver, Peter. 1999. “Civil-Military Relations.” *Annual Review of Political Science*. 2:1, 211-41, p. 224.

this policy has changed in both focus and scope throughout the decades. This section addresses the development of Israel's counterterrorism policy from an institutional perspective, with a description of what the structure looks like today and an identification of the constitutional and legal restraints within which that structure has developed.

Finally, I compare and contrast the U.S., Israeli, U.K., and Spanish cases with respect to the institutional and constitutional boundaries surrounding the development of counterterrorism policy and its implementation. It has been argued that "[b]ecause of its association with elite law enforcement or military capabilities, counterterrorism has taken on a...compartmentalized dimension that may ultimately hinder efforts to develop a comprehensive government response to terrorism."⁶ This section identifies those institutional boundaries that encourage such compartmentalization, and determine to what degree they have impacted the creation of a comprehensive counterterrorism response on behalf of the American and Israeli governments, respectively.

2) What type of institutional arrangement seems most conducive to a powerful military role in a state's counterterrorism policy?

As Martha Crenshaw notes,

[i]ssues can be partitioned among agencies, or different institutions can have more or less authority at various stages or sequences of a decision. For example, if terrorism is defined as a crime, it is a problem for the Department of Justice and the nation's law enforcement agencies such as the Federal Bureau of Investigation (FBI). However, if it is defined as warfare or as a threat to national security, responsibility shifts accordingly...[and] the military [may] become central to the process."⁷

Whereas the previous section adopted an external view of the military, examining it as one of several agencies taking direction from the central governments in both the

⁶ Smith, Lieutenant Colonel Andrew J., Australian Army. January-February 2002. "Combating Terrorism." *Military Review*. 82:1, 11-8, p. 12.

⁷ Crenshaw, Martha. 2001. "Counterterrorism Policy and the Political Process." *Studies in Conflict & Terrorism*. 24:5, 329-37, p. 330.

U.S. and Israel, this section disaggregates the military in both states, examining how militaries have been changed by state directives to fight terrorism. More specifically, I assess how the military's relative power within a government may change when the military is tasked with counterterrorism duties.

I examine structural changes to the institution of the militaries in both states, identifying military sub-agencies that may have been created or eliminated as part of broader counterterrorism reform, as well as how the overall mission of the military may have been altered in response to executive-directed institutional reform. Of particular interest are changes in the two militaries' leadership structures, especially the chain-of-command as it relates to the civilian leadership in the executive branch. I also consider the relationship between the military and the legislative branch in each country, especially the degree to which the military is able to influence legislative entities as its counterterrorism role is redefined in response to executive counterterrorism initiatives.

Finally, I compare the U.S., Israeli, U.K. and Spanish cases and assess which institutional arrangement is most conducive to a powerful military role in the development and implementation of counterterrorism policy. Because the Israeli, British and Spanish states have far more experience than the United States in this regard, a chief aim of this chapter is to judge what institutional arrangements with regards to the military appear to have been most successful in countering terrorism, and elucidate what lessons could be learned for the U.S. as its own counterterrorism policy evolves.

3) What are specific empirical examples of an expansion of military authority in response to terrorism? I examine the civil-military dynamics at work in the creation and employment of military courts to try those accused of terrorist activity. Israel has an extensive history of employing military courts to try domestic terrorism suspects. According to Lisa Hajjar's extensive 2005 study of the Israeli military court system,

[t]he primary purpose of the military court system is to prosecute Palestinians who are arrested by the Israeli military and charged with security violations and other crimes....Since 1967, hundreds of thousands of Palestinians have been arrested by the Israeli military. Although not all Palestinians who are arrested are prosecuted in the military court system (some are released, others are administratively detained without trial), of those who are charged, approximately 90 to 95 percent are convicted.⁸

The United States is new to the debate over the appropriateness of trying both citizens and non-citizens in military tribunals as opposed to civilian courts, and thus has much to learn from the Israeli experience in terms of how effective such a tactic may be in fighting the war against terror.

What is it that this expansion of the military into the judiciary provides to these governments, and what is the impact on civil-military relations? In answering this question, I analyze the Israeli military court system based on the following characteristics and draw conclusions as to what characteristics of the American political system and military could lead to a similar utilization of a military court system as a counterterrorism initiative.

Creation: Under what legal or constitutional authority was the central government able to, in effect, revise the jurisdiction of the state's existing judicial structure by deciding that certain cases could only be tried in a military tribunal?

Structure: How are military courts in Israel structured, and what degree of civilian oversight exists in the system?

Comparison with Civilian Courts: Why are civilian courts considered inappropriate for trials of terrorism suspects?⁹

⁸ Hajjar, Lisa. 2005. Courting Conflict: The Israeli Military Court System in the West Bank and Gaza. Berkeley, CA: University of California Press, p. 3.

⁹ While the debate over the employment of military courts in domestic terrorism cases will be expanded upon in the actual dissertation, for the purposes of background, arguments in defense of using military tribunals include: ordinary courts are insufficient for prosecuting acts of international terrorism; civilian court rules of evidence are cumbersome, and it is difficult to ensure that data collection and chain-of-control be properly established; special rules are necessary to protect sources and information; the manner

Specific Uses: What specific cases have highlighted the debate over the appropriateness of maintaining a military court system to try terrorism suspects?

I draw conclusions as to whether the expansion of military authority in this manner has proven to be an effective counterterrorism response in the Israeli case, and determine what the United States could learn from the Israeli experience as it considers institutional changes in the formulation of U.S. counterterrorism policy.

ARGUMENT AND RELATED HYPOTHESES

In brief, I am arguing that democratic states will expand the role and responsibilities of their militaries into what were formerly civilian areas of responsibility as a key tool in the implementation of their counterterrorism policy when certain conditions are present. The conditions will be presented here, and in the methodology section I will discuss why and how these institutional conditions create critical junctures that encourage military involvement in counterterrorism policy.

Condition 1: Militaries will expand their authority through the adoption of civilian responsibilities in the context of counterterrorism policy when military authority is only loosely circumscribed by state constitutional and legislative documents. In those states in which the military's role in domestic activity is only vaguely defined by

in which the prosecution would ask questions might give away too much information; public trials might create undo hazard to the judiciary and jury members; the publicity afforded by a regular trial would play into terrorists' hands; a lengthy trial and appeals process in civilian court would make demonstrating a swift judicial response to terrorist attacks impossible; international tribunals have proven to be inadequate ways to seek remedy; the possible mass destruction of human life outweighs the widely-accepted legal standard that it is better to let one guilty person go free than to have one innocent person incarcerated.

Arguments against using military courts include: in most countries, the executive branch has exceeded its constitutional authority in ordering such tribunals to take place; ordinary criminal court systems tend to have adequate procedures for dealing with classified information – judges can order that witnesses' identities or key documents be held back from the discovery process and jurors can be anonymous; publicity is not a problem if trials are declared off-limits to the media; lengthy trial periods allow the prosecution to gain depth of knowledge on the terrorist target; trial by military officers robs ordinary citizens of the opportunity to participate in the administration of justice in dealing with crimes that were, by definition, against them; military courts could violate international law. Summary of arguments taken from Donohue, Laura. July 2002. "Bias, National Security and Military Tribunals." *Criminology & Public Policy*. 1:3, 339-44.

the constitution and other governing documents, I expect the military's responsibilities to expand in response to the state's implementation of a more stringent counterterrorism policy. This requires that the executive branch be powerful enough in an institutional context to defend extending the military's position in light of the objections that tend to emerge from such initiatives in liberal democracies. States in which domestic laws have been interpreted to allow incarceration and trial of civilians by the military have proven themselves to be better able to defend government and military counterterrorism initiatives.

Condition 2: Militaries will expand their authority through the adoption of civilian responsibilities in the context of counterterrorism policy when the military has a history of strong participation in the formulation (versus simply implementation) of a state's national security doctrine. In states in which there exists significant military participation (either formal or informal) in the political process as it relates to national security, the military is more likely to be tasked by civilian authorities to handle domestic counterterrorism responsibilities. Examples of military involvement in the political process are the existence of institutionalized channels for direct lobbying of the legislative branch and discretionary control by the military over a relatively large share of the national budget. "How a nation or individual political leaders responds when faced with terrorism is a matter of choice based on estimates of anticipated reactions to and consequences of available policies."¹⁰ When legislative and executive entities consider the military leadership to be highly knowledgeable, it is more likely that the military will be tasked with developing and implementing a state's counterterrorism policy.

While the election or appointment of military leaders to executive posts is less common in the U.S. than in Israel, in both states there are enough institutionalized

¹⁰ Bobrow, Davis. April 2004. "Losing to Terrorism: An American Work in Progress." *Metaphilosophy*. 35:3, 345-64, p. 347.

channels of influence (i.e., official military briefings of legislative delegations and committees) that the military will nearly always have influence over the counterterrorism policy developed by the state. In neither the American nor Israeli case could it be said that the civilian sphere has been permeated by the military. However, I argue that the military's highly specialized knowledge of counterterrorism tactics deems its expertise absolutely necessary to civilian authorities' development of counterterrorism policy. Therefore, when civilians increase their emphasis on counterterrorism initiatives, the military will gain more relative power in the civil-military balance.

Condition 3: Militaries will expand their authority through the adoption of civilian responsibilities in the context of counterterrorism policy when the military maintains an exalted role in national history and is viewed by the citizenry as a core institution of national identity, and the government is facing both high internal and external threat levels to the safety of its citizens and installations. In well-funded militaries that appear to be subjected to high levels of civilian control, domestic terrorism investigations rarely involve either overt or covert action on behalf of the military. However, in most countries resources and threat levels are such that militaries must be utilized to manage the threat level and liquidate insurgent and terrorist threats, particularly "because military capabilities may be needed to react to these contingencies and also because the distinction between a crime and act of war is not clear in such cases."¹¹ Due to the heightened terrorist threat level faced by both the U.S. and Israel, I expect the executive branch in both states to rely heavily on the military for domestic security and implementation of its counterterrorism policy. In these contexts, I expect the military's vested interest in maintaining an expanded sphere of influence to further

¹¹ Morgan, Matthew. March 2004. "The Garrison State Revisited: Civil-Military Implications of Terrorism and Security." *Contemporary Politics*. 10:1, 5-19, p. 13.

encourage the institutionalization of this expansion through public military support of legislation beneficial to the military and increases in military allocations.

In countries in which the military has played a key role in the founding and development of the state, I expect that the military is more likely to be tasked by the executive branch with responsibilities normally handled by the civilian actors. “The theological bases of a nation’s identity...help to determine its ontology; the degree to which actors see themselves as possessing agency in the face of divine providence, for instance, will help to structure the type of security ethic possessed by the military of a given nation-state.”¹² Israel is a prime example of a historically-revered military playing a highly significant role in the implementation of a state’s counterterrorism policy, adopting responsibilities that in peacetime—what little peace Israel has seen—are delegated to civilian entities. Americans, in contrast, while inundated with military culture during the two World Wars of the twentieth century and in the early decades of the Cold War, do not place as much emphasis on the military as the primary tool of national security. This is due in part to the fact that for the vast majority of the nation’s history, Americans rarely experienced direct attack on their domestic territory. This has obviously changed, and the U.S. thus faces decisions that Israel made decades ago. Spain is an interesting contrasting case in this regard, with its citizenry’s extremely negative experience with domestic military activity leading the state to avoid domestic military deployments whenever possible. Thus, for the military to gain an expanded domestic counterterrorism role, I expect all three conditions—though in varying degrees—to be discernible, necessary, and sufficient.

¹² Sucharov, Mira. Winter 2005. “Security Ethics and the Modern Military: The Case of the Israeli Defense Forces.” *Armed Forces & Society*. 31:2, 69-99, p. 176.

RELEVANT LITERATURE

While much has been written in the past decade or so about those who commit terrorist attacks, less has been published discussing the other side of that equation – institutional responses to terrorism.¹³ Those articles that do address state responses tend to omit discussions of the role of the military in counterterrorism policy, and very little at all has been written about how governments’ need for military assistance in order to implement their counterterrorism policies alters civil-military relations in a given state. Internal military think tanks have produced studies on low-intensity combat (LIC), primarily based on the U.S. military’s counterterrorism experiences in Iraq and Afghanistan. These studies, too, are one-sided, tending to omit any mention of civilian authority. Therefore, the topic of this study is rare in terms of the existing academic literature, and as a result I necessarily draw on relevant literature from several different disciplines in order to provide context for my investigation.

The perpetual crisis of an ongoing war on terrorism was not part of Harold Lasswell’s original thought process when he wrote about prospects for the United States developing into a “garrison state” in the 1940s. “However, there is striking similarity between his central theoretical problem and the practical problems of sustaining civil liberties while facing the challenge of an active crisis of national security with no apparent end.”¹⁴ Fighting a widespread war against terrorism, a form of warfare defined in part by non-state combatants, requires a different state approach to national defense

¹³ Prior to 9/11, little systematic attention had been paid to the politics of the counterterrorism policy process. William Farrell’s 1982 book—The U.S. Government Response to Terrorism: In Search of an Effective Strategy. Boulder, CO: Westview Press—analyzed the organizations behind counterterrorism policy. Tucker, David. 1997. Skirmishes at the Edge of Empire: The United States and International Terrorism. Westport, CT: Praeger, is also relevant.

¹⁴ Morgan (2004), p. 7.

than what the world has previously seen.¹⁵ There is concern that some manifestation of the garrison state could emerge and the “nexus between civil defence, military force, and disaster response [could lead] to the fulfillment of Lasswell’s argument that specialists of violence will train in skills that we have seen traditionally accepted as part of modern civilian management.”¹⁶ While some may argue that the military-industrial complex in the United States is representative of such a trend, I argue that these predictions have yet to be fulfilled.

Therefore, traditional models of civil-military relations such as those offered by Huntington, Lasswell, and Janowitz are unable to fully explain institutional responses to terrorism today. Incorporating the literature on terrorism brings us a step closer to understanding what we are seeing, as it offers models that integrate the causes and results of terrorist activity into models of civilian response. The two most commonly cited models of counterterrorism include the “war model” and the “criminal justice model.” In short, the war model maintains a strong emphasis on restraining terror, often at the expense of protecting liberal rights and liberties, viewing terrorist activity as an act of revolutionary warfare intent on altering or removing the existing power structure. The criminal justice model, in contrast, explains how states will often pursue a potentially less effective counterterrorism policy in order to protect the civil rights and liberties of their citizens. Both of these models are simply frameworks, not intended to fully explain every case of counterterrorism policy as it exists today. However, certain patterns have

¹⁵ During the Cold War the construct of deterrence, articulated most prominently by Jervis, replaced the classical concept of defense in which the armed forces literally stand between the population and the enemy. “While deterrence was ultimately predicated upon the mutual vulnerability of states’ civilian populations, terrorists have several features that reduce the utility of this model. First, terrorists are often non-state actors, and they are thus not necessarily subject to the massive retaliatory response to which the opposing superpowers were. In addition, since terrorists are not necessarily linked to any state or national population, the response would not be commensurate.” Jervis, Robert. Spring 2002. “An Interim Assessment of September 11: What has Changed and What has Not?” *Political Science Quarterly*. 117:1, 37-54, and Morgan (2004), p. 9.

¹⁶ Lasswell (1941), as quoted in Morgan (2004), p 7.

emerged frequently enough to require a revision or expansion of these models.¹⁷ Specifically, both of these models assume some degree of uniformity in the government as an actor. However, in order to truly understand a government's counterterrorism policy, we must disaggregate the "government" into its constituent parts to forge conclusions regarding why one counterterrorism policy was chosen over another. In all governments, but particularly open, liberal democracies such as the U.S., Israel, the U.K., and Spain, there are many factors that determine why one actor is able to wield more power in the agenda-setting and decision-making processes than another, and the interests of these actors will determine why they prefer one course over alternative courses.

As part of this disaggregation of the government, we must understand not only how government agencies are able to pursue specific counterterrorism strategies, but indeed why they choose that course of action in the first place. The literature on strategic culture, with its focus on how military actors conceive of achieving ranked preferences in the security realm, can provide some insight in this regard though its emphasis is primarily the formation of security doctrine. "Alastair Iain Johnston defines strategic culture as a 'system of symbols...which acts to establish pervasive and long-lasting strategic preferences by formulating concepts of the role and efficacy of military force in interstate political affairs.'"¹⁸ Acts of terrorism directly challenge the military's confidence in its role as protector of national sovereignty, and therefore would naturally affect military strategic preferences. Other work loosely associated with the strategic culture vein has blended theories of organizational culture with the exigencies of domestic politics, most notably Elizabeth Kier's comparative research on French and

¹⁷ Pedahzur, Ami, and Magnus Ranstorp. Summer 2001. "A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel." *Terrorism and Political Violence*. 13:2, 1-26.

¹⁸ Johnston, Alastair Iain. 1995. "Thinking About Strategic Culture." *International Security*. 19:4, p. 59, as quoted in Sucharov (2005), p. 172.

British military doctrines and Jeffrey Legro's study of Anglo-German military relations during World War II.¹⁹

Mira Sucharov argues that the concept of security ethics can help to explain and predict the emergence of military doctrines as well as collective reactions to state policies. For Sucharov, "security ethic" refers to military attitudes toward the use of organized violence, including the circumstances under which and in what manner militaries deem it ethically permissible to use force. "The type of security ethic hinges on what we might call the 'politics of choice' in defining that military's missions; that is, the degree of agency that the military perceives vis-à-vis its adversaries, particularly regarding war's cause and its conduct."²⁰ The implications of Sucharov's argument for states existing under a high threat of terrorism are significant, especially as states often view terrorist activity that occurs domestically as a direct attack on their national sovereignty, thus justifying a stringent response by the military.

There is some disjunction between the predictions that arise from those who write in the strategic culture literature and the empirical studies that have been done on civil-military relations as they relate to either side's willingness to use force abroad. In 2003, Peter Feaver and Christopher Gelpi argued that there was some evidence that civilian leaders in the U.S. were more willing to use military force than were military leaders, particularly when the use of force comes in the form of small-scale limited intervention. They concluded that military leaders were likely to see international intervention as distracting from the main mission of defending the homeland from attack. Civilians, in contrast, were more likely to see such limited use of military force as useful from a policy perspective. The consensus of many scholars is that civilians, while more likely to

¹⁹ Kier, Elizabeth. 1997. Imagining War: French and British Military Doctrine Between the Wars. Princeton, NJ: Princeton University Press, and Legro, Jeffrey. 1995. Cooperation Under Fire: Anglo-German Restraint during World War II. Ithaca, NY: Cornell University Press.

²⁰ Sucharov (2005), p. 170.

advocate the use of military force in the pursuit of policy, are also more likely to wish to use the force in limited fashion.²¹ Feaver and Gelpi's research complimented the conclusions of earlier research performed by Deborah Avant. In the mid-1990s, Avant argued that there existed a lack of consensus among civilian institutions concerning the use of force, and that until some sort of consensus was reached, military leaders would be expected to advise hesitancy about committing forces.²² Today, it is possible that the increased threat level faced by the U.S. has moved its civilian establishment further toward a consensus on the conditions under which using force is justified, though the extension of military activity into civilian spheres of autonomy remains highly contentious.

While this provides us with some baseline by which to judge civil-military relations in terms of the implementation of counterterrorism policy abroad, standards by which to assess civil-military relations during the formation and implementation of counterterrorism policy in those cases in which the military is asked to adopt civilian areas of responsibility are still woefully lacking. Based on the current literature, one apparently universal conclusion in academia is that the military ought not to be involved in internal security, or at least have its participation severely limited.²³ The threat of terrorism, however, is making such an arrangement more and more difficult to maintain.

²¹ Feaver, Peter, and Christopher Gelpi. 2003. Choosing Your Battles: American Civil-Military Relations and the Use of Force. Princeton, NJ: Princeton University Press.

²² Avant, Deborah. Winter 1996/97. "Are the Reluctant Warriors Out of Control: Why the U.S. Military is Averse to Responding to Post-Cold War Low-Level Threats." *Security Studies*. 6:2, 51-90.

²³ Michael Desch, for example, argues that the ideal civil-military relationship would be one that prevents military coups, keeps the military within the proper sphere, reduces instances of civil-military conflicts over nationally important issues, ensures mutual respect between civil and military leaders, produces effectiveness in national policies, and most importantly, prevents the military from being involved in internal security. Desch, Michael. 1999. Civilian Control of the Military: The Changing Security Environment. Baltimore, MD: Johns Hopkins Press.

JUSTIFICATION OF CASES

Stephen Van Evera's²⁴ criteria for case selection include:

Data Richness: The case(s) provide enough data with which the research may fully explore the research question.

Intrinsic Importance: The phenomena being studied have enough of an impact on politics or society to merit extensive study.

Insufficiency of Existing Theories: Existing theories either make divergent predictions about the case, or fail to explain it altogether.

Applicability to Additional Cases: The theoretical framework or conclusions to be developed in the course of the research could be applied to other cases.

Based on these criteria, both the United States and Israel make strong cases for assessing the impact of a state's counterterrorism policy on its civil-military relations, as described below.

United States

In relation to its civilian counterparts, the U.S. military has seen its political power increase exponentially since the 9/11 terrorist attacks ushered in an era characterized by the need to significantly improve U.S. counterterrorism strategy. Under the Clinton administration, it was widely asserted that American military leadership was more alienated from its civilian leadership than at any other time in U.S. history.²⁵ This

²⁴ These criteria are adapted from Van Evera, Stephen. 1997. Guide to Methods for Students of Political Science. Ithaca, NY: Cornell University Press, 77-88.

²⁵ The literature documenting this tension is prolific. See Morgan, Matthew. 2001. "Army Recruiting and the Civil Military Gap." *Parameters*. 31:2, 101-17; Ricks, Thomas. 1997. Making the Corps. New York, NY: Scribner; Holsti, Ole. Winter 1998/99. "A Widening Gap Between the U.S. Military and Civilian Society? Some Evidence, 1976-1996." *International Security*. 23:3, 5-42; Feaver, Peter. January 1996. "The Civil-Military Problematique: Huntington, Janowitz and the Question of Civilian Control." *Armed Forces & Society*. 23:1, 149-78; Feaver, Peter, and Richard Kohn, eds. 2001. Soldiers and Civilians: The Civil-Military Gap and American National Security. Cambridge, MA: The MIT Press; Foster, Gregory. 2000. "Civil-Military Gap: What Are the Ethics?" *United States Naval Institute Proceedings*. 126:4; and

pervasive tension in American civil-military relations undoubtedly impacted the military's ability to repel Clinton administration initiatives to have the military play a greater role in counterterrorism policy implementation. Prior to 9/11, the Department of Defense fought an expansion of its role in the implementation of counterterrorism policy, arguing that the new responsibility was not appropriate to its mission or routine. This rejection of a redefinition of the military's mission was not universal, but became a rallying point for those troubled by the Clinton administration's attempt to reform military culture. In a 1998 speech to the Council on Foreign Relations, Secretary of Defense William Cohen mentioned that the Department of Defense would only provide "active support" to the Clinton administration in its attempt to consolidate the task of counterterrorism policy coordination into one lead federal agency.²⁶

I argue that the attacks of September 11th engendered a critical transformation in the military's operational focus, largely at the civilian authority's behest. American military intervention before 9/11 was viewed as justifiable when it was a response to direct attacks on the United States at home or abroad or as part of a United Nations or other multilateral mandate. The military tended to abstain from direct involvement in counterterrorism policies relating to domestic U.S. territory. Today, the standards for military intervention both domestically and abroad are far less stringent. This is especially true if the civilian authority is able to make the argument that national security is at stake, a standard that is theoretically met by each and every terrorist threat to U.S. installations or citizens at home or abroad.

In the United States, the policymaking process is pluralistic and highly fragmented, and all threatening events—terrorist attacks, natural disasters, etc—must be

Kohn, Richard. Spring 1994. "Out of Control: The Crisis in Civil-Military Relations." *The National Interest*. 35, 3-17.

²⁶ Crenshaw (2001), p. 332.

filtered through a disjointed political process that is constitutionally-mandated. As Martha Crenshaw emphasizes,

[d]espite the secrecy inherent in formulating and implementing policy toward terrorism, issues are developed, interests formed, and policies legitimized through public debates. Decision makers with different identities and preferences define and represent problems, or frame issues, in order to gain public support for their positions. Furthermore, the selection and implementation of policy depend on the particularistic interests of the actors or coalitions that assume the initiative as much as consistent policy doctrine or strategy based on a broad national consensus about what can and ought to be done. Lack of coordination and fragmentation of effort are often the result.²⁷

Institutionally, the military is just one of many groups aiming to influence the U.S.'s counterterrorism policy, and as such one goal of this study is to identify the institutional characteristics that determine the amount of power held by the military regarding the formation and implementation of a counterterrorism policy.

As previously mentioned, prior to the 9/11 attacks the U.S. military appeared to desire to refrain from direct interference in the implementation of counterterrorism policy at the domestic level, supporting law enforcement initiatives only when absolutely necessary. Because the past decade has shown that asymmetric warfare against American targets can be highly successful in achieving limited aims, the entire U.S. government has had to reform its counterterrorism infrastructure to better address this danger. “Nowhere has the preeminence of counterterrorism been more clearly articulated than in the architecture of the new U.S. military strategy in the aftermath of September 11,”²⁸ and I examine how this new infrastructure has shaped—and been shaped by—civil-military relations in the U.S.

²⁷ Ibid., pp. 329-30.

²⁸ Troyer, Lon. June 2003. “Counterterrorism: Sovereignty, Law, Subjectivity.” *Critical Asian Studies*. 35:2, 259-76, p. 264.

Israel

The Israeli case is highly instructive, for it is based on decades of intensive counterterrorism experience. By examining the development of Israel's counterterrorism policy as it relates to the Israeli Defense Force (IDF), we can discern critical junctures in military institutional development that have defined the IDF's position as defender of Israeli national sovereignty domestically. By doing so, we can compare the American and Israeli cases to determine if the successes and failures of the Israeli military with respect to counterterrorism initiatives could have been predicted based on the institutional evolution of the IDF, and whether or not any of those lessons could be applied to the American case today.

The IDF is the security arm of the Israeli government, entrusted to protect national sovereignty and ensure domestic stability in spite of (or in reaction to) salient national security concerns. This image of national defender is ingrained even deeper in the Israeli national identity due to civilian authority's policy of universal and dual-gender military conscription and the many wars that Israel has fought within its short history. This consistent state of threat and broad national participation in Israeli defense and counterterrorism initiatives, not to mention a long history of persecution by outsiders against persons of Jewish descent, have encouraged the widespread notion that Israel perceives any threat facing it as laden with the potential to cause the annihilation of Israel itself, and therefore justifying a strong military response. From its perspective, the Israeli military "sees itself as attempting great restraint within the context of military conduct, taking care not to harm civilians....In terms of choice, then, the IDF does not choose to fight wars—yet it does consciously choose the manner in which wars are fought."²⁹

²⁹ Sucharov (2005), pp. 180-1. "The concept of no alternative has achieved a lofty place within Israeli military and civilian discourse. The label has come to represent both the articulated mission of the state, and the label Israelis gave to every war fought by the Jewish state from its War of Independence in 1948

Israel may indeed be an anomaly in the context of civil-military relations. Certainly, Israeli military doctrine appears to be offensive while the rhetoric of its national strategy and own non-expansionist strategic goals appear to be defensive. “Even the Six Day War of 1967, which Israel technically initiated through a preemptive strike, was described by Rabin in its aftermath as being the war of ‘a nation that desired peace but was capable of fighting valiantly when enemies forced it into war.’”³⁰ I would argue, however, that in spite of Israel’s uniqueness in terms of its experience with domestic terrorism its experience will become only more applicable to other states in the years to come, as terrorism as a form of warfare will only become more frequent and deadly, than in past.

We are seeing hints of the Israeli strategy—offensive doctrine justified through defensive strategic goals—in the case of the U.S. military today. The Israeli Defense Force, like the United States military, has been primarily oriented toward the conventional battlefield. “Yet with terrorism a constant threat, the IDF has had to devote considerable resources to what it dubs a ‘current security’ (as distinct from ‘basic security’) problem,”³¹ and I foresee a similar path being taken by the U.S. military. As mentioned, many of the new studies produced by U.S. military think tanks explore the best methods by which to succeed against non-state actors in low-intensity combat situations.

In summary, referring back to Van Evera’s criteria for case selection, the United States and Israel appear to be strong cases for exploring the relationship between counterterrorism initiatives and civil-military relations. The data for both cases are

until the controversial 1982 Israeli-PLO War in Lebanon and Israel’s response to the 1987-1993 Palestinian *intifada* broke the national consensus.” Ibid., p. 181.

³⁰ From Yitzhak Rabin’s June 1967 speech at the Hebrew University, as recalled by Rabin in Rabin, Yitzhak. 1967. The Rabin Memoirs, p. 120, as quoted in Sucharov (2005), p. 185.

³¹ Sucharov (2005), p. 187.

exceptional, though far more has been written on institutional responses to terrorism in the Israeli case than in that of the U.S. The cases are intrinsically significant, as both states are militarily powerful and politically formidable internationally and in their respective regions. Existing theories, while helping to explain the actors and motivations on the terrorist side of the equation, are inadequate at explaining what role militaries should be playing in order to effectively counter terrorism while simultaneously preserving a level of civilian authority over the military that is adequate for “healthy” civil-military relations in liberal democracies. Finally, every state has a military of some sort, though the difference between militaries on all counts is significant and very few civilian authorities are able to shelter themselves from the potential for terrorist attack. Therefore, there is opportunity for wide application of the lessons learned from the U.S., Israeli, U.K. and Spanish cases.

United Kingdom and Spain

I have adopted a “tiered” case study structure for this research. In this series of structured comparisons, the United States will receive the most attention, with an examination of the Israeli case intended primarily to provide a framework by which to assess the development of US counterterrorism policy given Israel’s much longer experience with the creation and implementation of counterterrorism policy. Due to the unique situations in which the U.S. and Israeli states find themselves, a third tier of cases will be used for comparison and contrast with the intention of developing generalizations where possible. This last tier includes industrialized democracies that faced a high threat of domestic terrorism but did not experience an expansion of military authority into the civilian sphere in the manner which has occurred in the US and Israeli cases. I will examine two consolidated democracies that have had perhaps the most extensive experience with domestic terrorism, the United Kingdom and Spain.

METHODOLOGY

This study is based on the assumption that institutional arrangements play a significant role in the policymaking process. I focus on one aspect of institutional change—the source of change—and how existing institutional parameters may determine the direction and significance of that change. As such, I am employing the paradigm of Historical Institutionalism (HI) to explain how changes within institutions alter civil-military relations in the context of counterterrorism policy. According to Peter Hall and Rosemary Taylor, Historical Institutionalism is a body of theory based on the notion that the way in which institutions are organized structures conflict so as to privilege some interests while demobilizing others. In this paradigm, institutions are a principal factor in structuring collective behavior and generating distinctive outcomes. Both preferences and the distribution of resources are flexible and determined endogenously. Information about the consequences of alternatives is generated and communicated through organized institutions, so expectations depend on the structures and linkages within the system. In this manner, institutions alter the expectations an actor has about the actions others are likely to take.³²

According to Sven Steinmo and Kathleen Thelen, Historical Institutionalists attribute institutional change to a variety of causes. First, institutions may become important as a result of changes in the broader institutional environment. This may or may not be an intended change on the part of any set of individuals. In the context of this study, a major terrorist attack proved decisive in increasing the importance of the U.S. military in the implementation of American counterterrorism policy. Second, institutional change may originate when new political actors capture an established

³² Hall, Peter, and Rosemary Taylor. December 1996. "Political Science and the Three New Institutionalisms." *Political Studies*. 44:4, 936-57.

institution to pursue their interests. In the case of Israel, the IDF will implement a more aggressive counterterrorism policy when a more conservative party is in power. Finally, a third source of institutional change may occur when an established actor pursues new goals within an already established institution. New appointees to the position of Secretary of Defense, for example, may induce changes in the U.S. military's counterterrorism infrastructure.³³

One of the most useful facets of Historical Institutionalism is its espousal of a view of institutional development that emphasizes path dependence and unintended consequences. Paul Pierson describes “path dependence” as the method by which we can illustrate that specific patterns of timing and sequence matter. Starting from similar conditions, a wide range of social outcomes may be possible, large consequences may result from relatively small or contingent events, and particular courses of action, once introduced, can be almost impossible to reverse. Consequently, political development is punctuated by critical moments or junctures that shape the basic contours of social life.³⁴ Pierson argues that for political change to occur, a “critical juncture” in which institutions are challenged by strong socioeconomic or political pressures must take place. Change is able to continue within the institutional framework in a bounded way. Thus, by utilizing the Historical Institutionalism approach one is able to link large-scale political change to specific historical contexts. It is evident that historical context is highly significant as a causal agent in the reform and institutionalization of a state's counterterrorism policy.³⁵

³³ Steinmo, Sven, Kathleen Thelen, and Peter Hall, eds. 1992. *Structuring Institutions*. Cambridge, England: Cambridge University Press.

³⁴ Pierson, Paul. June 2000. “Increasing Returns, Path Dependence and the Study of Politics.” *American Political Science Review*. 94:2, 251-67.

³⁵ A corollary of path dependence is prospect theory, which will also be useful in this study. “Prospect theory also suggests a tendency to project onto the later steps in a course of action the expectations...that the earlier steps can be accomplished successfully at tolerable cost. [This] advantages counterterrorism lines of policy whose initial steps look very feasible and effective by exaggerating the likely success of later steps, and it disadvantages course of action for which the opposite seems to be the case.” Bobrow (2004), pp. 349-50.

A common criticism of the employment of path dependence as a research tool is that “critical junctures” can only be defined in retrospect, and I agree with this assessment. It is possible to identify certain moments in the history of a policy or institution that might prove more likely to be a critical juncture than others, but it is only in retrospect that we may assess a moment or decision as having restricted potential outcomes for the future, in part because we will not realize in what ways future options have been restricted until agencies attempt to implement new policies. In spite of this fault, path dependence is still a helpful way to understand the manner in which institutions shape preferences and to illustrate that the costs of switching from one alternative to another can be cost-prohibitive.

Applying the concept of path dependence to the study of counterterrorism policymaking allows us to identify those moments at which militaries have had their policy options restricted or redefined by their civilian authorities, and vice versa. As a result of increasing returns, once an institution has been defined a certain way or given a specific mandate, the probability of further steps along the same path increases. In economic parlance, institutions have significant start-up costs and therefore it is often easier to reform an existing institution than to start anew. Indeed, this is one of the primary arguments for why civilian authorities will expand the military’s area of responsibility into the civilian sphere rather than establishing parallel civilian agencies.³⁶

One of the most common critiques of Historical Institutionalism is that it is based on the assumption that institutions are unitary actors. March and Olsen argue that institutional coherence varies, but is substantial enough to merit viewing institutions as

³⁶ Regarding the U.S. system, Margaret Weir notes that because of the many veto points of federalism, pluralism, and separation of powers, innovation attempts are most successful if they occur under the auspices of existing programs rather than as wholly new policies. Weir, Margaret. 1992. “Ideas and the Politics of Bounded Innovation,” in Steinmo and Thelen, eds. Structuring Institutions.

actors,³⁷ and I concur. It is critical that we disaggregate institutions when attempting to determine how specific policy preferences are formed. This need for disaggregation is also why I reject the rational choice version of institutionalism, in favor of Historical Institutionalism.³⁸ Unlike the rational choice theorists who see institutions as functioning within the context of a punctuated equilibrium, Historical Institutionalists see constant and persistent conflicts over interests, ideas, and power occurring within institutions. Institutions, therefore, do not simply constrain choices of action with regard to preferences, but instead help to define such preferences and the choices available. In this sense, and in this study, institutions are both an independent variable and a dependent variable, and such a comprehensive view of institutionalism endows us with a far greater understanding of the ways in which the military is impacted by—and impacts—the counterterrorism policymaking process.

The political characteristics of both the American and Israeli counterterrorism infrastructures that make them conducive to the application of Historical Institutionalism as a research paradigm include the high density of institutions in that area of policy and the possibility for using political authority to enhance inherent or existing asymmetries of power. The status quo bias of political institutions and the relatively short time horizons

³⁷ March, James, and Johan Olsen. September 1984. "The New Institutionalism: Organizational Factors in Political Life." *American Political Science Review*. 78:3, 734-49.

³⁸ Steinmo and Thelen elucidate the major differences between Historical Institutionalism (HI) and Rational Choice Institutionalism (RCI). First, the RCI variant focuses almost exclusively on institutions as exclusively instrumental, while HI views policies that emerge from institutions as path-dependent outcomes that are best understood beyond the narrow interests of present actors, a view with which I agree. Second, Historical Institutionalists find strict rationality assumptions overly confining. For example, the RCI approach sees political actors as maximizing interests within and through institutions while Historical Institutionalists see political actors as rule-following satisficers, a view which I argue more accurately reflects the counterterrorism policies that emerge in both the American and Israeli cases. Third, RCI theorists see preferences as strategically fixed while Historical Institutionalists see preferences as institutionally malleable. The preference changes that follow the introduction of new ideas with each presidential administration are evidence in support of the more flexible HI framework. Fourth, RCI theorists, in their attempt to lend parsimony to the study of institutions, tend to miss significant background influences such as relative resources and legislative directives that are critical in understanding how institutions change over time. Steinmo and Thelen, 1992.

characteristic of the political process in the context of counterterrorism policy implementation are key explanatory factors in this study, and therefore path dependence is a strong methodological tool in my argument. A combination of archival research and personal interviews with both civilian and military participants in the domestic counterterrorism policymaking process will provide clarity on the civil-military negotiations that have resulted in the current design of the American counterterrorism infrastructure.

SIGNIFICANCE AND FUTURE RESEARCH AGENDA

This is a comparative case study, one intended to be hypothesis-generating. It therefore has value in terms of its contribution to theory-building by building on existing—though somewhat unrelated—theory to develop generalizations in areas in which theory does not currently exist.³⁹ Since the United States is well behind Israel in the development and implementation of counterterrorism policy, the results of this study could make a useful case for whether or not what the U.S. is doing in terms of its own counterterrorism policy is serving its efforts to maintain domestic security. While there are areas in which the results of this study could contribute theoretically, most of all I hope to provide an analysis with prescriptive richness that could yield useful policy recommendations for those states just beginning to make institutional changes in response to rising domestic terrorist threats. Thus, the real-world relevance of this study is highly significant.

In the future, I hope to expand this study of civil-military relations in the context of counterterrorism policy to non-democratic states. Most of the recent research on institutional responses to terrorism has been performed on liberal democratic states and the challenges and policy choices such governments face in trying to ensure the physical

³⁹ See Lijphart, Arend. 1971. World Politics. 2nd edition, for more on the value of theory-building.

safety of their constituents. For many reasons, less work has been done on military involvement in the counterterrorism policies of authoritarian states, which is odd considering civilian oversight of the military is widely acknowledged as a key to overall political form. While a shift in civil-military relations is no guarantee of overall political change, precedents in Asia and Latin America suggest that military reform can provide a good baseline from which to launch more pervasive liberal political development. Determining the military structure most conducive to effective counterterrorism policy implementation, a goal of this study, is therefore a strong basis from which to launch future research.

Chapter 2: Civil-Military Relations, Terrorism and the Democratic State

This study is based on the argument that the institutional arrangements which define a state's civil-military relationship shape the policy options available to that government as it debates the military's role in domestic counterterrorism policy. In order to make the case that under certain conditions a military's domestic authority will be expanded by the executive as the threat of domestic terrorism rises, we must establish a baseline for the type of relationship we would expect to see between civilian and military authorities in consolidated democracies in the absence of this threat, and indicate how that balance shifts as the threat level changes. As James Burk acknowledges, the "empirical domain of civil-military relations is large. It includes direct and indirect dealings that ordinary people and institutions have with the military, legislative haggling over the funding, regulation, and use of the military, and complex bargaining between civilian and military elites to define and implement national security policy."⁴⁰ This chapter explains how I have narrowed the field of inquiry among the many potential variables involved in civil-military relations to those most relevant for explaining the military's role in domestic counterterrorism policy.

DEFINING CIVIL-MILITARY RELATIONS

Relationships between civilians and the military are challenging to assess, as reflected in the difficulty of defining "civil-military relations" as a dependent variable. Michael Desch attributes disagreements over the definition to two causes:

First, it is not always clear when issues involve civil-military conflict rather than intracivilian struggles, intramilitary fights, or civil-military coalitional

⁴⁰ Burk, James. September 2002. "Theories of Democratic Civil-Military Relations." *Armed Forces & Society*. 29:1, 7-29, p. 7.

wars....[Second]...even when we are sure the issue is one of civil-military relations, it is often not clear whether these relations are good or bad. There is a remarkably broad range of ideas on what constitutes ‘good’ or ‘bad’ civil-military relations.⁴¹

Militaries and civilian bureaucracies are such large organizations that the reduction of either, with all of their complex internal processes, to a single homogenized variable often obscures endogenous characteristics that may act as mechanisms of change or otherwise indicate the “health” of the civil-military relationship. In addition, most of these internal characteristics interact with one another—and with the external environment—with such interdependence that determining causality is very difficult. Researchers must offer a list of clarifications and caveats to indicate what type of political system they are describing and which aspects of civilian and military behavior they are assessing, clearly explaining why other aspects were omitted.

The advent of increasing military involvement in domestic counterterrorism initiatives further complicates analysis by blurring the traditionally clear line between the military’s domestic and international functions. The application of Douglas Bland’s definition of the civil-military problematique to the question of domestic terrorism policy is a case in point. Bland sees the problem as an amalgamation of four separate but inherently intertwined questions: first, governments must limit the power of the military relative to its civilian counterparts, or, in established democracies, maintain this balance; second, democratic governments must ensure that the military acts in ways that safeguard the public, but do not bring harm to it; third, civilian authorities must be restrained so that they do not abuse the power they have over the military; finally, the power that expertise gives to the military must be balanced with the civilian authority’s ability to direct

⁴¹ Desch, Michael. 1999. Civilian Control of the Military: The Changing Security Environment. Baltimore, MD: The Johns Hopkins University Press, p. 3.

defense operations. While Bland acknowledges the overlap in these categories,⁴² military involvement in domestic counterterrorism policy blurs the distinction among all four to an unprecedented degree.

Particularly in consolidated democracies, significant military change—much like change in other areas of governance—is brought about through a long period of negotiation and compromise. In this type of regime, a “consensus-building procedure involving the civil authority, military leaders, and senior public servants is the main mechanism by which complex defense decisions are made.”⁴³ I argue that this notion of policy change as the result of negotiated settlement is especially true for counterterrorism policy, given the high stakes and large amounts of resources involved. This negotiation technique is apparent in consolidated democracies; militaries attempt to control the options presented to policymakers as policy choices, and civilians work to make their preferences ones that the military will willingly and effectively implement.

Peter Feaver suggests that any new theory of the “civil-military problematique” should extend beyond documenting relations between the two spheres to a more nuanced evaluation of the processes involved in communication and delegation between them to include “the conditions under which delegation from civilian authorities to the military happens” and the identification of “hypotheses about factors that shape the delegation in observable ways.”⁴⁴ This question of delegation and implementation is a core aspect of this study. According to Alfred Stepan, the identification of the specific issues over

⁴² Bland, Douglas. Fall 1999. “A Unified Theory of Civil-Military Relations.” *Armed Forces & Society*. 26:1, 7-25, pp. 12-3. Bland argues that the four problems “cannot be finally and absolutely resolved. Each is related in some respect to the others, and ultimately, if they are to be managed to everyone’s advantage, the military must be involved in the effort. Thus, paradoxically, civilian control of the armed forces depends partly on the senior leadership of the armed forces.” *Ibid.*, p. 13.

⁴³ Bland, Douglas. Summer 2001. “Patterns in Liberal Democratic Civil-Military Relations.” *Armed Forces & Society*. 27:4, 525-40, p. 535.

⁴⁴ Feaver, Peter. 2003. *Armed Servants: Agency, Oversight, and Civil-Military Relations*. Cambridge, MA: Harvard University Press.

which militaries are willing to assert their positions against civilian authorities may indicate the areas in which significant change is occurring.⁴⁵

According to Michael Desch, in accordance with democratic theory the “best indicator of the state of civilian control is who prevails when civilian and military preferences diverge. If the military does, there is a problem; if the civilians do, there is not.”⁴⁶ Thus, civilian control over the military is weak when military preferences prevail more often than not, and civilian control is strong when civilian preferences prevail most often. I use this framework to assess civil-military relations in each case based on whether civilian or military preferences regarding domestic use of the military as a counterterrorism tool prevail. In the case of the United States, I identify the current areas of civil-military contestation regarding the military’s increased domestic role, while in the longer-term Israeli, British, and Spanish cases I look more toward the outcome of such periods of civil-military contestation, examining whether the civilian or military side prevailed in these disputes and why they did so.

David Pion-Berlin contends that institutional approaches “teach us that armies...do not automatically translate their preferences into policy whenever and wherever they wish. Their will is mediated by governing agencies via procedural and structural mechanisms that can either open or restrict the military’s channels of

⁴⁵ This emphasis on areas of contestation echoes Alfred Stepan’s groundbreaking work on military change in Latin America, in which he measured the level of civilian control over the military in newly democratizing regimes by plotting the nature of military prerogatives and the level of military contestation of civilian decisions. See Stepan, Alfred. 1998. Rethinking Military Politics: Brazil and the Southern Cone. Princeton, NJ: Princeton University Press.

⁴⁶ Desch (1999), pp. 4-5. Douglas Bland identifies four primary matrices in defense management, within which civilian and military authorities bargain and negotiate: “strategic, sets of decisions about the ends and means of defense; organizational, decisions about the arrangement of defense resources and internal responsibilities; social, decisions about armed forces and society; and operational, decisions about the employment of forces.” See Bland (1999). Interestingly, counterterrorism policy—especially domestic counterterrorism policy—is an issue area that crosses the boundaries of every one of Bland’s defense matrices, emphasizing the complexity of homeland defense policymaking.

influence.”⁴⁷ For the purposes of this study, I have addressed the “measurement” problem in the study of civil-military relations by employing historical institutionalism to identify the legislative parameters which restrict the military’s channels of influence over defense policy and the defense policy options that are open to civilian policymakers. Legislation serves as the intervening variable through which changes in historical context and policy entrepreneurship are translated into changes in the civil-military relationship.

CIVILIAN MONITORING MECHANISMS

I define “civilian authority” as the elected civilians who—according to constitution and law—determine the role and mission of the armed forces, the allocation of resources to national defense, and decisions related to the use of force.⁴⁸ Civilian interference in military policymaking is, in my view, both natural and usually beneficial, ensuring that constituency defense priorities are met. Peter Feaver and Christopher Gelpi argue that “[b]ecause the military cannot claim exclusive knowledge about at least one specific value at stake—the probability of success on the battlefield—the civilian has grounds to justify this meddling.”⁴⁹ In most consolidated democracies, the military is granted significant latitude to determine the specific mission details that translate civilian orders into effective security policy. Civilian control, in this context, is easily limited by military expertise. Many analysts argue that this delegation of authority is not necessarily

⁴⁷ Pion-Berlin, David. 2001. “Introduction,” in Pion-Berlin, David, ed. Civil-Military Relations in Latin America: New Analytical Perspectives. Chapel Hill, NC: The University of North Carolina Press, 1-35. p. 23.

⁴⁸ This definition is adapted from Douglas Bland’s broad explanation of civilian authority in Bland (2001). David Pion-Berlin offers a more specific definition that illustrates how civilian authority in consolidated democracies is utilized by arguing that there must be: a distribution of power that allows constitutional authorities to make policy with the expectation that the military will carry it out; a functional division of labor, with civilians setting the general course and the military filling in the technical details; defense institutions in place to channel, regulate, and routinize the flow of influence and information from the political to the military sphere and back again; and an armed forces that acts professionally and nondeliberatively and believes in the civilians’ right to rule over them. Pion-Berlin (2001), p. 33.

⁴⁹ Feaver, Peter, and Christopher Gelpi. 2003. Choosing Your Battles: American Civil-Military Relations and the Use of Force. Princeton, NJ: Princeton University Press, p. 72.

the best decision for civilian authorities because civilians are better positioned to judge the political consequences of military policy: “Even in areas of obvious military expertise, tactics and operations, the best performance on the battlefield may come as the result of the very questioning, probing, auditing, and even hectoring that an intrusive monitoring regime would entail.”⁵⁰ This is particularly important during the implementation stages of counterterrorism responses, as the most effective counterterrorism responses require multi-agency coordination and political legitimacy.

Parliamentary oversight is crucial in any functioning democracy, and this is amplified in the context of domestic counterterrorism policymaking when parliamentary representatives are often the primary conduit through which citizen preferences regarding highly classified military and intelligence policy can be injected into the system. In addition to budgetary authority, parliaments are powerful actors in defense policymaking for the legitimacy their acceptance or contestation of specific defense policy initiatives may give (or remove) from military actions: the “engagement of the legislature in the defense policy process introduces a crucial element of democratic legitimacy to a state’s civil-military relationship.”⁵¹ Institutionally, the United States diverges from the other three cases because it is a presidential, as opposed to parliamentary, system. Because of this institutional difference, distinctions between the U.S. on the one hand and Israel, the UK and Spain on the other as to how legislatures establish parameters on military counterterrorism options will be evident. Despite this difference, in all of the cases the legislature plays an important role in civilian oversight of the military.

⁵⁰ Ibid., p. 300.

⁵¹ Cottey, Andrew, Timothy Edmunds, and Anthony Forster. October 2002. “The Second Generation Problematic: Rethinking Democracy and Civil-Military Relations.” *Armed Forces & Society*. 29:1, 31-56, p. 44. Bland echoes Cottey et al’s argument by concluding that multiparty civilian committees on national defense serve as a public forum for discussion of national defense issues. Bland (2001), p. 535.

The method of civilian control that we see most often in the democratic context—as well as the non-democratic context—is restriction of the military’s access to resources, such as funding and technological advancement. This type of civilian control is typically legally enshrined, as in the case of the United States where Article I, Section 8 of the U.S. Constitution dictates that Congress controls the financing for the armed forces. The funding allotted to a military by its civilian authorities will also influence force structure by determining the range of options financially available to the military, thus enforcing another mechanism of civilian control. The same line of argument applies to military doctrine,⁵² where the availability of resources often shapes the doctrinal options available to the armed forces by determining the feasibility of specific missions or techniques.

In the end, the efficacy of all mechanisms of civilian control depends on the capability of the state to enforce them.⁵³ In consolidated democratic states, the basic tool by which institutional powers are declared is law. That being said, in most governments—especially regarding military matters—there is actually a large amount of bureaucratic discretion that is not circumscribed by legislative means through which militaries can exert significant power. According to Bland, “[c]onstitutions, laws, customs and political declarations may legitimize actions and decisions of governments

⁵² Foster, Gregory. Winter 2005. “Civil-Military Relations: The Postmodern Democratic Challenge.” *World Affairs*. 167:3, 91-100, p. 97.

⁵³ Elizabeth Coughlan argues this same point: “If democratic rule is about building a state strong enough to mediate among the interest groups that make up civil society, then one of the keys to democratic control over the military is surely the strength of the state.” Coughlan, Elizabeth. Summer 1998. “Democratizing Civilian Control: The Polish Case.” *Armed Forces & Society*. 24:4, 519-33. The importance of state capacity cannot be overstated, as is evident when examining states that have recently transitioned to democracy. Many states in Eastern Europe and Latin America have instituted laws to clearly subordinate their militaries to a civilian authority, but the effectiveness of these arrangements is limited by the respective governments’ ability to uphold their side of the civil-military arrangement. As a result, while the militaries in these countries have only rarely overstepped their legal bounds since transition, there has been little that the civilian authorities could do in response to any such action, or even hold as a threat to keep the military in line.

but bureaucratic structures change them into operational outcomes and actual policies.”⁵⁴ The state must have the capacity to rein in the military based on mutually accepted legal boundaries in order to effectively exercise most methods of civilian control. All four cases fit the democratic structural requirement that high-level military officials involved in policymaking should be accountable to civilian representatives, who are themselves accountable to the citizenry by virtue of elections.⁵⁵ However, in each case there is only limited civilian consensus regarding domestic counterterrorism policy, and there exists substantial disagreement among policymakers on the legal framework that should support the implementation of that policy. This show of weakness makes civilian control less effective by highlighting gaps in the civilian front through which the military may negotiate its policy preferences.

MILITARY INFLUENCE ON CIVILIAN POLICY

A basic assumption of this study is that the military functions much like any other interest group in a democracy by lobbying for its policy preferences and working to increase its budget. This assumption is widely shared, as many theorists recognize the inherently political nature of the military.⁵⁶ However, the military differs from other interest groups in that it has more power than most government agencies to pressure the civilian authority to accommodate its preferences. In this view, the key to civilian control—as with the civilian authority’s relationship with other interest groups—is to

⁵⁴ Bland (2001), p. 531. According to Bland, “[t]he control of the civil authority, the military, and the defense establishment requires a clear set of national defense laws especially enacted for this purpose. The defense law should unambiguously identify the chain of authority linking the civil authority to the military command; delineate authority by identifiable position; prescribe military codes of conduct, courts-martial procedures, military offenses, and punishments; and provide the basis for regulations concerning terms of service, promotions and pay, redress of grievances, and other administrative necessities.” Ibid., p. 534.

⁵⁵ Coughlan (1998).

⁵⁶ For example, Bengt Abrahamsson, in Military Professionalization and Political Power, suggested that “to view the professional military as inherently apolitical was incorrect.” Abrahamsson, as summarized in Cottey et al (2002), p. 33.

create institutional control mechanisms that ensure a range of military policy options are offered to policymakers by military experts. The military will almost always exceed the civilian authority's level of technical expertise on military capabilities, naturally endowing the military with power over civilians. While the influence accorded by this expertise is not devoid of civilian control, it is difficult to counter, particularly early in new civilian administrations when the civilian authorities' political and military experience is relatively limited. Expertise and discretion during implementation are the primary tools used by the military to shape civilian policy regarding employment of the military and its resources, and these tools have the most impact when the civilian authority is politically weak.

The defense establishment's large budget and size are often viewed as indicators of political influence, but there are limits to the influence of this variable on the civil-military balance. Studies over the years have yet to produce a consensus view on how a military's large stable of resources may definitively alter the civil-military relationship in consolidated democracies. Samuel Huntington, for instance, argued that a military's political influence is not wholly a function of its size or resources:

Military forces that consume a large proportion of a country's GNP may be kept under quite effective civilian control, as with the United States and the Soviet Union in the Cold War, while armies that consume only a small portion of a country's GNP may regularly defy and overthrow civilian governments, as in many Latin American and African countries.⁵⁷

Quantitative examinations of the issue often find that military influence in civilian politics does have a positive correlation with military allocations,⁵⁸ though the conditions under which this relationship holds, and the degree of its effect, are matters of dispute.

⁵⁷ Powell, Colin, John Lehman, William Odom, Samuel Huntington, and Richard Kohn. Summer 1994. "Exchange on Civil-Military Relations." *National Interest*. 36, 23-32, p. 23.

⁵⁸ Hill, Kim Quail. April 1979. "Military Role vs. Military Rule: Allocations to Military Activities." *Comparative Politics*. 11:3, 371-77.

The use of the budgetary variable is even less helpful in studies of counterterrorism policy, as the specific amount of funding allocated to a given program is almost always classified.

In civil-military relations in consolidated democracies, civilian authorities should maintain a preponderance of power. In the interest of maintaining a positive, productive relationship, however, we rarely see civilian authorities lording their power over military officials. Both sides have expectations of the other, and both strategize the optimal way to attain their preferences based on these expectations. As the implementing agency, the military maintains discretionary power over the civilian authorities: “The military expects from government a clear policy set out in terms understandable to the military culture and supported by reasonable means. The government must develop its own competence to produce such a policy or at least a capability to critically assess policy recommendations provided by the defense establishment.”⁵⁹ If the government fails to fulfill its side of the bargain, the military will often make its own policy decisions. As Samuel Huntington argued in 1994, “[m]ilitary establishments want political leaders to set forth reasonably clear goals and policies. If political leaders fail to do this, chiefs of staff have to make their own assumptions and develop their plans and programs accordingly.”⁶⁰ Thus, both sides expect the other to fulfill its obligations to the civil-military relationship in order to maintain the country’s security. This level of cooperation is absolutely critical in counterterrorism operations.

At the core of these debates over civil-military relations in democracies is the normative assumption that military involvement in national policymaking is detrimental to the democratic health of a state. I argue, in contrast, that the military must be involved

⁵⁹ Bland (2001), p. 535.

⁶⁰ Powell et al (1994).

in domestic counterterrorism initiatives and participate substantively in negotiations with civilian authorities that result in domestic deployment. Military intervention in national security policymaking does not inherently retard democratic functions, but rather is an efficient use of expertise as long as the limits placed on the use of military expertise are accepted by both sides.⁶¹ Domestic counterterrorism military initiatives are based on intelligence collection in the environment in which the military is operating, and the societal implications of domestic military intelligence collection need to be taken into account during the policymaking process.⁶²

THE MILITARY AND COUNTERTERRORISM OPERATIONS

Governments worldwide have discovered that their domestic police and security forces often perform inadequately when charged with domestic counterterrorism operations, and have moved to employ their militaries domestically to close this gap.⁶³ This trend signifies a major change in how countries may deploy their armed forces in the decades ahead. In many of these cases the military is the only government agency with the resources and training necessary to combat and mitigate a wide range of domestic

⁶¹ “As long as this influence comes [to the military] as a result of the weight that is given to their considered opinions, there is no problem with taking actions that will influence policy. But when the opportunity arises, not because their opinions are respected, but because their services are needed, they must carefully eschew the opportunity to see that their preferred policies are the ones that are implemented.” Kemp, Kenneth, and Charles Hudlin. Fall 1992. “Civil Supremacy over the Military: Its Nature and Limits.” *Armed Forces & Society*. 19:1, 7-26.

⁶² Gregory Foster argues that this change in mission could alter the military’s character: “[It is] reasonable to postulate that a military increasingly configured for special operations against terrorist-type threats, one that would expect out of necessity to be permitted to operate in total secrecy...and frequently cross over into the domain of domestic law enforcement, could be much more difficult to control than a regular warfighting military.” Foster (2005), pp. 97-8.

⁶³ “For example, the United States has deployed military troops in anti-narcotics missions along the US-Mexican border instead of relying solely on civilian law enforcement officers. Thailand relies extensively on military troops to counter illegal migration and drug smuggling in its northern regions, especially along the border with Myanmar. In 1995, Italy deployed nearly 1,000 soldiers when faced with a mass influx of Albanian immigrants. In 1998, Brazil assigned 2,000 troops to fight an epidemic of dengue fever that had affected more than 6,000 residents. Military forces were also deployed in Indonesia in 1997 to counter widespread forest fires that contributed to a massive haze that blanketed almost the entirety of Southeast Asia.” Smith, Paul. Autumn 2000. “Transnational Security Threats and State Survival: A Role for the Military?” *Parameters*. 30:3, 77-92.

crises, from riot control to natural disaster relief to domestic terrorist attack. With this reality in mind, why are so many governments—especially in consolidated democracies—hesitant to deploy their militaries domestically and why are militaries disinclined to further intervene in the homeland?

From the military perspective, one of the most oft-cited excuses for abstaining from the type of mission shift required of domestic deployment is that a military trained for domestic purposes would lose its battlefield skills and function at a reduced readiness level with respect to foreign deployments. The implication of this is that domestic deployment of the armed forces would actually make a country less safe by reducing the chance that its military could deter or defeat a foreign threat. In addition, a domestically-focused military could also decrease national security “if such intervention made the military too attentive to domestic political pressure and not attentive enough to changing threats in the security environment, particularly when those threats run counter to the prejudices of domestic politics.”⁶⁴ Finally, utilizing the military in the domestic arena could cause problems in the military’s relationship with society. Military officers accustomed to working in hostile environments may overreact or miscalculate their responses to domestic incidents, possibly resulting in civil rights violations.

Counterterrorism operations are designed to debilitate terrorists by disrupting their operations. Direct, conventional military activity against terrorist strongholds almost always comes with a high risk of civilian casualties, as most terrorist groups and operatives take shelter in populated areas. As such, governments tend to be hesitant to use the type of overwhelming military force that has the greatest chance of accomplishing the mission. Counterterrorism operations typically utilize small groups of police and

⁶⁴ Tucker, David. October 2006. “Confronting the Unconventional: Innovation and Transformation in Military Affairs.” *The Letort Papers*. Carlisle, PA: U.S. Army War College, Strategic Studies Institute, p. 61.

intelligence agents and are precisely targeted to ensure fewer civilian casualties. Because of the dependence on intelligence in counterterrorism operations and the association of such initiatives with elite law enforcement or military capabilities, “counterterrorism has taken on a secretive and compartmentalized dimension that may ultimately hinder efforts to develop a comprehensive government response to terrorism.”⁶⁵ Interagency communication—while especially difficult in the classified context—is essential to the success of domestic counterterrorism operations.

Most militaries classify counterterrorism operations as a part of their low-intensity conflict (LIC) doctrine. Robert Freysinger argues that anti-terrorist operations can take offensive or defensive form: “Under the umbrella of offensive anti-terrorist operations would appear pre-emptive strikes against groups, individuals and bases, perhaps even if protected by another government. Also, retaliation strikes could be considered. Defensively, US forces could reinforce potential targets of terrorism, providing a deterrent and reducing vulnerability.”⁶⁶ In many militaries, this type of warfare has come to be called “Fourth Generation” warfare.

Fourth Generation warfare is distinct from its predecessors in two ways. First, terrorists typically aim to change the minds of policymakers regarding a specific issue area, not to tactically defeat a state. Second, Fourth Generation wars last much longer in duration than conventional conflicts,⁶⁷ which has a strong impact on how terrorist groups organize themselves. “4GW organizations have focused on the long-term political viability of the movement rather than on its short-term tactical effectiveness...The leadership recognizes that their most important function is to sustain the idea and the

⁶⁵ Smith, Lieutenant Colonel Andrew J., Australian Army. January-February 2002. “Combatting Terrorism.” *Military Review*. 82:1, 11-18, p. 12.

⁶⁶ Freysinger, Robert. June 1991. “US Military and Economic Intervention in an International Context of Low-Intensity Conflict.” *Political Studies*. 39:2, 321-34, p. 325.

⁶⁷ Hammes, Colonel Thomas X., U.S. Marine Corps. November 2004. “4th Generation Warfare.” *Armed Forces Journal*. p. 42.

organizations – not necessarily to win on the battlefield.”⁶⁸ Because LICs in the context of counterterrorism operations are usually fought in populated areas, “LICs are known to place an especially high premium on the need for civil-military coordination.”⁶⁹ Very few states have achieved the level of cooperation needed to combat every aspect of a terrorist or insurgency movement, and even those that are considered to have performed better than most—the Israeli Defense Forces in Israel and the British Army in Northern Ireland—have failed to fully address the root causes of violent opposition movements. In both of these cases, there exists a significant degree of cooperation between civilian and military authorities, as well as an effort to forge a political solution to supplement domestic military counterterrorism operations.

While no single model of civil-military relations in the context of counterterrorism has emerged from past studies addressing this topic,⁷⁰ certain patterns exhibited by governments which have proven themselves to be more successful against domestic insurgents can be discerned. Ideally, domestic police and military intelligence forces should collaborate in order to locate insurgents and predict their patterns of activity. The accumulation of this information often involves a great deal of work on the ground, even widespread “public relations” campaigns to encourage the citizenry—from which terrorists and insurgents not only emerge but are supplied and protected—to offer information leading to the capture of those intending to commit terrorist acts against the

⁶⁸ Ibid., p. 44.

⁶⁹ Cohen, Stuart. Spring 2003. “Why Do They Quarrel? Civil-Military Tensions in LIC Situations.” *Review of International Affairs*. 2:3, 21-40, p. 21.

⁷⁰ One theory that shows some promise is Doron Almog’s application of a cumulative deterrence framework in the counterterrorism context. Almog’s framework relies on specific military responses to hostile acts. In this theory, a series of small victories against terrorists over time produces increasingly moderate behavior on the part of the adversary, due to a shift in his strategic, operational and tactical goals as he realizes his chances for a successful operation are decreasing. At the macro level, these series of smaller victories, according to cumulative deterrence theory, may eventually result in political negotiations, and perhaps even a peace agreement. Almog, Doran. Winter 2004/2005. “Cumulative Deterrence and the War on Terrorism.” *Parameters*. 34:4, 4-19, p. 9. It could be argued that cumulative deterrence is what eventually led the IRA leadership to the negotiating table.

state.⁷¹ In all of this, military forces ideally should play a minimal role, at most intervening only in the more dangerous aspects of terrorist apprehension.

When the military is utilized in this manner, certain difficulties must be considered. First, the overlap of geographic responsibilities between civilian and military authorities that is characteristic of domestic conflicts might appear to be an advantage for purposes of communication and resource allocation. However, numerous historical examples illustrate conflicts of interest faced by members of both the military and the political elite may be more pervasive in LICs and domestic counterterrorism operations than in conventional warfare. Second, the military must strike a precarious balance between maintaining organizational flexibility so that it can adapt to changing political realities and ensuring that it does not involve itself in the political arena to the extent that it directs the overall course of the conflict and run the risk of becoming politicized.⁷² Finally, the civilian authority must ensure that it does not become so reliant on the military to perform police functions that the central government weakens vis-à-vis the military and a vicious cycle emerges in which civilians and the military need one another to such a degree that civilian autonomy becomes next to impossible.⁷³

⁷¹ “Special Forces, overt military and police units, psychological operations...and the legal system spearhead the government’s campaign to strike, which is also reinforced through socioeconomic operations such as reorganizing local government, creating jobs, and improving social forces.” Bulloch, G. 1996. “The Application of Military Doctrine to Counterinsurgency (COIN) Operations: A British Perspective.” *Studies in Conflict & Terrorism*. 19:3, 247-59, p. 255.

⁷² Cohen (2003), p. 31.

⁷³ Many governments employ paramilitary or gendarmerie forces to fulfill this need for domestic security, but this too risks threatening the civil-military balance in both democracies and non-democracies. Derek Lutterbeck argues that the existence of paramilitary forces is at odds with one of the basic principles of the modern, democratic nation-state—the separation between police and military. Lutterbeck, Derek. 2004. “Between Police and Military: The New Security Agenda and the Rise of Gendarmeries.” *Cooperation and Conflict*. 39:1, 45-68, p. 51. The Colombian government’s struggle against insurgents is illustrative of this notion. Cynthia Watson concludes that the assignment of non-traditional missions to military forces in support of maintaining domestic stability and limiting narco-trafficking has the unintended result of detracting civilian authorities from carrying out their part of the political pact. “If civilians are unable to accomplish their work, they gradually abdicate their tasks to the military, further imbalancing the fragile equilibrium between civilian and military players in society.” Watson, Cynthia. June 2000. “Civil-Military Relations in Colombia: A Workable Relationship or a Case for Fundamental Reform?” *Third World Quarterly*. 21:3, 529-48, p. 543.

THE INDEPENDENT VARIABLES

Chapter 3: Institutional Parameters for Military Participation in Domestic Counterterrorism Activity

This project examines the role of civil-military relations in consolidated democracies in determining the use of the military in domestic counterterrorism initiatives. Because consolidated democracies are characterized by use of the rule of law as a key foundation for governance, we would expect to see changes to the way militaries are used in these types of states encoded in the states' legal frameworks. Throughout their histories, the United States, Israel, the United Kingdom, and Spain have all codified to varying degrees restrictions on the domestic use of their militaries, and in each case the mounting threat posed by terrorists triggered an onslaught of legislation institutionalizing the preferred counterterrorism response.

I argue that the civil-military relationship in all of the cases in this study is changing, to varying degrees, as the domestic threat of terrorism increases, though in none of the cases is there a concern that the military will stage a *coup d'état* and overtake the civilian government. Relative military strength has changed less in the cases of the United States and the United Kingdom, relative to Israel and Spain. I rely on the paradigm of Historical Institutionalism (HI) to explain this disparity, discussing in this chapter how existing legislation regarding domestic use of a government's military shapes the policy options available to that government when the domestic terrorist threat is perceived to have increased.

Once an institutional path regarding civil-military relations has been established, shifting from that path to another to create different parameters for civil-military relations becomes increasingly difficult as time passes. As such, I expect to see less change in the

civil-military balance in response to an increasing domestic terrorist threat in the cases in which the institutions dictating civil-military relations are strong, and more change—specifically that the military will have gained significant power relative to its civilian authorities—in the cases in which the institutions governing the relationship have proven weak and malleable.

Counterterrorism legislation shapes—and is shaped by—civil-military relations in a variety of ways, as is evident in the empirical discussion below. For each of the cases under consideration, I briefly explain the evolution of the state’s counterterrorism regime and describe the primary terrorist threat faced by that state, then identify and assess the impact of critical legislative junctures throughout that evolution which shaped the counterterrorism policy options open to policymakers in each case. My examination of the legislation in these four cases supports David Pion-Berlin’s argument that the “[s]trategic options for either actor depend...on the civil-military balance of power established at a particular historical juncture.”⁷⁴ Specifically, a government’s ability to use its military domestically as part of its counterterrorism policy depends on the civil-military balance of power that has been institutionalized in that state.

COUNTERTERRORISM IN THE UNITED STATES: THE MILITARY IN A SUPPORTING ROLE

Between World War II and the 9/11 attacks, U.S. government agencies became increasingly focused on domestic terrorism, but their efforts were largely independent of one another, with little coordination or sharing of resources. Agencies were assigned different areas of terrorism prevention or response based on expertise. For example, the 1960s and 1970s were eras of state-sponsored terrorism, and the State Department

⁷⁴ Pion-Berlin, David. 2001. “Introduction,” in Pion-Berlin, David, ed. Civil-Military Relations in Latin America: New Analytical Perspectives. Chapel Hill, NC: The University of North Carolina Press, 1-35, p. 21.

managed counterterrorism policy since State was “...the official channel for communication with the governments presumed to be behind the terrorists. Moreover, since terrorist incidents of this period usually ended in negotiations, an ambassador or other embassy official was the logical person to represent U.S. interests.”⁷⁵ With the Iranian hostage crisis, counterterrorism coordination became a higher priority for the White House and counterterrorism authority was transferred from the State Department to National Security Advisor Zbigniew Brzezinski. The Reagan administration took a more active stance toward disrupting terrorist attacks by prioritizing intelligence collection on terrorist-related issues with the signing of National Security Directive 138 following the 1983 bombing of the U.S. Marines in Beirut, Lebanon.⁷⁶ At that point in time, high-casualty terrorism was viewed primarily as an international phenomenon, of little threat to domestic soil.

The military had only a small role in domestic counterterrorism policy prior to the end of the Cold War, designated as a “responding” agency to nuclear, chemical, or biological attacks on U.S. territory.⁷⁷ President Reagan’s decision to launch air strikes on Libya in response to Libyan leader Colonel Muammar Qadhafi’s role in the 1986 bombing of a disco in Berlin that killed two American soldiers suggested to the military establishment that if it were to have a role in counterterrorism, it would be a traditional role that employed military-specific assets. The military’s direct participation in air strikes and other spectacular special operations was intended to send a strong signal to leaders of terrorist-supporting states that their targeting of U.S. citizens overseas would

⁷⁵ National Commission on Terrorist Attacks Upon the United States. 2004. The 9/11 Commission Report. Authorized Edition. New York, NY: W.W. Norton & Company, p. 94.

⁷⁶ Ibid., p. 98.

⁷⁷ Objections to military involvement in domestic responses were already being sounded at this point, even in the context of a devastating nuclear attack. Aaron Weiss, writing pre-9/11, argued that “[o]verreliance on the military for domestic WMD protection...may diminish the military’s warfighting capability and holds the potential for infringement of individual rights.” Weiss, Aaron. Fall 2001. “When Terror Strikes, Who Should Respond?” *Parameters*. 31:3, 117-33, p. 117.

be met with a damaging military response. According to the findings of the 9/11 Commission, the U.S. military experience with Libya taught that “terrorism could be stopped by the use of U.S. air power that inflicted pain on the authors or sponsors of terrorist acts.”⁷⁸

The security vacuum created by the dissolution of the Soviet Union and the end of the Cold War “locked counterterrorism firmly into a national security dialogue.”⁷⁹ The Clinton administration took a legalistic approach to counterterrorism, issuing several Presidential Decision Directives (PDDs) to clarify and improve the existing counterterrorism infrastructure. This legislative approach was accelerated by the 1993 World Trade Center and 1995 Oklahoma City bombings:

In 1995, [Clinton] issued PDD 39, naming the FBI as the lead agency for domestic terrorism and the key supporting agency for international terrorist incidents....In 1998 [Clinton issued] PPD 62. This directive, aimed at developing a comprehensive strategy for preparation and response, established a national coordinator for security, infrastructure protection and counterterrorism within the NSC [National Security Council].⁸⁰

Clinton’s PDDs 62 and 63 kept the FBI and the Justice Department in charge of domestic counterterrorism policy, leaving responses to foreign terrorism to the State Department, Department of Defense, and Central Intelligence Agency.

⁷⁸ National Commission on Terrorist Attacks Upon the United States (2004), p. 98.

⁷⁹ Donohue, Laura. Autumn 2001. “In the Name of National Security: U.S. Counterterrorist Measures, 1960-2000.” *Terrorism & Political Violence*. 13:3, 15-60, p. 17. Michele Malvesti characterizes U.S. counterterrorism policy during this period as “four-pronged:” “The first element is to refuse to make concessions or strike deals with terrorists. The second element is to bring terrorists to justice for their actions. The third component is to isolate and apply pressure on state sponsors of international terrorism to force them to cease their terrorist-related activities. Finally, the fourth element of U.S. counter-terrorism policy is to strengthen, via co-operative efforts, the capabilities of other countries to combat terrorism.” Malvesti, Michele. Summer 2001. “Explaining the United States’ Decision to Strike Back at Terrorists.” *Terrorism & Political Violence*. 13:2, 85-106, p. 85.

⁸⁰ Donohue (2001), p. 45.

By 1997, the National Defense Panel was warning policymakers of a growing terrorist threat against the United States⁸¹ and the U.S. Commission on National Security in the 21st Century issued reports in 1999 and 2000 that identified an increasing threat for mass-casualty terrorism on U.S. soil.⁸² In response to this increasing threat, President Clinton centralized the U.S. government's counterterrorism infrastructure. The U.S. government doubled its annual expenditures on terrorism and dramatically increased its allocations for domestic preparedness, which topped more than \$1.5 billion by 2000. Congress also increased its own role, responding to the need for greater manpower and funding by expanding the number of Congressional committees that held hearings on terrorism-related topics.⁸³

The military played only a small role in this configuration, used primarily by the Clinton administration for small-scale, specifically-targeted lethal counterterrorism operations overseas. The most notable instances of the Clinton administration's use of the military in retaliation for terrorist attacks (or the threat of such attacks) were the 1993 air strikes against Iraqi intelligence headquarters in response to the Iraqi government's role in the plot to assassinate President Bush in Kuwait, and the 1998 air strike on al-Qa'ida-associated targets in Sudan following the bombing of U.S. embassies in Kenya and Tanzania. "The...1993 attack on Iraq symbolized for the military establishment effective use of military power for counterterrorism—limited retaliation with air power, aimed at deterrence."⁸⁴ The U.S. government's perception of future threat likely played a

81 National Defense Panel. 1997. *Transforming Defense: National Security Strategy in the 21st Century*. Washington, DC: Government Printing Office.

82 United States Commission on National Security/21st Century. 2001. *Road Map for National Security: Imperative for Change*. Washington, DC: Government Printing Office.

83 Donohue (2001), p. 18. This committee reorganization only confused the military's role in domestic counterterrorism. The 9/11 Commission specifically noted that prior to 9/11 "[c]ommittees with responsibility for the Defense Department paid little heed to developing military responses to terrorism and stymied intelligence reform." National Commission on Terrorist Attacks Upon the United States (2004), p. 106.

84 National Commission on Terrorist Attacks Upon the United States (2004), p. 98.

role in the decision to use military force in both of these cases. According to Michele Malvesti, each U.S. strike “was undertaken not simply in retaliation for a particular incident but with the larger objectives of attempting to disrupt the terrorists’ ability to conduct future acts of terrorism or to force them to alter their behaviour.”⁸⁵ Thus, international military force was viewed primarily as a sparingly-utilized means of deterrence.

The military’s participation in international counterterrorism operations was addressed legally once again with passage of the Comprehensive Terrorism Prevention Act of 1995, which stipulated that the President “should use all necessary means, including covert action and military force, to disrupt, dismantle and destroy infrastructure used by international terrorists.”⁸⁶ While this appears to be a mandate for expansive military authority, in reality limitations on “necessary means” are codified in other parts of U.S. law. According to Louis Rene Beres’s interpretation of the Act, although the goal of stopping terrorists “may enjoy...exceedingly broad support—support so broad that it generates a ‘no-holds barred’ orientation—the military commander must be governed not by momentary political sentiments but by operative expectations of national and international law.”⁸⁷ This legislation simply added another layer of oversight to military participation in counterterrorism operations, complicating the already fragmented framework and producing a counterterrorism approach in which “a convoluted command and control structure, decreased response time, and continuity-of-operations problems”⁸⁸

⁸⁵ Malvesti (2001), p. 89.

⁸⁶ Terrorism Prevention Act (1995). Accessed 28 October 2007 at <http://thomas.loc.gov>

⁸⁷ Beres, Louis Rene. Fall 1995. “The Legal Meaning of Terrorism for the Military Commander.” *Connecticut Journal of International Law*. 11:1, 1-27, p. 9.

⁸⁸ Maloney, Sean. Autumn 1997. “Domestic Operations: The Canadian Approach.” *Parameters*. 27:3, 135-52. Laura Donohue echoes this sense of confusion: “Just prior to 9/11, the U.S. “had become drawn into a counterterrorist spiral: fear of possible attack, the introduction of measures, the allocation of greater resources, increased publicity, and increased fear. The magnitude of the perceived threat dictated the degree of the state’s response. When placed in a national security context, this encouraged—indeed demanded—the introduction and adoption of measures to fight against the threat. Four further elements

were possible. The military's domestic counterterrorism role was still unclear at the time of the 9/11 attacks.

The Office of Homeland Security (OHS), established directly in response to the 9/11 attacks, initiated one of the largest institutional reorganizations in the history of the U.S. government. OHS, now defunct, was an early post-9/11 effort to address the lack of coordination among federal security agencies that had been identified as one of the primary failings of the U.S. counterterrorism infrastructure. Even before OHS morphed into a full Cabinet-level department, analysts were worried that the mission was so broad—namely, to maintain the security of the United States—and encompassed such a wide array of tasks that no single institution would be able to handle the responsibility, including the military. The Secretary of Defense was one of the original members of the Homeland Security Council, though the Pentagon's role on that Council was vague,⁸⁹ and military participation in what would inevitably be a highly politicized reform process seemed odd at the time given the Pentagon's past abstention from domestic counterterrorism initiatives.

The pattern seen in this description of the U.S. counterterrorism infrastructure's development is one in which the laws and policies that govern domestic military counterterrorism operations emerged primarily in response to dramatic attacks on U.S. installations and personnel. Each policy change or piece of legislation established parameters for military involvement under very specific conditions, arrangements that were built upon in subsequent legislation. This reactive approach to the national security

influenced this spiral: a multiplier effect (wherein the measures introduced piled up without reconsideration or repeal), incomplete information that accompanied matters related to terrorism, the moral ascription associated with the term 'terrorist', and the reluctance of individuals in authoritative positions to risk under-preparation for terrorist attacks. Each of these encouraged the adoption of more counterterrorist measures, requiring further funding, spurring greater awareness and fear." Donohue (2001), p. 18.

⁸⁹ The White House. October 2001. "President Establishes Office of Homeland Security." Press Release, accessed 28 October 2007 at www.whitehouse.gov

infrastructure poses command and control problems for the U.S. military, and the lasting impact of this series of vague legislative and policy initiatives is that the military role in domestic counterterrorism operations is still unclear.

Critical Junctures in U.S. Civil-Military Legislation

Legislative reforms, particularly since World War II, have focused on the civilian side of the civil-military problematic, enacting changes in the military command structure to encourage greater civilian control over the military. Most recent pieces of domestic counterterrorism legislation are intended to balance the military's need for reassurance that its soldiers will remain under the military chain-of-command in the event of domestic deployment with the public's need for reassurance that the military's role will be carefully circumscribed in order to prevent military violations of civil liberties. The fragility of this balance is reflected in the highly publicized congressional debates over legislation such as the *USA PATRIOT Act* and successive Defense Authorization bills. These legislative initiatives all referenced, in one way or another, the civil-military relationship established by three documents: the United States Constitution, the *Insurrection Act of 1807*, and the *Posse Comitatus Act of 1878*.

According to national security law expert Stephen Dycus, no single piece of legislation deals comprehensively with the military's domestic behavior,⁹⁰ but the U.S. Constitution establishes the basic framework against which all subsequent legislation on the topic may be assessed.⁹¹ The U.S. Constitution's codification of the American civil-military relationship shaped all subsequent policy decisions regarding domestic use of the military. The resilience of the civil-military relationship established by the Constitution and subsequent *Insurrection* and *Posse Comitatus Acts* means that widespread domestic

⁹⁰ Author's interview with Stephen Dycus, Professor of Law, Vermont Law School, 28 September 2007.

⁹¹ Author's interview with Peter Raven-Hansen, Professor of Law, The George Washington University Law School, 24 September 2007.

deployment of the military as a terrorism prevention tool is highly unlikely, even in the post-9/11 climate. The *Homeland Security Act of 2002*, by reinforcing these constitutionally established parameters, serves as evidence of the impact these three pieces of legislation have had on U.S. civil-military relations. Each piece of legislation, discussed in depth below, has proven critical to determining the current options open to U.S. military planners in preventing and responding to the domestic terrorism threat.

The United States Constitution

American civil-military relations are derived from the constitutional stipulation that the military will always obey the orders of civilian authorities, chief among these to abstain from involvement in civilian affairs. As a result, Americans have rarely experienced the presence of uniformed soldiers in their cities. Domestic use of military forces has not been unheard of in U.S. history,⁹² though it has been infrequent and limited. The Framers of the U.S. Constitution were adamant that the relationship between the civilian and military spheres of the new U.S. government be encoded into the Constitution, as opposed to evolving over time through the passage of state and federal laws. “Three concepts were particularly significant to Americans: the absolute civil control of the armed forces; centralization of national defense in the federal government; and protection for society from the arbitrary use of the military by the civil authority, thus producing the separation of powers in military affairs.”⁹³ The Framers granted the President, as commander-in-chief, the authority to deploy troops in what we would now

92 Notable examples of domestic deployment include: the summoning in 1794 of the local militia by President Washington to put down the Whiskey Rebellion; the use of regular Army and militia troops throughout the early part of American history to suppress Native American insurrection; the employment of military personnel in the 1800s to return fugitive slaves to their owners; and the deployment of military units by multiple presidents during times of racial unrest to reassert local authority. For a discussion of these incidents, see Banks, William. Autumn 2002. “Troops Defending the Homeland: The Posse Comitatus Act and the Legal Environment for a Military Role in Domestic Counter Terrorism.” *Terrorism and Political Violence*. 14:3, 1-41, pp. 18-9.

93 Bland, Douglas. Summer 2001. “Patterns in Liberal Democratic Civil-Military Relations.” *Armed Forces & Society*. 27:4, 525-40, p. 531.

consider a homeland defense capacity. The question, then, is not necessarily one of *whether* the military can be employed in a domestic context, but rather *to what degree* and *under what restrictions* this deployment may occur.

The current threat environment has led civilian authorities to consider what would have been unthinkable in the past, with the notable Cold War exception of federal response to a Soviet nuclear attack on American soil – a large-scale deployment of uniformed military personnel undertaking local security operations. While the Constitution reflected the Framers’ intention to fully subordinate the military to civilian authority, it never expressly prohibited the executive branch’s use of the military to enforce laws. The President is charged with enforcing laws by any means necessary, and this, presumably, could include domestic military action if the situation were especially dire.⁹⁴

Legally, the use of the military domestically is dictated by the scope of authorities and associated discretion granted to the different branches of government by the U.S. Constitution. Article I grants Congress the power to call forth the militia to execute federal law and repel invasions, and Article IV imposes on the federal government the responsibility to protect each state against invasion and domestic violence. When asked which pieces of legislation most directly shape the military’s domestic activity, every interview subject for this study cited the U.S. Constitution, noting that all subsequent legislation regarding domestic use of the military has referenced the constitutional principles of civilian control and military abstinence from intervention in civilian

⁹⁴ Banks (2002), p. 5.

affairs.⁹⁵ Instruction regarding the constitutional principle of military subordination to civilian authorities is still a part of Army basic training.⁹⁶

The Constitution's requirements that the Secretary of Defense be a civilian and that Congress maintain control of the military budget have functioned as checks on any attempt to extend military authority too far into the civilian sphere. Congress has a history of restraining the executive when it concludes that the White House has overstepped its constitutional bounds by employing the military in situations or manners that may not fit congressional preferences. One of the more notable examples of this reassertion of constitutionally-mandated Congressional authority in this context is the *War Powers Act* (WPA) of 1973. The WPA offers insight into how current constitutional debates over the use of the military domestically may be framed.

The *War Powers Act*—one of the most widely cited examples of civilians looking the limit executive (and by extension military) autonomy—was a reassertion of the Framers' philosophy toward the use of force. James Madison, in particular, emphasized that no single party in the government should be allowed to make the decision on whether or not to use force. The WPA, among other stipulations,⁹⁷ establishes three standards by which Congress is able to limit the President's ability to unilaterally wage war through definition of the conditions under which armed forces may be committed overseas. The President may only commit troops in situations in which Congress has officially declared war, granted a specific statutory authorization, or the U.S. (including its territories, possessions, and armed forces) has been directly attacked. It is this last category into

⁹⁵ Author's interviews with Eugene Fidell, President, National Institute of Military Justice, 4 October 2007; Raven-Hansen (2007); Dycus (2007); and Dr. Antulio Echevarria, Director of Research, Strategic Studies Institute, U.S. Army War College, 21 September 2007.

⁹⁶ Author's interview with Echevarria (2007).

⁹⁷ The War Powers Act also calls for the President to give a report to Congress within 48 hours of introducing troops into foreign countries and to gain specific statutory authority for all operations within 60 days of the initiation of conflict. If congressional approval is not granted, the President must recall the troops.

which terrorist acts fall. The new question with respect to the WPA is to what extent military activity since the 9/11 attacks constitutes a response to an attack on U.S. soil and hence qualifies for extensive congressional oversight.

The authors of the WPA likely never anticipated how American troops might be utilized in the context of domestic counterterrorism operations. The WPA's vague wording leaves room for interpretation and a testing of congressional limitations by the President, and the reality of responding to terrorist threats in a timely manner further weakens the applicability of the resolution.⁹⁸ Most constitutional scholars argue that the WPA's declaration that the President may use unilateral force in the case of an immediate and clear threat to the U.S. implies that the President may respond to terrorist threats for a short period of time without Congressional approval. The question is, therefore, at what point is the President's "initial" response over and a more intensive military operation in need of Congressional authorization begun? In addition, how is Congress to be involved in the decision making process in cases in which the enemy cannot be identified, as is often the case with terrorist attacks when the perpetrators either cannot be specifically identified or kill themselves during the act?

Despite the profligate legislation since 9/11 addressing counterterrorism initiatives within the U.S., very little has been legislated to regulate the use of U.S. forces in response to terrorist incidents. To some extent, this oversight likely is intentional, as it

⁹⁸ Phelps and Boylan argue that "[b]y the time Congress meets to debate and discuss presidential actions, troops and material are in the field. A military operation is under way, and decisions both strategic and tactical are being made. By inserting itself at this point, any decisions made by Congress tread perilously close to constitutional territory claimed by the commander-in-chief." Phelps, Glenn, and Timothy Boylan. June 2002. "Discourses of War: The Landscape of Congressional Rhetoric." *Armed Forces & Society*. 28:1, 641-67, p. 658. Many critics of expansive executive authority in this context argue that congressional notification, even in limited timeframes, is both possible and necessary. President Reagan, for example, notified Congress in 1986 when he staged air and naval strikes on Libyan military sites in response to Libyan leader Moammar Qaddafi's role in the bombing of a German nightclub that caused American casualties. Hendrickson, Ryan. 2000. "American War Powers and Terrorists: The Case of Usama Bin Laden." *Studies in Conflict & Terrorism*. 23, 161-74, p. 164.

gives the executive branch the right to respond militarily as it sees fit. This executive latitude is decreasing as U.S. goals in Iraq continue to go unmet. Deployment of troops—domestic or otherwise—will require extensive executive branch coordination with its congressional counterparts. In this way, the WPA’s requirement that congressional approval be attained for military deployments shapes the current debate over military encroachment into the domestic sphere by reinforcing the constitutional principle of checks on executive—and by extension, military—authority. Given the U.S.’s democratic political system, congressional approval is likely even more important in domestic deployments than those overseas, as a domestic deployment that generates significant voter backlash could encourage Congress to block authorization and withdraw funding. Therefore, options for domestic use of the military in counterterrorism operations are heavily constrained by the U.S. Constitution and Congress’s reassertion of its constitutional authority regarding use of the military in the subsequent *War Powers Act*.

Insurrection Act of 1807

The *Insurrection Act of 1807* (IA) states that the military may be used domestically to enforce U.S. law in cases of insurrection, though only if state and local law enforcement either are unwilling or become incapable of doing so. The law was passed in response to lawmakers’ concern that the White House could arbitrarily deploy troops to support its own political agenda, at the expense of state sovereignty. While the purpose of the law was to define the conditions under which the President could intervene militarily in state and local affairs, the language included in the Act was so general that its applicability in various circumstances has been hotly debated. National security expert and Vermont Law School professor Stephen Dycus assesses that given the

expansive guidelines provided in the IA, the President is bestowed with all of the authority he could ever want regarding the domestic deployment of troops.⁹⁹

In the ensuing two hundred years, legislation and presidential findings have been used to clarify the executive branch's authority to order domestic deployments and the rules of engagement to be followed by the military in those cases. One of the primary points of contention for all involved is the chain-of-command in this context. By virtue of Executive Order 12656, signed in 1988, the *Insurrection Act* is interpreted to mean that the rules of engagement for a domestically deployed military force must be approved by the Attorney General prior to orders being given through the military chain-of-command.¹⁰⁰ This Executive Order signaled a shift in the executive branch's view of the military's role in future domestic operations by highlighting the need for military forces to follow domestic law rather than the international peacekeeping practices for which they typically train.

The *Insurrection Act* is the most notable legal departure from the primary governing principle of American civil-military relations: *posse comitatus*. The *Posse Comitatus Act* (PCA),¹⁰¹ passed nearly eighty years after the IA, established the conditions under which the military could adopt law enforcement responsibilities. Though the PCA has often been cited as the most important piece of civil-military legislation passed in the U.S. next to the Constitution, every military law specialist with whom I spoke on this topic cited the *Insurrection Act* as a point of reference for the subsequent PCA. The PCA specifically stated that the conditions for domestic intervention established by the preceding IA still held. As Jessica DeBianci argues, the “reach of the *Insurrection Act* is tremendous. Courts have found that the President has

⁹⁹ Author's interview with Dycus (2007).

¹⁰⁰ *Executive Order No. 12656*. 21 November 1988.

¹⁰¹ The *Posse Comitatus Act* is discussed in full in the next section of this chapter.

plenary authority to use the armed forces under this exception [to the PCA]; these decisions are not subject to judicial review....[T]he *Insurrection Act* predates the PCA, and the drafters of the PCA specifically stated that the law was not to nullify laws already in effect.”¹⁰²

The *Insurrection Act* has been used to justify federal government intervention in several contexts of domestic unrest, not only the civil insurrection for which it is named. According to Michael Greenberger, Professor of Law at the University of Maryland School of Law, following the landfall of Hurricane Katrina the Bush administration engaged in a heated internal debate as to whether the federal government had the legal authority to invoke the *Insurrection Act* and deploy troops to New Orleans to restore order. The Justice Department’s Office of Legal Council finally concluded that based on their readings of the *Insurrection Act* and the *Posse Comitatus Act* the White House had the authority to deploy troops to the area, even if local officials objected.¹⁰³ This extended debate contributed to the slowness of the federal response, after which the Senate Committee on Armed Services “issued a report stating that the *Insurrection Act*’s ‘lack of explicit reference to such situations as natural disasters or terrorist attacks may have contributed to a reluctance to use the armed forces in situations such as Hurricane Katrina.’”¹⁰⁴

¹⁰² DeBianchi, Jessica. December 2006. “Military Law: The Winds of Change—Examining the Present-Day Propriety of the Posse Comitatus Act After Hurricane Katrina.” *University of Florida Journal of Law & Public Policy*. 17:3, 473-510, p. 488.

¹⁰³ Greenberger, Michael. April 2007. “Symposium: Extraordinary Powers in Ordinary Times: Did the Founding Fathers Do ‘A Heckuva Job?’ Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City.” *Boston University Law Review*. 87:397, p. 406. Department of Defense assets allocated to the region were fully in place by 7 September 2005, “constituting the largest deployment of troops within the United States since the Civil War.” *Ibid.*, p. 410.

¹⁰⁴ *Ibid.*, p. 415. Following an examination of the federal response to Hurricane Katrina, the White House recommended that the Department of Homeland Security and the Department of Defense “should jointly plan for Department of Defense’s support of Federal Response activities as well as those extraordinary circumstances when it is appropriate for the Department of Defense to lead the federal response.” Townsend, Frances. 2006. *The Federal Response to Hurricane Katrina: Lessons Learned*. Accessed 28 October 2007 at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>

Large-scale domestic terrorist attacks obviously were not in the minds of legislators composing the *Insurrection* and *Posse Comitatus Acts* in the 1800s, and the executive branch currently is pushing for an expansion of the executive's authority to deploy troops domestically as initially granted in those Acts. Section 1076 (known familiarly as the Warner Amendment) of the 2007 Defense Authorization Bill, passed by Congress on September 20, 2006, modified the IA by reducing constraints on the President's ability to deploy troops domestically for law enforcement purposes. Section 1076 was intended to improve the federal government's ability to respond to both natural disasters (such as Hurricane Katrina) and terrorist attacks (such as 9/11), thereby avoiding the delay in federal response that occurred in New Orleans.

While the need for significant institutional change following Katrina was evident, the decision by Congress to approve a substantial change to one of the longest-standing laws in U.S. history provoked considerable outrage. The opposition was most pronounced at the state and local levels, particularly among those officials who suddenly saw their sovereignty eroded in favor of executive authority. For example, all fifty governors opposed the Warner amendment.¹⁰⁵ While the bill eventually passed with a bipartisan majority, several prominent senators and congressmen were quite vocal in their opposition and still argue against the change today. Essentially making a states' rights argument, in February 2007 Senator Patrick Leahy (D-Vt) and Senator Kit Bond (R-Mo) introduced legislation to revert the IA to its previous state. In an open letter addressed to the leadership of the Senate and House Armed Services committees, Leahy and Bond argued that “[s]pecifying specific criteria [to federalize the military]—including such a regularly occurring trigger as a natural disaster—changes the presumption against

¹⁰⁵ Greenberger (2007), p. 416. Some state legislators took this even further, introducing resolutions in their state houses to de-federalize their state National Guard units. While few likely intended to carry this out given what de-federalization would mean for the resources allocated to state Guard units, the message publicly protesting the White House's policy shift was clear.

invoking federal martial law into a presumption for the domestic use of the military in our States and communities.”¹⁰⁶ Leahy and Bond further asserted that the White House’s subsequent proposal to exempt the National Guard from the amendment

would be equally wrongheaded, creating competing military chains-of-control, one going through the States and another through the Federal Government. One could easily see a situation in which a mayor or Governor in control of an emergency situation is forced to compete against a high-ranking general officer sent to command the activated military.¹⁰⁷

Senator Leahy and others claim this amendment is part of a concerted attempt by the White House to expand executive authority citing counterterrorism needs as justification. Senator Leahy repeatedly has voiced his objections to various Bush administration homeland security policy initiatives. Speaking in September 2006, Leahy asserted that the changes to the IA survived the conference committee only because the White House and Pentagon pushed for them. Leahy further argued that in the aftermath of Hurricane Katrina,

Governor Blanco rightfully insisted that she be closely consulted and remain largely in control of the military forces operating in the State during that emergency. This infuriated the White House, and now they are looking for some automatic triggers—natural disasters, terrorist attacks, or a disease epidemic—to avoid having to consult with the governors.¹⁰⁸

Indeed, under section 1076 the President does not even have to consult with any state agency in taking control of its National Guard units, and only has to notify Congress

¹⁰⁶ Leahy, Patrick, and Christopher Bond. 6 September 2006. “Open letter to John Warner (R-Va), Carl Levin (D-Mi), Duncan Hunter (R-Ca), and Ike Skelton (D-Mo).” Accessed 25 October 2007 at <http://leahy.senate.gov/press/200609/090606b.html>

¹⁰⁷ Ibid.

¹⁰⁸ Leahy, Patrick. 29 September 2006. “Remarks of Sen. Patrick Leahy, National Defense Authorization Act for Fiscal Year 2007.” *Conference Report, Congressional Record*. Accessed 25 October 2007 at <http://leahy.senate.gov/press/200609/092906b.html> Leahy also pointed out the danger in making wide-reaching constitutional changes out of fear or anger at the 9/11 attacks or the federal response to Hurricane Katrina: “It should concern us all that the Conference agreement includes language that subverts solid, longstanding posse Comitatus statutes that limit the military’s involvement in law enforcement, thereby making it easier for the President to declare martial law. There is good reason for the constructive friction in existing law when it comes to martial law declarations.” Ibid.

that the White House believes the state can no longer manage the situation. This represents a monumental shift in the manner in which the federal government works with the states regarding domestic troop deployments. Following this barrage of state and military opposition to section 1076, in the spring of 2007 the House passed legislation to repeal the provision. This repeal is currently under discussion in the Senate.

It is important to note that the Insurrection Act has never been invoked in a mass casualty situation resulting from terrorist attacks.¹⁰⁹ It is thus unclear what the change to the IA will mean for implementation of the federal response in such cases. In its present form the IA is sufficiently broad to permit the President to order military forces to respond to a terrorist incident on U.S. soil, but the question is at what cost has this arrangement been won? Is this just one in a long line of incremental steps that are resulting in an expansion of executive authority, or is it an improved response policy that will preserve the carefully crafted relationship between the military and broader society? Throughout my conversations with legal and military experts, it is apparent that confusion regarding the military's role in the domestic response to a terrorist threat or incident still abounds and that fear of executive encroachment is legitimate.

By specifically discussing the military's responsibility to ensure the maintenance of order in the states, the *Insurrection Act of 1807* created the legal premise on which current debates over military involvement in a domestic counterterrorism response are based. The IA was intended to reassert the federal government's authority over the states while also reaffirming the military's responsibility to obey the commander-in-chief and Congress as opposed to local officials. This distinction would become highly significant in the decades following the passage of the Act as the country descended into civil war. The *Insurrection Act* was a critical juncture in the development of civil-military relations

¹⁰⁹ Banks (2002), p. 18.

in counterterrorism, creating a legal environment in which domestic troop deployments by federal authorities were to be carefully regulated. Echoes of this arrangement in which federal troops play a supporting role to National Guard forces are found in all of the post-9/11 legislation addressing the military's response to domestic terrorism. The legal and cultural roots of the IA reach so deeply that it took a highly controversial legislative amendment to expand the executive's counterterrorism powers to legally permit domestic use of the military as a counterterrorism response.

Posse Comitatus

The *Posse Comitatus Act of 1878* (PCA) prohibits military personnel from acting in a law enforcement capacity within the United States without express authorization from Congress, thereby substantially limiting the federal government's discretion to use the military for domestic purposes.¹¹⁰ The PCA was passed in response to civil unrest during the Reconstruction era, intended to prohibit the use of federal troops to supervise elections in former Confederate states. Several exceptions to the Act have been legally recognized over time, and because of these changes the PCA today does not apply when National Guard units are functioning under the authority of a state, federal troops are used to quell widespread domestic violence (as in the case of the L.A. riots in 1992), or troops are used under the President's authority pursuant to the *Insurrection Act*. Many scholars and attorneys have claimed that exceptions to the PCA are so numerous and pervasive as to make the Act relatively useless as a check on executive power,¹¹¹ while

¹¹⁰ Throughout the PCA's long existence, no individual or group has been charged with violating the Act, though the PCA has been invoked as a defense strategy in several cases. The most notable of these precedent-setting cases was *Bissonette v. Haig*, in which domestic law enforcement agents were lent equipment belonging to the U.S. military during a standoff with an armed group of Indians occupying the South Dakota village of Wounded Knee. After ten weeks the Indians surrendered but later sued, claiming their Fourth Amendment rights ensuring reasonable search and seizure were violated through acts expressly forbidden by the PCA. The court found that the provision of military equipment did not violate the PCA and the Indians lost their case. Banks (2002), pp. 6-7.

¹¹¹ Author's interview with Raven-Hansen (2007). Raven-Hansen argues that *Posse Comitatus* is so riddled with exceptions that it should no longer be considered a primary legal document on the matter of

others insist that the PCA's underlying principle of limitations on civilian use of the military domestically is still strong.¹¹² Importantly, all of these statutory exceptions to the PCA contain language emphasizing that no matter what level of intervention in society the military is granted, command authority of military activity will always remain on the federal, civilian side of the equation, specifically with the President and Secretary of Defense. Thus, even in the direst circumstances, such as a catastrophic terrorist attack, the military command structure is intended to hold.¹¹³

Beyond this issue of command, however, the situation is far less clear and remains untested. To "what extent the President's Commander in Chief...authorities may extend to law enforcement as contemplated by the PCA is unclear,"¹¹⁴ though we may find clues to those limits in past uses of the *Stafford Act of 1803*. In any homeland defense response, the U.S. federal system is designed to support state and local authorities as "initial responders," with federal authorities permitted to intervene only if local authorities are unable to maintain civil order or otherwise care for the people under their jurisdiction. This long-standing pattern of disaster response was first stipulated in

domestic use of the military, though it remains symbolically significant by creating an entrenched presumption against using the military domestically. In terms of assessing the usefulness of the PCA, Donald Currier asserts that "[t]he natural abhorrence of the military to domestic duty, coupled with existing regulatory prohibitions promulgated to satisfy other existing statutes, are much more likely to be the reason why there have been so few recorded violations and no convictions of the Act." Currier, Donald. September 2003. "The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?" Carlisle, PA: U.S. Army War College, Strategic Studies Institute, p. 11.

¹¹² Author's interview with Dr. Max Manwaring, Professor, Strategic Studies Institute, U.S. Army War College, 5 October 2007. Manwaring argues that the military is very cognizant of Posse Comitatus and the responsibility of the military to obey civilian orders in a democracy, even when the military disagrees with civilian policy. Eugene Fidell also feels that the importance of Posse Comitatus is not overstated in arguments regarding domestic use of the military in the counterterrorism context. Author's interview with Fidell (2007).

¹¹³ Under the current Governmental Interagency Concept of Operations Plan (CONPLAN), the on-site FBI commander overseeing federal response to a domestic terrorist attack is charged with requesting military support from the senior military commander at the site, and the Secretary of Defense must approve the support request. Once the troops are deployed, however, the FBI loses much of its control, as the military units remain under their own chain of command, though they still answer to civilian authorities at the executive level. Banks (2001), p. 24.

¹¹⁴ *Ibid.*, p. 13.

the Tenth Amendment to the Constitution which reserved for the states those powers not delegated to the federal government. Ensuing legislation, specifically the *Stafford Act*, clarified the process by which state governors could request the President to supply military personnel to their localities. The *Stafford Act* was intended to provide structure to government responses to natural disasters and epidemics, though it has been used with domestic terrorist incidents. For example, President Clinton invoked the *Stafford Act* in response to the 1995 Oklahoma City bombing and President Bush used the Act to declare a major disaster in the wake of the 9/11 attacks.¹¹⁵

The legal framework for domestic intervention of the military in cases of counterterrorism clearly favors situations in which civilian law enforcement is unable to appropriately respond to a crisis. While the use of the military in this context is rarely contested, the manner in which the military is allowed to enforce law and order is highly controversial. Military orientation and training with respect to facing the “enemy” changes in the domestic context, when those who may be posing the greatest threat to civil order may be U.S. citizens. In addition, those the military is attempting to protect may not always welcome its intervention: “The stronger the military presence at home and the more legal power it has to participate in domestic matters, the higher the perceived potential for abuse.”¹¹⁶

In assessing this potential for abuse, two recent precedents for military involvement in domestic affairs are relevant. The most contentious domestic use of military personnel has been as law enforcement agents in counter narcotics operations. Due to a series of legislative initiatives in the 1980s and 1990s, the U.S. Army is allowed to provide equipment, training, and expert military advice to civilian law enforcement agencies as part of the “war on drugs,” and is also permitted to provide a wide range of

¹¹⁵ Ibid., p. 19.

¹¹⁶ Currier (2003), p. 11.

military support along U.S. borders with the caveat that a “nexus” between drug trafficking and the military support offered be established.¹¹⁷ These authorizations were used to justify limited U.S. Army involvement in the highly controversial assault on the Branch Davidian compound outside Waco, Texas, in 1993. Though the specific plan involving military personnel was never implemented,¹¹⁸ the prospect of military personnel participating in any way in a violent assault on U.S. citizens led to widespread concern that the PCA would be violated.

The L.A. riots offer an additional, highly significant precedent for problems with domestic deployment of the military. In the first meeting between the National Guard and active duty forces deployed in 1992 to bring order back to south central Los Angeles, “...it was clear that neither the military commander nor the Los Angeles police chief nor the county sheriff had a clear perception of the proper role of military forces in the emergency.”¹¹⁹ According to Colonel Thomas Lujan, the Joint Task Force commander in charge of the U.S. law enforcement response believed that he and his troops were constrained by the PCA and therefore could not legally participate in law enforcement activities. However, because the situation was one of spiraling civil unrest, the President had already authorized the exclusion of the military from the *Posse Comitatus* provisions. “This misunderstanding seriously degraded the effectiveness of military support of local law enforcement in Los Angeles.”¹²⁰

This longstanding confusion over the military’s responsibilities in domestic law enforcement is just one reason the U.S. military historically has been adamant about not involving itself in domestic operations. Such operations, it is also argued, detract from

117 House of Representatives Report No. 71, Part 2 (1981), 97th Congress, 1st session, as cited in Lujan, Thomas. Autumn 1997. “Legal Aspects of Domestic Employment of the Army.” *Parameters*. 82-97.

118 Ibid.

119 Ibid.

120 Ibid.

warfare training and use valuable resources that should be devoted to traditional military missions. Domestic involvement in this capacity may also cause negative interactions with the public, degrading the relationship between the military and society, as occurred during the military's response to the L.A. riots. Dallas Owens, a professor at the U.S. Army War College, contends that as long as the American public perceives domestic military activity as being justified a good relationship with society will be maintained. However, if troops are operating domestically for the wrong reason—or, in the case of the L.A. riots operating for the right reason, but incorrectly—the American public will react negatively and the military's relationship with society could be harmed.¹²¹ For all of the reasons described above, the military has often used the PCA as justification for *avoiding* domestic deployment:

Former DoD official John Deutch once remarked that the PCA was not a barrier preventing a military response to a genuine threat, but rather a bureaucratic reason not to do something perceived as less than a genuine threat....To those in the Defense Department who are concerned about losing the focus on warfighting, the PCA serves as a comforting legal impediment preventing the military from being distracted from its focus on wars overseas.¹²²

In Historical Institutionalism terminology, the PCA serves as the third critical juncture in the institutionalization of American civil-military relations. The *Posse Comitatus Act* further defines the parameters first established by the U.S. Constitution within which the executive may use the military to achieve its policy preferences. Every policy option for the post-9/11 reorganization of homeland security had to address the restrictions placed upon domestic use of the military by the PCA. This debate is ongoing:

121 Author's interview with Dallas Owens, Professor, Strategic Studies Institute, U.S. Army War College, 21 September 2007.

122 Currier (2003), p. 13. Deutch quote is excerpted from Grove, Gregory. October 1999. *The U.S. Military and Civil Infrastructure Protection: Restrictions and Protections Under the Posse Comitatus Act*. Stanford, CA: Center for Strategic and International Cooperation, p. 23. Dr. Antulio Echevarria also mentions this tendency of active duty military personnel to cite the Posse Comitatus principle as justification for abstaining from involving themselves in something they do not want to do. Author's interview with Echevarria (2007).

“As conditions and threats have changed...so has the principal of *posse comitatus*. Construed literally, the PCA could compromise homeland defense or hinder a response to widespread disorder in society. Interpreted too generously, the exceptions could give rise to regrettable excesses.”¹²³

Discussion

There is no single law that clearly defines the U.S. military’s role in domestic counterterrorism. A few key principles have developed over time which, by shaping civil-military relations, have also shaped the policy options available today for domestic use of the military. In December 2001, the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction (also known as the Gilmore Commission) assessed in its Third Annual Report to the President and Congress that the “roles, missions, and organization of the military to deter, prevent, or respond to a terrorist incident inside our borders remain ambiguous.”¹²⁴ With the emergence of each piece of post-9/11 counterterrorism legislation, this uncertainty seems to only worsen.

Because amending the U.S. Constitution to increase the domestic role of the military is highly unlikely given tremendous state and local opposition, lawmakers have targeted the *Insurrection Act* (IA) and *Posse Comitatus Act* (PCA) for amendment. The Bush administration has been especially vocal in calling for easing the PCA’s restrictions on executive authority. In October 2001, Deputy Defense Secretary Paul Wolfowitz testified to Congress that he strongly advocated reexamining the PCA.¹²⁵ Following the inept government response to Hurricane Katrina, Department of Defense spokesman Lawrence Di Rita reportedly stated that Secretary Rumsfeld was reviewing the military’s

¹²³ Banks (2002), p. 3.

¹²⁴ Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction. 15 December 2001. *Third Annual Report to the President and the Congress*. p. x.

¹²⁵ “Preserve Posse Comitatus.” November 2005. *Progressive*. 69:11, p. 9.

response to domestic emergencies, including the viability of the PCA, an Act that Di Rita described as “archaic.”¹²⁶ On the military side, General Ralph Eberhart, the first commander of NORTHCOM, argued that policymakers “should always be reviewing things like *Posse Comitatus*...if we think it ties our hands in protecting the American people.”¹²⁷

Despite these objections to existing law on the matter, as of 2008 no piece of post-9/11 legislation has provided clear and comprehensive guidelines for use of the military in domestic counterterrorism initiatives. Confusion regarding each agency’s role in the domestic counterterrorism response was supposed to have been alleviated with passage of the *Homeland Security Act of 2002* (HSA), which, according to President Bush, was the most extensive reorganization of the federal government since the 1940s. Bush stated that “[t]he mission of the new Department would be to prevent terrorist attacks within the United States, to reduce America’s vulnerability to terrorism, and to minimize the damage and recover from attacks that may occur.”¹²⁸ The Bush administration emphasized that the new department was not intended to expand government,¹²⁹ but rather to reorganize it in such a way as to reduce duplication of effort and increase inter-agency communication on homeland security issues.

To date, those two goals have not been met. The National Response Plan, implemented under President Bush’s February 2003 Homeland Security Presidential Directive (HSPD-5), pre-approved federal troop deployment under certain conditions of civil emergency, but the Department of Defense (DoD) has its own standards for

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Bush, George W. 24 June 2002. “Message to Congress Transmitting Proposed Legislation to Create the Department of Homeland Security” *Weekly Compilation of Presidential Documents*. 38:25, p. 1035.

¹²⁹ Ibid.

domestic deployment, which may complicate the “pre-approval” status discussed in HSPD-5:

By regulation, DoD evaluates requests to support civilian law enforcement including ‘acts or threats of terrorism’ by considering the legality of the request for support, the potential for lethal use of force, the risks to DoD forces, the...impact on the DoD budget, the appropriateness of the operation to the DoD mission, and the impact of the request on DoD’s ability to perform its principal missions.¹³⁰

To assuage concerns that the military was facing an erosion of power and responsibility with the creation of DHS, President Bush affirmed that military personnel serving domestically would still be answerable to the military chain of command: “Nothing in this directive impairs or otherwise affects the authority of the Secretary of Defense, including the chain of command for military forces from the President as Commander in Chief, to the Secretary of Defense, to the commander of military forces, or military command and control procedures.”¹³¹ Under the new regime, DoD and DHS were required to collaborate a great deal with one another, but the White House emphasized that DoD maintained its autonomy in domestic operations, even those that were within DHS’s jurisdiction. The text of the *Homeland Security Act of 2002* (HSA) encoded this division of labor:

Nothing in this Act shall confer upon the Secretary [of Homeland Security] any authority to engage in warfighting, the military defense of the United States, or other military activities, nor shall anything in this Act limit the existing authority of the Department of Defense or the Armed Forces to engage in warfighting, the military defense of the United States, or other military activities.¹³²

¹³⁰ Banks (2002), p. 16.

¹³¹ Bush, George W. 10 March 2003. “Directive on Management of Domestic Incidents.” *Weekly Compilation of Presidential Documents*. 39:10, p. 281.

¹³² Homeland Security Act (2002). Accessed at www.dhs.gov 14 July 2007. The HSA specifically highlighted the value of the Posse Comitatus Act, declaring that no interpretation of the new Act could in any way be used as justification to violate the PCA: “Congress reaffirms the continued importance of [the PCA], and it is the sense of Congress that nothing in this Act should be construed to alter the applicability of such section to any use of the Armed Forces as a *posse comitatus* to execute the laws.” *Ibid.*

Significantly, then, the HSA specifically stated that civilian authorities within DHS could not disrupt the civil-military chain of command that had been carefully cultivated over many years, regardless of the changing domestic threat environment.

Integration of military personnel into the domestic counterterrorism infrastructure was a key aim of the HSA. The Act authorized the Secretary of Homeland Security to manage a permanent Joint Interagency Homeland Security Task Force composed of representatives from military and civilian agencies and charged with anticipating and responding to terrorist threats.¹³³ By definition, the HSA looks to shape the way in which military authorities work with their civilian counterparts. In spite of concern that the increasing military role in homeland security may blur the lines between the civilian and military authorities, in 2006 then-Assistant Secretary for Homeland Defense Paul McHale stated that he believed the civil-military boundary would remain intact:

I am confident that any new definition of DoD responsibilities in relationship to a catastrophic event will remain consistent with our historic belief that the role of the military within domestic American society should be limited, that our operational activities should be constrained, that our relationship to law enforcement activities should be carefully limited to extraordinary circumstances and be of brief duration.¹³⁴

All post-9/11 legislation regarding federal responses to terrorism is premised on the civil-military institutional arrangements established by the U.S. Constitution, the *Insurrection Act*, and the *Posse Comitatus Act*. The *USA PATRIOT Act*, for example, attempted to clarify the PCA's rules regarding domestic use of the military by stipulating that the Department of Defense may respond to formal requests for assistance in cases in which the U.S. has been attacked by terrorists. This specific mention of terrorism supplemented previously established permission for domestic military intervention in the

¹³³ Ibid.

¹³⁴ Krause, Col. Merrk, and Jeffrey Smotherman. 2006. "An Interview with Assistant Secretary of Defense for Homeland Security." *Joint Forces Quarterly*. 40:1, 10-5, p. 15.

case of a nuclear, biological, or chemical weapon strike, meaning that the military could now *legally* respond domestically to attacks such as those that occurred on September 11, 2001.

Section 1076 of the *Defense Authorization Bill for Fiscal Year 2007*, as discussed above, is the one notable departure to the institutional parameters for domestic military intervention established by the Constitution, PCA, and IA. Section 1076—unlike the Constitution, PCA, or IA—does not require the President to consult with the state or local government of the area in which he plans to deploy troops. This is highly controversial, with many both inside and outside Congress arguing that it effectively nullifies both the PCA and the IA, thereby altering the civil-military relationship between the leaders of the federal and state governments that has existed for nearly two centuries. Section 1076 has yet to be tested in a real world scenario, and its full impact on civil-military relations in the context of domestic counterterrorism is unknown.

The *Homeland Security* and *PATRIOT Acts* both reference the civil-military relationship established by the Constitution, the *Insurrection Act*, and the *Posse Comitatus Act*. However, the general principles in these documents have not translated easily into on-the-ground counterterrorism plans, and the current U.S. counterterrorism infrastructure poses command and control problems for the military. The U.S. Army War College's Dallas Owens believes that the chain-of-command established by the post-9/11 plans is actually more convoluted and confusing than the one on which it was meant to improve.¹³⁵ The lasting impact of this recent series of numerous yet vague legislative initiatives is that the military role in domestic counterterrorism remains unclear.

¹³⁵ Author's interview with Owens (2007).

COUNTERTERRORISM IN ISRAEL: THE MILITARY AS THE PRIMARY ACTOR

Israel, like the United States, is an established democracy in which the citizenry has the right to alter government policy by electing new leaders. The similarities between the two cases are limited, however, given the vastly different threat environment in which each government operates. Israel is, by its own definition, a Jewish state¹³⁶ that also governs non-Jewish citizens and non-citizens under military authority. This Jewish/Arab dichotomy can be seen in most of the major pieces of national security legislation passed by the Knesset throughout Israel's short history, as "law is deployed by the state to promote and protect national security in ways that reinforce this 'national boundary.' This is evident in the ways security laws are written, interpreted, and applied..."¹³⁷

Israel has long been cited as a case that defies Lasswell's theory that a state constantly at war will become a garrison state. Israeli exceptionalism in this regard has been explained, in part, by the Israel Defense Forces' (IDF) reputation of being a "people's army," drawing its manpower through universal conscription, and endowed with a strong sense of purpose in a consistently hostile security environment. The Israeli military has always reached into multiple facets of civilian life, to include a high level of involvement in the political system, a condition normally considered anathema to "healthy" democratic civil-military relations. As a result, and as befits a "people's force—the IDF has for long facilitated, and even fostered, civil-military integration."¹³⁸

¹³⁶ "The two most important laws affirming and consolidating the Jewish nature of the state are the Law of Return (1950), which guarantees automatic and immediate citizenship to any Jew upon immigration to Israel, and the Nationality Law (1951), which establishes the basis upon which people have a right to claim citizenship." Hajjar, Lisa. 2005. *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza*. Berkeley: University of California Press, p. 31.

¹³⁷ *Ibid.*, p. 32.

¹³⁸ Cohen, Stuart. Winter 1995. "The Israel Defense Forces (IDF): From a 'People's Army' to a 'Professional Military'—Causes and Implications." *Armed Forces & Society*. 21:2, 237-54.

In spite of this intentional blurring of the civilian and military spheres, civilian control over the military has never really been at risk. The fact that so few cases of significant military insubordination have occurred is somewhat surprising, given the incomplete and often unenforceable institutional mechanisms for civilian control over the military:

The powers of the government, and of the defense minister in particular, over the chief of the general staff have not been clearly defined by law. The defense department has no authority over the army, focusing its activity instead on the procurement of armaments for the army's use. Parliamentary control of the military, through its Foreign and Defense Committee, is formal rather than real—the committee lacks the instruments for such control and its decisions are not binding on the army. Government control over the military's budget is also deficient, because the government lacks the ability to estimate the army's needs and to evaluate the manner in which its budget is utilized.¹³⁹

This lack of institutionalization is particularly apparent when comparing the Israeli case to the other governments considered here, particularly that of the United States, a political system in which military subordination to civilian authority has been clearly enshrined in a number of key governing documents.

The obscuring of these boundaries by no means signifies a fully cooperative relationship between and among members of the two spheres. Rather, the functional overlap often has spurred public criticism of the civilian authorities by the military and vice versa, neither of which is considered indicative of robust and effective civilian control. Some level of publicly-aired dissatisfaction with the policies of the political authorities is likely warranted, given that IDF units deployed to the territories often take the brunt of failed or ineffective domestic counterterrorism policies.

The IDF according to most analysts¹⁴⁰ is beginning to show evidence of increasing military professionalism while also retaining some of the features of a militia

¹³⁹ Etzioni-Halevy, Eva. Spring 1996. "Civil-Military Relations and Democracy: The Case of the Military-Political Elites' Connection in Israel." *Armed Forces & Society*. 22:3, 401-17.

¹⁴⁰ See, for example, Cohen (1995).

force. However, while most indicators of professionalism are defined by their encouragement of civilian control, civilian control of the IDF may actually have decreased in recent years due to a variety of institutional inadequacies in both the political and military spheres:

In the policy sphere, these factors include dependence on the military monopoly on information, a relatively weak institutional system of civilian control that depends more on internalization of the principle of civil supremacy and less on strong constitutional mechanisms, and the absence of coordinating organs between the military and the civilian side. On the military side, these factors include weakness of the mechanisms that are supposed to separate the military from politics—for example, by creating obstacles to a swift transition from military service to a political career—and traditional resistance to the creation of checks and balances to military power such as a powerful council for national security.¹⁴¹

These shortfalls have always existed in the Israeli civil-military relationship, but, as discussed in Chapter 4, a bevy of security crises over the past decade have increased the dependence of the political echelons on the armed forces for everything from ensuring national security to enhancing the political legitimacy of specific counterterrorism policies. “Far from being a passive implementer of policy, the Israeli military has been a major catalyst in embarking on the road to peace as well as the path to war. Such a high level of policy influence is uncharacteristic of the military in advanced democracies. However, it has been typical of political-military relations in Israel.”¹⁴²

¹⁴¹ Peri, Yoram. November 2002. “The Israeli Military and Israel’s Palestinian Policy: From Oslo to the Al Aqsa Intifada.” *Peaceworks*. Washington, DC: United States Institute of Peace, accessed 20 January 2007 at www.usip.org, p. 6. Stuart Cohen offers a contrasting assessment, arguing that changes within the IDF have enabled the civilian authorities to increase their power vis-à-vis the military leadership. Cohen asserts that the IDF’s “relative power to influence civilian society has been considerably curtailed by its own efforts both to cut back on the size of the military establishment (e.g. by selective conscription and reduction of the reserve complement) and to reduce the level of its participation in such essentially civilian projects as immigrant absorption, the provision of supplementary education, and assistance to land settlement.” Cohen, Stuart. October 2006. “Changing Civil-Military Relations in Israel: Towards an Over-subordinate IDF?” *Israel Affairs*. 12:4, 769-88, p. 775.

¹⁴² Peri (2002), p. 5.

The Israeli civil-military relationship at many times, particularly those of high insecurity, is better characterized as a partnership than one of blind military obedience to civilian authority. The fragmented and institutionally weak nature of the Israeli parliamentary system has meant that the military, like most political actors, has multiple channels through which to influence policy and the military's preferences have been heavily reflected in Israeli counterterrorism initiatives. Military influence on civilian policy is not without bounds, however. As will be discussed in Chapter 5, the personal power of the prime minister has played a significant role in determining how much power the military leadership possesses vis-à-vis the civilian authorities. After discussing the military's role in the development of Israel's counterterrorism infrastructure, I explain how the *Defense (Emergency) Regulations of 1945*, the *Geneva Conventions*, and the *Basic Law: The Army* (1976), while further institutionalizing civilian control over the military, also placed so much power in the hands of the military leadership that the military is able to easily assert its counterterrorism policy preferences in the face of civilian dissent, more so than what we see in other established democracies.

The Military as the Cornerstone of Israel's Counterterrorism Infrastructure

The state of Israel since its inception has faced significant domestic terrorist threats, from both Jewish and Palestinian extremists.¹⁴³ Arab-Israeli violence has ebbed and flowed throughout the years, and Israeli counterterrorism tactics have adjusted accordingly. The nature of the violence has also changed. According to Ariel Merari,

143 "The frequency of Palestinian terrorist attacks as well as their characteristics and arena have varied greatly over the years. The Palestinian hostility towards the Jewish population in the country started as early as the British occupation of Palestine in 1917, and continued after the establishment of the State of Israel in 1948. In the first half of the 1950s this animosity took the form of terrorist incursions into Israel from the West Bank and the Gaza Strip. These incursions by and large ceased after the 1956 Sinai Campaign. Terrorist incursions from across the border resumed in 1965, following the establishment of several militant Palestinian organizations, notably Fatah. ... The occupation of the West Bank and the Gaza Strip in the Six Day War and the development of the Palestinian militant groups brought about a great rise in the intensity of Palestinian terrorist and guerrilla activity against Israel, which has continued until now." Merari, Ariel. January 2005. "Israel Facing Terrorism." *Israel Affairs*. 11:1, 223-37, p. 227.

[f]rom June 1967 until their expulsion from Jordan in September 1970, the Palestinian groups' main effort took the form of a guerrilla campaign against Israel, waged from neighbouring Arab countries, particularly from Jordan. The attacks included shelling across the border, mining roads and ambushes....Since 1971, however, the main form of Palestinian armed struggle [has been] terrorism, mostly within Israel and the occupied territories. [These attacks] consisted of armed assaults, explosive bombing, suicide bombing attacks, hostage taking and shelling across the border. The great majority of the attacks (about 80%) have targeted civilians.¹⁴⁴

The Israeli government implements a wide range of counterterrorism policies to address these different facets of the terrorist threat. The extent of the military's domestic counterterrorism role has been governed by legal constraints that set the rules of engagement between Israel Defense Forces (IDF) personnel and residents of the territories, as well as Israel's effort to deflect criticism that it is not adhering to international conventions on human rights. Israeli society has shown itself to be conflicted about appropriate responses to threats emanating from the Gaza Strip and West Bank, though it tends to advocate centrist policies characterized by a mixture of political and military techniques. Extreme policies such as the full expulsion of Palestinians from Israeli territory or the establishment of a separate Palestinian state garner little support: "This suggests that Israelis have learned the limits of the use of force as a result of the Lebanese war and the *Intifada*, although they continue to display a high threat perception and very much fear the emergence of a Palestinian state and the hostile intentions of other Arab actors. Consequently, the centrist outlook on force remains prominent...."¹⁴⁵

The role of the Israeli military in domestic counterterrorism initiatives has been far more extensive than that of the militaries in any of the other cases considered in this study. For historical reasons related to Israel's strategic environment that will be discussed in Chapter 4, the Israeli military is a key part of the Israeli administrative state,

¹⁴⁴ Ibid., p. 227.

¹⁴⁵ Barzilai, Gad, and Efraim Inbar. Fall 1996. "The Use of Force: Israeli Public Opinion on Military Options." *Armed Forces & Society*. 23:1, 49-80.

and has always reached outside the legal and social bounds typical for militaries in advanced, consolidated democracies: “The IDF’s self-perceived mission is to underwrite Jewish sovereignty against a sea of hostility, the ebbs and flows of which vary according to cease-fire agreements and occasional peace treaties. More than simply a defensive body, in the words of one of its past chiefs of staff, the IDF is an ‘existential instrument.’”¹⁴⁶ The role of the IDF in national mythology is especially apparent when contrasted with public opinion of the other primary Israeli government entity charged with counterterrorism missions, the General Security Service (GSS). Known familiarly as Shabak or Shin Bet, this internal Israeli security service operates relatively freely within Israeli borders, and the public’s ability to enforce accountability on the GSS is limited given the lack of legislation defining the GSS’s operational limits.¹⁴⁷ The IDF, in contrast, is perceived to be an Israeli institution and societal cornerstone that is derived from, belongs to, and is directly accountable to, the Israeli people.

In addition to formally establishing the IDF in 1948, the other major security initiative taken by the provisional Israeli government was passage of the *Rule of Government and Law Ordinance (1948)*, which extended British Mandate-era security rules pertaining to Palestinians. Section 9 of this law specifically authorized the executive authority to suspend, revoke, or alter parliamentary legislative measures in cases of emergency,¹⁴⁸ which the Israelis for years argued was continual. For the new state’s institutional development, the *Ordinance* signified “the adoption of the legal concept of ‘succession of laws,’ according to which no legal vacuum remained and

¹⁴⁶ Sucharov, Mira. Winter 2005. “Security Ethics and the Modern Military: The Case of the Israel Defense Forces.” *Armed Forces & Society*. 31:2, 169-99, p. 184. “With its pre-state forces formed during World War II, and its official inauguration in 1948, the State of Israel intended the IDF’s fighting stance to be in sharp contrast to the victim years of Holocaust and Exile. And like the memory of the Diaspora, when the Jews operated as the few against the many, the IDF has been a small, yet highly effective, military.” *Ibid.*

¹⁴⁷ Pedahzur, Ami, and Magnus Ranstorp. Summer 2001. “A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel.” *Terrorism and Political Violence*. 13:2, 1-26, pp. 10-1.

¹⁴⁸ *Ibid.*, p. 10.

existing laws remained in force as long as they were not abolished, changed or amended by legislation of the new independent parliament.”¹⁴⁹ This “succession of laws” process ensured the weakness of Israel’s institutions by rendering them easily modifiable.

The IDF established administrative and military control of the territories in June 1967, withdrawing from the Gaza Strip in 2005 and still deployed in the West Bank. Prior to the onset of the first *intifada* in 1987, the military rarely staged invasive military operations in the West Bank and Gaza, relying primarily on an administrative “carrot and stick” approach to mitigating violent dissent among Palestinians residing in those areas. As the violence worsened in the late 1980s, Prime Minister Rabin began to realize that the Israeli military’s counterterrorism approach was ineffective,¹⁵⁰ and the type of warfare being waged by the Palestinians was on a far different level than that for which the military forces deployed to those areas were prepared to fight. Rabin implemented contingency plans

to be carried out in a manner he named “wise firmness.” According to the previously established guidelines, this policy included massive military presence and the arrest of the inciters....In this initial stage, Chief of Staff Dan Shomron, in a letter to his soldiers in the territories...pointed out that the policing duties imposed on the IDF required certain unspecified adaptations.¹⁵¹

¹⁴⁹ Shamgar, Meir. April 2005. “On the Need for a Constitution.” *Israel Affairs*. 11:2, 345-58, p. 351.

¹⁵⁰ “In March 1988, Rabin began to believe that ‘just by using force within the framework of what is allowed, through detentions as permitted by law, we will be unable to stop the violence.’ He then rejected the option of mobilizing reserve soldiers on a much wider scale and for longer terms to police the territories because ‘it will hurt our economy.’ Yet he raised the possibility of ‘using civilian means, such as harsh economic measures and limitations on freedom of movement.’ The legal constraints on Israel’s freedom of action in the territories, which the defense minister deplored more than once, prevented more radical measures such as the use of deportation as a regular punishment or relaxing restrictions on opening fire on civilians. In other words, Rabin began to think in terms of an integrated policy of civilian and military means.” Inbar, Efraim. Fall 1991. “Israel’s Small War: The Military Response to the Intifada.” *Armed Forces & Society*. 18:1, 29-50.

¹⁵¹ *Ibid.* Rabin “pointed out that the popular uprising, which utilized almost no firearms, needed no logistic system, as the Palestinians could easily supply themselves with stones, knives, or petrol bombs. The motivation to challenge the Israeli military presence was widespread, and the activities engaged in by Palestinians needed little coordination from a headquarters or a communications network. The decentralized use of low-level violence, primarily stone throwing and road-blocks, as well as civil disobedience, posed quite a challenge to the IDF.” *Ibid.*

This emphasis on policing was a significant shift for the Israeli military, requiring increased interaction with Palestinians. The IDF adopted highly regulated rules of engagement for the territories: “[b]ecause of the Israeli responsibility to the civilian population in its role as the occupying power, there were legal and political limitations on what the IDF could do.”¹⁵²

This continuous reconsideration of Israeli institutional arrangements also characterizes military management of the occupied territories. As the threat situation shifts or international pressure increases, Israel supplements existing legislation to authorize its preferred domestic military activity. For example, after years of attempts at legislative reform, the Knesset approved the *Emergency Powers (Detention) Law (1979)*, which expanded rights granted to detainees.¹⁵³ While this appeared to address many of the international community’s concerns about the Israeli military’s detention policy, the fluid nature of Israel’s lawmaking system gave the civilian authorities a way to bypass the law’s stipulations simply by making changes to the statute in subsequent years. The Knesset did just that in 1987, when, following the increase in violence that marked the beginning of the first *intifada*, *Military Order 1229* was handed down, enacting harsher guidelines with respect to administrative detention in the occupied territories.¹⁵⁴

The onset of the *intifada* marked a new era of Israeli counterterrorism policy, one characterized by a greatly increased domestic role for the IDF. According to Iffraim Enbar, the

intifada constituted a strategic as well as tactical surprise for Israel. It took several months to digest the significance of the new challenge and to develop the

¹⁵² Ibid.

¹⁵³ Also known as the Administrative Detention Law, the 1979 statute set caps on the amount of time detainees could be held and gave them more rights to participate in legal hearings concerning their detention.

¹⁵⁴ Grebinar, Jonathan. November 2003. “Note: Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law.” *Fordham Urban Law Journal*. 31:1, 261-84, p. 262.

policy that began to be implemented in spring 1988. [Prime Minister Yitzhak] Rabin admitted that the policy was reached only after a process of trial and error, which was quite typical of Israeli national security decision making.¹⁵⁵

The *intifada* forced the IDF to assume a larger non-military role, which, according to Michael Desch, greatly politicized the IDF: “With the decision to evacuate troops and settlers from parts of the West Bank and Gaza Strip, the IDF has been placed in the center of a bitter and deeply divisive national debate that threatens to pull it in opposite directions.”¹⁵⁶ After a series of internationally-brokered negotiations, in September 1993 Rabin and PLO Chairman Yasir Arafat signed a Declaration of Principles to allow the two sides to resolve the political and geographic points of dispute. The IDF redeployed over the next six months, withdrawing from certain parts of the territories as the Palestinian Authority developed its capacity to govern. However, aggressive IDF counterterrorism policies continued. “Between 1994 and 1997, the [IDF] built 180 miles of bypass roads in the territories to protect settlers from sniping, bombing, and drive-by shootings. The Military Commander has directed hundreds of thousands of gallons of aquifer water to settlements for household, agricultural, and landscaping needs.”¹⁵⁷

The violence of the second *intifada*, known as the *Al-Aqsa Intifada*, changed both the pace and extent of military activity in the territories. Since 2000, “the IDF has been in constant operational use against terrorist and armed guerrilla fighters—many of which were trained, equipped and mobilized paradoxically under the auspices of the Oslo peace process in order to ‘to guarantee public order and internal security.’”¹⁵⁸ The more aggressive operations performed by the IDF since 2000—to include widespread

¹⁵⁵ Inbar (1991).

¹⁵⁶ Desch, Michael. 1999. Civilian Control of the Military: The Changing Security Environment. Baltimore, MD: Johns Hopkins University Press, p. 125.

¹⁵⁷ Galchinsky, Michael. Fall 2004. “The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence.” *Israel Studies*. 9:3, 115-36, p. 117.

¹⁵⁸ Catignani, Sergio. February 2005. “The Strategic Impasse in Low-Intensity Conflicts: The Gap Between Israeli Counter-Insurgency Strategy and Tactics During the *Al-Aqsa Intifada*.” *The Journal of Strategic Studies*. 28:1, 57-75, pp 60-1.

checkpoints, military patrols, enforced curfews, and house demolition—supplement the routine policing measures that have been in place for the past 30 years. The IDF undertook “large-scale urban combat operations in April 2002 in several cities, including Janin and Nablus, as part of its Operation Defensive Shield....[The fighting] displayed unique features and constituted the biggest military engagements in the West Bank since the 1967 Six-Day War.”¹⁵⁹

The IDF’s domestic counterterrorism operations have been particularly controversial, and the closest parallel among the other three cases considered in this study is British military activity in Northern Ireland. In the case of the IDF, the Israeli government has used the military to implement counterterrorism measures that, though superficially effective, may in the end cause greater harm to Israel’s long-term strategic interests. Sergio Catignani, for example, classifies the Israeli policy of demolishing houses that belong to suspected terrorists or their relatives as a practice that has been “considered successful by the IDF as a deterrent for other terrorist attacks in spite of the censure expressed by human rights organizations.....”¹⁶⁰ Catignani further concludes that the use of the Israeli military “to lower the level of violence...has led to an over-emphasis on the operational and tactical use of the IDF as a panacea for the lack of the military and political leadership’s ability to come up with a new strategic paradigm that will bring about a strategic decision vis-à-vis the problem of Palestinian terror....”¹⁶¹

¹⁵⁹ Henriksen, Thomas. February/March 2007. “Security Lessons from the Israeli Trenches.” *Policy Review*. 141, 17-31, p. 28.

¹⁶⁰ Catignani (2005), pp. 60-1.

¹⁶¹ *Ibid.*, p. 62. Ariel Merari offers a similar assessment: “Beyond the goal of maintaining public morale, in applying antiterrorism measures tactical, short-range goals are sometimes in conflict with strategic, long-range objectives. In this regard, Israel has always favoured short-term results over long-term gains.” Merari (2005), p. 235.

Critical Junctures in Israeli Counterterrorism Legislation

While many countries facing a high domestic threat level expand the domestic roles of their military, police, and internal security forces, few attempt to institutionalize this expansion by writing extrajudicial activity into law. What is interesting about the Israeli case, then, is the push to have the authority supporting these exceptional uses of the military encoded into law. Israel's desire to use its legal system to buttress Israeli counterterrorism policy is due to the historical circumstances surrounding its governance as well as the need to maintain the image of a consolidated democracy in which the rule-of-law prevails:

The military victory in 1967 enabled Israel to take control of the West Bank and Gaza, transforming those areas into an 'internal' domain and installing itself as the de facto sovereign. (In south Lebanon, in contrast, which Israel also occupied, the state never assumed de facto sovereignty...). The use of law and legally regulated force has been necessary to legitimize this arrangement and to sustain support from important constituencies, both domestic and international.¹⁶²

Three bodies of law—two domestic, one international—have had a significant impact on the Israeli state's use of the military as a domestic counterterrorism tool. The *Defense (Emergency) Regulations of 1945*, the *Geneva Conventions*, and the *Basic Law: The Army (1976)* established the military's parameters for domestic intervention, thereby shaping the counterterrorism policy options open to the civilian authorities.

Defense (Emergency) Regulations of 1945 (Renewed in 1948)

The Israeli military has always exercised substantial domestic power, becoming the de facto government of restive areas under the state of emergency that was invoked contemporaneously with Israel's *Declaration of Independence*. Israeli authorities justified this state of emergency by citing the war the Arab countries had just waged against Israel, but despite relative stability it remained in effect for years without

¹⁶² Hajjar (2005), p. 28

legislative review. In the context of this state of emergency, Israel adopted the *Government and Law Arrangements Order* in 1948, which was an extension of the *Defense (Emergency) Regulations (DER)* restrictions placed on Palestinians under the British Mandate,¹⁶³ many of which are still in effect today. The DER, in its 1948 version, empowered the Israeli military command to take any measure necessary to ensure the security and sovereignty of the Israeli state and its people, including the search and arrest of anyone deemed to be a threat, without judicial review.¹⁶⁴ While the DER technically applies to everyone in Israeli territory, in reality “the enforcement of these regulations within Israeli borders is not common and is carried out only with the approval of the highest levels of the executive authority (the Cabinet or Minister of Defense).”¹⁶⁵ Palestinians clearly were the intended target of this legislation.

The DER established a legal precedent for pervasive domestic Israeli military activity in pursuit of the state’s counterterrorism objectives. The DER granted military authorities the right to apprehend or restrict the movements of anyone they felt was posing a threat to Israeli control, duties that in most countries are managed by local police forces, but due to Israel’s state of emergency were handled by the IDF. Most significantly for this study, the DER authorized the IDF Chief of the General Staff (CGS) to create special courts to try individuals suspected of posing a threat to Israel’s

¹⁶³ The League of Nations gave the British government a mandate following World War I to administer the geographic area of Palestine until a local, sovereign government could be established. The DER of 1945 imposed a system of martial law in the areas under British control. Both the British and Israeli versions of the DER empowered the military command to: restrict individuals to a limited area or deport them entirely without trial or charge; destroy, seize, and occupy private property; impose curfews for an indeterminate period of time; declare an area closed to residents; and impose censorship upon associations and publications. Bar Human Rights Committee of England and Wales. 2006. Human Rights Manual for Palestinian Lawyers. p. 69. Accessed 15 January 2008 at www.barhumanrights.org.uk

¹⁶⁴ “Regulations 108 and 111 empowered the High Commissioner and Military Commander to order the detention of a person if either official believed it necessary for maintaining public order or securing public safety or state security.” Grebinar (2003).

¹⁶⁵ Pedahzur and Ranstorp (2001), p. 10.

security.¹⁶⁶ All legislation passed since the DER to direct the military's rule over the occupied territories has relied heavily on the judicial and administrative authority granted to the military in that 1948 statute. For example, Israel's house demolition counterterrorism policy has been justified by Regulation 199 of the DER, which "empowers the military commander to order the demolition of a house and to confiscate the land on which it is built."¹⁶⁷

Specific aspects of the DER can still be seen in Israeli military administration of the West Bank. Broad powers of search and seizure, long-term detentions, censorship, suspension of local civil courts without explanation, and the destruction of property are all hallmarks of the IDF's military rule and court system. In accordance with Israeli practice, a clause was included in the 1948 law that granted the Knesset the authority to change any part of the regulations if and when that became necessary. This freedom to reform the law on a case-by-case basis has proven to be important as the debates over specific provisions within Knesset committees increase. Early attempts to repeal certain provisions were derailed by advocates of military rule, to include the military authorities themselves. The 1967 war and Israel's full occupation of the territories silenced the debate temporarily, as it became easier for the Israeli political authorities to justify this extensive use of the military given the high domestic threat level. To further entrench military authority in the territories, the military leadership in 1967 handed down *Military*

¹⁶⁶ Ibid., pp. 10-1.

¹⁶⁷ Grebinar (2003), pp. 5-6. Regulation 119 of the *Defense Regulations* states that a "military commander may by order direct the forfeiture to the Government of Palestine of any house, structure or land from in which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown detonated, exploded or otherwise discharged or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence, and when any house, structure or land is forfeited as aforesaid, the Military commander may destroy the house or the structure or anything in or on the house, the structure or the land. The terms of Regulation 119 clearly give the military commander broad power to respond to terrorist acts that impair the security of the population or threaten public order." Ibid.

Order #224, which declared that the DER regulations would remain in effect in the West Bank until specifically declared invalid. Today, most DER regulations remain in effect in the West Bank, serving as the framework for IDF domestic counterterrorism activity.

The Geneva Conventions

International law—and Israel’s attempts to placate the international community by justifying its counterterrorism policies with international law—has played a pivotal role in shaping Israel’s domestic use of the military as a counterterrorism tool. While it has been argued that the Israeli government has entirely disregarded international law in conducting military activity in the Palestinian territories, Israeli authorities actually have shown themselves to be highly cognizant of the tenets of this body of international law and have worked diligently to ground the domestic use of its military in terms that make a strong case for Israeli adherence to the letter of the laws of war. Palestinians are considered by international law to be a stateless, “occupied population,” and Israel has been, since 1967, the only internationally recognized state exercising control over the West Bank and Gaza Strip. Technically, the West Bank and Gaza are not part of sovereign Israeli territory, and the Israeli government classifies Palestinians living in these areas as “foreign civilians.” Lisa Hajjar argues that the

Israeli state has never claimed or sought the right to represent Palestinians in the West Bank and Gaza, only the right to rule them. Therefore, although Israel’s occupation of the West Bank and Gaza is the longest in modern history and has taken on many permanent-looking features, the principle of temporariness obtains because military rule over a ‘foreign’ population is legally unacceptable and politically unstable as a permanent arrangement.¹⁶⁸

Because the legal status of Palestinians is an unsettled question, the Israeli government has been able to make a strong argument that international law—such as the *Fourth Geneva Convention (1949)*, which governs state conduct during war and

¹⁶⁸ Hajjar (2005), p. 2

occupation and to which Israel is a party—does not apply to Palestinians living under Israeli military occupation. Article 49 of the *Fourth Geneva Convention* specifically prohibits occupying powers from transferring its own civilian population into the territory it is occupying. The intention behind these provisions is to deter states from acting aggressively with the intention of colonizing the territory of other states. Because the Israeli government does not consider the West Bank to be occupied in the legal sense of the term, however, it argues that the *Geneva* rules do not apply.¹⁶⁹

Indeed, the *Geneva Conventions* do not have the force of law and states have been able to interpret *Geneva* provisions in ways that support their own policies. IDF *Military Order 144* of October 1967 revoked Article 35 of *Military Proclamation No. 3 (1967)*, which said that provisions of the *Fourth Geneva Convention* were applicable to the military tribunals of individuals in the territories, meaning that the Israeli government declared itself no longer legally bound by the *Geneva Conventions* in its treatment of Palestinians. Despite this, the Israeli government has attempted to assuage concerns of the international community and domestic constituencies that Israel's system of military governance violates the spirit of the *Geneva Conventions*.¹⁷⁰

In addition to making the argument that Palestinians who engage in violent activities do not fall under international legal protections because of the nature of their

¹⁶⁹ “[T]he Israeli government has claimed that the West Bank is ‘disputed’ rather than ‘occupied’ territory and therefore the Geneva Conventions do not apply. Their argument is that Jordanian control of the West Bank between 1948 and 1967 was ‘illegal’ and the Arab state set out by the U.N. partition plan of 1948 was never established (Israel Ministry of Foreign Affairs 2003)...[C]onflicting interpretations of the legal status of the West Bank have not only guided the economic and institutional structures that the Israeli state has created in the region, but have also played a central role in framing many of the forms of legal opposition to the Israeli presence in the West Bank.” Kelly, Tobias. Winter 2006. “‘Jurisdictional Politics’ in the Occupied West Bank: Territory, Community, and Economic Dependency in the Formation of Legal Subjects.” *Law & Social Inquiry*. 31, 39-74, p. 44.

¹⁷⁰ Dajani, Souad. May 2005. “Ruling Palestine: A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine.” Geneva, Switzerland: The Centre on Housing Rights and Evictions (COHRE), p. 81. Accessed 25 January 2008 at <http://www.cohre.org/store/attachments/COHRE%20Ruling%20Palestine%20Report.pdf>

tactics,¹⁷¹ Israel also relies upon international legal conventions that support the right of a state to use force against terrorists operating within its own territory. According to Emanuel Gross, “[i]n view of the lack of cooperation or, in the alternative, the inability of the Palestinian Authority to prevent terrorist operations, Israel must attempt to defend itself. In the light of customary international law, Israel faces an immediate threat by terrorists, particularly, where the terrorists are willing to commit suicide.”¹⁷² Indeed, the Israeli government faces a difficult policy decision. If, on the one hand, it does nothing to prevent a terrorist attack for which it does not have perfect forewarning about the method and individuals involved, it risks the lives of precisely those citizens it has been charged with protecting. If it acts too aggressively, however, it invites widespread criticism and condemnation. With this precarious balance in mind, most consolidated democracies, including Israel, have adopted a policy of deadly force as a last resort, only if arrest and trial are not possible in the context of the threat at hand.¹⁷³

International law has shaped the Israeli government’s domestic use of its military in a counterterrorism context by placing parameters on the types of activities that are

¹⁷¹ A key assumption of Israel’s military policy toward Palestinians is that the stateless status of Palestinians means that they are not covered by international law. “The notion of regarding ‘freedom fighters’ as combatants for all purposes was not adopted or accepted by the Geneva Conventions in 1949. In 1977, however, in Protocol I, such fighters were granted the rights of prisoners of war, on condition that they conducted themselves in accordance with the rules applicable to combatants under international law....[I]f one party is interested in including the ‘freedom fighters’ within its armed forces, it must notify the other party of the same, a step that has not yet been taken by the Palestinian Authority, or by any neighboring country engaged in hostilities with Israel. Moreover, the organizations confronting Israel carry out their attacks from bases within civilian populations and do not take steps to distinguish themselves from that population, contrary to the requirements of Article 44.3 of Protocol I.” Gross, Emanuel. Spring 2005. “Symposium: Balancing Security and Liberty in the New Century: Article: Thought is Self-Defense against Terrorism—What Does It Mean? The Israeli Perspective.” *Temple Political & Civil Rights Law Review*. 14:579, pp. 580-1.

¹⁷² *Ibid.*, p. 584.

¹⁷³ The U.S. policy, for example, according to the judgment in *Nicaragua v. United States* (1986), is that there exist minimum conditions which must be met before allowing an army to respond to terrorist attacks, including: “(1) that the nation carefully evaluate the evidence to ensure a high degree of certainty that it has identified those responsible for an attack and that more attacks are imminent; (2) that the facts relied upon be made public; and (3) that the facts are subject to international scrutiny and investigation.” *Ibid.*, pp. 587-8.

permissible to international and domestic constituencies. Indeed, “Israeli military authorities are so sensitive about the handling of their military occupation according to law that they have published a book entitled Israel, the 'Intifada' and the Rule of Law that lays out in detail Israel's legal basis for actions it has taken.”¹⁷⁴ There is no question that the Israeli state is under a high degree of threat from residents of the Palestinian territories with whom it is politically and militarily engaged. When the military and non-military institutions of a sovereign state are targeted by terrorists, international law certainly does not prohibit the targeted state from attempting to disrupt that threat:

There is sufficient existing doctrine and precedence under international law to allow a state to exercise preemptive force against such terrorist organizations. This is an important principle because of the unpredictability and lawlessness of the terrorist organizations acts, magnified by the potentially huge damage that they could cause, given technological advances.¹⁷⁵

However, the right of states to militarily respond to terrorist threats, especially those arising from territory over which they maintain control, is not without bounds. International law places limits on what states can do in this context, but there exist only limited avenues for enforcement. “So far, international law’s relatively weak enforcement mechanisms have permitted lawmakers to rely on Israel’s internal jurisprudence,”¹⁷⁶ which, for the most part, has placed few limits on the IDF’s domestic

¹⁷⁴ Fricker, Richard, and Gary Hengstler. February 1994. “From Military Rule to Civil Law.” *ABA Journal*. 80:2, pp. 62-5. Israeli authorities also often rely upon Israeli jurists and legal theorists to justify their interpretation of the laws and war. However, as is reflected in the highly factionalized Israeli public, many other Israeli legal experts argue that Israel is indeed violating international law through its domestic counterterrorism policies. See Michael Galchinsky’s discussion of Yoram Dinstein, Moshe Drori, and Thomas Kuttner in Galchinsky (2004), pp. 120-1.

¹⁷⁵ Kastenber, Major Joshua E. 2004. “The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption.” *The Air Force Law Review*. 55, 233-67, pp. 123-4.

¹⁷⁶ Galchinsky (2004), pp. 128-9. United Nations Security Council resolutions clearly apply to settlements in occupied territories, but so far the Council has refrained from enforcing restrictions on such activity, and the Israeli government has used this reticence as a sign of consent for its counterterrorism activities: “According to UN Security Council Resolution 242 (June 14, 1967) Israel must return ‘territories’ occupied during the Six-Day War. While Palestinian representatives have always held that this means Israel must return all territories captured, the Israeli government has always held that the absence of the definite article (the territories) means that Israel must return only some of the captured territories. On Israel’s

military operations relating to Palestinians. If bodies such as the International Criminal Court gain the ability to make binding, enforceable decisions, there is the chance that Israeli courts may begin to hand down decisions more in line with international law. This has been seen to some degree with legal action over the IDF's construction of a barrier in the West Bank: "Both the Israeli High Court of Justice and the International Court of Justice, in recent opinions about the barrier, concur that the West Bank is under the law of belligerent occupation, exemplified by The Hague Regulations and the Fourth Geneva Convention. But then their opinions diverge."¹⁷⁷ It is apparent, therefore, that the Israeli political authorities are taking international law into account in formulating their counterterrorism policies, but still maintain enough leverage given the vagueness of these laws to take action in line with military preferences.

Basic Law: The Army (1976)

Israeli political authorities have repeatedly attempted to insert control mechanisms into their political system, realizing that it is highly susceptible to military influence. Israel's first Prime Minister, David Ben-Gurion, asserted that "[i]t is not for the army to decide anything related to policy, regime, law, or governance. The army does not even determine its own structure, organization, and operations....It is merely an executive arm...."¹⁷⁸ The appropriateness of the ideal of civilian supremacy over the military has never been in question, even with the fledgling government's heavy reliance on its military forces. Civilian authorities have always been expected to play a pivotal role in determining military policy and tactics: "Civil supremacy, according to Ben-Gurion, meant the total involvement of the political sphere in all aspects of military and

reading, the resolution recognizes that the Green Line is a cease-fire line rather than a permanent border, providing some small margin on either side of the line open to negotiation." *Ibid.*, p. 125.

¹⁷⁷ *Ibid.*, p. 127.

¹⁷⁸ Kober, Avi. June 2001. "Israeli War Objectives into an Era of Negativism." *Journal of Strategic Studies*. 24:2, p. 180.

wartime activity, even in real time situations, in order to serve the political view loyally and consistently.”¹⁷⁹

Ben-Gurion, with his commanding presence and centralized power structure, was able to force military compliance with his vision for the Israeli state. Later prime ministers, however, were not as successful at reining in the IDF leadership. The state of Israel, unlike the United States, does not have a core foundational document that provides the legal guidelines within which the military relates to the civilian authorities. Rather, the Israeli constitution

is best described as partly written and partly unwritten....The constitutional rules of Israel are included in Basic Laws..., in ordinary laws including constitutional provisions, in abstract legal norms defined in judgments of the Supreme Court and in customs and practices. The constitution is thus evolutionary in character, exhibiting a gradual organic growth and development, changing from being comprised largely of ordinary laws, norms and customs to constituting, to a large extent, Basic Laws in the general sense of that term.¹⁸⁰

This style of constitutional development was, like most aspects of Israeli political life, a compromise solution to conflict brewing among the different political factions in 1950 regarding the political future of the state.¹⁸¹

Basic Laws are enacted separately from one another, part of a system of legislative precedence that also allows room to diverge from past rules of conduct when necessary. This loose structure has been particularly beneficial to military authorities as they work to push their counterterrorism policy preferences through the Israeli political and bureaucratic systems. What has developed is a highly informal network of civilian

¹⁷⁹ Bar-or, Amir. July 2006. “Political-Military Relations in Israel, 1996-2003.” *Israel Affairs*. 12:3, 365-76, p. 375.

¹⁸⁰ Shamgar (2005), p. 349.

¹⁸¹ “Behind this resolution and the reason for its adoption lay the three divergent approaches which had become apparent in the course of the preceding discussions (a) opposition to any written constitution mainly expounded by Prime Minister Ben-Gurion and the religious parties; (b) support for the idea of a formal written constitution; (c) a proposal for a ‘chapter by chapter’ process by trial and error and the gradual development of written constitutional norms, keeping in line with social, cultural and political developments.” *Ibid.*, p. 353.

and military leaders that emerged “from the lack of a precise distinction between the political and military, the absence of formal legislation regulating their relationship, and from the need to maintain workable political–military ties during Israel’s first three decades.”¹⁸²

Thus, civil-military relations in Israel are more fluid than what is seen in the U.S., with far more political room to accommodate shifting coalitions. In many cases, the Israeli military has been able to launch high-stakes military missions without official approval from the Knesset, though the military leadership often consults politicians in informal channels. Indeed, there were no legal conventions addressing military attacks on other countries until ratification of the *New Basic Law of Government in 1992*, even though the Israeli military obviously engaged in such warfare. The 1992 law is very limited, requiring government authorization only for a full military declaration of war, but not for domestic military counterterrorism missions. “Thus the issue of who has authority to order the Israel Defence Forces...to launch a military assault that falls short of a war has not been legally resolved,”¹⁸³ leaving the military leadership with a great deal of autonomy to enact its own counterterrorism policies against terrorist groups operating within Israeli territory.

The 1976 *Basic Law: The Army* was a Knesset attempt to add structure to the unpredictable nature of Israeli civil-military relations by institutionalizing the norm of military deference to civilian authorities. The law specifically declared that Chief of the General Staff (CGS) would be subordinate to the Minister of Defense, and therefore accountable to a civilian authority. The Minister of Defense, however, in the same law

¹⁸² Bar-or (2006), p. 366.

¹⁸³ Kuperman, Ranan. October 2005. “Who Should Authorize the IDF to Initiate a Military Operation? A Brief History of an Unresolved Debate.” *Israel Affairs*. 11:4, 672-94, p. 672. As another example, until the 1992 law the military was the primary government entity charged with declaring a state of emergency. Under the revised statute, today the Knesset may declare a state of emergency for up to one year with the option for extension. Grebinar (2003).

was also granted legal control of the army by government consent.¹⁸⁴ This arrangement was inherently weak and malleable: “Such convoluted legalistic language regarding the chain of command, and the allocation of unprecedented authority in the hands of the government and defence minister, left ample room for interpretation and did little to alter the basic rules of the political–military game....[T]he wording was sufficiently vague to leave the protagonists room for manoeuvre.”¹⁸⁵

The Knesset’s passage of the *Basic Law: The Army* following Israel’s poor performance in the 1973 war was a reassertion of civilian oversight of military operations. The Agranat Commission—the body charged with investigating the Israeli government’s military and intelligence failures in that conflict—made a strong recommendation that the Israeli government formalize its political-military relationship in order to more clearly assess accountability for similar mishaps in the future. Prior to the 1976 law, there was no official position for commander-in-chief of the armed forces, and the civil-military relationship “had been characterized by manifest ambiguity over the allocation of authority among the prime minister, government (cabinet), defence minister, CGS, and Knesset.”¹⁸⁶

This piece of legislation, while adding more formality to the relationships between the Prime Minister, Chief of the General Staff, Minister of Defense, and Knesset, did not, in and of itself, redefine the substance of the civil-military relationship in Israel. Passage of the *Basic Law* serves as a critical juncture for its symbolism, signaling to the military leadership that the civilian authorities intended to play a more consequential role in the military's activities, particularly those that could put their own

¹⁸⁴ *Basic Law: The Army*, adopted by the Knesset 31 March 1976, accessed 27 January 2008 at the Israeli Ministry of Foreign Affairs website, www.mfa.gov.il/MFA

¹⁸⁵ Bar-or (2006), p. 366.

¹⁸⁶ *Ibid.*, p. 365.

chances for re-election at risk. The reality of Israeli politics, however, is that such legislation at this point in time has only a limited impact on the way in which the various civilian and military officials work with one another. Military leaders may confer more often with their civilian counterparts to ensure that their plans will meet little resistance, but Israeli civil-military relations remain highly informal and based on personal relationships between the principal actors, as will be discussed in Chapter 5.

Discussion

Unlike the other states under consideration, two of Israel's three primary institutional restraints on domestic military counterterrorism activity are derived from external parties: the *Defense (Emergency) Regulations of 1945/1948* was a British Mandate-era law renewed by the new Israeli government in 1948, and the laws of war that place limits on specific IDF tactics used in the territories are largely rooted in the *Geneva Conventions*. The *Basic Law: The Army* was passed nearly 30 years into Israel's existence, and while infusing Israeli civil-military relations with a semblance of structure and hierarchy, to date has had little effect on reining in the military's domestic counterterrorism initiatives given the military's strong allies in the Knesset and other elite political entities.¹⁸⁷ As Rebecca Schiff assesses, "rules are often made to define the scope of military authority, and then changed depending on the particular governmental cabinet. All of this precludes the possibility of a distinct and well regulated civilian authority that

¹⁸⁷ As an example, "[j]ust as at the beginning of the 1990s the military had shown a willingness to make far-reaching concessions in order to reach a settlement with the Palestinians, at the end of the 1990s it pressed for severe measures to counter the second intifada. The IDF came to the new confrontation with the Palestinians armed with a firm decision not to repeat mistakes it had previously made....The military sought to firmly suppress the intifada by adopting an aggressive approach, causing large numbers of casualties on the Palestinian side, and aimed for a decisive military outcome, even with the unfortunate price of hitting innocent civilians. For this reason, it even gave commanders in the field a substantial room to manoeuvre. The IDF intends to win in this confrontation and it was unwilling to allow the political branch, with the latter's conflicting directives and its other considerations, to diminish the military's victory." Peri, Yoram. April 2005. "The Political-Military Complex: The IDF's Influence Over Policy Towards the Palestinians Since 1987." *Israel Affairs*. 11:2, 324-44, pp. 340-1.

controls the military.”¹⁸⁸ Thus, while these three legislative measures are the most significant in existence in terms of defining the scope of domestic counterterrorism activities in which the Israeli military may engage, the realities of the Israeli political system mean that historical events and strong policy entrepreneurs—discussed in Chapters 4 and 5, respectively—are just as critical in determining domestic use of the military.

COUNTERTERRORISM IN THE UNITED KINGDOM: THE MILITARY AND THE IRA

The Cabinet retains ultimate authority for policy direction in the British system of governance. Within the Cabinet, there exists a senior ministerial committee that manages defense and security policy. According to Robert Egnell, however, “in practice the more important defence policy issues are dealt with in trilateral correspondence between the Foreign Secretary, the Defence Secretary and the Prime Minister.”¹⁸⁹ British civil-military relations are characterized by a high degree of collaboration between the Ministry of Defence’s military and civilian personnel—much more so than is seen in the US civil-military relationship—leading each entity to seek out the advice of the other. Further, the Ministry of Defence maintains a professional civil service component that “provides consistency of policy within the ministry, but also acts as a buffer between the political and military aspects of the issues.”¹⁹⁰ In the case of the British Army’s deployment to Northern Ireland, military officials acknowledged the political roots of the conflict and worked closely with political authorities to develop the military’s

188 Schiff, Rebecca. Fall 1995. “Civil-Military Relations Reconsidered: A Theory of Concordance.” *Armed Forces & Society*. 22:1, 7-24.

189 Egnell, Robert. December 2006. “Explaining US and British Performance in Complex Expeditionary Operations: The Civil-Military Dimension.” *The Journal of Strategic Studies*. 29:6, p. 1052.

190 Hopkinson, William. 2000. The Making of British Defence Policy. Norwich, UK: The Stationary Office, p. 37, as cited in Egnell (2006), p. 1054. Egnell assesses that “On the whole the British culture and structure of civil-military relations resemble the Janowitzean notion of civil-military integration and mutual understanding. Or to use Bland’s terminology, there is more of shared responsibility in the British case [than in that of the US].” Ibid.

counterterrorism policy. This has proven to be a lasting pattern, surfacing in recent military operations.¹⁹¹

The United Kingdom has a relatively long history with domestic deployments of the military given the conflict over Northern Ireland. The partition of Ireland occurred at the beginning of the twentieth century and thereafter unionists loyal to the British crown controlled Northern Ireland. The Irish Republican Army (IRA), a nationalist and Catholic movement that waged terrorist campaigns to expel the British government from Northern Ireland, made the erasure of the British-imposed southern border its primary aim. During the 1960s the Northern Irish political climate became increasingly tense and in 1969 Westminster deployed troops to Northern Ireland to stabilize the province long enough for local security forces to be strengthened. Soon after, Parliament passed the Ulster Defence Regiment Act (1969), which created the Ulster Defence Regiment (UDR). In April 1970, Britain formally instituted the UDR as a part of the British Army and created the Joint Security Committee to manage the British troop deployment.¹⁹²

This deployment followed an atypical period in British civil-military relations during which the British government negotiated the deployment of its own troops into Northern Ireland directly with the province's authorities. British and Northern Irish leaders previously agreed that inter-governmental consultation should precede any deployment of British troops into Northern Ireland. As tension escalated in the 1960s,

191 Brigadier Simon Mayall, former commander of the British forces deployed to Kosovo, argued in 2004 that the structure of British civil-military relations means that political oversight is not problematic in the British chain-of-command: "There are political advisers for all commanders, normally down to the brigade level, who keep a line open to London on the political-military side, and who ensure that the commanders understand the background of the operation. This is not perceived as political meddling as the advisers are considered a resource for the commanders and not as tools for control." Robert Egnell's November 2004 interview with Brig. Simon Mayall, as cited in Egnell (2006), p. 1066.

192 Donahue, Laura. 2001. Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000. Dublin: Irish Academic Press, p. 117.

the British government closely examined the legal basis for domestic military deployments. According to Campbell and Connolly,

[t]he core problem as viewed by the Secretary of State for Defence lay in a clash between legal and administrative norms; specifically, there was a mismatch between the [Minister of Defence's] (and the Secretary's) administrative jurisdiction over the Army (the channel for democratic accountability and control), and the legal doctrine giving the military an independent power to intervene in situations of civil disturbance.¹⁹³

The question of civilian control of the military in such an odd environment was settled, in nominal terms, in the 1969 *Manual of Military Law* which insisted that in the case of a conflict between the civilian and military authorities over a response to a domestic crisis the military commander should take necessary action to restore order and protect British interests on the ground, even if the civilian authority gives direction to the contrary.¹⁹⁴ Civilian authorities were not always in full support of military initiatives in Northern Ireland, and British civil-military relations showed the strain: “There was often an inherent tension between the security force’s focus on a counter-insurgency strategy and government’s political strategy that sought periodically to draw the Republicans into a political process.”¹⁹⁵

Clearly this system of civilian control was highly ambiguous and open to interpretation, particularly in the heat of battle. The British Army, which had always been under firm civilian control throughout its presence in Northern Ireland, began in the 1970s to adopt higher levels of on-the-ground autonomy with its internment policy and was granted the authority to run a system of prisons in Northern Ireland and conduct interrogations of those whom it had arrested or interned. This episode of military

¹⁹³ Campbell and Connolly (2003), p. 350.

¹⁹⁴ Ministry of Defence. 1969. *Manual of Military Law*. p. 502, as cited in Campbell and Connolly (2003), p. 349.

¹⁹⁵ Dixon, Paul. 2001. *Northern Ireland: The Politics of War and Peace*. Basingstoke: Palgrave, pp. 98-102, as discussed in Tuck, Christopher. June 2007. “Northern Ireland and the British Approach to Counter-Insurgency.” *Defense & Security Analysis*. 23:2, p. 170.

autonomy—widely criticized for alleged human rights violations—had lasting consequences for British civil-military relations and current counterterrorism policies: “Allegations of torture still dog the army today. As a consequence, the army turns over anyone it arrests to the civilian police and does not conduct independent interrogations or operate prisons.”¹⁹⁶

In 1995, after 25 years of deployment to Northern Ireland, the British Army ordered its soldiers off daytime foot patrols in West Belfast, signaling the end of the most invasive aspect of British military activity in the province. However, the arguments regarding domestic use of the military did not lessen along with the pullback in the military’s mandate for domestic intervention. The British government today is facing a resurgence of similar views opposing aggressive domestic counterterrorism tactics that have their roots in the UK’s experience with Irish separatist bombing campaigns in Great Britain. The British public openly questions British security policies that incorporate military personnel in plans to safeguard the mainland from homegrown terrorists, primarily those inspired by or associated with al-Qa’ida.

The United Kingdom, like Israel, has no single written constitution to guide lawmaking. Instead, state power is exercised within a continually changing legal framework composed of multiple rules regarding the rights of specific state actors to affect the scope and behavior of the state. In the words of Kieran McEvoy and John Morison, “[C]onstitutionalism in the UK often is reduced to the bare proposition that all sovereignty resides with the Westminster Parliament, which is free to make or unmake

196 Bell, J. Bowyer. 1993. *The Irish Troubles, A Generation of Violence 1967-1992*. New York: St. Martin’s Press, p. 230, as cited in Campbell, Lieutenant Colonel James D., *Maine Army National Guard*. March-April 2005. “French Algeria and British Northern Ireland: Legitimacy and the Rule of Law in Low-Intensity Conflict.” *Military Review*, p. 4. Campbell further asserts that since this period of internment “[t]he British Government has insisted on maintaining civilian and police control over military operations, using the minimum possible level of violence in attacking terrorists, and has held fast to the rule of law in conducting military operations....[T]ransgressions of law have been publicly investigated and prosecuted.” *Ibid.*, p. 2.

any law it pleases. This, in turn, leads to a view that no particular law is of higher standing than any other, or has constitutional status as such.”¹⁹⁷

While the fluidity of the British lawmaking system has proven beneficial in many cases, at times the lack of an overriding national law governing relationships between government branches has spurred conflict and indecision. This has been particularly true in the case of British counterterrorism policy and domestic use of the British military in counterterrorism missions. According to Colm Campbell and Ita Connolly, the UK’s legal framework governing military intervention in conflict situations is characterized by “a lack of clarity as to the legal basis for intervention; the democratic deficiency of doctrines seemingly giving the Army a power of intervention without governmental approval, or indeed, in defiance of government; and a mismatch between legal and administrative norms.”¹⁹⁸ These deficiencies were clearly visible in the deployment of the British Army to Northern Ireland in the 1970s and 1980s, and have shaped—and been shaped by—British civil-military relations. In this section, I will briefly discuss the evolution of the UK’s domestic counterterrorism infrastructure, beginning with counterterrorism laws focused on Northern Ireland and followed by those statutes targeting Islamic extremists. Finally, I will explain how the Special Powers Act played a key role in shaping future counterterrorism statutes in the UK.

The United Kingdom’s Counterterrorism Infrastructure with Respect to Northern Ireland

Threats from Irish nationalists have long been a primary consideration of those charged with developing British security policy, and legislation governing the British-

¹⁹⁷ McEvoy, Kieran, and John Morison. April 2003. “Constitutional and Institutional Dimension: Beyond the ‘Constitutional Moment’: Law, Transition, and Peacemaking in Northern Ireland.” *Fordham International Law Journal*. 26, p. 964.

¹⁹⁸ Campbell, Colm, and Ita Connolly. September 2003. “A Model for the ‘War Against Terrorism’? Military Intervention in Northern Ireland and the 1970 Falls Curfew.” *Journal of Law and Society*. 30:3, p. 370.

Irish relationship has existed in varying forms for centuries. Legislative attempts to manage the conflict increased in both number and reach in the late 1960s as Irish nationalists made terrorist attacks against British targets a cornerstone of their offensive policy. Throughout the “Troubles,” criminal justice institutions were a mainstay of British counterterrorism policy, though the powers bestowed upon these institutions shifted in accordance with changes in British legislation. The British government often worked in tandem with the Northern Irish authorities on legislative counterterrorism approaches, particularly after 1972 when Great Britain prorogued the Northern Ireland government via the Northern Ireland (Temporary Provisions) Act, which empowered Westminster to make laws in place of the Northern Ireland Parliament. During this period, at the height of Irish nationalist violence against British targets, UK counterterrorism policy was based on a preventive—vice punitive—legal strategy, intended to deter terrorist activity as opposed to simply punishing it. The pillars of this system included curfew; internment; exclusion orders; special powers of arrest; and, most significantly for this study, juryless trials in which British military personnel played key prosecutorial roles. Evaluations of the effectiveness of each approach are decidedly mixed.

Curfew

Curfews, while not common in consolidated democracies, are not without precedent, especially in periods of significant domestic threat or upheaval. In the United States, for example, curfews were implemented to quell violence during the 1992 L.A. riots and to restore order to hurricane-ravaged New Orleans in 2005. In the United Kingdom, curfews were imposed by the British authorities in Northern Ireland whenever violence escalated. In July of 1970 the British Army imposed a weekend-long curfew on

residents of the IRA-controlled Lower Falls district of Belfast, known as the Falls Curfew.¹⁹⁹

The Falls Curfew is notable for its representation of an unsanctioned extension of executive power which allowed the British Army to act outside of parliamentary-approved parameters for military activity in Northern Ireland. The curfew was enforced under the guise of executive—and by extension military—counterterrorism authorities and involved only limited consultation with Parliament. According to Colm Campbell and Ita Connolly, “[w]hat made the event of particular legal significance was that this resurrection of non-statutory military powers ran directly counter to the generalized assumption that the development of democratic and constitutional norms in the twentieth century had made such powers obsolete.”²⁰⁰ The Falls Curfew is widely assessed to have been counterproductive: “Along with the introduction of internment without trial (1971) and the Bloody Sunday killings (1972), [the Falls Curfew] played a major role in reversing the previously good relations between the Army and Northern Ireland nationalists.”²⁰¹

Internment

The Detention of Terrorists Order (1972) permitted the British military and other civilian and police authorities to detain without trial individuals believed to be a danger to national security.²⁰² The Order stipulated that anyone “suspected of having been concerned in the commission or attempted commission of any act of terrorism or in the

199 “Immediately prior to and during the ‘Falls Curfew’, the Army killed four people, widely believed to be innocent civilians, in the affected area, fired 1,500 live rounds and large numbers of CS gas cartridges, conducted mass house searches, and made 337 arrests.” Campbell and Connolly (2003), p. 343.

200 Ibid.

201 Ibid.

202 Internment was initially used as a counterterrorism policy in the 1956-62 British campaign against the IRA, with some success. See Tuck (2007), p. 175.

direction, organization or training of persons for the purpose of terrorism”²⁰³ could be detained for twenty-eight days, at which point the detainee would either be released or referred to a hearing before a commissioner. These hearings, according to Jeremie Wattellier, denied defendants traditional common law rights by allowing the detainee to be excluded from the proceeding if the commissioner assessed there to be a risk to national security and by permitting the hearing to be based solely on hearsay.²⁰⁴ This executive policy of internment, carried out almost wholly outside the civil judicial system, stayed in effect until 1980 despite widespread condemnation and the policy’s ineffectiveness in preventing violence.²⁰⁵

Exclusion Orders

The use of exclusion orders, which prevent a given individual from entering or remaining in a country, is fairly common in consolidated democracies. Such orders typically are punitive measures implemented against non-citizens who have been convicted of criminal activity. In contrast, in the UK exclusion orders relating to Northern Irish terrorist activity were rarely employed as a punitive tactic but instead were intended to function as a preventive counterterrorism tool. Exclusion orders were characterized as another example of the extension of executive authority but, unlike other primary counterterrorism practices, involved review by the British legal system. However, the courts only heard cases in order to ensure that exclusion proceedings adhered to the letter of the law as opposed to passing judgment on the legality of the

²⁰³ Wattellier, Jeremie. Winter 2004. “Comparative Legal Responses to Terrorism: Lessons from Europe.” *Hastings International and Comparative Law Review*. 27, pp. 401-2.

²⁰⁴ Ibid.

²⁰⁵ “Internment, a purely executive procedure, had been a disaster: on August 9, 1971, Operation Demetrius resulted in the imprisonment, without charge, of hundreds of Catholics in Northern Ireland—many of whom had no involvement with paramilitary organizations. Violence in the province exploded. In the four months preceding internment, eight people died from troubles-related violence. In the subsequent four months, 114 individuals were killed. From seventy-eight explosions in July 1971, the number jumped in August to 131, followed in September by 196.” Donohue, Laura (March 2007) “Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law” *Stanford Law Review* 59, p. 1335.

exclusion law itself. In the case of exclusion orders, Wattellier assesses that “by failing to limit the executive’s procedure-stripping [powers], British courts have proven reluctant to infringe upon the executive’s security interests.”²⁰⁶

Special Powers of Arrest

The special arrest powers employed by British authorities in the 1970s and 1980s are akin to—though not as severe as—those used by Israeli authorities to arrest individuals they assess are linked to terrorism in some way. These special powers were included in most pieces of legislation passed by the British Parliament over the last century, but were expanded and formalized with the Northern Ireland Act (1978), which endowed constables in Northern Ireland with the power to arrest, without a warrant, anyone suspected of terrorist activity. With recent legislation, such as the Prevention of Terrorism Act (1984), the powers of arrest permitted under the Northern Ireland Act were expanded to all of the United Kingdom.²⁰⁷ These two Acts also included allowances for mass arrests and expanded powers of interrogation, and were reflective of the UK’s growing emphasis on intelligence-based preventive counterterrorism approaches.

Juryless Trials

Trying suspected terrorists in courts without a jury is one of the longest-standing counterterrorism tools employed by the British government. Juryless trials were common in the internecine Irish fighting of the 1800s, essentially *ad hoc* tools of small militias, local police forces, and prominent families engaging in “vigilante justice.” As the British government presence in Northern Ireland gained permanence in the early twentieth century, juryless trials were formalized as a key aspect of British policy toward Northern Ireland. British authorities’ preference for juryless trials ebbed and flowed according to

²⁰⁶ Wattellier (2004), p. 402.

²⁰⁷ *Ibid.*, pp. 402-3.

changes in the security levels of British interests in Ireland. As localized violence in the province decreased during and immediately following World War II, such courts were largely abandoned in any official capacity; as violence within Northern Ireland and England increased exponentially throughout the late 1950s and into the 1960s, juryless trials became preferred policy once again, though this time they included a substantial role for British military personnel.

The Criminal Justice Administration (Ireland) Bill (1920) served as the legal precedent on which future laws ordering the use of juryless trials were based. The Bill enabled Westminster to use local authorities loyal to the British crown as its justice representatives, sanctioning a special court with three justices, all appointed by the Lord-Lieutenant, who had the power to refer cases to the court for charges relating to treason, murder, and explosives.²⁰⁸ This arrangement was further institutionalized with the Northern Parliament's passage of the Criminal Procedure Act (Northern Ireland) (1922), "which allowed for the removal of juries and the creation of special courts for trials involving serious crime."²⁰⁹ Significantly, the guidelines under which cases would be referred to these courts were left intentionally vague to allow greater on-the-ground discretion for Northern Irish authorities loyal to Westminster.

The apex of British military involvement in counterterrorism-related court activity occurred with passage of the Northern Ireland (Emergency Provisions) Act (1973), which removed the right for trial by jury specifically for offenses that were linked to terrorism. With the establishment of the "Diplock courts," the Act ushered in one of the most controversial aspects of British counterterrorism policy to date. The Diplock courts were specifically designed to try terrorist offenses, and it was hoped the new court system

²⁰⁸ Donohue (2001), p. 14.

²⁰⁹ Ibid.

would “ensure a high number of convictions and...de-politicize the crimes in Northern Ireland. In order to bypass the limitations of the traditional common-law rules, Diplock courts [did] away with the jury and ha[d] less stringent rules of evidence and proof.”²¹⁰ The Diplock courts were created to alleviate what was perceived to be the most significant problem with trying suspected terrorists in Northern Ireland – the high personal risk to jurors. Many jurors evaded court appearances, and for the jurors that did appear it was widely assumed that their testimony was inaccurate,²¹¹ altered to reduce the threat they would face once the trial concluded.

Laura Donohue assesses that the Diplock courts were effective on some counts, but wholly lacking on others:

[The courts] neutralized the risk posed to jurors, and they provided a clean start while eliminating jurors’ biases from the equation. The system...proved flexible enough to alter over time to address deficiencies, and it may well have saved valuable resources when the state needed funds for other important security needs. But the Diplock courts also carried important disadvantages: they clashed with Britain’s traditional embrace of trial by jury, and they eliminated one of the only ways the minority Catholic community could participate in the administration of justice.²¹²

In spite of widespread domestic and international condemnation, British authorities hailed the Diplock courts as a successful preventive counterterrorism tool. The overall drop in violence that occurred during most of the period in which the special courts were employed²¹³ added credence to Westminster’s claims that such a system was necessary.

²¹⁰ Wattellier (2004), p. 403.

²¹¹ According to Jeremie Wattellier, trials of suspected terrorists in Northern Ireland had several problems surrounding witness reliability: “In order to gather evidence, immunity and other privileges are offered to accomplices - in return for cooperation with the government on terrorist matters. One problem with accomplice evidence is its reliability. Because the accomplice is receiving advantages in exchange for information, there is an incentive to make up information.” Ibid.

²¹² Donohue (2007), pp. 1334-5.

²¹³ “Indeed, after the courts’ introduction, violence fell. And as intended, convictions increased: in the first five years, murder convictions rose from nine to seventy-seven; wounding convictions from 142 to 499; and robbery convictions from 791 to 1836.” Carlton, Charles. 1981. “Judging Without Consensus: The Diplock Courts in Northern Ireland.” *Law & Policy Quarterly*. 3, pp. 225, 229, as cited in Donohue (2007), p. 1336.

In addition, the British government's move toward reliance on legal measures to counter terrorism was viewed positively by even the most strident critics of the Diplock courts, as it represented a shift away from the extension of executive authority via the military in Northern Ireland toward a judicial tactic that could be more easily monitored and reviewed: "As a structural matter, the shift from internment to the Diplock court system meant that individuals would not lose their freedom at the say-so of a politician, but as a result of a deliberative, judicial process."²¹⁴

The Diplock court system was disbanded in 1999, more than thirty years after its inception. Despite initial billing as a "temporary" measure, the courts existed on the books longer than any other UK counterterrorism statute. Significantly, juryless courts in Northern Ireland remain a policy option for the British government, written into a temporary subsection of permanent legislation in 2000.²¹⁵

British Counterterrorism Legislation in the Twenty-First Century: Islamic Extremists as the New Target

Following years of combating domestic terrorism through primarily military means, the United Kingdom, like most consolidated democracies, eventually began a legal process that institutionalized the criminalization of terrorism. Criminal statutes targeting material support for terrorism or incitement of violence may be one of the more effective preventative counterterrorism tools, given the difficulty of legally proving the intent of suspected terrorists who have yet to commit a terrorist act. The UK's shift toward criminalization of terrorist activity began in the late 1970s. This process "formally subordinated the military to the police effort, but it is arguable that despite

²¹⁴ Donohue (2007), pp. 1335-6.

²¹⁵ *Ibid.*, p. 1328.

some important judicial rulings, the issue of the legal limits of permissible military action remained unresolved throughout the conflict.²¹⁶

The trend toward the criminalization of terrorism law has become even more pronounced as the UK attempts to deal with threats from UK-based individuals associated with Islamic extremism. The most ubiquitous and oft-used legal tool has been the Terrorism Act (TA) of 2000, which was “the first Act with which a British government enshrined anti-terror legislation in permanent form...for previous Acts were either temporary measures or applied only to the territory of Northern Ireland.”²¹⁷ The TA for the first time established a uniform definition of terrorism, one that did not specifically refer to Northern Ireland but encompassed any form of serious violence committed (or planned) with religious or ideological purposes.²¹⁸ As of 2006, the TA—as has been the case with post 9/11-counterterrorism legislation in the United States—has had more symbolic value than success in producing convictions.²¹⁹

Following the 9/11 attacks in the US, the UK passed two pieces of legislation that addressed what were perceived to be gaps in the government’s domestic counterterrorism capabilities. The Anti-Terrorism, Crime and Security Act (ATCSA) of 2001 greatly expanded the British government’s legal ability to arrest and detain individuals suspected

216 Campbell and Connolly (2003), p. 370. Under the policy known as “Ulsterization,” “the Police were to be given primacy in the fight against the IRA, and the campaign was to be conducted as far as possible in ways designed to treat militant Republicanism as a criminal, rather than a military, activity....Reducing the profile of the Army helped to ‘localize’ the conflict, reducing the most obvious elements of external intervention, and also lowering the campaign’s profile on mainland Britain.” Tuck (2007), pp. 168-9.

217 Haubrich, Dirk. December 2006. “Ant-terrorism Laws and Slippery Slopes: A Reply to Waddington.” *Policing & Society*. 16:4, p. 409.

218 “In terms of prosecution, the most significant parts of the Act are sections 11 (Membership of a proscribed organisation), 57 (Possession of articles for terrorist purposes), 58 (Collection of information for terrorist purposes) and 44 (Stop and search powers).” Ibid.

219 According to British Home Office records, between September 2001 and September 2005 “895 individuals were arrested under the Act. Of these, only 23 people were eventually convicted, while 496 (i.e., 50 per cent) had to be released without charge. In most of these cases, the arrests and charges attract a great fanfare by the media, the police and politicians, only for the cases to be quietly dropped days, weeks or months later.” Ibid., pp. 409-10.

of links to terrorist activity. As part of the ATCSA, Westminster declared a state of “public emergency” within the UK so that the government could legally derogate from European Convention on Human Rights obligations and detain without trial non-citizen suspected terrorists.²²⁰

As the threat from domestic terrorism became more salient, the British government continued to extend its authorities to strengthen its ability to monitor and disrupt terrorists. In March 2005, Parliament passed the Prevention of Terrorism Act (PTA) which allowed British authorities to restrict terrorism suspects’ access to cell phones and the Internet and to issue warrants for house arrest of suspect individuals, a level and pervasiveness of executive power that has been characterized as unprecedented in peacetime Britain.²²¹ The PTA, like the ATCSA, has not resulted in many convictions relative to the number of arrests made in its name. In all three Acts, the “crimes most likely to be committed are already an offence under existing legislation (on terrorism or otherwise), provided they are forcefully applied.”²²²

Discussion: The Special Powers Act and Historical Institutionalism

According to Dirk Haubrich, the only lasting impact of the post-9/11 flurry of counterterrorism legislation—specifically the ATCSA—is that British law enforcement agencies are “now using all the powers that previous legislation had already granted

220 “Dozens of foreign nationals were detained and held in Belmarsh prison under the Act in the months after 9/11 - 13 of them well into the year 2005. Unlike people detained under general criminal law, these detainees were never charged with an offence, did not have the right to know the evidence against them, did not have the right to deny or explain that evidence, and did not have the right to a public jury trial.” Ibid., p. 408. In December 2004, British legal authorities ruled that this type of detention of foreign nationals violated human rights law because the ATCSA applied only to foreigners and not British citizens. 221 Ibid., p. 408. Haubrich assesses that in the UK terrorism “counter-measures are no longer deployed on the basis of actual events or on intelligence of planned events, but on the basis of probabilities and risk assessments, and suspects are identified, not on the basis of an actual crime, but because they correspond to a certain surveillance profile, move in certain circles or hold certain (anti-government) opinions.” Ibid., p. 410-1.

222 Ibid., p. 413.

them,”²²³ many of which can be traced back to the 1922 Special Powers Act, and its two precursors, the 1920 Restoration of Order in Ireland Act (ROIA) and the 1914-15 Defence of the Realm Acts (DORA). The DORA granted the

military authority numerous emergency powers, such as occupation of land and buildings, the confiscation of property, control of petrol, control of lands, control of movements of the civil population, the power to make bylaws, powers of search, interrogation and arrest. They also provided for the trial of offences via courts-martial or a court of summary jurisdiction.²²⁴

The ensuing ROIA drew its powers from the precedents of the DORA, and in 1922 these powers and others were granted to the civil authority in the Special Powers Act (SPA). The Unionist government in Northern Ireland also adopted many of the SPA’s powers as its own, continually renewing the legislation at the behest of Westminster.²²⁵

Though the SPA was intended to be a temporary measure, in various forms the Act was continually updated and passed by Parliament for many decades. The Emergency Provisions Act (1973) (EPA) renewed the extensive powers of arrest, detention and internment established by the SPA, thereby reinstating powers that previously were granted to the military authority in Ireland.²²⁶ The EPA represented the culmination of Westminster’s push for a resurgent British military role in Northern Ireland, deemed to be a necessary step as violence against pro-British interests in the province escalated rapidly. In the trials of suspected terrorists that were held under EPA

²²³ Ibid., p. 409.

²²⁴ Donohue (2001), p. 17.

²²⁵ “The Unionist government renewed the 1922 SPA annually from 1923 through 1927 and extended it in 1928 through the Civil Authorities (Special Powers) Act (Northern Ireland). In 1933 the government noted the efficacy of the legislation and made it permanent through the 1933 Civil Authorities (Special Powers) Act (Northern Ireland). On one further occasion, in 1943, the Executive further amended the SPA.” Ibid., p. 16.

²²⁶ Ibid., p. 131. In the EPA the “British government directly incorporated measures from the 1922-43 SPAs relating to detention, internment, the closing of licensed premises, the blocking up of roads, the prohibition of vehicle usage, powers of entry, search and seizure, possession of property and land, compensation, the prohibition of meetings, assemblies and processions, proscription and the collection of information on security forces.” Ibid., p. 130.

authorities, “[e]vidence for the Crown derived almost exclusively from the testimony of members of the Army and the RUC Special Branch....[Much of the evidence that was given] depended on information gained from paid informers who received sums of money and favours from the security forces.”²²⁷

Ensuing counterterrorism legislation followed much the same pattern. Soon after enacting the EPA, Parliament passed the Prevention of Terrorism Act (1974), one section of which was directly modeled on an EPA stipulation that allowed for the proscription of organizations linked with Northern Irish terrorism.²²⁸ Finally, the Northern Ireland (Emergency Provisions) Act (1998) “retained the schedule of terrorist offences, the mode of trial for such offences, the Diplock courts, additional powers of arrest, search and seizure for the police and army, specific offences against public security and public order...and the appointment of the independent assessor of military complaints procedures,”²²⁹ most of which were powers previously granted to the military authorities by the SPA.

The 1922 SPA established a legislative path from which neither Westminster nor the loyalist lawmakers have diverged. Given the institutional investment made by both parties in the state powers associated with the SPA framework, such adherence is not surprising; establishing a new framework would present significant costs for both governments. Indeed, the counterterrorism policies derived from the SPA have become only more entrenched in the past few decades. The Unionist government in Northern Ireland built on the powers bestowed on it by the SPA by passing multiple laws—the 1969 Firearms Act (Northern Ireland), the 1969 Protection of Persons and Property Act

²²⁷ Ibid., p. 165.

²²⁸ Ibid., pp. 218-9. According to Laura Donohue, “the resultant 1973 Northern Ireland (Emergency Provisions) Act (EPA) did not so much revoke the previous statutes as simply rename and expand them.” Ibid., p. xxi.

²²⁹ Ibid., pp. 277-8.

(Northern Ireland), the 1970 Explosives Act (Northern Ireland), the 1970 Criminal Justice (Temporary Provisions) Act (Northern Ireland), and the 1970 Prevention of Incitement to Hatred Act (Northern Ireland)²³⁰—that identified specific terrorism-related offenses, vice general terrorist intent, as illegal. The same type of provisions, cast as emergency measures, were simultaneously passed by the British Parliament as the threat from Northern Irish political violence began to spread into mainland Britain, measures which clearly reflected the powers of the SPA.²³¹

The 1998 Belfast (Good Friday) Agreement committed both the British and Irish governments to limiting the roles of security forces and the use of emergency legislation. While much progress on the Northern Ireland peace process has been made since the Agreement was forged, neither side has fully discounted the prospect of utilizing emergency legislation in the future. The British government is still employing emergency legislation as a counterterrorism tool, though now the statutes are directed against homegrown Islamic extremists as opposed to Northern Irish-linked violence.²³² For Laura Donohue, the lingering question is why emergency law—always framed as temporary in duration—has become a mainstay of British counterterrorism law, despite widespread criticism of its use and doubts about its efficacy:

These wide-sweeping measures alienated a significant portion of the population, exacerbated the conflict, contributed to the suspension of the Northern Ireland Parliament, allowed for significant miscarriages of justice and a weakening of British civil liberties and resulted in drawing international attention to and condemnation of British domestic legislation...[However], the nature of emergency legislation—its formal structure, duplication of existing criminal offences, symbolic importance and perceived effectiveness—certainly contributed

²³⁰ Ibid., p. 113.

²³¹ Ibid., p. xxii.

²³² For example, “[f]rom its initial application to Northern Irish violence, by 1996 some 50 per cent of the cases prosecuted under the PTA related to international terrorism. Having been faced for years with Northern Irish political violence, the British government adapted its powers under the PTA to apply to violence instigated by non-domestic terrorist organizations.” Ibid., p. xxiii.

to the retention of the Special Powers...[and] Britain's previous use of emergency law in Ireland set a precedent for exercising the powers.²³³

Emergency legislation embedded in the Special Powers Act—like the *Posse Comitatus Act* in the United States—provided the institutional framework within which the UK's future counterterrorism laws regarding domestic use of the military were made in the past and will continue to be made for the foreseeable future.

COUNTERTERRORISM IN SPAIN: THE NATIONALIST CHALLENGE FROM ETA

Spain—unlike the other three cases under consideration—over the past 150 years has experienced multiple military interventions. There are two general theories used to explain this pattern of frequent military intervention:

The first one states that *military praetorianism*—understood as the inclination of the military to intervene in politics—was fueled by the instability of the [Spanish] political system, which failed in keeping the military away from politics. The second one states that the rebellious nature of the Spanish Army and its natural propensity to intervene prevented the political system from evolving gradually toward a democracy.²³⁴

Also unlike the other three cases, Spain was governed during a significant portion of this period as an authoritarian state by a military dictator, General Francisco Franco. Since the early 1800s, Spanish military leaders commonly issued statements known as *pronunciamientos*, essentially policy directives that were nearly always implemented by the Spanish state. *Pronunciamientos* have been the primary impetus for political change in Spain over the past 200 years.²³⁵

²³³ *Ibid.*, pp. 307-8.

²³⁴ For application of the first theory, see Serrano, Carlos Seco (2002) *La Espana de Alfonso XIII* Madrid: Espasa Calpe; for the second theory, see Ballbe, M (1985) *Orden Publico y Militarismo en la Espana Constitucionat (1812-1983)* Madrid: Alianza Editorial; Lleixa, Joaquim (1986) *Cien Anos de Militarismo en Espana* Barcelona: Anagrama; and Nunez, Florencio (2000) *R.Las Espanas de 1898* San Juan: Lea, as discussed in La Porte, Pablo (Winter 2004) "Civil-Military Relations in the Spanish Protectorate in Morocco: The Road to the Spanish Civil War, 1912-1936" *Armed Forces & Society* 30:2, 203-26, p. 205.

²³⁵ La Porte (2004), p. 206.

Following Franco's death in 1975, Spain underwent a political transition that culminated in passage of a democratic constitution in 1978. The outcome of years of negotiations between the most powerful political parties and interest groups in Spain, the Constitution reflected varied policy preferences of multiple political actors. The military was forced to engage in the political process to protect its stake in the system and acceded to the demands of the opposition for the sake of national stability. According to Felipe Aguero, one of the foremost authorities on Spanish civil-military relations, of most concern to the military was the new Ministry of Defense which functioned in the context of a cabinet that was now accountable to an elected parliament and "augured changes that might eventually affect the civil-military balance."²³⁶

The carefully negotiated calm was shattered in 1981 with the announcement of Prime Minister Adolfo Suarez's plan to provide limited autonomy to Catalonia and the Basque region, sparking a military revolt that resulted in an attempted coup. Spanish King Juan Carlos in his role as commander-in-chief of the military intervened and persuaded the military to yield. Ensuing parliamentary elections brought in a Socialist government "intent on promoting reform and modernization in the military"²³⁷ and strong parliamentary support for the reform plan allowed the Socialists "to pursue their program and ultimately assert civilian supremacy."²³⁸ According to Aguero, under Franco "military ministers were at the top of the command structure in the defense establishment...[but by] 1987 the role of civilians in military and defense affairs had been vastly expanded and had, in fact, become dominant."²³⁹

²³⁶ Aguero, Felipe. 1995. Soldiers, Civilians and Democracy: Post-Franco Spain in Comparative Perspective. Baltimore: The Johns Hopkins University Press, p. 148.

²³⁷ Aguero (1995) as cited in Coughlan, Elizabeth. Fall 1996. "Review of Solders, Civilians, and Democracy: Post-Franco Spain in Comparative Perspective." *Armed Forces & Society*. 23:1, pp. 126-8, p. 127.

²³⁸ Coughlan (1996), p. 127.

²³⁹ Aguero (1995), pp. 200-1.

One of the most contentious areas of military reform—which also has significant implications for Spain’s choice of counterterrorism regime—was the military’s extensive role in domestic intelligence gathering under Franco. The numerous changes in institutional control over the state’s intelligence apparatus epitomized the larger battle waged by civilian authorities to rein in the military. Under Franco, Spain had at least ten different intelligence services, most of which either were run by or had direct connections to the military. One of the first reform efforts on behalf of the post-Franco government was to centralize control over these agencies. Prime Minister Suarez created a central intelligence service, the Centro Superior de Informacion de la Defensa (CESID) in 1977, against the preferences of the military. Over the next four years, CESID essentially became a military agency once again, and after the military’s 1981 coup attempt the reform of CESID became a top priority for new Prime Minister Leopoldo Calvo and his Cabinet. Ministerial Order 135/5, signed in September 1982, “curtailed military influence over the CESID by decreeing that CESID's main duty was to supply the Prime Minister's information needs.”²⁴⁰ Parliament also used its jurisdictional powers to erode the military’s domestic intelligence gathering authorities.

Within the current Spanish political system, the “constituted civil hierarchy has been institutionalised, military autonomy weakened, and civilian control over the military has emerged.”²⁴¹ The Spanish military is still an influential interest group in Spain, but is on similar footing with militaries in most consolidated democracies. Therefore, according to Jorge Zaverucha, “from the military prerogative perspective we may conclude that Spain completed its transition to a democratic regime because it repealed

²⁴⁰ Zaverucha, Jorge. May 1993. “The Degree of Military Political Autonomy during the Spanish, Argentine and Brazilian Transitions.” *Journal of Latin American Studies*. 25:2, 283-99, pp. 286-7. “Under the Felipe Gonzalez administration, the drive to separate CESID from autonomous military power continued. Royal Decree 135/1984 established the CESID as organically dependent upon the Defence Minister, but functionally subordinated to the Prime Minister.” *Ibid.*

²⁴¹ *Ibid.*, pp. 283-4

the military's autonomous behaviour, and the military reliably obeys civilian commands.”²⁴²

Spain, like Israel and the United Kingdom, has faced a long-term domestic terrorist threat from a group with separatist and nationalist goals. However, Spain is more like Israel in that it is unlikely that the domestic political environment will recognize those nationalist aims in the near future, meaning that the threat will continue. In this section, I will discuss the evolution of the threat posed by ETA and its impact on the development of Spain's domestic counterterrorism infrastructure. Then I will explain how the 1978 Constitution (and ensuing Organic Laws) and the 2002 Law on Parties served as critical junctures in the Spanish state's decision not to employ the military in any significant manner in domestic counterterrorism operations.

Euskadi Ta Askatasuna (ETA)

For the majority of the post-Franco era, Spain's primary domestic terrorist threat has derived from *Euskadi Ta Askatasuna* (ETA). ETA emerged in 1958 as a Basque nationalist political party. ETA employed bombings, assassinations, and kidnappings to pressure the Spanish state into allowing the establishment of an independent Basque state composed of four northern Spanish provinces that had experienced severe repression under Franco.²⁴³ Since that time, ETA has staged multiple terrorist attacks against Spanish interests and is responsible for more than 800 deaths.²⁴⁴ Initially, ETA's target set included military targets associated with Franco's regime but soon grew to include

²⁴² Ibid., p. 299.

²⁴³ “Franco's attempt to homogenize Spain included a ban on the use of...Euskera—[the traditional Basque language]—in schools, government offices, and other public places. It assumed such intrusive forms as prohibiting parents the freedom to give their children...Basque names [and] displaying nationalist symbols such as flags...” Encarnacion, Omar. Winter 2004. “Democracy and Federalism in Spain.” *Mediterranean Quarterly*. 15:1, 58-74, p. 64.

²⁴⁴ Celso, Anthony. 2006. “Spain's Dual Security Dilemma: Strategic Challenges of Basque and Islamist Terror during the Aznar and Zapatero Eras.” *Mediterranean Quarterly*. 17:4, 121-41, p. 121.

politicians and civilians, especially those with links to the *Partido Popular* (PP) political party. ETA drew upon Basque nationalist sympathies and the pervasive hatred of Franco's military and police forces to justify its violent activities to the Spanish public, but once Spain's democratization process began in full and the group's target set expanded to include civilians, public support rapidly declined.

Differences over the future course of the organization surfaced in the mid-1970s, resulting in the group's split. For 'ETA political-military,' "armed struggle and political participation in the new democratic system would complement each other [while for 'ETA military' the prevailing paradigm was that] the organization should invest all its resources in the armed struggle, subordinating its political wing..."²⁴⁵ By the early 1980s, the political-military wing of ETA was fully subsumed into the larger democratic process, while the hard-line faction remained independent and active.

While not effectively forcing the Spanish government to grant autonomy to the Basque provinces, ETA's terrorist tactics have succeeded in bringing the government to the negotiating table. By the late 1980s, the Spanish state was fully involved in peace negotiations with ETA. ETA did not achieve its goals in that round of talks, however, and aimed to gain greater ground in future negotiations by killing larger numbers of civilians. The Spanish and French authorities disrupted ETA's strategy by arresting the group's leadership in France in early 1992, seriously degrading the group's personnel infrastructure and operational capabilities.²⁴⁶ Since that 1992 disruption the Spanish government has had a series of successes against ETA, though the group maintains its capability to stage lethal terrorist attacks. ETA has not disarmed, and has repeatedly

²⁴⁵ Sanchez-Cuenca, Ignacio. June 2004. "Terrorism as War of Attrition: ETA and the IRA." *Working Paper*, Madrid: Juan March Institute. p. 11.

²⁴⁶ Sanchez-Cuenca, Ignacio. 2001. *ETA Contra el Estado. Las Estrategias del Terrorismo*. Barcelona: Tusquets, as cited in Robles, Luis de la Calle. June 2007. "Fighting for Local Control: Street Violence in the Basque Country." 51, 431-55, p. 439.

broken self-imposed ceasefires. Politically, the Spanish government has worked to restrict the participation of ETA-linked political parties, and the Spanish judiciary has banned many of the *Batasuna* party's activities, largely silencing ETA's primary political voice.²⁴⁷

The "decline of ETA" has been widely discussed since the late 1990s, but the group's December 2006 bombing of the Madrid airport that killed two innocent civilians and subsequent non-lethal attacks claimed by the group reinforced the Spanish government's desire to maintain its counterterrorism focus on ETA as well as al-Qa'ida-linked individuals and groups. Further,

[t]he general profile of ETA terrorists (young, ideological, and nihilistic) militate against a peaceful outcome. ETA has experienced lulls in violent activity only to resurface with bloody attacks (dozens were killed and hundreds were wounded in the early 1990s) and the organization still has the capacity to launch attacks against the government with impunity.²⁴⁸

The group's demonstrated terrorist capability, the economic strength of the Basque region, and the staunch opposition of the PP to Basque independence²⁴⁹ make it unlikely that the Spanish government will allow the Basque region to become autonomous in the near future, maintaining ETA's justification for its use of terrorist tactics.

²⁴⁷ Paddy Woodworth acknowledges that "[t]hough some *Batasuna* offices were closed, new ones opened, and the party, which remains illegal today, still gives public press conferences. Some of its attempts to put forward candidates under alternative labels were ruled illegal by Spanish judges but, in 2004, a surrogate group, the Communist Party of the Basque Lands, actually improved *Batasuna*'s representation in the Basque parliament from seven to nine seats (out of 75). Yet charges of complicity with terrorism, carrying heavy sentences, were pursued against several levels of *Batasuna* leadership...." Woodworth, Paddy. Spring 2007. "The Spanish-Basque Peace Process: How to Get Things Wrong." *World Policy Journal*. 24:1, 65-73, p. 66.

²⁴⁸ Celso (2006), pp. 140-1.

²⁴⁹ According to Paddy Woodworth, the Basque territory "is one of Spain's most powerful economic dynamos. And many Spaniards—including a substantial minority of Basques—regard the region as an integral part of Spain's ancient heartland. Thus, the big Spanish conservative party, the Partido Popular (PP), currently in opposition, is fiercely opposed to any peace process with ETA. Even Spanish citizens who do not share the PP's strident nationalism fear that, if ETA's claim to self-determination were conceded, fissiparous tendencies could balkanize Spain." Woodworth (2007), p. 66.

Spain's Counterterrorism Infrastructure

Spain, like the United Kingdom and Israel, faces both internal and external terrorist threats. In the case of Spain, the two primary entities from which the threat emanates diverge widely—both ETA and al-Qa'ida-linked or inspired terrorists have executed lethal attacks on Spanish soil.²⁵⁰ Throughout the Spanish state's long battle with ETA, the government has employed a multitude of counterterrorism strategies, most based on the criminal justice model. Spain's experience with ETA, therefore, has proven pivotal in the development of its current counterterrorism regime, to include counterterrorism investigations into and prosecutions of al-Qa'ida-linked terrorism suspects.²⁵¹ “[T]errorist crimes are now included in the regular Criminal Code and special law enforcement and judicial powers to combat terrorism are incorporated into the Criminal Code of Procedure.”²⁵²

Organizationally, counterterrorism resources are concentrated in three state security agencies, the *Policia Nacional* (National Police), the gendarmerie force *Guardia Civil*, and the *Centro Nacional de Inteligencia*, known as the CNI (Center for National Intelligence). In addition to these primary agencies, counterterrorism authorities have been bestowed upon smaller agencies within the Basque territory. These agencies have long fought ETA-related terrorist activity, but all broadened their jurisdiction to examine Islamic extremist activities following the September 11, 2001, attacks in the U.S., and the

²⁵⁰ Though they do not pose the same degree of threat as ETA or al-Qa'ida, leftist terrorist groups such as the FRAP (Revolutionary, Antifascist and Patriotic Front) and the GRAPO (First of October Antifascist Resistance Group) as well as nationalist groups like Terra Lliure have also been targeted by Spanish security agencies. Jordan, Javier, and Nicola Horsburgh. July 2006. “Spain and Islamist Terrorism: Analysis of the Threat and Response 1995-2005.” *Mediterranean Politics*. 11:2, pp. 209-29, p. 209.

²⁵¹ “Spain's strict antiterrorism measures, shaped by years of grappling with ETA violence, have been applied to all those arrested for alleged links to al-Qaeda as well as for alleged participation in the March 11 bombings.” Human Rights Watch. January 2005. “Setting an Example? Counter-Terrorism Measures in Spain.” *Human Rights Watch Report*. 17:1(D), p. 1.

²⁵² *Ibid.*, p. 14.

counterterrorism priorities further shifted toward al-Qa'ida-associated threats immediately following the 2004 Madrid bombings.²⁵³

Judicially, terrorist-crimes occurring since 1978 have been tried at the *Audiencia Nacional*, or National High Court. Located in Madrid, the High Court has jurisdiction over “crimes committed by persons belonging to armed groups or related to terrorist or rebel elements...and by those who in some way cooperate or collaborate in the acts of these groups or individuals.”²⁵⁴ No matter where the crime of terrorism occurs, the trial is held at the High Court. Significantly, crimes under the High Court’s jurisdiction are *not* subject to trial by jury.²⁵⁵ Spain’s current statutory authorities for handling terrorism suspects—which are relatively harsh by Western European standards—include the following:

Incommunicado Holding Period. Individuals suspected of terrorist activity are subject to what is known as an “incommunicado period,” in which five days may pass before the suspect is granted access to an attorney. This is a legal exception to the constitutional rule that states detainees must be either freed or presented to a judge within 72 hours of their arrest.

Preventive Detention. At the height of the Spanish government’s battle against ETA, Parliament passed Article 55.2 of the Constitution, which allowed lawmakers to suspend constitutional rights when terrorism is involved.²⁵⁶ The policy of “preventive detention”—“the imprisonment of people suspected of posing a threat to national security

253 “Between 9/11 and the Madrid attacks, over 70 suspects were arrested in Spain....These numbers increased as awareness of the danger grew, and also because Spain was committed to the US-led coalition in the ‘War on Terror.’ Most of the arrests, even after the Madrid attacks, were made by the Policia Nacional (around 95 per cent), with the Guardia Civil arresting the remainder.” Jordan and Horsburgh (2006), pp. 213-4.

254 *Organic Law 4/1988* of 25 May 1988, as cited in Human Rights Watch (2005), pp. 16-7.

255 As a legacy of the Spanish state’s history with handling ETA-related cases, penalties for terrorist activities always entail a prison sentence. Jordan and Horsburgh (2006), p. 222.

256 Wattellier (2004), pp. 399-400.

or public order where the goal is to avoid the alleged danger rather than the prosecution of any criminal act”²⁵⁷—has become, since the September 11th attacks, a key part of Spain’s counterterrorism strategy against Islamic extremists.²⁵⁸

Secreto de Sumario. Spanish legislation authorizes use of *secreto de sumario* in terrorism investigations, permitting state authorities to withhold information about evidence they will be using in court from defendants and their legal counsel. The Spanish government argues that this nondisclosure practice is necessary to protect state investigatory methods and the High Court has thus far upheld the government’s right to use the system.²⁵⁹ The government’s reliance on sealed records has thus far been most frequent in investigations into individuals suspected of connections to the Madrid bombings.

Inmate Dispersal. Since the late 1980s, the Spanish government has dispersed individuals convicted of ETA-related terrorist crimes across prisons throughout Spain. This policy has been widely condemned by human rights groups for separating inmates from their families, but the Spanish government has long argued that the policy is necessary “to avoid the concentration of large numbers of ETA members, to break the control of the organization over individual members, to prevent the planning and execution of new crimes by ETA members from within prison, and to protect victims from potential secondary victimization.”²⁶⁰ Though one high level Spanish jurist assesses

257 Human Rights Watch (2005), p. 54.

258 A defense attorney for several Spanish citizens being held for possible involvement in the September 11th attacks claimed that a two-year extension of preventive detention was “practically automatic” in terrorism cases in Spain. Human Rights Watch interview with an 11-S criminal defense lawyer, Madrid, 22 June 2004, as cited in Human Rights Watch (2005), p. 52.

259 Human Rights Watch Report (2005), pp. 45-6.

260 Notes verbales from *Permanent Mission of Spain to U.N., Appendix II (Observations on some of the Special Rapporteur’s recommendations), Recommendation 70*, as cited in Human Rights Watch (2005), pp. 62-3.

that Spain's dispersal policy "has no grounding in law and is applied arbitrarily,"²⁶¹ others have argued that the policy has been successful in weakening group cohesion.²⁶²

As discussed in Chapter 4, the 2004 Madrid bombings had a significant impact on Spain's counterterrorism infrastructure. In addition to the massive influx of resources into counterterrorism agencies, the Spanish government worked to ensure the infrastructure was conducive to interagency cooperation. Interestingly, outside of strengthening state controls on explosive materials little was done legislatively in the wake of the attacks. Precisely because Spain had such a lengthy experience in dealing with domestic terrorism the Spanish counterterrorism legal infrastructure was already "efficient and accepted by society."²⁶³

One considerable change has occurred, however, with regard to the evidentiary basis required to arrest an individual suspected of terrorist activity. Since the Madrid bombings, Spain has fallen into line with arrest policies similar to those used post-9/11 in the U.S. and the U.K. and today in Spain "more arrests are made based on indicators sufficient to confirm that the accused are jihadists (for example, possession of radical propaganda or attendance to meetings where jihadi documents are displayed)."²⁶⁴ As has also been seen in the American and British cases, this prevention-based policy has not resulted in a higher number of convictions and longer sentences as the courts have had little evidence on which to base decisions. According to Jordan and Horsburgh, Spain's current "strategy of punctual intervention has advantages in the short term in the prevention of attacks, but can present problems in terms of long-term anti-terrorist

²⁶¹ Human Rights Watch (2005), pp. 62-3.

²⁶² See Jordan and Horsburgh (2006).

²⁶³ Jordan and Horsburgh (2006), p. 217.

²⁶⁴ *Ibid.*, p. 224.

efficiency since a large proportion of those detained so far have been released shortly after their arrest (although many are released on probation).”²⁶⁵

Critical Junctures in Spanish Counterterrorism Legislation

1978 Constitution and the Ensuing Organic Laws

The 1978 Constitution was specifically designed to be a symbol of national reconciliation. According to Spanish scholar Victor Perez-Diaz, “for many years during and since the democratic transition the main business of politics has consisted in a series of pacts and understandings among competing forces. The Constitution itself was the result of such a pact between left and right, and other understandings were reached with the church and the army.”²⁶⁶ A series of laws²⁶⁷ negotiated between military officials and leftist parties in the 1970s following Franco’s death laid the framework of civilian control of the military that would be enshrined in the 1978 Constitution, resulting in an increasingly disempowered military elite.

One of the most contentious debates between civilian and military leaders during the transition was over the severing of Spanish police forces from military control. This system formed the cornerstone of Franco’s domestic counterinsurgent strategy and enabled him to rule with an iron fist. The 1978 Constitution, against the preferences of the military, legally separated the police from the armed forces. This legal separation carried little substance,²⁶⁸ and, while a symbolic victory for the democratic reformers, the

²⁶⁵ Ibid.

²⁶⁶ Perez-Diaz, Victor. June 1990. “The Emergence of Democratic Spain and the ‘Invention’ of a Democratic Tradition.” *Working Paper*. Madrid: Juan March Institute, pp. 19-20.

²⁶⁷ “As part of the left’s acceptance of a negotiated transition, the 1976 law of political reform eliminated a host of military prerogatives and a royal decree law in early 1977 prohibited the military from participating in political parties or trade unions.” Encarnacion, Omar. January 2005. “Do Political Pacts Freeze Democracy? Spanish and South American Lesson.” *West European Politics*. 28:1, 183-203, pp. 193-4.

²⁶⁸ Organizationally, the only significant change following passage of the Constitution was a change in the uniforms of the Armed Police, which had been the entity most directly involved in implementing Franco’s system of political repression, while the leadership remained the same. Zaverucha (1993)pp. 292-3.

most significant changes would come later: “The Constitution had set guidelines for the development of norms and institutions in specific areas, but their implementation remained pending. Such was the case with the judiciary and the court system, the system of autonomous communities, and the military, for which major definitions were left unresolved, to be developed later in an organic law.”²⁶⁹

Democratic reformers once again attempted to force civilian control of the military with Organic Law 6 in 1980, requiring that the Civil Guard would report to the Minister of Interior during peacetime and would only report to the Minister of Defense during times of war. “Unlike the Franco era, a Guard could now become a soldier or a policeman, but neither a soldier nor a policeman could become a Guard.”²⁷⁰ Organic Law 6 also established legislative control over administrative actions of the military, a condition that was further entrenched with passage of another Organic Law in 1984. According to the 1984 law, Parliament was given budgetary authority over defense expenditures, endowed with the power to declare war and make peace, and given the responsibility of making international military treaties.²⁷¹

Most pertinent to this examination of domestic uses of the military in the context of counterterrorism was the passage in 1981 of Organic Law 4, with which “Parliament made very clear that even in case of extreme necessity, only the government or Parliament had the right both to appoint and to dismiss the military authorities that would be needed to uphold order.”²⁷² Given the military’s consistent domestic deployment throughout Franco’s rule under the auspices of “maintaining order,” the constitutional requirement that only Parliament could order domestic deployment of military forces proved to be a turning point in how the Spanish government faced the terrorist threat

²⁶⁹ Agüero (1995), p. 137.

²⁷⁰ Zaverucha (1993), pp. 292-3.

²⁷¹ *Ibid.*, pp. 290-1.

²⁷² *Ibid.*

from ETA and, later, Islamic extremists. Organic Law 4 “had the purpose of creating enough constitutional constraints to deter the military, given unusual conditions, from breaking previous constitutional commitments.”²⁷³

Interestingly, it is due to the 1978 Constitution that Spain does not have a separate body of law to address terrorist offenses. Because Spain was already dealing with domestic terrorism at the time the Constitution was ratified, counterterrorism and counterinsurgency statutes were included in the Constitution itself, and were defined as criminal (vice military) offenses. Spain’s Code of Criminal Procedure “establishes the powers of law enforcement agencies and judicial authorities in investigating crimes of terrorism...,”²⁷⁴ powers directly derived from Article 55.2 of the Constitution.

The Law on Parties (2002)

Article 6 of the 1978 Constitution decreed that a political party must have a democratic structure and adhere to the democratic rules of the Spanish state to be considered legal. For the most part, Article 6 has not been enforced, evident in the significant political role played by *Herri Batasuna*, the political party most closely aligned with ETA. Largely because *Batasuna* served as an important intermediary between the Spanish government and ETA, legal action was never taken in accordance with the constitutional stipulation that all parties must accept the legitimacy of the Spanish government. ETA, for its part, viewed itself as the only actor able to force Spanish authorities and Basque separatist leaders politicians into negotiations.²⁷⁵

²⁷³ Ibid.

²⁷⁴ Human Rights Watch (2005), p. 18.

²⁷⁵ ETA maintained what proved to be a highly successful strategy of targeting various political actors in the months leading up to the ceasefire with the intention of “terroriz[ing] into silence representatives of the political opposition.” MacDonald, Ross B., and Monica C. Bernardo. Fall/Winter 2006. “The Politics of Victimhood: Historical Memory and Peace in Spain and the Basque Region.” *Journal of International Affairs*. 60:1, 173-196, pp. 185-6.

The Spanish government in an effort to erode public support for ETA's political goals implemented a policy of limiting the political participation of actors that advocated similar aims. During the escalation of ETA-sponsored violence in the late 1990s, for example, at the turn of the century, the Spanish government enacted a new law that penalized those who verbally expressed support for terrorist acts against the state, resulting in the arrest of a large number of individuals belonging to multiple social, cultural, and political organizations linked to ETA.²⁷⁶ In May 2002 Parliament passed the *Law on Parties*, which criminalized political parties that publicly supported violence as a legitimate political expression.²⁷⁷

In brief, what the new law demands from the political parties is a democratic pre-commitment expressed as a clear turning away from terrorism. To achieve this end, the law demands from the parties that they refrain from carrying-out certain actions, and forces them to carry-out others. For instance, parties are required to apply disciplinary measures against any member who simultaneously belongs to an organisation linked to a terrorist group.²⁷⁸

In August of that same year, ETA carried out a lethal terrorist attack for which *Batasuna* publicly expressed support. The Spanish government responded by invoking the 2002 law and declaring *Batasuna* to be an illegal political party. The 2002 Law on Parties was a critical juncture in the development of Spain's domestic counterterrorism policy, permanently shaping the manner in which terrorist entities can legally articulate their political goals.

²⁷⁶ Ibid., 187.

²⁷⁷ According to Miguel Revenga Sanchez, the 2002 law "is exasperatingly detailed in the regulation of behaviours that may bring about a declaration of illegality." Sanchez, Miguel Revenga. 2003. "The Move Towards a (and the Struggle for) Militant Democracy in Spain." Paper presented at the 2003 ECPR Conference, Marburg. Accessed 13 September 2008 at <http://www.essex.ac.uk/ECPR/events/generalconference/Marburg/papers/10/7/Sanchez.pdf> p.12.

²⁷⁸ Ibid., p.13. MacDonald and Bernardo argue that "on the one hand, this measure reflects a democratic commitment to allow participation in the political process on the condition that participants renounce violence and exclusively employ democratic processes. Yet on the other hand, the legislation could establish precedence for excluding certain problematic political ideologies and aspirations, such as regional movements for greater political autonomy." MacDonald and Bernardo (2006), p. 184.

Discussion

The 2002 *Law on Parties* set a precedent it set for choosing to counter terrorism through political and criminal means, as opposed to military- or paramilitary-based methods. This law is a continuation of the pattern set in 1978 in which the Spanish government, using laws based upon the principles of the 1978 Constitution, has specifically avoided using violent means to counter terrorism wherever possible despite the lethal terrorist campaign waged by a domestic insurgent group. Most other Western European governments that faced the same sort of domestic terrorism problems in the same time period responded more forcefully than did Spain. This is due in part of the institutional constraints placed upon the Spanish government by the 1978 Constitution, but is also due to the country's history with government-ordered military violence against Spanish citizens and the careful balancing act the myriad political actors must play in the context of "pact-based" politics. These latter two causal factors will be addressed in Chapters 4 and 5, respectively.

CONCLUSIONS: INSTITUTIONAL PARAMETERS AS CRITICAL JUNCTURES FOR MILITARY PARTICIPATION IN DOMESTIC COUNTERTERRORISM INITIATIVES

This chapter examined the ways in which existing legislation regarding domestic use of a government's military for counterterrorism purposes shaped the policy options available to that government when the domestic terrorism threat increased. In accordance with the Historical Institutionalism approach, I argued that once an institutional path regarding civil-military relations with respect to domestic military activity had been established, shifting from that path to another to create different parameters would become increasingly difficult as time passed. The expectation in each of the four cases was to see less change in the civil-military balance in response to an increasing domestic terrorist threat level in the cases in which the institutions dictating civil-military relations

were strong, and more change—specifically that the military would gain power relative to its civilian authorities—in the cases in which institutions governing the relationship were weak.

Evaluation of the four cases demonstrates that while this expectation was generally met, the complexity of the civil-military relationship in advanced democracies and the importance of the perceived threat level at a given time mean that a far more nuanced characterization is necessary. The rules regarding domestic use of the military for counterterrorism purposes were the least clear in the cases in which the political system allows for a strong executive, such as in the U.S. and Israel. Based on their institutional arrangements, an extension of executive authority to increase the military’s domestic activities—even in a judicial context—is more likely in the U.S. and Israel than in the other two cases because the system allows room for such an expansion to occur. Relative to the other cases, the institutions in Israel appear to be the least able to restrict executive authority on these matters when the domestic terrorism threat is heightened.²⁷⁹

All four cases illustrate the importance for consolidated democracies of rooting domestic use of the military in existing legislation, and in two of the cases—the U.S. and Spain—the constitution remains the final guideline for expanding executive power in this manner. However, a constitution is not necessary, as both the UK and Israel—neither of which has a constitution—still base their domestic military deployments on pre-existing legal authorities. Significantly, all four governments have relied extensively on authorities granted to the executive under emergency legislation. Spain has been the least likely to rely on emergency legislation regarding military deployments due to that state’s particular history with a military dictatorship²⁸⁰ and transition-era laws that restrict

²⁷⁹ For example, regarding the counterterrorism activities of the Israeli GSS (Shabak), “...there is not only an absence of legislation which may have defined the limits and methods of the GSS, but public accountability of the security service is only partial.” Pedahzur and Ranstorp (2001), pp 10-1.

²⁸⁰ Spain’s historical experience will be discussed in Chapter 4.

domestic military activity. In all four cases, the initial laws that shaped civil-military relations were critical to determining the future counterterrorism policy options open to those governments. In this manner, David Pion-Berlin's argument that strategic options at a given juncture depend on the existing civil-military balance established at a particular historical juncture²⁸¹ holds true for all four cases.

There are three areas in which I expect to see this pattern become increasingly evident as states adapt their counterterrorism infrastructure to the rising threat of Islamic extremism. First, and as discussed in Chapter 4, the 9/11 attacks affected the counterterrorism infrastructures of many of the world's consolidated democracies by demonstrating the perils of a lack of coordination among counterterrorism agencies. Governments will continue to pass legislation to address these insufficiencies, and these institutional reforms are likely to be rooted in existing legislation. Second, international law will become an ever more important influence on states' domestic counterterrorism policies, particularly as the domestic-international nexus of today's terrorist threats evolves. I expect many governments to adopt the Israeli government's policy that it is entitled under international law to use military force against domestic terrorists because it faces an immediate threat that no local government—to include the Palestinian Authority—can manage effectively.²⁸² Third, in the next several years I expect to see many consolidated democracies passing legislation that offers clear guidance on how state authorities—to include the military—should handle suspected terrorists and their

²⁸¹ Pion-Berlin (2001), p. 21.

²⁸² The U.S. policy, for example, according to the judgment in *Nicaragua v. United States* is that there exist minimum conditions which must be met before allowing an army to respond to terrorist attacks, including: "(1) that the nation carefully evaluate the evidence to ensure a high degree of certainty that it has identified those responsible for an attack and that more attacks are imminent; (2) that the facts relied upon be made public; and (3) that the facts are subject to international scrutiny and investigation." Gross (2005), pp. 587-8.

associates.²⁸³ Significantly, the push for this type of legislation is less about ensuring the human rights of the individual in question and more about ensuring that these individuals are managed in such a way that the government does not harm its ability to try cases in a court of law, military or civil. Handling terrorist suspects was once an infrequent problem that could be appropriately managed through existing emergency legislation, but has become such a common legal dilemma that laws addressing specific counterterrorism techniques, such as detention and interrogation, have become necessary.

The U.S. Congress has yet to pass one piece of post-9/11 legislation that provides clear guidance for domestic use of the military in counterterrorism initiatives, and in the UK and Spain—which have faced a domestic terrorist threat for far longer—the laws are also unclear. Even in the case of Israel in which the military has had the longest and most substantial domestic counterterrorism role, “[r]ules are often made to define the scope of military authority, and then changed depending on the particular governmental cabinet.”²⁸⁴ In this sense, then, institutional guidelines regarding domestic use of the military are not determinant; two other independent variables—the historical context in which the government is operating and the relative power of various counterterrorism policy entrepreneurs, to be discussed in Chapters 4 and 5, respectively—also affect the content of a given democracy’s counterterrorism infrastructure.

²⁸³ Campbell and Connolly are seeing an increasing number of similarities in the legal dilemmas faced by the British with regard to counterterrorism powers in Northern Ireland and the questions emerging in the US as it attempts to manage its own heightened domestic terrorist threat: “The correspondence is most striking in the American employment of prolonged detention without trial of suspect foreigners, and in the increased role for the military, evidenced by provision for trial by military commission and in suggestions for loosening the restrictions on the Army imposed by the 1878 Posse Comitatus Act.” Campbell and Connolly (2003), p. 342.

²⁸⁴ Schiff (1995).

Chapter 4: Historical Experiences as Critical Junctures in Counterterrorism Policy

Prospect theory dictates that political power-holders favor established policies that confirm their preferences, rather than shifts in policy that may run counter to those preferences. A critical juncture—in the case of terrorism, typically a highly lethal domestic attack—usually eases the path for large-scale institutional change by causing these varying preferences to align in favor of a response to the attack. For counterterrorism policymaking, this means that the costs of a large-scale policy shift for the average civilian authority—especially those that are elected—are significantly reduced immediately following a terrorist incident. Enacting a substantial increase in the military’s domestic power in consolidated democracies is a difficult prospect, especially as time passes following the terrorist incident that spurred the policy shift and constituents become less concerned with their immediate safety and more concerned with their quality of life. Because the stakes in counterterrorism policy are the highest possible—protection of human life—office holders have a longer window of time in which to pursue high-cost activity following a terrorist incident than would normally be present. The failure of existing counterterrorism policy to adequately mitigate a given terrorist threat shifts the boundaries on available policy options, though it does not imply a total erosion of those boundaries.²⁸⁵

Critical events are especially important in determining policy change in democracies, in which citizens have a legal method—the election—by which to punish

²⁸⁵ “In practice, the costs of reinventing the wheel probably make bureaucratic inertia (continuing the current pattern) attractive. Civilians still have the option, however, of changing the relationship on any issue; that they often choose not to simply underscores how they are sensitive to costs.” Feaver, Peter, and Christopher Gelpi. 2003. Choosing Your Battles: American Civil-Military Relations and the Use of Force. Princeton, NJ: Princeton University Press, p. 58.

lawmakers who fail to enact desired reforms. The disappointment of collective expectations is especially pertinent in causing policy entrepreneurs to push for policy change following a critical event. According to Jeffrey Legro, “expectations become salient vis-à-vis events. When expectations of what should happen are not matched by the consequences of experienced events, there is pressure for collective reflection and resentment.”²⁸⁶ Legro further argues that the aggregation components necessary for change—in essence, a critical mass of public protest in favor of significant change—are more likely to occur when events generate consequences that deviate from society’s collective expectations.²⁸⁷ In the four cases under consideration—the United States, Israel, the United Kingdom, and Spain—the public has been able to drive change in domestic counterterrorism policy by pushing elected officials to make institutional changes when they perceive the security environment has become more threatening.

Militaries, though notoriously bureaucratic and slow to change, are quite capable of adaptation, particularly following repeated or lethal mission failure. Dallas Owens of the U.S. Army War College notes that militaries are reactors to change and the impetus for change is usually external, such as mission failure, reallocation of resources, a changing threat environment,²⁸⁸ or doctrinal or technological advancement in a competing military.²⁸⁹ Historical events, especially mission failure, are among the

286 Legro, Jeffrey (July 2000), referencing Levy. 1994. “The Transformation of Policy Ideas.” *American Journal of Political Science*. 44:3, 419-32, p. 424.

287 Ibid., p. 420.

288 Author’s interview with Dr. Dallas Owens, Professor, U.S. Army War College, Strategic Studies Institute (21 September 2007).

289 A case in point is U.S. military institutional change during the Cold War. The civilian authority’s realization that the nature of the Cold War would require a different type of warfare—coupled with the USSR’s creation of the Communist Information Bureau (COMINFORM)—led the U.S. military to place increased emphasis on military-led psychological operations in peacetime, a significant departure from past military practices. The military was “at best a reluctant and hesitant participant” in creating this new psychological operations apparatus, representing a broader pattern of military reluctance to reform each time a change in the threat environment caused civilians to pressure the military to transform. Weigley, Russell. October 1993. “The American Military and the Principle of Civilian Control from McClellan to Powell.” *The Journal of Military History*. 57, 27-58, pp. 39-41.

strongest factors in inducing military change. Following mission failure, typically both civilian and military authorities engage in institutional reform to prevent a repeat of the error. Militaries, given their extensive investment in existing doctrine, often adopt gradual institutional modifications. All of the militaries under consideration in this study make extensive use of “after-action reports” in designing their counterterrorism strategies, exhaustively assessing military performance in past failed missions. Following the attack on U.S. troops at Khobar Towers in Saudi Arabia, for instance, General Wayne Downing’s after-action report “reoriented the [DoD] approach to force protection and established commitments to improve the protection of U.S. Forces from the growing threats of terrorism,”²⁹⁰ resulting in the establishment of the Joint Staff position of Deputy Director for Operations, Combating Terrorism (J-34). Separately, the Rwanda and Haiti interventions of the mid-1990s showcased the lessons learned from evaluation of the U.S. military’s poor performance in the prior Grenada and Somalia interventions.²⁹¹

Conventional “exogenous shock” arguments view a single, identifiable “shock” to a static system as the impetus for institutional change.²⁹² It is clear that exogenous shocks have led to change in a variety of situations, but what is less clear is what else is necessary to cause an institutional shift. Systemic shocks, on their own accord, do not always cause wide-scale institutional change, and the causation in this relationship is unclear. Legro argues that “[t]he implicit answer is that certain events somehow show extant beliefs to be wrongheaded and that change is therefore unavoidable. But it is not clear which events are likely to do this. Comparable wars or economic crises often seem

290 Harper, Rickey and Wendy Ryberg. July-September 1999. “Joint Global Counterterrorism Detachment (JGCTD).” *Military Intelligence Professional Bulletin*. 25:3, p. 23.

291 Walsh, Mark, and Michael Harwood. Winter 1998-99. “Complex Emergencies: Under New Management.” *Parameters*. 28:4 .

292 See Higgs (1987), Goldstone (1991), Berger (1998), and Olsen (1992).

to have differential effects.”²⁹³ 9/11-style tragedies that highlight systemic failures are the primary driving force behind the *rate* of change, but the U.S. military, for example, had been making incremental, small-scale changes toward better domestic counterterrorism practices prior to that event. Thus, 9/11 is a necessary, but not sufficient, causal factor to explain the U.S. military’s expansion of operations into the domestic sphere.

Chapter 3 described the importance of established institutional parameters in determining the nature and scope of institutional change regarding the military’s role in domestic counterterrorism policy, but institutional parameters alone, especially in the U.S. case, probably would not have been enough to bring about substantial institutional change. The key impetus behind the military’s expanded domestic role in the U.S. was the devastation of the 9/11 attacks. Prior domestic acts of terrorism—notably the 1993 attack on the World Trade Center and the 1995 Oklahoma City bombing—raised discussion in policymaking circles regarding domestic counterterrorism posture, but it took an event with the impact of 9/11 to provide sufficient inertia in the policymaking process to bring about today’s drastically different domestic counterterrorism regime.²⁹⁴ In this manner, it is the combination of existing institutional parameters, policy entrepreneurship, and an exogenous shock that caused an increase in the U.S. military’s domestic counterterrorism role.

²⁹³ Legro (2000), p. 423.

²⁹⁴ Following the Oklahoma City attacks, Congress began earmarking specific counterterrorism projects and dramatically increased the FBI’s counterterrorism budget. Congress also instructed the Departments of Justice and Defense to prepare long-term plans for counterterrorism, and established an independent National Commission on Terrorism to investigate government policy. Crenshaw, Martha. 2001. “Counterterrorism Policy and the Political Process.” *Studies in Conflict & Terrorism*. 24, 329-37, pp. 333-4. None of these policy initiatives is representative of the scale and scope of institutional change that was initiated following the far more lethal 9/11 attacks.

The argument of this chapter adopts portions of Michael Desch's "structural threat environment"²⁹⁵ theory of civil-military relations and applies it to the counterterrorism policymaking context. Desch, in short, theorizes that shifts in the structural threat environment, both internal and external to a given state, shape that state's civil-military relationship. According to Desch, external threats usually produce increased unity within a given state by focusing the attention of civilian and military authorities on the outside actor generating the threat. Internal threats have a more complex effect, depending on whether they affect civilians, the military, or society more significantly.²⁹⁶ In the cases under examination, the threats have been a combination of the above. In the U.S., the threat is a domestic attack, primarily from external actors. In the U.K. and Spain, in the period of time under consideration the threats were primarily internal, from indigenous terrorist groups. Finally, in Israel, the situation has been highly precarious, with an extended period of time in which both the internal and external threat levels have been high.

THE UNITED STATES

Two world wars and the perception of a growing Soviet threat led to a long period of American military expansionism in the twentieth century, and with it a significant increase in executive branch power as the White House expanded cabinet-level agencies to manage this growth. By the end of the Cold War, as Ernest May has argued, "the main business of the United States government had become the development, maintenance,

²⁹⁵ Desch, Michael. 1999. Civilian Control of the Military: The Changing Security Environment. Baltimore, MD: The Johns Hopkins University Press.

²⁹⁶ Specifically, Desch argues that an "internal threat that affects only state and society, not the military, is unlikely to adversely affect civilian control. A threat from society to the military and civilian institutions could lead to a military-supported civilian dictatorship, as in Alberto Fujimori's Peru. A threat from the state to the military and society is likely to produce a military coup that installs a different civilian leadership, as in France in May 1958. Finally, a threat from the state and society to the military is apt to lead to military rule, as in Brazil in 1964 or Chile in 1973. Domestic threats divide the state and focus everyone's attention inward." *Ibid.*, pp. 12-3.

positioning, exploitation, and regulation of military forces.”²⁹⁷ The heightened tension of the evolving international threat environment, especially in the context of the Soviet nuclear threat, fostered a policymaking environment in which policy entrepreneurs could more easily push through large-scale institutional change. The militarization of international politics during World War II, for example, enabled President Truman to persuade Congress to pass the 1947 National Security Act “because all parties shared a sense of emergency derived from their common experiences with Pearl Harbor and World War II.”²⁹⁸

The sense of heightened domestic threat generated by the 9/11 attacks has caused another landmark push for institutional change. The drive to reduce the risk for another lethal terrorist attack on U.S. soil requires a mix of agency initiatives, several of which have been highly controversial. In Desch’s Cold War argument, the compatibility of civilian and military ideas about the use of force and the nature of the international threat environment limited conflict in the civil-military relationship.²⁹⁹ Today, civilian and military authorities more or less agree on the nature of the international terrorist threat, but vary greatly on what type of response will best mitigate that threat. These policy debates about domestic counterterrorism response certainly existed prior to 9/11 but rarely had political salience until the 9/11 attacks gave domestic counterterrorism policy a prominent place on the public agenda.

John Kingdon argues that significant policy change comes about at the rare points in history when the problem, policy, and political “streams” all meet, often in response to

²⁹⁷ May, Ernest. 1992. “The US Government, a Legacy of the Cold War,” in Hogan, Michael, ed. The End of the Cold War: Its Meaning and Implications. New York: Cambridge University Press, as cited in Jablonsky, David. Winter 2002-03. “The State of the National Security State.” Parameters. pp 9-10.

²⁹⁸ Stuart, Douglas. November 2000. “Conclusion,” in Stuart, Douglas, ed. Organizing for National Security. Carlisle, PA: U.S. Army War College, Strategic Studies Institute p. 285.

²⁹⁹ Desch (1999) p. 23.

what he terms “focusing events.”³⁰⁰ The 9/11 attacks provided just this moment, bringing a policy concern of the general public’s to the forefront of the public agenda. The first attack on the World Trade Center, in 1993, raised the prospect of foreign terrorist groups targeting the American infrastructure: “In the past, planning and preparations for armed conflict seemed implicitly to assume that U.S. territory would remain a sanctuary. Shattering a complacent sense of invulnerability, the bombing moved these threats to salience in the public perception.”³⁰¹ The 2001 attacks brought to fruition a threat that experts had long been predicting, but that the American public and policymaking communities chose to downplay. The 9/11 attacks induced a paradigm shift by confirming “that the foreign and domestic distinctions of the Cold War national security system could no longer apply to the evolving concept of national security in terms of structure, organization, and the interagency process.”³⁰²

The U.S. Military and Counterterrorism Operations

The Pentagon first became concerned about terrorism as a result of highly publicized hostage taking by international terrorists in the 1970s.³⁰³ As the frequency of international terrorism increased, the White House and Congress asked the Pentagon whether the U.S. was prepared to intervene in hostage situations. According to the

300 Kingdon, John. 1995. *Agendas, Alternatives, and Public Policies*. 2nd edition. New York, NY: HarperCollins College Publishers, p. 20. According to Martha Crenshaw, “[i]n the case of terrorism, focusing events frequently come in clusters, so that it is often difficult to trace a specific policy response to a single event. The reaction to the Oklahoma City bombing, for example, is linked to perceptions of the 1993 World Trade Center bombing and the 1995 Aum Shinrikyo sarin gas attack on the Tokyo subways. Under the Reagan administration, the 1986 military strike against Libya was a response not just to the La Belle disco bombing in Berlin but to earlier attacks such as the TWA and Achille Lauro hijackings and the shooting attacks at the Rome and Vienna airports in 1985. Thus, sequences of events rather than single disasters typically serve as policy catalysts.” Crenshaw (2001), p. 329.

301 Morgan, Matthew. March 2004. “The Garrison State Revisited: Civil-Military Implications of Terrorism and Security.” *Contemporary Politics*. 10:1, 5-19, p. 11.

302 Jablonsky (Winter 2002-03), p. 15.

303 Specifically, the June 1976 hijacking of an Air France plane and the October 1977 seizure of a Lufthansa aircraft.

National Commission on Terrorist Acts Upon the United States, known familiarly as the 9/11 Commission, “[t]he answer was no. The Army immediately set about creating the Delta Force, one of whose missions was hostage rescue.”³⁰⁴ The Department of Defense soon issued a directive requiring each of the services to create programs to protect American personnel at U.S. facilities overseas, but it took the 1983 bombing of a U.S. Marines barracks in Beirut for “force protection” in counterterrorism deployments to become a DoD priority.³⁰⁵ Again, mission failure, encapsulated in a salient terrorist event, was the driver for change in the military’s counterterrorism policy.

One of the U.S. military’s first high profile counterterrorism missions—and a turning point in American military policy³⁰⁶—was the failed April 1980 hostage rescue mission known as Desert One, during which two U.S. helicopters crashed on Iranian soil as they were heading to Tehran. The special commission investigating the incident recommended the creation of a counterterrorism task force and an expert group on special operations. “There followed, in 1983, a partial consolidation with the creation of a Joint Special Operations Command (JSOC), and finally, in 1987, all Special Forces were put together under a single command at Tampa, Florida, called the United States Special Operations Command (USSOCOM).”³⁰⁷ Importantly, based on this relatively lengthy experience with military counterterrorism missions, President Bush designated USSOCOM as the primary military entity for military counterterrorism operations following the 9/11 attacks.

304 National Commission on Terrorist Attacks Upon the United States. 2004. The 9/11 Commission Report. Authorized Edition. New York, NY: W.W. Norton & Company, p. 96.

305 Ibid., p. 97.

306 Cogan, Charles. January 2003. “Desert One and Its Disorders.” *The Journal of Military History*. 67:1, p. 202.

307 Ibid. The consolidation of the services’ various special operations forces was forced by the Cohen-Nunn Act in 1986.

Prior to 9/11, the military's interest in counterterrorism was minimal and limited primarily to specific, targeted counterterrorism operations abroad, notably the air strikes in Libya in 1986 and in Afghanistan and Sudan in 1998. The military's counterterrorism planning focused on international missions, with little experience in training for domestic counterterrorism operations. This was due, in part, to the military leadership's conviction that the strategic environment of the 21st century would be much like that of the 20th century, characterized by conventional military-to-military warfare. Writing in 1997, the U.S. Army War College's Steven Metz noted that "[w]hile the orthodox position [in the Army] anticipates dramatic improvements in the effectiveness of militaries able to capitalize on...information technology, war will remain essentially *political, episodic, violent, state-centric, and distinct from peace*. The orthodox position expects only evolutionary change in the strategic environment."³⁰⁸ The military leadership assumed its current configuration was capable of managing any mission that might arise due to a domestic terrorist attack: "The unwritten Army policy was that forces organized, trained, and equipped for overseas conflicts could handle these missions without significant additional training or preparation."³⁰⁹ This lack of focus on preparing for domestic counterterrorism operations was driven by the pervasive assumption that the military in reality could do little to mitigate a terrorist threat.³¹⁰

In their 2000 cross-service survey of mid-level officers at the command and staff colleges, Deborah Avant and James Lebovic assessed that military officers viewed

308 Metz, Steven. Autumn 1997. "Which Army After Next? The Strategic Implications of Alternative Futures." *Parameters*.

309 Kelly, Terrence. Summer 2003. "Transformation and Homeland Security: Dual Challenges for the US Army." *Parameters*. p. 39.

310 For example, writing in the mid-1990s, Charles Eppright assessed that "[t]he military could have done nothing to prevent or deter the 1995 Oklahoma City attack. Its perpetrators found a fairly soft target and then acted out their agenda without any concern about military detection or retaliation. In the context of domestic terrorism, conventional military power is therefore completely irrelevant as a deterrent." Eppright, Charles. 1996-97. "'Counterterrorism' and Conventional Military Force: The Relationship between Political Effect and Utility." p 342.

nontraditional missions—defined as drug interdiction, peacekeeping, sanctions enforcement and humanitarian assistance—as *least* fitting for their service, reserving their highest ratings for traditional missions associated with fighting a regional or world war.³¹¹ The study indicated that the respondents believed the greatest danger to the U.S. was terrorism but actually ranked counterterrorism operations low on the “appropriateness of mission” scale,³¹² suggesting they felt this threat could not be adequately addressed through military initiatives. Avant and Lebovic concluded that the officers assumed that “the greatest dangers lie in the threats they are least enthusiastic about defending.”³¹³ Indicative of this mindset, pre-9/11 the military nearly always left its role in the U.S. government’s domestic counterterrorism infrastructure to be defined by other agencies. The 9/11 Commission concluded that

[a]t no point before 9/11 was the Department of Defense fully engaged in the mission of countering al Qaeda, though this was perhaps the most dangerous enemy then threatening the United States....[The Bush administration’s] strategy envisioned some yet undefined further role for the military in addressing the problem. Within Defense, both Secretary [William] Cohen and Secretary Donald Rumsfeld gave their principal attention to other challenges.³¹⁴

Another driver of military reluctance to become involved in counterterrorism operations has been the military leadership’s disinclination to use its own resources in a counterterrorism capacity when it viewed its true mission as traditional warfare. Then-Chairman of the Joint Chiefs of Staff General Hugh Shelton felt that the August 1998 air strikes in Afghanistan and Sudan were “a waste of good ordinance and thereafter consistently opposed firing expensive Tomahawk missiles merely at ‘jungle gym’ terrorist training infrastructure.”³¹⁵ This restraint on behalf of the military leadership

311 Avant, Deborah, and James Lebovic. Fall 2000. “U.S. Military Attitudes Toward Post-Cold War Missions.” *Armed Forces & Society*. 27:1.

312 Ibid.

313 Ibid.

314 National Commission on Terrorist Attacks Upon the United States (2004), pp. 351-2.

315 Ibid., p. 351.

surfaced once again following the 2000 bombing of the USS Cole while it was docked in Yemen. Richard Clarke, chief counterterrorism advisor on the National Security Council, told the 9/11 Commission that the military's lack of response to the Cole attack taught al-Qa'ida and the Taliban that they could kill Americans without a significant response: "Once might have thought that with a \$250m hole in a destroyer and 17 dead sailors, the Pentagon might have wanted to respond. Instead, they have often talked about the fact that there is 'nothing worth hitting in Afghanistan.'"³¹⁶

In many ways, the military was only echoing its civilian authority's pre-9/11 philosophy of military restraint. In 2000, then-Governor Bush campaigned on a message of military temperance, arguing that "the military should not be used for 'unclear military missions' or serve as 'permanent peacekeepers, dividing warring parties.'"³¹⁷ The Bush administration assumed power intending to drastically modernize and lighten the international footprint of the U.S. military, but also wanting to expand the military's domestic presence to enhance executive power. Military analysts, writing prior to the 9/11 attacks, suggested that Bush's incoming policy team should reconsider its plans regarding military institutional change, citing public opposition to infringement on civil liberties, congressional resistance to the expansion of executive authority, and the already tense state of civil-military relations.³¹⁸

This is not to say that the Republican administration was wholly unaware of the threat posed by al-Qa'ida. In the summer of 2001, the Bush administration circulated a draft presidential directive instructing Secretary of Defense Donald Rumsfeld to develop contingency plans to attack al-Qa'ida and Taliban targets in Afghanistan, an order which,

³¹⁶ Ibid., pp. 212-3.

³¹⁷ Bush, George W. 23 September 1999. "A Period of Consequences." Speech at The Citadel, South Carolina, as cited in Melillo, Michael. Autumn 2006. "Outfitting a Big-War with Small-War Capabilities." *Parameters*. p. 28.

³¹⁸ Stuart, Douglas. November 2000. "Conclusion," in Stuart, Douglas, ed. Organizing for National Security. Carlisle, PA: U.S. Army War College, Strategic Studies Institute. 283-8, p. 284.

according to Deputy National Security Advisor Stephen Hadley, meant “the White House was putting the Pentagon on notice that it would need to produce new military plans to address this problem. ‘The military didn’t particularly want this mission,’ Rice told us [9/11 commission].”³¹⁹ The September 11, 2001, attacks immediately and definitively changed the “contingency” nature of this order, and by the end of September, homeland defense had become a top Pentagon priority: “[T]he 2001 Quadrennial Defense Review (QDR) arguably made homeland defense the Department of Defense’s primary mission, and the QDR report states that ‘preparing for homeland security may require changes in force structure and organization.’”³²⁰ The 9/11 attacks served as the critical juncture after which defense policy became heavily focused on the achievement of domestic counterterrorism objectives.

The Establishment of NORTHCOM

The drive following the attacks of September 11th to “terrorist-proof” the United States has resulted in a vast expansion of the defense budget and a massive reorganization of the executive branch through establishment of Northern Command, known as NORTHCOM, in October 2002 and the Department of Homeland Security in 2003. “The creation of NORTHCOM marked the first time since the Civil War that the U.S. Armed Forces had operational command for domestic purposes.”³²¹ NORTHCOM, organizationally, is the principal point of contact for military support during homeland defense and security operations. Speaking in 2002, then-Deputy Assistant Secretary of

319 National Commission on Terrorist Attacks Upon the United States (2004), p. 208.

320 US Department of Defense. 30 September 2001. *Quadrennial Defense Review Report*. pp 17-19 <http://www.defenselink.mil/pubs/qdr2001.pdf>, as cited in Kelly (2003), p. 37.

321 Donohue, Laura. 18 May 2006. “Pentagon Spies Are Watching You.” *L.A. Times*. p. B13, as cited in Greenberger, Michael. April 2007. “Symposium: Extraordinary Powers in Ordinary Times: Did the Founding Fathers Do ‘A Heckuva Job?’ Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City.” *Boston University Law Review*. 87:397, p. 408.

Defense Peter Verga described NORTHCOM's primary missions, as originally envisioned by the Bush administration: NORTHCOM would be involved in

traditional military missions performed inside the U.S., called "extraordinary circumstances," such as combat air patrols during which military aircraft might be ordered to shoot down a terrorist-hijacked airliner; emergency circumstances, where the military assists federal agencies with logistical and other support in disaster relief missions; and temporary, situational circumstances, such as DoD support to the Olympics.³²²

The military's plan to have NORTHCOM direct a variety of quick-reacting missions for U.S. soldiers within the United States represents a historic shift for the Pentagon and its efforts to refrain from domestic interference. The Department of Defense has always been involved in discussions over potential federal responses to a domestic terrorist incident involving WMD, but these early discussions were directed toward the Soviet nuclear threat, which is, by law, in the military's jurisdiction. The idea of a domestic command for homeland defense was discussed in the late 1990s, but Congress was starkly opposed to the idea, expressing concern that a domestic command would pave the way for an increased military role in civilian affairs. The compromise solution was the establishment of the Joint Forces Command, located at Norfolk, Virginia, charged with directing the military's response to domestic emergencies, both natural and man-made.³²³

The conditions under which the Army would see domestic deployment, as established in the plan to establish NORTHCOM, create a unique dilemma for the military in its interaction with civilians. When the military is deployed for homeland security operations, they will fall under the command of NORTHCOM, but

322 Gilmore, Gerry. 11 December 2002. "Verga Clarifies DoD's Homeland Defense Role." *American Forces Press Service*. Washington DC, as cited in Kelly (2003), p. 40.

323 National Commission on Terrorist Attacks Upon the United States (2004), p. 97; Banks, William. Autumn 2002. "Troops Defending the Homeland: The Posse Comitatus Act and the Legal Environment for a Military Role in Domestic Counter Terrorism." *Terrorism and Political Violence*. 14:3, p. 30.

NORTHCOM will not run the operations, which likely will be handled by federal, state or local civilian authorities. “These nonmilitary operational modes will demand new doctrine to guide training and planning,”³²⁴ with the hope of addressing the military’s primary quandary regarding domestic deployment—working outside the military’s chain-of-command. As it stands now, the operational plan for NORTHCOM is racked with inconsistencies regarding the military’s scope of operations and its role in the interagency counterterrorism process. This confusion is due primarily to the civilian authorities, who have not given military leaders adequate instruction regarding their preferences, and likely are themselves unsure of the level of domestic operating latitude that should be bestowed upon NORTHCOM. As argued by Deborah Avant, “[c]ivilian choices about how to organize a military institution affect the integrity and institutional bias of the organization....The higher the degree of organizational integrity, the greater the ability of the organization to articulate preferences and pursue them as an actor in the political arena.”³²⁵

Outside the concern over establishing a mutually agreeable chain-of-command, another primary problem with the institutional design of NORTHCOM is that “there is no assurance that specially-trained forces will be available to NORTHCOM prior to a crisis, and that current civil support training across the armed forces in general is insufficient,”³²⁶ according to the 2002 report of the *Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction*. In the context of domestic deployment, training military personnel in the protection of constitutional rights and proper legal procedures becomes exceptionally important. This

324 Kelly (2003), p. 41.

325 Avant, Deborah. 1993. “The Institutional Sources of Military Doctrine: Hegemons in Peripheral Wars.” *International Studies Quarterly*. 37, p. 413.

326 *The Fourth Annual Report to the President and Congress of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction*. December 2002, as cited in Kelly (2003), p. 42.

is a critical issue in debates over the military's potential collection of intelligence on U.S. citizens, a process that the legal system currently prohibits. "Until those laws are changed, a military combatant commander cannot gather the intelligence necessary to take proactive steps in defense of the homeland,"³²⁷ and this is a mission that neither the military nor their civilian authorities truly want. It is the purview of the civilian authorities to decide the degree to which the military should be involved in domestic intelligence gathering, a critical function if NORTHCOM is to be truly effective as a domestic counterterrorism agency. To date, this decision has not been made.

According to Dallas Owens of the U.S. Army War College's Strategic Studies Institute, the idea of a domestic command was controversial before 9/11, but the context of the attacks opened a policy window within which NORTHCOM's supporters could usher through the institutional change. Owens questions the necessity and effectiveness of NORTHCOM, as it is currently arranged. During the Cold War, any serious threat to the U.S. would have been managed at the national, presidential level; even in the midst of a nuclear arms race when the risk of a catastrophic domestic attack was at its highest, the U.S. did not have a combatant command to handle threats from the Soviet Union. Owens assesses that it is still not clear, four years after the establishment of NORTHCOM, how the command has answered or reduced threats to the U.S. mainland, and it is also unclear how Canada and Mexico fit into the organizational vision. In the end, barring another large-scale terrorist attack on U.S. soil, it is unlikely that these problems will be resolved through the strengthening of NORTHCOM, as such an expansion of authority could only be done at the expense of state autonomy by expanding federal command over state Guard units.³²⁸

³²⁷ Echevarria, Lieutenant Colonel Antulio. January 2002. "Homeland Security Issues: A Strategic Perspective," in Martin, John R., ed. Defeating Terrorism: Strategic Issue Analyses. Carlisle, PA: U.S. Army War College, Strategic Studies Institute, p. 36.

³²⁸ Author's interview with Dallas Owens (2007).

The U.S. Military’s Responsibilities in a Post-9/11 World

In the post-Cold War world, the U.S. military needed to find a new way to remain engaged and relevant in a changing threat environment. Military and civilian authorities were beginning to grasp the fact that mitigating the growing terrorist threat defied purely military solutions, and would require large-scale institutional reform for the military to remain mission relevant. This period of institutional adjustment has proven critical to the development of the current domestic counterterrorism infrastructure. The prevalence of non-traditional missions in the 1990s brought about “an unprecedented frequency of decisions to be made at [the] political-diplomatic-strategic intersection,” resulting in an “unprecedented mingling of civilian and military leaders in the course of the policy-making process.”³²⁹ For example, the Army, in preparation for an increased number of peacekeeping missions (such as Haiti and Kosovo) had already begun bridging interagency divides in order to more effectively fulfill international peacekeeping missions. Post-9/11, policymakers have built upon this nascent nexus between civilian and military agencies: “The Army, recognizing the importance of military police and civil affairs capabilities in stability and counterinsurgency operations, has reorganized excess capability in artillery, engineer, and air defense units—legacies of the Cold War—to perform those functions so critical in stability and counterinsurgency operations.”³³⁰

While many argue that the institutional changes currently being adopted by the military have their roots in pre-9/11 policymaking,³³¹ few dispute the fact that these efforts to reform domestic military institutions increased exponentially immediately following the 9/11 attacks, and that the extent of the U.S. military’s domestic activities

329 Weigley (1993), p. 56.

330 Melillo (2006), pp. 30-1.

331 Reynolds, Kevin. November 2006. “Defense Transformation: To What, For What?” Carlisle, PA: U.S. Army War College: Strategic Studies Institute, p. vii.

has also increased significantly since 2001. The Department of Defense soon after the attacks

took the lead in the planning and execution of the Global War on Terrorism, with the quiet acquiescence of the National Security Council....This was partly due to the practical reality that the resources available to DoD dwarf anything else in the U.S. government, but it was also due to institutional habit and inertia. The Department of Treasury is not accustomed to campaign planning, but CENTCOM does it for a living.³³²

The military, at least on paper, became fully integrated into the new homeland defense infrastructure with a July 2002 Pentagon memorandum that gave the lead role for military management of domestic disturbances to the recently created position of Assistant Secretary of Defense for Special Operations and Low Intensity Conflict and Homeland Defense Policy. These responsibilities were soon transferred to the new position of Assistant Secretary of Defense for Homeland Defense (AS/HD), as stipulated in the Defense Authorization Act of 2002.³³³

The military's various subagencies began to adjust their areas of operations immediately following the 9/11 attacks. For those that already had a role in counterterrorism or domestic operations, the transition was simpler. For example, the U.S. Army Counterintelligence Center (ACIC)—the pre-9/11 mission of which was to provide global terrorism analysis in support of the Army—had always played a role in missions traditionally associated with homeland security and homeland defense, but “the terrorist attacks on 11 September 2001 resulted in a refocusing of priorities and will result in long-term changes in how the ACIC does business.”³³⁴ ACIC now focuses its resources heavily on counterterrorism and force protection intelligence analysis in

332 Thompson, Mitchell. Winter 2005-06. “Breaking the Proconsulate: A New Design for National Power.” *Parameters*. p. 72.

333 Department of Defense. 1 July 2002. “Deputy Secretary of Defense Memorandum, Subject: DOD Homeland Defense Policy (HDP) Responsibilities.” PL 107-314, as cited in Kelly (2003), p. 40.

334 Harlan, Charles. July-September 2002. “U.S. Army Counterintelligence Support to Homeland Security.” *Military Intelligence Professional Bulletin*. 28:3.

support of homeland defense. Inherent in this operational shift is the acknowledgement by Army planners that domestic terrorism has become enough of a threat in its own right to merit reorganization of the pre-9/11 military intelligence apparatus, expanding intelligence activities to include terrorists directly targeting the homeland.

Due to civilian and military authorities' recognition that domestic counterterrorism initiatives must be interagency in nature in order to be efficient, effective (and indeed legal), in October 2001 the Pentagon created Joint Interagency Coordination Groups, or JIACGs. Secretary of Defense Rumsfeld instructed the various combatant commanders that JIACGs would be "organized to provide interagency advice and expertise to Combatant Commanders and their staffs, coordinate interagency counterterrorism plans and objectives, and integrate military, interagency, and host-nation efforts."³³⁵ DoD's official doctrine on the new joint operation noted that "JIACGs at each Combatant Command headquarters will significantly increase civilian and military coordination and enable a more complete understanding of policy decisions, missions and tasks, and strategic and operational assessments."³³⁶ The effectiveness of JIACGs in integrating the military into the domestic counterterrorism infrastructure is unclear, and to date, JIACGs have exhibited the same problems that have faulted many other post-9/11 interagency initiatives.³³⁷ There is a general consensus among both civilian and military

³³⁵ Cardinal, Charles. Autumn 2002. "The Global War on Terrorism: A Regional Approach to Coordination." *Joint Force Quarterly*. 32, as cited in Thompson (Winter 2005-06), p 66.

³³⁶ United States Department of Defense. November 2003. *Joint Operations Concepts*. Washington: Department of Defense. p. 20, as cited in Thompson (Winter 2005-06), p. 66.

³³⁷ Mitchell Thompson notes that non-DoD agencies "are usually operating on far more limited resources than the military, and the costs of JIACG participation often outweigh any perceived benefits. Second, there are strict limitations on the roles and responsibilities of the JIACGs. They cannot task civilian agency elements or personnel...or unilaterally commit agency resources...Third, and most fundamentally, the vastly differing organizational cultures of the civilian and military agencies that constitute the JIACG greatly hinder its smooth functioning." Thompson (Winter 2005-06), p. 67.

personnel that, while the JIACGs have served a useful purpose, "...they are clearly not the final answer for interagency unity of effort at the strategic or operational level."³³⁸

The military is not ready, organizationally or otherwise, to engage in domestic homeland defense and security operations. Prior to 2001, most of the military's training focus was on what the U.S. Army refers to as DOTMLPF (Doctrine, Organization, Training, Materiel, Leadership, Personnel, and Facilities), and how changes within these areas could help the military to better fight wars in foreign countries. Since 2001, this has not changed substantially.³³⁹ The military's reluctance to engage in domestic operations is still a significant barrier to the true integration the military into the interagency domestic counterterrorism infrastructure. The U.S. Army War College's Dallas Owens notes that military personnel still do not want to engage in activities such as riot control, disaster response, or firefighting, especially given current military responsibilities globally, but that they will acquiesce to the demands of the civilian authorities and fulfill these missions regardless of their own preferences.³⁴⁰ The 9/11 attacks did not change the military's willingness to engage in domestic counterterrorism operations, but it did change the urgency of the justification with which the White House has asked them to do so.

Potential Problems with Expanding the Military's Domestic Counterterrorism Role

It is not in any way odd that the American people turned to their military in the days following the devastation of the 9/11 attacks. The executive branch extended its own authority into areas normally reserved for state and local authorities in order to ensure that the U.S. government would be able both to deter and adequately respond to similar attacks in the future. Following the rapid institutional change of the immediate

³³⁸ Ibid.

³³⁹ Kelly (2003), p. 37.

³⁴⁰ Author's interview with Dallas Owens (2007).

post-9/11 period, analysts are starting to ask broader questions about the impact of these reforms, specifically the appropriateness of the new arrangement in the context of a consolidated democracy. In terms of the civil-military relationship in the U.S., the debate centers on whether this increase of domestic military authority will expand the number of policy realms in which the military is already able to influence its civilian authority. Risa Brooks, for one, sees the potential that

in the process of institutionalizing a role in domestic security, military leaders and their organizations become vested in internal debates about the allocation of resources and methods in countering terrorist activity in the United States.... This would also likely enhance pressures to become participants in partisan debates about these issues, as politicians court military support in trying to sell alternative conceptions of how homeland security resources are structured and allocated.³⁴¹

To some extent this has already occurred, as evidenced by some military personnel's public criticism of the Bush administration's use of Guantanamo to hold suspected terrorists.

A second main area of concern over the expansion of the military's role in domestic counterterrorism initiatives is that the potentially higher visibility of the military in American cities could erode some of the public goodwill the American public feels for its all-volunteer military. There is the chance, especially in crisis situations in which the chain-of-command over the military is unclear, that military personnel may clash with local and state authorities who are directing the local response. Leaders of military units serving in a homeland deployment "will need to understand not only that in most cases the Army will be a support agency, but also that they will frequently not be the experts on the circumstances they encounter (e.g., local leaders will know the area, understand the people, and understand the mission better than any federal agency could.)"³⁴² This exact

³⁴¹ Brooks, Risa. 2002. "The Military and Homeland Security." *Policy and Management Review*. 2:2, p. 10.

³⁴² Kelly (2003), p. 42.

conflict was seen between military and local authorities during the military's domestic deployment in response to the 1992 L.A. riots.

Perhaps the strongest and most oft-cited justification for keeping the military out of domestic counterterrorism operations—especially salient now, given the Iraq and Afghanistan campaigns—is that expanding the military's role in homeland security could harm its ability to fulfill its core mission of external warfighting. Strains on personnel and equipment overuse are serious concerns for planners at the Pentagon. These personnel and resource issues are particularly acute for the National Guard, which since 9/11 has maintained its critical role in domestic security while also making up a large segment of the forces deployed to Iraq and Afghanistan. For the most part, military planners are publicly denying that mission readiness has been harmed by the military's current level of activity.³⁴³ Expanding the military's domestic counterterrorism role may also distract the already stretched administrative agencies in the Pentagon by adding domestic management duties to their external responsibilities. Following the 9/11 attacks, the Pentagon added layers of bureaucracy to manage its liaison relationships with domestic agencies, and a greater homeland role would increase this bureaucratic burden. According to Risa Brooks, “[e]verything from chains of command, doctrine and training, to rules of engagement and conduct for military personnel would have to be designed, established and monitored.”³⁴⁴

³⁴³ Dr. Dallas Owens of the U.S. Army War College argues that the question of battle readiness depends on the task at hand. For example, pilots who are flying, even in a homeland security capacity, likely will not see a degradation in their skills, but military personnel who specialize in other skills critical in war zones, such as convoy protection, may lose some of their sharpness if they are stationed domestically for too long of a time period. Owens sees the strain today as being most acute in National Guard forces, though he believes they are still capable and prepared to fulfill missions, both domestically and abroad. Owens noted that out of the services, the Army is in the worst shape in terms of being able to respond quickly to a domestic terrorist event, while the Navy and Air Force likely remain highly capable. The difference is due to the higher strain on Army forces in the Iraq and Afghanistan theaters. Author's interview with Dallas Owens (2007).

³⁴⁴ Brooks (2002), p. 7.

Finally, there is the issue of a reallocation of military resources from global bases to domestic sites, and how this might erode the political capital gained through years of military-to-military exercises and support to overseas bases, both of which have ensured the U.S. military's ability to deploy quickly and efficiently worldwide. Conrad Crane has argued that

the Army must not allow an increased emphasis on force protection and other operations against terrorism to deflect it from supporting regional CINCs in their efforts to remain engaged overseas....Often such involvement can shape the regional environment to prevent conflicts or facilitate responses when they occur. The U.S. ability to conduct current operations against Afghanistan was aided considerably by 82d Airborne Division exercises with Kazakhstan and Uzbekistan in 1997. Remaining engaged around the world now will similarly facilitate operations when the next unexpected crisis occurs and will also help prevent crises from occurring in the first place.³⁴⁵

Crane's is a particularly strong argument given the global nature of the war on terrorism, which requires a rapid response military capability. Maintaining goodwill with militaries throughout the world allows the U.S. a broader base of geographical resources on which to draw if necessary.

9/11 as a Critical Juncture?

A key identifying characteristic of a "critical juncture" in the historical institutionalism literature is that it causes definitive, lasting institutional change. Given the short period of time that has elapsed since 9/11, it is too soon to judge the resilience of the institutional changes that has occurred to date. We can, however, make assessments as to the prospects for their endurance. Doctrinally, the Pentagon's focus on homeland security has made only small ripples, as conventional foreign-focused missions have remained at the forefront of military strategic planning. Institutionally, the change

³⁴⁵ Crane, Conrad. January 2002. "Maintaining Strategic Balance while Fighting Terrorism," in Martin, John R., ed. Defeating Terrorism: Strategic Issue Analyses. Carlisle, PA: U.S. Army War College, Strategic Studies Institute. pp. 27-8.

has been more apparent. The Pentagon has created specific sub-agencies to address homeland security needs. The newly reorganized Army Military Intelligence Corps, for example, is considered to be a “crucial component in how the Army will develop and manage information to support the Department of Homeland Security.”³⁴⁶ The effect of the military’s largest institutional change—the establishment of NORTHCOM—thus far is unclear. Dallas Owens, who works closely with various National Guard units around the country, believes that the National Guard has seen only limited day-to-day impact from NORTHCOM’s creation.³⁴⁷ It may indeed be the case that much of NORTHCOM’s impact will never be seen in unclassified channels since the details of the organization’s domestic counterterrorism initiatives will be tightly held. The most apparent indicator of the military’s performance in domestic counterterrorism operations may come, unfortunately, in the case of another large-scale terrorist attack on U.S. soil.

As Peter Feaver asserts, the “new war on terrorism put the question of civil-military relations in especially sharp relief, simultaneously raising the stakes and underscoring the importance of civilian control to day-to-day workings of the government.”³⁴⁸ The establishment of NORTHCOM, coupled with the organizational demands of managing the U.S. campaigns in Iraq and Afghanistan, has resulted in a mammoth Department of Defense, with three of its unified commands—USSOCOM, USCENTCOM, and USNORTHCOM—charged with counterterrorism as a primary mission.³⁴⁹ With a dramatically increased budget and broader operational authority, the military—and by extension the executive branch—has seen its domestic authority increase considerably.

346 Green, Clyde. April-June 2003. “Doctrine Corner: The Challenge of Homeland Defense.” *Military Intelligence Professional Bulletin*. 29:2. p. 57.

347 Author’s interview with Owens (2007).

348 Feaver, Peter, and Christopher Gelpi. 2003. Choosing Your Battles: American Civil-Military Relations and the Use of Force. Princeton, NJ: Princeton University Press, p. 2.

349 National Commission on Terrorist Attacks Upon the United States (2004), p. 401.

According to Dr. Max Manwaring of the U.S. Army War College, the lines between the civilian and military spheres have become increasingly blurred since the 9/11 attacks. In his opinion, however, it is not the organizations that are causing the blur, rather the overlap in their operational tasks. Manwaring argues that it is the nature of war that has changed, and as a result, to be effective in war a government must utilize all instruments of state and military power. By definition, the execution of this type of warfare blurs the distinction between the civilian and military spheres. Manwaring and others have argued that while this operational overlap is absolutely necessary in order to effectively execute the war on terrorism, this blurring has the potential to cause the central government, in addition to the military, to gain more power relative to the other branches of government.³⁵⁰ The precise effect of adding an internal focus to the military's long-standing externally-focused warfighting doctrine is unclear, but it is safe to assume that this shift will have an impact.

One of the primary effects of the 9/11 attacks was that, at least for an initial period of time, a much broader array of domestic counterterrorism options became possible: "For the first time since the end of the Cold War, the vital national interest was threatened, and the Department of Defense immediately moved to a war footing....[T]he heightened national interest lowered the policy costs of monitoring."³⁵¹ The U.S. War College's Dr. Antulio Echevarria argues that 9/11 as a specific event did not necessarily have a great impact on the day-to-day functions of military personnel, but the future threat indicated by the attacks has proven to be a strong driver for institutional change. In Echevarria's opinion, the standing up of NORTHCOM was a political decision, intended to reassure the public that the executive branch was working to make the homeland more

³⁵⁰ Author's interview with Dr. Max Manwaring, Professor, U.S. Army War College, Strategic Studies Institute (5 October 2007).

³⁵¹ Feaver & Gelpi (2003), pp. 290-1.

secure, but it was likely also a conscious decision to ensure the military profile inside the United States remained small,³⁵² confined within the boundaries specifically established by the civilian authorities through the creation of a specific command for the United States. In this manner, then, 9/11 as an event had a significant impact on civil-military relations in the U.S.:

Before 9/11, "...prior beliefs about the role of the American government in domestic matters clearly imposed a set of constraints on central government domestic powers and 'interference from Washington.' That is, the mandate for national defense was much less hedged than that for domestic matters....For responses to 9/11, these patterns suggest administration efforts to make domestic measures part of national defense falling under its mandate."³⁵³

There is no question that the attacks of September 11th provided a critical juncture in the military's institutional development, providing the organizational impetus and public support to expand the military's domestic counterterrorism role. In combination with the Bush administration's strong policy entrepreneurship in favor of executive authority expansion and a group of established institutional parameters that defined this expansion, the 9/11 attacks produced a domestic counterterrorism infrastructure in which the military is playing an increasingly powerful role. In the past, civilian authorities have created new institutional checks on the military in the context of highly controversial issues, such as the establishment of the Atomic Energy Commission to ensure civilian control over nuclear weapons,³⁵⁴ and we are seeing the same pattern with respect to use of the military in counterterrorism initiatives. As I explain in Chapter 6 on the use of military courts as a domestic counterterrorism tool, Congress is working to reassert its control over the executive branch's use of the military.

352 Author's interview with Echevarria (2007).

353 Borrow, David. April 2004. "Losing to Terrorism: An American Work in Progress." *Metaphilosophy*. 35:3. p. 355.

354 Feaver & Gelpi (2003), p. 84.

ISRAEL

The public perception that Israel is constantly thwarting plots that threaten its survival has become the overriding reality that shapes the structure of the Israel Defense Forces (IDF) and its relationship with Israeli political authorities and society.³⁵⁵ This unique threat environment separates Israel from its democratic peers: “Israel is the only post–World War II democracy in the world that has been in a state of constant war with its neighbors throughout the entirety of its existence. Its military machine is among the largest in the world relative to its population....”³⁵⁶ While the sanctity of civilian command has never been at risk, the balance of power between the political and military authorities is highly volatile. Amir Bar-or attributes this power struggle to the government’s attempts to narrow the senior command’s influence on its decision making, measured against the realization that the army is gaining increasing influence over counterterrorism policymaking³⁵⁷ as domestic security threats grow.

The original pattern of civil–military relations in Israel was fashioned at a time when the IDF’s principal operational commitment was to defend the country against the threat of a cross-border invasion by neighbouring conventional armies....By contrast, the containment and/or suppression of Palestinian guerrilla

355 Moskos, Charles, John Allen Williams, and David Segal. 2000. “Armed Forces after the Cold War.” pp 1-13, in Moskos, Charles, John Allen Williams, and David Segal, eds. The Postmodern Military: Armed Forces after the Cold War. Oxford, England: Oxford University Press. p. 10. “Israel has always faced three distinct categories of military threat. One consists of perimeter (i.e., cross border) incursions. In addition to large-scale attacks launched by the conventional armies of Israel’s immediate Arab neighbors, these could take the form of low-intensity raids conducted by groups of Palestinian marauders stationed in Arab lands. A second category of military threat consists of intrafronteir insurgent activities and guerilla attacks on civilian as well as military targets, emanating from inside the borders of the state or from regions behind the lines held by IDF troops. The third category of military threat is remote; it consists of long-range aerial or missile bombardment launched by foes with whom Israel shares no geographical boundaries.” Gal, Reuven, and Stuart Cohen. 2000. “Israel: Still Waiting in the Wings.” pp. 224-241, in Moskos, Charles, John Allen Williams, and David Segal, eds. The Postmodern Military: Armed Forces after the Cold War. Oxford, England: Oxford University Press. p. 226

356 Peri, Yoram. November 2002. “The Israeli Military and Israel’s Palestinian Policy: From Oslo to the Al Aqsa Intifada.” *Peaceworks*. Washington, DC: United States Institute of Peace. Accessed 20 January 2007 at www.usip.org. p. 11

357 Bar-or, Amir. July 2006. “Political-Military Relations in Israel, 1996-2003.” *Israel Affairs*. 12:3, pp 365-376, p. 374.

activities were considered far less pressing tasks....That order of priorities now seems obsolete.”³⁵⁸

In spite of such changes in the threat environment—or, perhaps, because of them—the Israeli military maintains a preeminent role in Israeli society. The IDF, often called the “people’s army,” has gone through several rounds of structural changes throughout its existence to meet this changing threat, but has kept alive its society-based militia character. This unity of purpose is derived from a common Israeli historical experience: “That Israelis experienced themselves as being born out of centuries of Diaspora persecution into the arms of Arab intransigence meant that, from its beginnings, Israel cultivated a role based on existential self defense....”³⁵⁹ Even though exceptions to the Israeli policy of universal conscription have mushroomed and negative press reports regarding IDF recruitment and retention policies are common, military service in Israel is still viewed as a rite of passage and one of the ultimate expressions of Israeli citizenship. The policy of universal conscription—along with the salience of national security concerns in Israel society “and the many wars that Israel has fought within its short history—has granted the IDF [a place of] pride within the Israeli imagination.”³⁶⁰

Two broad historical events, to be discussed below, have encouraged the use of the IDF in a domestic counterterrorism context. First, the manner in which the Israeli state was established and the key role of the IDF (and its predecessor militias) in that society prior to independence have increased the chance that the army will be relied upon to mitigate threats in times of high insecurity. Second, the advent of the first and second *intifadas* in the late 1980s and 1990s, respectively, was especially significant in

³⁵⁸ Cohen, Stuart. October 2006. “Changing Civil-Military Relations in Israel: Towards an Over-subordinate IDF?” *Israel Affairs*. 12:4, 769-88, p. 779.

³⁵⁹ Sucharov, Mira. Winter 2005. “Security Ethics and the Modern Military: The Case of the Israel Defense Forces.” *Armed Forces & Society*. 31:2, 169-99, p. 180.

³⁶⁰ *Ibid*, pp. 179-80.

increasing and institutionalizing the IDF's domestic counterterrorism role. During both *intifadas*, domestic Israeli military activity increased substantially, to include a vast rise in the number of cases brought before Israeli military courts, as will be discussed in Chapter 6.

The Vaulted Role of the Israel Defense Forces in Israeli National Mythology

The notion of being a “society under siege” has encouraged the perception of the Israeli state as exceptional, and as such uniquely justified in using aggressive methods to fend off those who might threaten the sanctity of the state. The primacy of security policy has nurtured a political environment in which civilian authorities are heavily reliant on their military counterparts, as much for the technical and professional skills they possess as for the legitimacy they can grant to civilian initiatives that are implemented with military support. “This militarist orientation has occasionally bordered on a genuine glorification of the secret services and elite army units and has led to far-reaching implications. Israelis tend invariably to prefer security interests to other considerations, including proper government procedures.”³⁶¹

Israeli military analysts often discuss the importance of the Israeli national consciousness in endowing the IDF with such a high degree of political power. It is possible, however, that this consistent fear of extinction—versus the actual threat level—could lead Israel to overstate threats to its existence, both internally and externally. There is no question that Israel faces a higher level of threat from both realms than most other states in the international system, especially among consolidated democracies, but this type of self-definition alters what is permissible in Israeli democracy and allows substantial military involvement in the political system. For decades scholars have

³⁶¹ Pedahzur, Ami, and Magnus Ranstorp. Summer 2001. “A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel.” *Terrorism and Political Violence*. 13:2, 1-26, pp. 14-5.

argued that Israel disproves Lasswell's garrison state thesis, but this is an incomplete assessment of the phenomenon. As Yoram Peri writes, "Israeli society is not militarized despite the prediction of the garrison state thesis. On the contrary, the military has become civilianized."³⁶²

Other Israeli institutions reflect this confluence of security priorities and national aspirations. Foreign and defense policy are considered, for the most part, to be one and the same. A single Knesset committee, the Foreign Affairs and Defense Committee, manages both foreign and defense policy. For many years, the prime minister also served as the defense minister. Shifts in the threat environment began to cause changes within this original defense infrastructure:

The defense system gained added importance in 1967 following the establishment of a military government in the West Bank, the Golan Heights, and Sinai. In addition to being constantly occupied trying to quell an insurgent war that took various forms—infiltration across the border (mainly from Jordan), terrorism (in Israel itself), guerilla warfare (in southern Lebanon), and popular uprising (in all the occupied territories)—the defense apparatus was also the body governing the Palestinian civilian population.³⁶³

While there are still disagreements within the Israeli political and military elite about domestic threats should be mitigated, political solutions are increasingly recognized as an integral supplement to domestic military counterterrorism operations.

The IDF has never endangered civilian control by forcing political authorities to abide by its preferences. However, the IDF is able to use its integral defense role and Israel's unstable security environment to support attainment of its own policy preferences.

[P]articularly during wartime there have been many cases when military activity went beyond the original instructions or when the IDF secured the approval of the political echelon only after operations were completed. Stories of field

³⁶² Peri (2002), pp. 11-2.

³⁶³ Ibid., p. 20.

commanders who turned off their radio equipment to avoid receiving orders they did not want to hear are part of the IDF military tradition....”³⁶⁴

In one of the most widely cited examples of military disobedience, in 1967 Deputy Chief of Staff General Haim Bar-Lev pushed Israeli troops all the way to the Suez Canal, against the orders of Defense Minister Moshe Dayan.³⁶⁵ In this example, as in most, Israeli military defiance occurred on the tactical rather than strategic level, and civilian control of the armed forces was never really in jeopardy.

A turning point in Israeli civil-military relations occurred with publication of the Agranat Commission’s findings, following its investigation of the IDF’s poor performance in the 1973 Yom Kippur war. The commission clearly placed the onus for the failure on IDF intelligence personnel, and abstained from extensive evaluation of the political authorities’ performance during the crisis.

Military officers took this as a lesson that during a crisis the politicians would disclaim responsibility and would instead lay the blame on the generals. This awareness led to a profound change in the military’s attitude toward politicians. On the one hand, military leaders developed a lack of respect and deep suspicion of the latter; and on the other hand, the officers wished to be more equal partners in making decisions so they would not fall victim to a failed policy that they had no role in formulating.”³⁶⁶

Because of the military’s strong connections to Israeli society the negative perception the military held of its civilian master filtered down into the broader citizenry. The Israeli

³⁶⁴ Ibid., p. 39. “This gray area is precisely where the IDF allowed itself broad scope for interpretation of government policy in 2001. One observer described the situation thus: ‘The military drags its feet when the orders are not to its liking’ (Ofar Shelach, *Yediot Aharonot*, December 22, 2000). Many examples of the military undercutting government policy could be cited. When a government order came to open the airfield at Dahania, the IDF carried it out but at the same time blocked the roads to the airfield so that people could not reach it. When ordered to open a major road, the IDF delayed doing so for several hours. Another case concerned a brigade commander who decided not to carry out an explicit order from the defense minister himself to open the Adam bridge over the Jordan. “When he was asked why, he replied that he would not have enough manpower to carry out the order.” Ibid.

³⁶⁵ Kober, Avi. June 2001. “Israeli War Objectives into an Era of Negativism.” *Journal of Strategic Studies*. 24:2, 176-201, pp. 178-9.

³⁶⁶ Peri (2002), pp. 21-2.

public, therefore, at this point tended to lend their support to the IDF, despite the army's perceived failure in combat.

Indeed, the IDF is, by design, a “people's army” and national symbol. The Israeli military has always been involved in non-military functions within Israeli society. Because the IDF was conceptualized by its founders as a cornerstone of Jewish nation-building, multiple avenues to purposefully blur the boundaries between the civilian and military spheres were paved. For example, Prime Minister Ben-Gurion worked to institutionalize the ideal of a society-based military through

(a) the formation of the NAHAL (youth pioneer fighting) Corps, set up to provide manpower for Jewish agricultural settlements in areas of the country considered too insecure or remote for normal civilian habitation; (b) the provision, via the Education Corps, of supplementary instruction for school children and potential recruits in underprivileged communities; (c) the use of IDF engineering units to construct and maintain many of the camps which housed the large number of new immigrants who arrived early in the 1950s.³⁶⁷

Historically, military service has been vital to gaining stable employment and accessing state services, and while the requirements regarding military service have been reduced significantly, “military service is still a key stratifier in Israeli society.”³⁶⁸ In addition, in the words of Martin Van Creveld, “regardless of the ongoing peace process, the IDF remains the ultimate guarantor of the country's existence and a critical component of the balance of power in one of the world's strategically most important regions.”³⁶⁹ The IDF's deep roots in Israeli society, its track record of being a trusted and dependable state institution able to prevent the destruction of the Israeli state, and the

³⁶⁷ Cohen, Stuart. Winter 1995. “The Israel Defense Forces (IDF): From a ‘People's Army’ to a ‘Professional Military’—Causes and Implications.” *Armed Forces & Society*. 21:2, pp. 237-54. Martin Van Creveld places these social initiatives in the context of the development theory that was popular at that time: “Its central tenet was that, thanks to its cohesion and supposed familiarity with things technical, the military was one of the important institutions by which newly independent nations could pull themselves up by the bootstraps and achieve rapid modernization.” Van Creveld, Martin. 2002. The Sword and the Olive: A Critical History of the Israeli Defense Force. New York: PublicAffairs, p. 156.

³⁶⁸ Cohen (1995).

³⁶⁹ Van Creveld (2002), p. xxi.

Israeli public's tolerance for military intervention into domestic life when the threat level is high, makes the IDF a natural choice for conducting domestic counterterrorism operations.

The First and Second *Intifadas* and the Militarization of Counterterrorism Policy

The *intifada* ushered in years of profound disagreement between—and among—civilian and military authorities regarding the appropriate and most effective counterterrorism tactics to be utilized by military forces deployed to the Palestinian territories. As the Palestinian forces fighting Israeli military rule strengthened and the Israeli citizenry's frustration grew,³⁷⁰ Israeli political and military officials began to portray Palestinian activities as similar to the regional wars Israel fought against its Arab neighbors. In 1988, Prime Minister Rabin characterized the *intifada* as “a violent civilian activity with a clear political goal, which is no different from that of the Arab states in their wars against us. The goal...is to push us out of the West Bank and Gaza Strip, and I am not sure whether it is only these territories from which the Palestinians want to push us.”³⁷¹

This heightened domestic threat perception, while certainly based in truth, was at the same time a key tool by which the Israeli political and military establishments justified aggressive domestic military activity. Early IDF counterterrorism tactics proved ineffective:

From the first the Israeli military authorities were at a loss in dealing with an uprising that had no central leadership and in which the ‘enemy’ usually consisted

³⁷⁰ Yoram Peri notes that the shift of the civil-military balance toward the military leadership in the 1990s was largely due to “the constant political crisis as a result of the Israeli political system’s inability to ‘deliver the goods’ and to deal effectively with Israel’s central problem since 1967, the occupied territories and relations with the Palestinians.” Peri, Yoram. April 2005. “The Political-Military Complex: The IDF’s Influence Over Policy Towards the Palestinians Since 1987.” *Israel Affairs*. 11:2, 324-44, p 329.

³⁷¹ Inbar, Efraim. Fall 1991. “Israel’s Small War: The Military Response to the Intifada.” *Armed Forces & Society*. 18:1, pp. 29-50. Rabin quote: For the English transcript, see Yitzhak Rabin. April 1988. “We Have Our Priorities.” *Spectrum*. 6.

of unarmed civilians....Although occasional demonstrations of force were held...in this struggle 95 percent of the firepower [the IDF] deployed against regular Arab armies was irrelevant; neither the fighter-bombers nor the tanks nor the heavy artillery (let alone warships or submarines) were of any use when it came to controlling crowds or chasing small parties of teenagers....³⁷²

These early failures encouraged a reevaluation of the IDF's counterterrorism infrastructure, and the first *intifada* resulted in a long period of intelligence reform in which the military's domestic intelligence infrastructure expanded and increased cooperation with domestic intelligence agencies to better counter the terrorist threat: "Mechanisms for better coordination between the [General Security Services and IDF Intelligence Branch] were established. IDF units in the territories began having liaison officers to the GSS. This improved coordination since mid-1989 enabled the IDF to display more initiative in contrast to the reactive behavior characteristics of the beginning of the *intifada*."³⁷³

The interim period between the first and second *intifadas* provided time for the pervasive tensions that arose between civilian and military authorities during the first *intifada* to ease. Beginning with the 1993 Oslo Accords, the pace of domestic military activity slowed. As security priorities declined in importance and the military leadership became less consequential in the political authority's decision-making process, civilian authority over the military appeared to solidify. This, however, did not last. In the mid-1990s, the Israeli government designed its Hebron withdrawal plan and ordered the opening of the Western Wall tunnel in Jerusalem—both, by definition, military operations—without consulting the military leadership. According to Amir Bar-or,

³⁷² Van Creveld (2002), p. 343.

³⁷³ Efraim (1991). According to Martin Van Creveld, early in the *intifada* there was no indication "that the significance of such difficult struggles as those in Algeria, Vietnam, and Afghanistan had been grasped or even so much as studied; even though coping with *Intifada* constituted the army's main activity between 1988 and 1995, *Maarachot*, its flagship publication, did not carry a single article about it." Van Creveld (2002), p. 345.

[t]he fact that military figures were no longer ‘in the game’ consigned them to the awkward position of having to provide military solutions for political contingencies that they were not consulted on in the first place. In light of the worsening relationship between the prime minister and the army after the Western Wall tunnel fiasco, when blame was placed on the army, and the IDF became, in effect, a political punch-bag, distrust between the different sectors soared to its highest level since the 1967 war.³⁷⁴

At the same time, the military was becoming increasingly important domestically as the second *intifada* began. This caused another shift in Israeli counterterrorism policy, as the second *intifada* was “far more violent than the first because of the political and geographic changes that had been instituted under Oslo.”³⁷⁵ IDF domestic counterterrorism policy at this point was far more aggressive than it had been in the past.

The low-intensity, protracted nature of the conflict in the Palestinian territories further impacted the civil-military relationship by increasing civilian monitoring of military operations and sparking military resentment of civilian “interference” in operational matters:

Almost invariably, [low-intensity conflict (LIC)] situations tend to aggravate the tendency of politicians to deny their generals even tactical autonomy over military matters that the latter usually consider exclusively their preserve. Indeed, the more protracted the LIC becomes, the more restricted the military’s freedom of operational manoeuvre tends to be. Politicians become increasingly sensitive to the fact that even seemingly minor actions can have enormous strategic consequences, especially when subjected to the glare of media attention.³⁷⁶

This combination of internal and external pressure, coupled with extensive domestic and regional security concerns, altered the balance of the Israeli civil-military relationship. According to Stuart Cohen, “the tendency of Israeli politicians to keep their generals on a particularly tight leash became even more apparent during the second

³⁷⁴ Bar-or (2006), p. 368.

³⁷⁵ Hajjar (2005), p. 15.

³⁷⁶ Cohen (2006), p. 780.

intifada. In part, this was due to the domestic opposition, and in some cases revulsion, that many IDF operations against Palestinians had begun to fuel.”³⁷⁷

This debilitating tension at the highest echelons of the civilian-military complex reflected the battles being fought within Israeli society at large regarding the substance and end goals of Israeli counterterrorism policy, fulfilling the prediction of some civil-military scholars that high internal threat levels, such as what the IDF is facing, may orient the military toward internal tasks in such a manner that military officers become politicized. The advent of the first *intifada* caused a significant shift in Israeli civil-military relations precisely at the time when Israeli institutions were supposed to be consolidating behind clear rules of civilian control, as implemented under the 1976 *Basic Law: The Army*. Thus, the changing historical context altered the military’s domestic counterterrorism role, increasing its importance in both the policymaking and implementation stages.

DISCUSSION

The threat environment in Israel, both internally and externally, has long been menacing and volatile. Ironically, this constant level of threat has “permitted the retention of a relatively stable set of strategic and operational formulae that emphasized (in an ascending order of violence) deterrence, preemptive attacks, and short wars.”³⁷⁸ What has changed, however, is Israeli society. While it has always been highly factionalized—even for a consolidated democracy—voices arguing for reduced military autonomy are gaining strength. Much of this shift is a result of the changing threat environment and ensuing shifts in Israeli military counterterrorism policy. This change finds its roots in the early 1990s with signing of the Oslo Accords and the resultant

³⁷⁷ *Ibid.*, pp. 780-1.

³⁷⁸ Gal and Cohen (2000), p. 227.

difficulty faced by the Israeli military as it adjusted its policies for managing the domestic terrorist threat. Uri Savir, a civilian on the staff of the Civil Administration, described the difficulty of transferring administrative authority to the Palestinian Authority in the mid-1990s:

In the course of the twenty-seven years of occupation almost every third Palestinian in the territories had at some time or another been imprisoned or detained, and the population as a whole had suffered great humiliation at our hands. Some of the wounds of that period may never heal. Now those who had ruled over the Palestinians were asked to transfer their authority to their “subjects,” and this caused them extreme distress, both conceptual and emotional. When we terminated the occupation...there were those among our people who found it very difficult to change.³⁷⁹

In spite of what has been a very difficult existence, the Israeli government has managed to maintain its democratic structure and assert civilian control over the military, even when faced with highly divisive issues. Indeed, as Yoram Peri points out, at four critical landmarks in Israeli history final decisions regarding IDF activities as they related to the Israeli-Arab dispute were determined by political leaders, against the preferences of the military leadership.³⁸⁰ However, the power balance between the two entities has fluctuated, and more often than not the military leadership has gained power at the expense of the civilian establishment as the threat of attack—both externally from a neighboring Arab state or Iran and internally from a Palestinian terrorist group—increased. The IDF’s foundational role in Israeli history and society and a domestic

³⁷⁹ Peri (2002), pp. 48-9.

³⁸⁰ “Prime Minister Begin responded to President Sadat’s peace initiative at the end of the 1970s and was ready to give up the whole of the Sinai despite the opinion of his CGS, Motta Gur. The Oslo Accords, which opened the peace process between Israel and the PLO in the 1990s, were achieved by Prime Ministers Rabin and Peres without the involvement of the military and despite the reluctance of CGS Barak. The decision to withdraw from southern Lebanon in 2000 was made by Prime Minister Barak in direct opposition to the attitude of his CGS, Shaul Mofaz. One can also cite another event from the more distant past, when Prime Minister Ben Gurion decided in 1957 to withdraw from the Sinai after the Suez campaign despite the opposition of his CGS, Moshe Dayan. On the other hand, those who made these decisions were people who had only recently exchanged their military uniforms for civilian dress, including Rabin, Barak, Dayan, and Weizman. And these people were also helped by the fact that there were some senior officers whose opinions differed from those of the CGS.” Ibid., pp. 50-1 .

threat level that continues to put Israeli citizens at risk fosters an environment in which domestic military counterterrorism operations are both permitted and encouraged.

THE UNITED KINGDOM'S COUNTERTERRORISM POLICY

Counterterrorism policy in the United Kingdom, as discussed in Chapter 2, evolved over a much longer period than that in the United States or Israel. The protracted nature of the British government's violent relationship with Irish nationalists throughout the nineteenth and twentieth centuries ensured that counterinsurgency and counterterrorism policies would always rank highly on the national agenda. The British government's imperialist experience, the Anglo-Irish Treaty of 1921, the guerilla nature of the Irish Republican Army (IRA), and a collection of specific events that killed large numbers of British citizens all served as critical junctures in the development of domestic counterterrorism policy in Great Britain; all, also, led British authorities to support a significant role for the military in domestic counterterrorism operations.

Colonialism and the British Military

The British military, particularly the Army and the Royal Navy, has a long history of engaging in "small wars," a series of counterinsurgency campaigns waged to entrench British control over its imperial possessions. In between the two World Wars, the British Army's responsibilities shifted from expanding the reach of the British Empire by establishing colonies toward a system of imperial policing, in which it was granted "temporary" governance of certain areas that had been on the losing side of World War I. Following World War II, the British Army engaged worldwide in a wide array of counterinsurgency campaigns,³⁸¹ building a sense of mission mindset in which

³⁸¹ "The British Army fought its post-World War II campaigns in the predominantly rural jungle conditions of Malaya, Kenya, Borneo, Guyana, and Dhofar to the desert conditions of Palestine; Muscat and Oman; Radfan; and Kuwait and was successful in small-scale and medium-scale operations." Cassidy, US Army

“[i]mperial policing, intrastate security, and counterinsurgency [were] considered normal roles for the British Army.”³⁸²

The British government’s success in using its military to advance state interests throughout the nineteenth and early twentieth centuries led the civilian leadership to rely heavily on the military to attain diplomatic aspirations. While the Army’s purpose for deployment to British colonial holdings was different than that it held for Northern Ireland, today’s British military culture suggests “certain continuities in the underlying approach between colonial insurgency and Northern Ireland because of deep-seated beliefs and attitudes held by the Army as a result of its historical experiences.”³⁸³ The principles that guided the British Army’s counterterrorism strategy in its colonial territories in the twentieth century—“minimum force; civil and military cooperation to win support of the population; and decentralization of command and control supported by a regimental system that creates initiative in junior leaders”³⁸⁴—were the same principles on which the Army based its counterterrorism strategy in Northern Ireland.

As discussed in Chapter 2, British civil-military relations are characterized by a “mixed management” structure in which civilian and military personnel work side-by-side. While this has always been a somewhat unique characteristic of civil-military relations in the UK, the Army’s experiences with counterinsurgencies in its colonial

Lieutenant Colonel Robert M. May-June 2005. “The British Army and Counterinsurgency: The Salience of Military Culture.” *Military Review*. pp. 53-59, p. 56.

382 Ibid., p. 58. It has been argued that “the British Army is primarily a counter-insurgency army, and that ‘since its very formation and for the greater part of its history, this army’s principal mission was to acquire and then to police imperial possessions.’” Thornton, Rod (2004) “Historical Origins of the British Army’s Counter-insurgency and Counter-terrorist Techniques.” Geneva Centre for the Democratic Control of the Armed Forces conference paper, as discussed in Egnell, Robert. December 2006. “Explaining US and British Performance in Complex Expeditionary Operations: The Civil-Military Dimension.” *The Journal of Strategic Studies*. 29:6, 1041-75, p. 1064.

383 Cassidy (2005), p. 58. According to Cassidy, the Army’s experiences in Northern Ireland still resonate: “The influence of Northern Ireland in perpetuating the British Army’s experiences and attitudes about low-intensity conflict is also salient....[O]ne cannot overstate the deep influence of the Ulster experience on British Army culture.” Ibid.

384 Ibid.

holdings and Northern Ireland reinforced the necessity and efficacy of that management structure.³⁸⁵ Operational flexibility with a keen awareness of the political ramifications of military activity was a key development in British military culture during the twentieth century, especially in Northern Ireland. This background nurtured the British government's faith in employing its military as part of a broader counterterrorism strategy, and also institutionalized the military integration of political concerns into tactical counterterrorism approaches.

The Anglo-Irish Treaty of 1921

The Articles for an Agreement between Great Britain and Ireland (1921), or the Anglo-Irish Treaty, ended the Irish War of Independence and partitioned Northern Ireland from the Irish state. The Treaty formalized pervasive, pre-existing sectarian differences by creating separate spheres of government power, largely along religious divisions, and provided a new frame of reference from which further conflict would define itself. The Treaty did nothing to resolve the fault lines³⁸⁶ that led to the need for a settlement in the first place, generating conflict for years to come and repeatedly causing the British government to deploy troops to Northern Ireland.

The Special Powers Act of 1922 (SPA)—the legal precedent for every executive-authorized domestic deployment of military personnel for British counterterrorism

³⁸⁵ According to Robert Cassidy, “[t]he key to the British Army’s success in counterinsurgency conflicts was its integrated civil-military approach. Civilian officials remained in control of emergencies and were responsible for the broader political strategy and for propaganda. The British Army operated under civilian control and accepted the requirement of employing minimum force. *Ibid.*, p. 56.

³⁸⁶ According to Kieran McEvoy and John Morison, these fault lines included: the formalization of a Unionist/Protestant majority in Northern Ireland and creation of a coercive apparatus to maintain that supremacy; the corralling of a Nationalist/Catholic minority within the province that was excluded from political power; and the continuation of pre-partition allegiances with Unionists intent on remaining constitutionally connected to Britain and Nationalists focused on the re-unification of Ireland. McEvoy, Kieran, and John Morison. April 2003). “Constitutional and Institutional Dimension: Beyond the ‘Constitutional Moment’: Law, Transition, and Peacemaking in Northern Ireland.” *Fordham International Law Journal*. 26, pp. 971-2.

operations in the twentieth century—was a direct response to a rapid increase in political violence in the early 1920s,³⁸⁷ much of which was itself a response to the signing of the Anglo-Irish Treaty. The Northern Parliament’s passage of a similar version of the SPA lent further legitimacy to Westminster’s deployment of troops to the province. Powers bestowed upon military personnel by the SPA and subsequent renewals were used most often against minorities in Northern Ireland, leading to widespread reports of discrimination in application. The Gardiner Committee—an ad hoc commission convened by the British government in the mid-1970s to examine the efficacy of the Emergency Powers Act (1973)—reported that “[w]itnesses who appeared before us left us in no doubt that sections of the minority community, and some parts of the majority community, consider that the use made by the army of these powers is excessive and constitutes a real and continuing source of grievance and friction.”³⁸⁸

The sectarian differences perpetuated by the Anglo-Irish Treaty proved to be particularly acute and debilitating in the British Army’s use of emergency powers in counterterrorism operations carried out in the province. During the Falls Curfew, for example, the Army carried out extensive arrests with no participation from the local unionist Royal Ulster Constabulary (RUC), the Protestant state police force of Northern Ireland. According to Campbell and Connolly’s review of arrest patterns in non-curfew cases, during the years when both the Army and the RUC were functioning under law enforcement authorities far more Republicans/Irish nationalists were arrested in operations involving the Army than in those that only involved the RUC. “What appears to emerge is an early example of an institutional bifurcation whereby nationalist areas

387 “Between 6 December 1921 and 31 May 1922, 236 people died and a further 346 sustained injuries in Northern Ireland as a result of political violence.” Donahue, Laura K. 2001. Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000. Dublin: Irish Academic Press, p. 16.

388 Ibid., p. 170. See Chapter 5 for a discussion of the importance of ad hoc commissions in shaping domestic counterterrorism policy in the United Kingdom.

became subject to military control mechanisms (the ‘military-security approach’), whereas in loyalist areas, police-led approaches dominated.”³⁸⁹

The Diplock Commission, in its recommendations in the early 1970s for the direction of British counterterrorism policy in Northern Ireland, argued forcefully for the use of juryless trials based largely (if unintentionally) on sectarian divisions that were institutionalized with the Anglo-Irish Treaty:

We are...driven inescapably to the conclusion that until the current terrorism...can be eradicated, there will continue to be some dangerous terrorists against whom it will not be possible to obtain convictions by any form of criminal trial which we regard as appropriate to a court of law.... The only hope of restoring the efficiency of criminal courts of law in Northern Ireland to deal with terrorist crimes is by using an extra-judicial process to deprive [terrorists] of their ability to operate in Northern Ireland....³⁹⁰

While the British judiciary—as will be discussed in Chapter 5—has been able to place some limits on discriminatory counterterrorism initiatives based on international human rights law, for the most part the executive’s justification of national security concerns has been sufficient to maintain a body of sectarian-based emergency laws.

The impact of the military’s use of SPA powers was profound, forming the basis of the civil rights movement in Northern Ireland in the 1960s and the eventual suspension of the Northern Parliament. In spite of widespread criticism of the Army’s use of SPA powers, SPA-derived legislation was continually renewed for eighty years; “temporary” or “emergency” law had become the normal state of affairs for domestic counterterrorism policy. “Facilitating their repeated introduction and use was the perception in Westminster that Northern Ireland was somehow different from the rest of the United Kingdom, and as a unique place with its own history, counter-terrorist legislation was,

389 Campbell, Colm, and Ita Connolly. September 2003. “A Model for the ‘War Against Terrorism’? Military Intervention in Northern Ireland and the 1970 Falls Curfew.” *Journal of Law and Society*. 30:3, 341-75, p. 355.

390 Donahue (2001), p. 124.

although regrettable, somehow acceptable in, particularly, the Northern Ireland context.”³⁹¹

The IRA: A Military Response for a “Military” Opponent

The Irish Republican Army (IRA) throughout its various incarnations has “historically been imbued with a sense of military vanguardism. It sees itself as the embodiment of the Irish spirit and destiny that are expected to reside in an Ireland united and free of all British influence.”³⁹² Dissension over the strategic direction of the IRA—negotiation with the British authorities versus violent operations targeting British interests—has been at the core of each and every split in the movement.³⁹³ According to Kieran McEvoy, “political struggle has historically been subservient to ‘armed struggle’ within Irish Republicanism. Republicanism has traditionally been primarily a militarist movement, which mistrusted politics and held in disdain those who ended military struggle to pursue the political route.”³⁹⁴

Military factions within the Irish nationalist movement succeeded in railroading repeated attempts by more moderate factions to negotiate ceasefires and integrate IRA-linked terrorist elements into the broader political party. Sinn Fein, for example, was

391 Ibid., pp. 307-8. According to Laura Donohue, “The political situation into which the Northern government and Westminster introduced emergency powers was of utmost importance in the retention of the legislation. The sheer complexity and depth of the conflict ensured that any attempt to address the political situation would be fraught with difficulty, thus lending an apparent permanence to the mere existence of the conflict itself....Repeated reference to past events served to justify not just the republican view of the British government as an outside force, but physical force organizations as a ‘legitimate’ means to rid the country of British presence....In turn, the counter-revolutionary tradition sought to uphold the authority of the State...profess[ing] devotion to the British Crown.” Ibid., p. 324.

392 Page, Michael von Tangen, and M. L. R. Smith. Fall 2000. “War by Other Means: The Problem of Political Control in Irish Republican Strategy.” *Armed Forces & Society*. 27:1, 79-104, p. 82.

393 “If one looks back at the Irish republican tradition, one can suggest that it is possible to reinterpret its history as a struggle for and against political control over the military. The fact is that each successive attempt to establish a form of control over the military has led to a split in the movement.” Ibid., p. 100.

394 Toolis, K. 1995. Rebel Heart: Journey to the Heart of the IRA, as cited in McEvoy, Kieran. December 2000. “Law, Struggle, and Political Transformation in Northern Ireland.” *Journal of Law and Society*. 27:4, 542-71, p. 545.

hampered in its attempt to expand its vote share by the Provisional IRA's military policy, "which through the late 1980s seemed particularly unresponsive to electoral needs. PIRA was not sensitive to requests to make its violence more 'voter friendly.'"³⁹⁵ The consistent ability of the IRA's militant elements to discourage the British government's trust in its moderate negotiating partners within the IRA encouraged Westminster to respond to IRA-linked violence with military tactics. According to Page and Smith, the Republican reliance on force "has been reinforced over the years by a belief that the constitutional realm is an artificial British creation, an artfully constructed game with rules set in favor of maintaining British interests and stifling nationalist aspirations. Only by going beyond those rules, therefore, can British rule be successfully challenged."³⁹⁶ It is not surprising, therefore, that many British politicians believed that a political resolution was untenable, deeming military defeat of the IRA to be both "possible and desirable."³⁹⁷ As such, British counterterrorism policy against Irish nationalists—particularly during periods of escalating violence—was usually centered upon the employment of military means to disrupt and deter terrorist operations against British interests in Northern Ireland and the British mainland.

Specific Terrorist Events as Critical Junctures

The most common catalyst for the introduction of counterterrorism legislation in the British Parliament—as in all of the cases under consideration in this study—has been

³⁹⁵ Page and Smith (2000), p. 95. The Provisional IRA (PIRA) was a militant offshoot of the IRA, formed in 1969.

³⁹⁶ "Constitutionalism and Sinn Fein (circa 1912-1916) *Sinn Fein Pamphlets* No. 5, and *An Phoblacht/Republican News* (15 April 1982, 28 August 1986), as discussed in Page and Smith (2000), p. 83. Page and Smith further assess that this "perception has been reinforced by the belief that violent actions induce movement in the British position—the only language they understand...The result is a situation in which alternative, nonviolent methods, are discounted and armed force deployed without any systematic analysis of whether it will be effective in achieving political goals." Ibid.

³⁹⁷ Tuck, Christopher. June 2007. "Northern Ireland and the British Approach to Counter-Insurgency." *Defense & Security Analysis*. 23:2, 165-83, p. 170.

a deadly terrorist incident that also caused significant property damage. British counterterrorism policy is replete with examples of this pattern, the most notable to include: the passage of the Prevention of Violence (Temporary Provisions) Act (PVA) in 1939 in response to the initiation of an IRA mainland bombing campaign; the reintroduction of PVA powers in 1974 in response to the bombing of a pub in Birmingham;³⁹⁸ the British government's assumption of direct control of Northern Ireland in 1972 in response to the rapid escalation of violence in Northern Ireland in the late 1960s and early 1970s, including the implementation of a broad system of juryless trials; and the forceful demand for more stringent counterterrorism powers for the executive by Prime Minister Tony Blair in response to the Real IRA car bombing in Omagh that killed 28 and injured more than 200 in 1998.

Interestingly in the British case, public outrage at specific British military operations has been a driving force behind counterterrorism policy change. From the late 1960s until 1972, the British government instituted a law enforcement, vice military, approach to countering the waves of violence sweeping Northern Ireland.³⁹⁹ Once it became clear that this approach was unsuccessful and British interests were continually being targeted, the military took a more direct role in counterterrorism operations. The apex of this more aggressive stance was the "Bloody Sunday" incident in early 1972 during which a British Parachute Regiment killed 13 men and wounded 13 others during a protest of Irish nationalists in Derry, Northern Ireland. The grave errors committed by the military in this incident led to the broad reform of military intelligence gathering

³⁹⁸ *Ibid.*, p. xxii-xxiii.

³⁹⁹ "The disturbances that emerged in the province of Northern Ireland were regarded by the government as a local problem and one that was a "law and order" rather than a terrorism issue. The British Army was deployed in a peacekeeping role designed to curtail violence in order to allow a program of limited political and economic reforms in the province." Tuck (2007), pp. 166-7.

methods and tactical strategies,⁴⁰⁰ and also highlighted the need for more direct control of military counterterrorism operations from Westminster.⁴⁰¹

Particularly destructive external attacks also appear to follow the same pattern. The British Parliament, only days after the 9/11 attacks, introduced the Anti-Terrorism, Crime and Security Act (2001) (ATCSA), a vast and far-reaching counterterrorism bill that was one of the largest bills enacted since World War II.⁴⁰² The lack of formal debate, though not wholly unusual for British legislation, is atypical given the high political sensitivity the Act's restrictions on civil liberties would entail. The lack of debate and rushed approval, therefore, is best attributed to the catalytic power of 9/11 as a critical juncture in British counterterrorism policy.⁴⁰³

Discussion

Great Britain's colonial experience, the signing of the Anglo-Irish Treaty in 1921, the founding of the Irish Republican Army as an organization grounded in military and terrorist ideology, and a string of highly lethal terrorist attacks on British interests all served as critical junctures in determining the British military's role in domestic counterterrorism policy. The Army and Royal Navy's significant roles as diplomatic and political arms of the British state in British colonial possessions set a precedent for employing the military in counterinsurgency and counterterrorism operations in support of the Crown's political objectives. The Anglo-Irish Treaty formalized sectarian

400 Cassidy (2005), p. 58.

401 Donahue (2001), p. 121.

402 Haubrich, Dirk. December 2006. "Ant-terrorism Laws and Slippery Slopes: A Reply to Waddington." *Policing & Society*. 16:4, 405-14, pp. 407-8. British MPs took only sixteen hours over a three-day period to debate complex counterterrorism policies about "terrorist property, freezing orders, disclosure of information, immigration and asylum, race and religion, aviation security, retention of communication data, and police powers...." Ibid.

403 Dirk Haubrich asks the question, what did the ATCSA achieve "other than to enact measures that had been contemplated for years by the Home Office, [that] had repeatedly been rejected in parliamentary hearings as too far-reaching?" Ibid., p. 409.

divisions that would foster violence for decades to come and encouraged the increasing militarization of the IRA, creating a consistent need for British military intervention in Northern Ireland. Finally, the long string of terrorist incidents against British targets—stretching from the mainland Irish nationalist bombing campaigns of the early twentieth century to the July 2005 attacks in London by Islamic extremists—has nurtured a political environment in which the establishment of aggressive counterterrorism legislation is both expected and accepted by vast swaths of the British public.

SPAIN

Out of the four cases under examination, Spain is the only state that has *not* chosen to use military courts as a counterterrorism tool once it became a consolidated democracy. Institutional constraints—especially the 1978 Constitution—and a vast network of policy entrepreneurs that worked to limit military autonomy in as many areas of governance as possible contributed significantly to the Spanish government’s decision to use only civilian courts to try domestic terrorism cases. Both of these causal factors, in turn, were heavily influenced by Spain’s past. The Spanish Civil War, the Franco dictatorship, and the 1981 attempted military coup all shaped the Spanish government’s decision not to expand military authority to include the trial of suspected terrorists. The Spanish institutional reaction to ETA bombing campaigns and the 2004 Madrid attacks illustrate the government’s preference to avoid empowering the military with greater domestic authorities despite a heightened domestic threat environment.

The Spanish Civil War

The 1936-39 Spanish Civil War “has been the moral and emotional reference point of the contemporary Spanish transition to democracy in much the same way as the English civil war of the XVIIth century was the moral and emotional reference point for

the sociopolitical arrangements that opened the way to modern Western liberalism.”⁴⁰⁴ Since that time, the Civil War has served as the worst-case scenario by which all policy proposals and institutional reforms are judged. The modern Spanish state was a product of pact politics in which widely divergent preferences were muted or sacrificed for the sake of national stability, lest the state descend once again into civil conflict. In the context of counterterrorism policy, the lessons of the Spanish Civil War were those of employing inclusive policies to counter Basque terrorism in such a way that political differences—vice ethnic divisions—were emphasized as the root of the problem and were addressed as such.

While there is widespread agreement over the significance of the Spanish Civil War in shaping future Spanish governments, there is disagreement over how the memory of that event shapes specific policy outcomes. According to Paloma Aguilar, collective memory of the war shaped political outcomes in two separate, though complementary, ways: “On the one hand, it dissuaded the main political and social actors from engaging in confrontational politics. On the other hand, it also persuaded actors to reach agreements and to embrace consensual politics.”⁴⁰⁵ Most importantly, “the presence of a traumatic memory of the Civil War led [the various actors] to act on the assumption that, if certain forms of behavior and institutions from the past were not avoided, the war might break out again.”⁴⁰⁶ This drive to counter Basque terrorist activity through police and criminal justice tactics rather than military mobilization is largely derived from an

404 Perez-Diaz, Victor. June 1990. “The Emergence of Democratic Spain and the ‘Invention’ of a Democratic Tradition.” *Working Paper*. Madrid: Juan March Institute, pp. 24.

405 Aguilar, Paloma. December 1996. “Collective Memory of the Spanish Civil War: The Case of the Political Amnesty in the Spanish Transition to Democracy.” *Working Paper*. Madrid: Juan March Institute. Footnote 4, p. 2. Aguilar attributes the classification of these two impacts of collective memory to Olick, J. K. (1995) “Collective Memory and Cultural Constraint: Holocaust Myth and Rationality in German Politics” Paper presented at the Annual Meetings of the American Sociological Association, Washington, DC.

406 *Ibid.*, pp. 41-2.

historical memory—born out of the Spanish Civil War and deepened under the Franco dictatorship—that values compromise and accommodation over repression.

The Legacy of the Franco Era

One of the primary tools of state control under the Franco regime was the imprisonment of political opponents, both violent and non-violent. With the newly democratized government, the Spanish state reformed its counterterrorism strategy to clearly distinguish between non-violent political opponents of the state and ones that used terrorist tactics to bring attention to their political causes. Both types of opponents were punished heartily under Franco, and in the new government, only the latter would be.

Under Franco, the armed forces were a mixture of rank-and-file military personnel and a large number of local and state police forces, all of which shared responsibility for domestic security. The mission of these forces “was to ‘guarantee the unity and independence of the country, the integrity of her territory, national security and the defense of the institutional system’ (LOE, Article 37).”⁴⁰⁷ The Armed Police and Civil Guard were “fully militarized, governed by military regulations and procedures, and put under the command of an army general...”⁴⁰⁸ In the early days of the Spanish democratic state, government counterterrorism policies against ETA reflected these same police techniques. According to MacDonald and Bernardo,

[a]lmost immediately upon the escalation of ETA violence after the democratic transition, the state developed the paramilitary Group Against Armed Liberation Groups (GAL). It has been documented that GAL, acting on behalf of the Spanish state between 1983 and 1987 was responsible for numerous human rights violations, including twenty-three targeted-assassinations and numerous instances of torture.⁴⁰⁹

⁴⁰⁷ Aguero, Felipe. 1995. Soldiers, Civilians and Democracy: Post-Franco Spain in Comparative Perspective. Baltimore: The Johns Hopkins University Press. pp. 51-2.

⁴⁰⁸ Ibid.

⁴⁰⁹ Woodworth, Paddy. 2001. Dirty War, Clean Hands: ETA, The GAL and Spanish Democracy. Cork: Cork University Press, and Chapman, Sandra. 2006. “Report on the Basque Conflict: Keys to

The Spanish state never turned to overt use of military or paramilitary forces to combat domestic terrorism, due largely to the public outcry that would have occurred given the brutal nature of these forces during the Spanish Civil War and Franco's rule, but the state continued to use the paramilitary infrastructure put in place under Franco to covertly battle domestic terrorists. The decision to engage in these types of counterinsurgency operations, often in opposition to the criminal justice-based approach favored by the majority of the newly democratic government, can be attributed to the military's sustained confidence in its political role as granted by Franco. During the transition, the military "never requested or imposed formal guarantees to protect its institutional interests and political preferences....[T]he military relied on the deterrent effect that fear of a reaction by the armed forces would have on politicians should they become wooed by the benefits of pursuing unlimited reforms."⁴¹⁰ As the Spanish democratic state consolidated, however, the government's post-Franco counterterrorism strategy began to more closely reflect the pacted democratic transition that did not permit a significant military role in domestic counterterrorism operations.

The 1981 Coup d'Etat

Despite the new Constitution's restrictions on military authorities, the military elite maintained a privileged and powerful role in the democratizing political system. Indeed, in the years in between Franco's death and the passage of the Constitution, "the guarantor role of the armed forces acquired greater visibility, as did their constitutional powers to oversee the proper functioning of Franquist institutions."⁴¹¹ President Calvo Sotelo, while diligently pursuing legislation that would further assert civilian supremacy

Understanding the ETA's Permanent Ceasefire." <http://www.lokarri.org>, as cited in MacDonald, Ross, and Monica Bernardo. Fall/Winter 2006. "The Politics of Victimhood: Historical Memory and Peace in Spain and the Basque Region." *Journal of International Affairs*. 60:1, 173-96, pp. 182-3.

⁴¹⁰ Aguero (1995), p. 78.

⁴¹¹ *Ibid.*, pp. 47-8.

over the armed forces, was “arrested by the magnitude of the continuous hardline challenge, which distracted the government from conducting policy and forced it, instead, to handle innumerable skirmishes with hardliners.”⁴¹²

In the early 1980s, hard-line military factions, sensing their position to be increasingly threatened, acted more aggressively to protect their stake in the system. According to Felipe Aguero, the weakening of President and Parliament in the years immediately following passage of the Constitution, “coupled with the government’s excessively mild exercise of authority to discipline the military, gradually led the military to visualize reduced cost of intervention.”⁴¹³ The result was the staging of a *coup d’etat* by hard-line military factions in February 1981. These military officials miscalculated their chances of success in taking over the state, however, and the King intervened and persuaded them to release the President and parliamentarians whom they were holding captive in the Parliament building.⁴¹⁴ In addition, large public demonstrations held throughout Spain against the military’s aggressive actions suggested to the *coup* leaders that they would not have the public support necessary to govern. The *coup* leaders surrendered and were promptly arrested, imprisoned, and tried for treason before a military court.⁴¹⁵

The impact of ETA’s terrorist attacks—which were directed primarily against military targets during the early 1980s—on the drive for the establishment of civilian

412 Ibid., p. 177. According to Felipe Aguero, “[t]he first post-constitution democratic period in Spain reveals the difficulties that face democratic advancement if a military that has transited intact from the previous regime is led to reassess the costs and opportunities involved in acquiescence to the new regime. This reassessment is encouraged by what military leaders perceive to be persistent attacks on the military institution or its ‘sacred’ mission. Nationalism and terrorism played this role in Spain...” Ibid., p. 159.

413 Ibid., p. 159.

414 According to Aguero, the “king’s role in defeating the coup and his subsequent stance finally convinced everybody that a military move against democracy would never be given the legitimacy of monarchic approval, necessary to gain the support of a large sector in the army. The king had asserted his authority over the army unambiguously in favor of civilian democratic government.” Ibid., p. 175.

415 See Chapter 6 for a discussion of Spain’s use of military courts in this case.

control over the military during this early period in Spain's democracy cannot be overstated. The military often used ETA's violence as justification for aggressive domestic counterterrorism operations and retaining significant influence in the counterterrorism policymaking process. The failed *coup* attempt, however, proved to be a critical juncture in Spanish civil-military relations—and, in extension, Spanish counterterrorism policy—by demonstrating to the military that non-democratic, violent actions would not be tolerated by the new state and encouraging the civilian leadership's belief that its control of the military must be strengthened. As a result, “[n]o political contestation by the military to the democratic regime would take place after 1982. From this point onward military opposition shifted to more strictly corporate concerns, and attempts at resistance turned into strategies of accommodation.”⁴¹⁶

Spain's Unique Historical Legacy and Its Fight against ETA

Spanish history is replete with examples of established ethnic communities clashing with enclaves of newly settled immigrants. Ethnic and regional tensions “reached a climax in the 30's and played a role in the Civil War, only to be forcefully repressed under Franco's rule.”⁴¹⁷ Basque separatist-associated violence has occurred for centuries, but increased in magnitude and lethality in the mid-twentieth century. Basque separatist violence began to take the form of a concerted terrorist campaign in the late 1960s, though the Spanish state responded slowly. Some attribute this slow response to the difficulty Spaniards have had “in reconciling the image they have about themselves and their institutions with the bare facts of political violence”⁴¹⁸ as they experienced it in the Spanish Civil War.

⁴¹⁶ Aguero (1995), p. 181.

⁴¹⁷ Perez-Diaz (1990), pp. 32-3.

⁴¹⁸ Ibid., pp. 20-1.

Given ETA's targeted attacks against Spanish military institutions and personnel, it is perhaps surprising that the military has not intervened more often to quell the violence, especially at the height of ETA's terrorist campaign in the 1980s when hundreds of civilians were killed. As previously mentioned, the institutional constraints placed upon the military as part of the democratic pact negotiated in the late 1970s certainly played a role in limiting the military's ability to push for its own policy preferences, as has the wide array of civil society entities working to limit the military's political power.

In portraying itself as a representative of the Basque people and developing a strong political component to its movement, ETA itself deterred military operations against the group, as the government feared that such activities could be interpreted by the Spanish public as military intervention in the political process. According to MacDonald and Bernardo, ETA makes a concerted effort to proclaim itself "facilitator of the peace process, using a general strategy of managing violence and the politics of suffering: escalating violence at key moments or declaring temporary ceasefires to influence political discussions."⁴¹⁹ The Spanish government has also encouraged ETA to choose political approaches over violent means. The joint strategy of institutional isolation of the group and public rejection of ETA-directed terrorist violence "forced ETA to detract resources from terrorist attacks to other kinds of organizational goals."⁴²⁰

⁴¹⁹ MacDonald and Bernardo (2006), pp. 184-5. According to MacDonald and Bernardo, "[t]hese shifts in strategy reflect in part (1) a transition from an authoritarian to democratic context marked by a shift in the locus of decision-making power in the polity; (2) ETA's representation through Herri Batasuna and the need to facilitate the success of this political party in achieving independist demands; (3) ETA's successes and failures in influencing the political process; and (4) perceptions of the legitimate use of violence by Basque society, especially the independist-left which ETA purported to represent." Ibid.

⁴²⁰ Robles, Luis de la Calle. June 2007. "Fighting for Local Control: Street Violence in the Basque Country." 51, 431-55, pp. 438-9. The 1992 arrest of most of ETA's leadership in France heavily influenced the group's decision to place more emphasis on the participation of Basque political parties in the parliamentary system.

However, such breaks in violence have been short-lived, and “[g]iven the nonnegotiability of ETA’s demands for Basque independence and the Spanish government’s refusal to move beyond autonomy and regional decentralization for Basque peoples, a peaceful end to this conflict is difficult to forecast.”⁴²¹ As such, ETA’s sustained campaign against the Spanish state will continue to shape—and be shaped by—Spain’s domestic counterterrorism policy. Despite this continued violence, however, the Spanish state does not appear to be moving toward a military-based counterterrorism approach to ETA at any point in the near future.

9/11 and the Madrid Attacks

Up until the September 11, 2001, attacks in the United States, Islamist terrorism was a secondary consideration for the Spanish authorities. Just after the 9/11 attacks, however, the Spanish government took a more proactive approach toward investigating and disrupting Islamic terrorist activities on Spanish soil. At that point, ETA was still the primary terrorist target. That changed, however, with the bombing of four commuter trains in Madrid during the morning rush hour on March 11, 2004.⁴²² Spanish authorities initially blamed ETA for the attack, but the investigation quickly pointed to a group of extremists, some of whom had connections to al-Qa’ida. Jordan and Horsburgh assess that since the Madrid attacks “Spanish antiterrorist politics has become far more preventative. This is a logical change, since the leaders of the 11-M network were known by the police but were not arrested given the weak evidence against them.”⁴²³

421 Celso, Anthony. 2006. “Spain’s Dual Security Dilemma: Strategic Challenges of Basque and Islamist Terror during the Aznar and Zapatero Eras.” *Mediterranean Quarterly*. 17:4, 121-41, p. 127.

422 The ten bombs killed 191 people and injured more than 1,400.

423 Jordan, Javier, and Nicola Horsburgh. July 2006. “Spain and Islamist Terrorism: Analysis of the Threat and Response 1995-2005.” *Mediterranean Politics*. 11:2, 209-29, p. 224.

The Madrid bombings were a critical juncture in the evolution of Spain's domestic counterterrorism regime. Reforms of the country's counterterrorism infrastructure were made almost immediately, to include:

- a. Increased human and material resources devoted to counterterrorism
- b. Improved systems of coordination between agencies charged with counterterrorism responsibilities
- c. Supplementary legislation to Spain's already robust domestic counterterrorism regime
- d. Increased role for the military in domestic counterterrorism missions when strategic installations are targeted or at risk.⁴²⁴

The military's greater domestic role was one of the most significant aspects of this policy shift. For most consolidated democracies, it is neither odd nor unexpected for a state's military to be charged with protecting its domestic financial, energy, and security installations, but for Spain the more visible presence of the Spanish military on the streets of Madrid and elsewhere in the country was unusual. Spaniards spent nearly three decades following Franco's death ensuring that the domestic presence of troops would no longer be felt so overtly, but widespread public insecurity in the wake of the 11 March attacks superseded strong concerns about domestic military activity.

Politically, the Madrid bombings also had a significant impact, leading to the unexpected victory of the opposition *Partido Socialista Obrero Espanol* (PSOE) in Parliament and the ascent of Jose Luis Rodriguez Zapatero to the position of Prime

⁴²⁴ Ibid., pp. 217-9. The most important measure addressing domestic use of the military is the Prevention and Anti-Terrorist Protection Plan, "which includes the participation of the military when necessary. The plan aims to protect strategic installations (from communication points to nuclear centres) and zones of high population concentration. Every time the plan is activated, the monitoring is particularly intense in train stations, buses, ports and airports. Until now, the plan has been activated during the holiday season, when the use of transport is high and leisure zones heavily populated. The plan was also activated, to the highest level, following the London bombings in July 2005. Ibid.

Minister. Zapatero quickly announced his plan to create structures to better coordinate counterterrorism intelligence operations, but otherwise largely left the already stringent Spanish counterterrorism regime in place. Currently—as in the other three cases under consideration—strong drives for tougher counterterrorism measures by hardliners in Spain’s rightist political parties. The 11 March attacks gave these factions the historical impetus to push policies that have the potential to increase the military’s domestic counterterrorism authorities.

Discussion

The passage of the 1978 Constitution, the attempted *coup d’etat* in 1981, and the 2004 Madrid bombings have all served as critical junctures in the development of Spain’s counterterrorism policy, clearly shaping the counterterrorism policy options open to policymakers. The 1978 and 1981 events served to drastically reduce the military’s role in domestic counterterrorism operations, while the 2004 Madrid bombings served to expand—within limits, and at the behest of the civilian authorities—the military’s domestic role. This difference can be attributed to the level of democratic consolidation at which Spain stood at the time of each event as well as the nature of the threat; ETA threats were almost always preceded by a phone call that allowed for authorities to clear the target area of civilians, while Islamic extremists provided no such warning and carried out far more lethal attacks. The threat level Spain faces from Islamic extremists is unlikely to abate at any time in the near future: “Spain’s involvement in international peacekeeping operations in Afghanistan and its high profile prosecution and trials of more than one hundred 9-11 and 3-11 defendants will be sufficient provocation for the Islamists.”⁴²⁵

425 Celso (2006), p. 138. According to Celso, “[o]ne can easily imagine that the Spanish justice system’s conviction of eighteen al Qaeda militants (including a twenty-seven-year sentence for al Qaeda’s head in

CONCLUSIONS: HISTORICAL EXPERIENCES AS CRITICAL JUNCTURES ACROSS CASES

In this chapter I argued that a critical event, such as a single highly lethal terrorist attack or an extended series of smaller ones, enabled large-scale institutional change with respect to domestic counterterrorism policy. In the terms of Historical Institutionalism, the cases illustrate that political authorities found it easier following a terrorist attack to enact significant policy change with respect to domestic military counterterrorism activity as opposed to a situation in which a catalytic event had not occurred. While it is difficult to assess the contrary—for example, what would have happened in the development of U.S. counterterrorism policy had the 9/11 attacks not occurred—it is safe to conclude that the same degree and rate of policy change would not have been evident absent an attack. The explanatory power of the “path dependence” theory is evident given its application in four cases in which there are significant differences across time in the domestic threat level.

A key assumption of this argument is that a voting public in a country in which a significant event has occurred will have the power to push political leaders to enact change with the intention of preventing further attacks. For all of the cases under consideration, the failure of the state’s existing counterterrorism policy to mitigate a given terrorist threat shifted the publicly acceptable boundaries on available policy options with respect to domestic military deployments. Because all four states are consolidated democracies, the public in each of them has been able to drive change in domestic counterterrorism policy following a significant terrorist event by pushing elected officials to make institutional changes. The ability of the public to encourage policy change is most apparent in the British and Spanish cases, where long strings of

Spain) for conspiracy in the 9-11 attacks and the Spanish justice system’s desire to eventually try dozens of 3-11 suspects may invite terrorist retaliation.” Ibid.

nationalist-driven terrorist attacks explicitly linked to status negotiations have nurtured political environments in which aggressive counterterrorism legislation is both expected and accepted.

The impact of historical experience is most apparent in the case of Israel, where the primacy of security policy has nurtured a political environment in which civilian authorities are heavily reliant on their military counterparts, as much for the technical skills they possess as for the legitimacy they can bestow upon civilian initiatives that are implemented with military support. The IDF has never seriously endangered civilian control by forcing the civilian leadership to abide by its preferences, but it is able—to a higher degree than any of the other three militaries under examination—to use its integral defense role to lobby for its own policy preferences as well as to justify aggressive domestic military activity. The Israeli case provides the most support for the argument at hand, as the military leadership clearly has gained power at the expense of the civilian establishment as the threat of attack—both externally from a neighboring Arab state or Iran and internally from a Palestinian terrorist group—was perceived to have increased.

Despite the obvious policy shifts that occurred following specific terrorist events in these four cases, conventional “exogenous” shock arguments are not, in and of themselves, sufficient to explain the institutional change that took place. In the U.S. case, for example, policy reform also required established institutional parameters that permitted an expansion of executive authority and an executive branch poised for pushing for that expansion. In a contrary case, Spain is the only state of the four that has not chosen to use military courts as a counterterrorism tool once it became a consolidated democracy. In the Spanish case, institutional constraints—especially the 1978 Constitution—and a vast network of policy entrepreneurs that worked to limit military autonomy contributed significantly to the Spanish government’s decision to use only

civilian courts to try domestic terrorism cases. Thus, all three variables are significant factors in determining policy outcomes. The impact of policy entrepreneurs—the third independent variable—will be examined in detail in Chapter 5.

Chapter 5: The Policy Entrepreneur and the Military's Role in Counterterrorism Policy

*Civil-military relations at the policymaking level often seem to be dominated by personalities. Contrast the problems of President Clinton with his war-hero predecessor, President Bush; compare the ruffled tenure of Secretary Aspin or the academic acerbity of Secretary Albright to the no-nonsense corporate mentality of Secretary Rumsfeld; or consider the unusual charisma and political clout of General Powell. Personalities matter and they may be decisive in certain cases.*⁴²⁶

Martha Crenshaw writes that the “selection and implementation of policy depend on the particularistic interests of the actors or coalitions that assume the initiative.”⁴²⁷ Actors matter, and they matter most when they are proactive in articulating their interests and seeking policy change. One of the more surprising findings of this research is how significant the effect of a strong personality can be on inducing military change. Indeed, every interview subject in this study noted how important a strong personality could be to altering the military both internally and externally, in its relationships with civilians and with society.⁴²⁸ The U.S. Army War College’s Antulio Echevarria, for instance, argued that the importance of processes and documents in defense policymaking is overstated, and that individuals with strong personalities are able to evade restrictive documents to achieve their institutional preferences.

426 Gelpi, Christopher, and Peter Feaver. December 2002. “Speak Softly and Carry a Big Stick? Veterans in the Political Elite and the American Use of Force.” *American Political Science Review*. 96:4, p. 791.

427 Crenshaw, Martha. 2001. “Counterterrorism Policy and the Political Process.” *Studies in Conflict & Terrorism*. 24, p. 330.

428 Author’s interviews with Eugene Fidell, President, National Institute of Military Justice, 4 October 2007; Antulio Echevarria, Director of Research, Strategic Studies Institute, U.S. Army War College, 21 September 2007; Dr. Dallas Owens, Strategic Studies Institute, U.S. Army War College, 21 September 2007; and Dr. Max Manwaring, Strategic Studies Institute, U.S. Army War College, 5 October 2007.

While strong individuals may indeed be able to shape the policymaking environment to produce their optimal outcome, they strategize based upon precisely the existing restrictions of the institutions they are attempting to evade, as discussed in Chapter 3. In this sense, then, institutions matter, and it is the task of this chapter to explain how individuals influence the established policymaking environment to bring institutions more into line with their personal preferences. In the context of this study, I am looking to identify the parties that have mattered most in determining the military's role in counterterrorism policy and to identify which actors' preferences drove change (or prevented change) in the military's level of involvement in domestic counterterrorism policy.

In the civil-military relations literature, there are essentially two schools of thought on the military's role in policymaking. One school argues that warfare training is so time-consuming and laborious that soldiers do not have the resources to participate in the policy process. The opposing school of thought holds that participation by military leaders in national security policymaking is both necessary and unavoidable given the technical character of military defense. I argue that if military input in the domestic counterterrorism policy process remains heavily needed and requested, we can expect a strengthened military, vis-à-vis civilian authorities, and that the second school of thought more accurately explains how military policy entrepreneurs are able to manipulate policy windows to effect institutional change.

THE UNITED STATES

Writing in 1957, Samuel Huntington classified civil-military relations in the United States as an example of "subjective" control, a type of control "more rooted in the

vagaries of personal harmony between civilian and military leaders”⁴²⁹ than the institutionally structured “objective” version. This view of American civil-military relations is especially relevant in the context of domestic counterterrorism policy, in which civilian and military agencies must pool resources and local expertise in order to offer the greatest chance at effectively defending against and responding to domestic terrorist incidents. The debates over the military’s domestic counterterrorism role have largely been between the President and his Secretary of Defense on one side, and the military (represented by the Joint Chiefs of Staff and the service Chiefs) and certain Congressional coalitions on the other side. The Bush administration’s policy to use military courts to try suspected terrorists highlights this division, and will be discussed in more detail in Chapter 6.

Political scientist John Kingdon argues that successful “policy entrepreneurs” do more than actively support their cause; the most successful entrepreneurs know how important timing is for opening up a policy window.⁴³⁰ For those who supported greater political—or at least policymaking—power for the military vis-à-vis civilian authorities in the wake of the Clinton administration’s military policy, it would seem as though the 9/11 attacks were the critical juncture that generated the opportunity for military change in that direction. I argue that 9/11 was a necessary, but not sufficient, cause of the expansion of the military’s domestic authority. A policy entrepreneur (or group of policy entrepreneurs) was necessary to push for a greater domestic role for the military, which did not always fit the preferences of the military itself. The military’s domestic role in

429 Huntington, Samuel. 1957. The Soldier and the State: The Theory and Politics of Civil-Military Relations. Cambridge, MA: Belknap Press of Harvard University Press, as cited in Weigley, Russell. October 1993. “The American Military and the Principle of Civilian Control from McClellan to Powell.” *The Journal of Military History*. 57:5, p. 31.

430 For Kingdon, institutional structure and individual personality are both significant: “The window opens because of some factor beyond the realm of the individual entrepreneur, but the individual takes advantage of the opportunity.” Kingdon, John. 1995. Agendas, Alternatives, and Public Policies. 2nd edition. New York: HarperCollins College Publishers, p. 181.

counterterrorism as it stands today reflects the outcome of this struggle; the military's expanded domestic role is indicative of the President and Secretary of Defense's preferences, rather than those of the Joint Chiefs of Staff.

The President

The President's preeminent position in agenda setting can be explained by two factors: first, a powerful set of institutional resources, such as the veto; and second, the command of public attention, which can be converted into pressure on other government officials to adopt the President's agenda.⁴³¹ Several theories of Presidential policymaking argue that the impact of these two factors is even stronger when the issue at hand is one of foreign policy, as opposed to domestic policy.⁴³² The President's policymaking ability, based on this body of theory, should be at its strongest in the midst of a domestic crisis that requires a foreign policy response, such as the 9/11 attacks. Indeed, an examination of legislative voting patterns immediately following 9/11 shows a strong "rally" effect in support of President Bush's policy initiatives.

Richard Neustadt theorized that a President's strength or weakness could be measured by his personal capacity to influence the conduct of government personnel: "[h]is influence becomes the mark of leadership."⁴³³ The counterterrorism policies of presidential administrations since the 1980s reflect a combination of geopolitical realities and each President's governing philosophies. The Reagan administration, for example, was characterized by the use of military force in response to acts of terrorism,⁴³⁴ reflecting President Reagan's high regard for the deterrent effect of expressions of

431 Kingdon (1995), pp. 25-6.

432 See Wildavsky's (1966) "two presidencies" thesis, and Fleisher and Bond (1998).

433 Neustadt, Richard. 1960. Presidential Power and the Modern Presidents. 1990 Edition. New York: Free Press, p. 4.

434 National Commission on Terrorist Attacks Upon the United States. 2004. The 9/11 Commission Report. Authorized Edition. New York, NY: W.W. Norton & Company, p. 94.

military prowess. President Clinton's approach, in contrast, was colored by the poor state of civil-military relations during his tenure,⁴³⁵ resulting in a counterterrorism strategy based primarily on interagency cooperation and a diplomacy-heavy, non-military focus, resorting to military force only as a last resort. Clinton's 1998 public address following air strikes on Sudan and Afghanistan in response to the US Embassy bombings in Kenya and Tanzania reflect his strong preference to use legal mechanisms and diplomacy to combat terrorism prior to the employment of military force: "America has battled terrorism for many years. Where possible, we've used law enforcement and diplomatic tools to wage the fight....But there have been and will be times when law enforcement and diplomatic tools are simply not enough, when our very national security is challenged, and when we must take extraordinary steps to protect the safety of our citizens."⁴³⁶

Michael Desch argues that George W. Bush's administration "arrived in Washington resolved to reassert civilian control over the military—a desire that became even more pronounced after September 11."⁴³⁷ The new administration worked to repair

435 According to Richard Hooker, policy disputes between military and civilian authorities were abundant during the Clinton administration: "Under President Clinton, military force structure was cut well below the levels recommended in General Powell's Base Force recommendations. US troops remained in Bosnia far beyond the limits initially set by the President. Funding for modernization was consistently deferred to pay for contingency operations, many of which were opposed by the Joint Chiefs. In these and many other instances, the civilian leadership enforced its decisions firmly on its military subordinates." Hooker, Richard. Winter 2003-4. "Soldiers of the State: Reconsidering American Civil-Military Relations." *Parameters*. 33:4, p. 10.

436 Clinton, William J. 20 August 1998. "Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan." *Public Papers of the Presidents*. 1998:2. Washington, DC: U.S. Government Printing Office. p. 1461. David Halberstam concluded that perhaps the most striking difference between the Bush and Clinton administrations "was the dramatically lower profile given national security issues by President Clinton (at least in his first term). It was widely understood in the government that national security was a lower-profile issue....The diminution of the president's role in this area inevitably weakened the hand of the civilians against the military." Discussion of Halberstam, David. 2001. War in a Time of Peace: Bush, Clinton, and the Generals. New York: Scribner, in Feaver, Peter, and Christopher Gelpi. 2003. Choosing Your Battles: American Civil-Military Relations and the Use of Force. Princeton, NJ: Princeton University Press, pp. 209-10.

437 Desch, Michael. May/June 2007. "Bush and the Generals." *Foreign Affairs*. 86.

relations with the military that had deteriorated under Clinton, and carefully selected civilian leaders at the Pentagon who would move the military in the direction President Bush and Secretary of Defense Donald Rumsfeld envisioned. Though the new officials at the Department of Defense (DoD) were briefed on terrorism, their main focus, in line with Bush's priorities, was on creating a 21st century military.⁴³⁸ The Bush administration—in line with its limited focus on counterterrorism—initially opted for a slow, methodical, and multi-pronged counterterrorism approach, a policy that shifted rapidly in the days following the 9/11 attacks. The Bush administration achieved the military aspects of its counterterrorism policy largely by politically dominating the military leadership,⁴³⁹ and civil-military relations declined accordingly, especially as the unpopular Iraq war proceeded.⁴⁴⁰

Each of the presidential administrations battled with Congress over the direction in which the White House wanted to move the military. The U.S. Constitution's organization of the foreign policy infrastructure engenders a natural and intended tension between Congress and the executive branch regarding foreign policy and the use of American troops,⁴⁴¹ both at home and abroad. Today, these constitutional safeguards

438 National Commission on Terrorist Attacks Upon the United States (2004), p. 208. In his 2007 study of President Bush's relationship with high-level uniformed personnel, Michael Desch argued that the Bush administration's initial drive to reform defense policy made the continuation of conflict that developed during the Clinton administration "all but inevitable," noting that White House officials "worried that without aggressive and relentless civilian questioning of military policies and decisions at every level, they would not be able to accomplish their objective of radically transforming the military and using it in a completely different way." Desch (2007).

439 "The fact that [Deputy Secretary of Defense] Paul Wolfowitz, rather than [Army Chief of Staff] Eric Shinseki, prevailed in the debate about the force size necessary for the Iraq war shows just how successful the Bush administration was in asserting civilian authority over the military." Ibid.

440 According to a 2006 *Military Times* poll, nearly 60 percent of servicemen and servicewomen did not believe that civilians in the Pentagon had their "best interests at heart." Ibid.

441 Historically, the President could constitutionally conduct "war" without congressional approval, either when the threat was too trivial (such as dealing with Indian raids or pirates) or when the threat was too immediate to allow the convening of Congress (as when the British attacked Washington in 1814.) Between these two extremes, the president's power as Commander-in-Chief and Congress's power to declare war have often come into conflict. Graebner, Norman. January 1993. "The President as Commander in Chief: A Study in Power." *The Journal of Military History*. 57:1. p. 116.

also impact decisions regarding how the military will be engaged in the Bush administration's war on terrorism. In most contexts the President has been able, as commander-in-chief, to justify his overseas deployment of American troops based on the implication that the executive branch, due to its expansive foreign affairs and military establishments, possessed knowledge superior to that available elsewhere in the country.⁴⁴² The domestic deployment of U.S. troops undermines this justification, as current force configurations for the domestic use of troops rely heavily on local and state authorities who often will know more about the operating environment and the type of deployment most likely to prove effective than would the White House.

The President's policy entrepreneurship may be limited by the nature of the U.S. democratic electoral system. The President's ability to advance his agenda, domestic or otherwise, is almost always dependent upon his ability to build a coalition of supporters within Congress (or at least the appearance of congressional support). If Congress shares the military's preference on a given issue, it becomes more difficult for the President to justify his defiance of military preferences to the American public. Christopher Paul theorizes that crisis and crisis response tend to increase consensus behind presidential policy decisions, partly because "the usual secrecy and the short time to respond decrease the opportunity for groups or organizations outside of the core decision-makers...to participate."⁴⁴³ This consensus is harder to obtain in non-crisis situations. Since the period of high congressional and public support for the Bush administration immediately following the 9/11 attacks, Congress has become increasingly critical and divided on support for Bush's plan to fight terrorism through military means. Congress has been supported in its criticism of the Bush administration by an unprecedented amount of

⁴⁴² Ibid., p. 118.

⁴⁴³ Paul, Christopher. Summer 2004. "The U.S. Military Intervention Decision-Making Process: Who Participates, and How?" *Journal of Political and Military Sociology*. 32:1. p. 26.

public criticism of the White House's Iraq policy by top military personnel, both active duty and retired.

The Secretary of Defense

The Secretary of Defense is a civilian authority directing the U.S. military bureaucracy, appointed directly by the President and intended to serve as the President's voice in military matters and ensure that Pentagon activities mesh with White House policy preferences. While the Secretary of Defense serves at the pleasure of the President and thus in most cases will do the White House's bidding, there are instances in which the Secretary may attempt to persuade the President on a given policy decision, working to bridge gaps between military and presidential preferences. For example, then-Secretary of Defense Donald Rumsfeld reportedly objected to language included in National Security Presidential Directive 17, a strategy statement describing the White House's increasing emphasis on nonproliferation, which he believed confused military and domestic lines of authority. In the end, President Bush signed the Directive without addressing Rumsfeld's concerns.⁴⁴⁴

Leadership skills in public agencies are particularly important in two areas: first, externally, in ensuring a favorable response to the organization from outside groups, and second, internally, in maintaining employee morale: "However well endowed it may be in other respects, an agency that is not effectively led will fall far short of its potential influence."⁴⁴⁵ The most recent example of a strong Secretary of Defense who was able to forge significant institutional change is Donald Rumsfeld. Rumsfeld's discordant relationship with the military leadership existed long before the U.S. military's

⁴⁴⁴ Allen, Mike, and Barton Gellman. 11 December 2002. "Preemptive Strikes Part of U.S. Strategic Doctrine; 'All Options' Open for Countering Unconventional Arms." *The Washington Post*. p. A1.

⁴⁴⁵ Rourke, Francis. 1984. Bureaucracy, Politics and Public Policy. Boston: Little, Brown, p. 91.

deployment to Iraq, even pre-dating the 9/11 attacks.⁴⁴⁶ The main issue of contention—the so-called “transformation” debates to determine the direction of the military for the 21st century—would have caused trouble in any civilian-military relationship,⁴⁴⁷ but Rumsfeld’s lack of consultation with the military leadership heightened the conflict and made the civilian authorities an easy target for public criticism:

During the first months of the Bush administration, there were signs of attempts to redress this apparent imbalance – and some military resistance to the change. There were reports of friction between Secretary of Defense Rumsfeld and the Joint Chiefs of Staff over his strategic review, especially concerning the impression that Rumsfeld was ignoring or bypassing them in shaping his policies.⁴⁴⁸

According to the U.S. Army War College’s Dr. Antulio Echevarria, the U.S. military has always played an important role in defense policy formulation. The national security policymaking process is intentionally designed to allow the military to provide significant input and capture the military’s expertise for the benefit of policymakers. The Secretary of Defense plays the role of intermediary in this process, reconciling Presidential defense priorities with military policy preferences. According to Echevarria, in the case of policy preference differences between the Secretary and the military leadership, the final decision always belongs to the Secretary,⁴⁴⁹ reaffirming the principle of civilian control over the military. The Secretary of Defense, of course, is not required to follow the advice of the military planners, but tradition dictates that the Secretary

446 See Tucker, David. October 2006. “Confronting the Unconventional: Innovation and Transformation in Military Affairs.” Carlisle, PA: U.S. Army War College, Strategic Studies Institute, p. 61; Kamen, Al. 7 September 2001. “Donny, We Hardly Knew Ye.” *Washington Post*. p. A27; and Lowry, Richard. 3 September 2001. “Bombing at the Pentagon.” *National Review*. 53:17, p. 36.

447 Dr. Dallas Owens of the U.S. Army War College notes that prior to Bush taking office in 2001, General Shinsheki had his own view of transformation and a great deal of change was anticipated. When Rumsfeld and Bush took over, reform became more DoD-based as opposed to service-based, and the Army did not approve of this shift. Author’s interview with Dr. Dallas Owens (2007).

448 Ulrich, Marybeth Peterson, and Conrad Crane. January 2002. “Potential Changes in U.S. Civil-Military Relations,” in Martin, John R., ed. *Defeating Terrorism: Strategic Issue Analyses*. Carlisle, PA: U.S. Army War College, Strategic Studies Institute, p. 59.

449 Author’s interview with Dr. Antulio Echevarria (2007).

always solicits that advice, especially on tactical issues such as the composition of future forces. Rumsfeld “faced resistance from the generals, many of whom choose to view questioning from a civilian boss as disrespectful. But to accuse Rumsfeld of not listening to military advice is incorrect. He listened, but he did not always accept it. Nothing wrong with that; a Secretary of Defense is not paid to be a rubber stamp.”⁴⁵⁰

There are, however, limits within which the Secretary may use the position’s authority to initiate or sustain institutional change, especially when this change is at odds with military preferences. The most significant limitation is the Secretary’s reliance on the JCS for advice about military operations and force readiness. “Theoretically, his civilian advisers could challenge estimates of what it would take to conduct an operation or make a unit ready for battle, but [the Office of the Secretary of Defense] is not organized or equipped to do so.”⁴⁵¹ A second constraint on the Secretary’s policymaking power is a check that all government agencies face, that of Congressional authority over the budget. Writing in 1999, John Hillen concluded that compared to the various services, the Secretary of Defense has almost no budgetary authority but still must devise military strategy and control forces in the field: “Strong presidents and defense secretaries have sometimes managed to bend the services’ budgets to their strategy. But the extent to which those officials may take control of money and programs is determined more by personality than by statute, and today that formal and informal authority is largely unused.”⁴⁵² The Secretary’s ability to utilize this informal authority to attain the

450 Kester, John. July 2007. “Bush May Be Stubborn but He’s Not Tough.” *Washingtonian*. p. 99.

451 Korb, Lawrence. November 2000. “DoD in the 21st Century,” in Stuart, Douglas, ed. Organizing for National Security. Carlisle, PA: U.S. Army War College, Strategic Studies Institute, p. 228. The Office of the Secretary of Defense is the central organization through which the Secretary is able to exercise civilian authority over the Pentagon, and the military writ large. “Since OSD may choose to forgo certain military capabilities to save or redirect money, it has the potential to clash with the armed services.” Jones, Christopher. Summer 2001. “Roles, Politics, and the Survival of the V-22 Osprey.” *Journal of Political and Military Sociology*. 29:1.

452 Hillen, John. July-August 1999. “Defense’s Death Spiral.” *Foreign Affairs*. 78:4. Hillen quotes 1970s Secretary of Defense James R. Schlesinger’s assessment of why the military continued to fund itself in the

White House's policy preferences is often indicative of a Secretary with strong policy entrepreneurship powers.

Rumsfeld's ability to personally shape policy was greatly enhanced by the historical conditions under which he served. During the months immediately following the 9/11 attacks, Rumsfeld's dominant personality and image as a strong leader⁴⁵³ likely were assets for the Bush administration in its relationship with the military leadership as both worked to devise a military response to the attacks. Rumsfeld had extensive government experience over several presidencies and was able to push his agenda preferences on to his military counterparts by drawing on support from other long-standing government contacts. Geopolitical realities change, however, and as the Bush administration failed to achieve its short-term military and political goals in Iraq, Rumsfeld's self-assured management style became a liability for the administration, and the policies he advocated were tainted by several years of failed White House policy in the Middle East. As Rumsfeld's abilities to push the President's agenda waned, Bush began to look past Rumsfeld for military guidance, establishing a "war czar" position at the White House to give him a direct pipeline to military personnel in the field, bypassing the Secretary of Defense entirely.⁴⁵⁴

While it is too soon to make definitive conclusions regarding the effect Rumsfeld's departure from the Pentagon has had on American civil-military relations,

same manner despite changes in the national strategy as being "because it is too hard to do it any other way." Ibid.

453 Writing in January 2002, U.S. War College faculty members assessed that "Secretary Rumsfeld's position in Washington...has been strengthened by both his own strong leadership and the unified national support for the military that has accompanied the war on terrorism." Ulrich & Crane (2002), p. 61.

454 National security analyst John Kester is especially critical of the creation of the war czar position: "What has happened to defense policy when the President sets up a uniformed officer, answering to no one but the President, to be 'execution manager'—to bypass the Secretary of Defense and go directly to commanders in the field? How could Robert Gates, who is supposed to be running the Pentagon, have acquiesced in such a notion? How could Stephen Hadley, assistant to the President for national-security affairs, have endorsed it?" Kester (2007), p. 46.

theoretically the “leadership of an agency is the most frequent mechanism for changing agency behavior.”⁴⁵⁵ We indeed have seen many changes in the Pentagon’s policies in Iraq since Secretary Robert Gates took the helm, but given the long decision making timeline for defense programs, it is impossible to discern if these changes were underway prior to Rumsfeld’s resignation. The larger questions surrounding the military’s involvement in domestic counterterrorism initiatives remain. Prior to the 9/11 attacks, very few Secretaries of Defense expressed an interest in using the military in a counterterrorism capacity, with the exception of targeted overseas air strikes or special forces’ extraction of hostages. When asked by the press in 1999 about Secretary Cohen’s decision to seek presidential approval for a permanent DoD task force to plan for a chemical or biological attack on U.S. soil, Deputy Defense Secretary John Hamre reportedly said, “Frankly, we’re not seeking this job.”⁴⁵⁶ Initially the George W. Bush administration showed little initiative in reforming the Defense Department to meet the increasing threat of terrorism on American soil. According to the 9/11 Commission, the JCS’s General Shelton “could not recall any specific guidance on the topic from the secretary.”⁴⁵⁷ One of the primary responsibilities of the current—and certainly future—Secretaries of Defense is to build a national defense infrastructure that is capable of countering these terrorist threats. What is still left to be decided, ultimately by policymakers including the Secretary of Defense, is the role the military will play in that configuration. Congress is currently investigating the Department of Defense’s efforts to obtain records from U.S. banks in terrorism investigations, a practice that the Bush

455 Wood, B. Dan, and Richard Waterman. September 1991. “The Dynamics of Political Control of the Bureaucracy.” *American Political Science Review*. 85:3, p. 822.

456 Crenshaw (2001), p. 332.

457 National Commission on Terrorist Attacks Upon the United States (2004), p. 208. In contrast, Rumsfeld told the 9/11 Commission that he was always interested in terrorism, but that the DoD infrastructure was not capable of combating terrorism: “[T]he Defense Department, before 9/11, was not organized adequately or prepared to deal with new threats like terrorism.” Ibid.

administration contends is legal under the *PATRIOT Act*.⁴⁵⁸ The military's ability to gather intelligence domestically is heavily restricted by a large body of law, and Congress is attempting to curb the military's expanded authorities granted by the *PATRIOT Act's* vague language.

The Chairman of the Joint Chiefs of Staff

Widespread concern over the effectiveness of the military's command structure spurred a mass movement toward Defense Department reorganization during the Reagan administration, culminating in the 1986 passage of the Goldwater-Nichols Department of Defense Reorganization Act. Congressional and military preferences prevailed with the ensuing consolidation of power in the military leadership against the wishes of the Secretary of Defense,⁴⁵⁹ resulting in extensive institutional change. By establishing the Chairman of the Joint Chiefs of Staff as the principal military advisor to the President, Goldwater-Nichols substantially decreased the power of the individual service chiefs and provided a military counterweight to the civilian Secretary of Defense. In addition, under Goldwater-Nichols commanders of the various combatant commands, i.e. CENTCOM and SOUTHCOM, were granted greater authority over the service elements under their command. "Against the history of congressional efforts to organize an effective joint

⁴⁵⁸ Speaking on the 14 January 2007 edition of Fox News Sunday, Vice President Dick Cheney defended the military's use of national security letters: "The Department of Defense has legitimate authority in this area...that goes back three or four decades. It was reaffirmed in the Patriot Act." Transcript of *Fox News Sunday*, 14 January 2007.

⁴⁵⁹ Defense Secretary Caspar Weinberger's "tendency to stonewall on virtually every issue raised management and efficiency issues to much higher levels of salience....A more politically savvy and competent defense secretary willing to negotiate with Congress probably could have reduced the reform urge on Capitol Hill, ending up with a much less radical organization [than seen in Goldwater-Nichols]." McNaugher, Thomas, and Roger Sperry. 1994. "Improving Military Coordination: The Goldwater-Nichols Reorganization of the Department of Defense," pp. 247-8, in Gilmour, Robert S. and Alexis Halley, eds., . Who Makes Public Policy? The Struggle for Control between Congress and the Executive. New York, NY: Chatham House Publishers.

military structure out of the nation's separate military services, these were truly significant changes."⁴⁶⁰

The Chairman of the JCS is the principal mechanism by which the military's policy preferences are introduced into the policymaking process, and serves as the primary point of contact for the Secretary of Defense to ascertain military preferences. The military chiefs of each individual service, in turn, are advisors to the Chairman and work to ensure each service's preferences are considered in the policymaking process.⁴⁶¹ The Chairman has proven to be as strong as his personality; weaker Chairmen often just transmit service preferences to the Secretary of Defense and the White House, but strong Chairmen, such as General Colin Powell, have had the political support to push those preferences against those of the civilian authorities. The Chairman alone decides how—indeed, if—to articulate individual service preferences to the Secretary and the White House. For instance, the service chiefs were not consulted by C-JCS General Henry Shelton prior to the cruise missile attack on Osama bin Ladin in 1998,⁴⁶² suggesting that the civilian authorities, namely President Clinton, wished to avoid getting their input, and the General Shelton felt no need to do so.

General Colin Powell, Chairman of the Joint Chiefs of Staff from 1989 through 1993, is widely cited as the quintessential example of a strong military official tipping the civil-military power balance in favor of the military. According to Lawrence Korb, “[r]elying on the powers granted to the Chairman of the JCS by the Goldwater-Nichols Act of 1986 and the political and bureaucratic skills he developed at the Office of

⁴⁶⁰ Ibid., p. 219.

⁴⁶¹ The U.S. Army War College's Dr. Max Manwaring emphasized that the service chiefs and the JCS have a responsibility to articulate preferences to policymakers and to ensure that each service's policy preferences are well known throughout the policy community. Author's interview with Dr. Max Manwaring, Strategic Studies Institute, U.S. Army War College, 5 October 2007.

⁴⁶² Korb (2000), p. 227. “After the August 1998 missile strike, other members of the JCS let the press know their unhappiness that...Shelton had been the only member of the JCS to be consulted.” National Commission on Terrorist Attacks Upon the United States (2004), p. 351.

Management and Budget (OMB),...(OSD), and the White House, Powell dominated the policy process in the immediate post Cold War period.”⁴⁶³ When the first Bush administration in 1992 was debating the use of military force in the Balkans in an attempt to contain the ethnic conflict in Bosnia and Hercegovina, Powell wrote in the op-ed pages of the *New York Times* that military force would not be an effective response to such a conflict, for which there could be no decisive solution (thereafter known as the “Powell Doctrine”). Russell Weigley argues that Powell’s intervention in the debate “would have been proper only if he was voicing a professional military judgment to the effect that his knowledge as a military expert assured him that limited military intervention was incapable of attaining the desired objectives. He was doing no such thing. His opinions in the case were much more political than professional.”⁴⁶⁴ Powell’s public opposition to civilian policy on the Balkans formed the basis of months of open discussion over the status of civilian control of the military.

The debate about the Powell Doctrine’s significance for civil-military relations still goes on today,⁴⁶⁵ with many expressing concern that it undermined civilian control by asserting a greater domestic role for the military in foreign policymaking. This debate

⁴⁶³ Korb (2000), p. 225.

⁴⁶⁴ Weigley (1993), pp. 27-8. Michael Desch seconds Weigley’s conclusion, reporting that Secretary of State James Baker “clashed head-on with Powell, who not only vehemently opposed any use of force in Bosnia but was willing to publicly fight that battle with the civilian leadership more stridently than any of his predecessors. And even after agreeing to go in, the military still resisted civilian pressure to pursue war criminals vigorously.” Desch, Michael. 1999. Civilian Control of the Military: The Changing Security Environment. Baltimore, MD: The Johns Hopkins University Press, p. 32.

⁴⁶⁵ Dr. Antulio Echevarria of the U.S. Army War College notes that the Powell Doctrine can be read two ways: first, as an example of military supremacy, with the military asserting it will only engage in missions that meet its preferences; or, second, as an example of the civilian authority telling the military that they will keep the military on the side of the fence where the civilians prefer them to be. Author’s interview with Dr. Antulio Echevarria (2007). Most scholars of civil-military relations view Powell’s interjection in the debate over military intervention in Bosnia as characteristic of the first point of view. Following Powell’s statements, Robert Kaplan concluded “that the American military, ‘in all but a technical sense, is no longer ordered anywhere. It is a self-interested bureaucracy with the power of negotiation.’ Moreover, the Powell Doctrine undermines military organizational norms of subordination to civilian authority.” Kaplan, Robert. September 1996. “Fort Leavenworth and the Eclipse of Nationhood.” *Atlantic Monthly*. 278:3.

over the boundaries of military brass in commenting publicly on Secretary of Defense and Presidential defense policy was rekindled in 2006, sparked by the public criticism of Rumsfeld's Iraq policy by six retired Army and Marine Generals. Interestingly, while Americans tended to agree with the Generals' critique overall, many were angered by this public departure from established standards of military conduct, arguing that the Generals failed to articulate their preferences while they were active and that a public lashing of Rumsfeld after their retirement only weakened the already perilous U.S. position.⁴⁶⁶

For the purposes of preparing the military to engage in domestic counterterrorism operations, Goldwater-Nichols and a strengthened JCS has made White House-directed strategic changes in military doctrine and areas responsibility more formidable. For example, "[Air Force General Richard] Myers's term as chairman of the Joint Chiefs was characterized by an extraordinary deference to Rumsfeld. He let himself [be] overruled on issues such as picking his own staffers for the Joint Staff. Inside the military, he was widely regarded as the best kind of uniformed yes-man - smart, hard-working, but wary of independent thought."⁴⁶⁷ Secretary Rumsfeld faced opposition from the service chiefs on many of the Bush administration's institutional reform initiatives—including use of the military's court system for trying suspected terrorists—but civilian preferences prevailed over those of the military.

Military officials have been instrumental in pushing a program through Congress that would help them strengthen the counterterrorism capabilities of allied militaries, in effect reducing the burden placed on American military forces. The Building Partnerships Act of 2007 authorized the allocation of \$750 million to help foreign governments strengthen their military, police, and other security forces to 'combat

⁴⁶⁶ Robert Kaplan concluded that other active-duty generals learned from the example of then-Army Chief of Staff General Eric Shinseki, who was "publicly upbraided and ostracized by Rumsfeld" for speaking up. Kaplan, Fred. 26 August 2007. "Challenging the Generals." *New York Times*, Op-Ed page.

⁴⁶⁷ Ricks, Thomas. 2006. *Fiasco*. New York, NY: The Penguin Press, p. 89.

terrorism and enhance stability.”⁴⁶⁸ In February 2007 testimony before the House Armed Services Committee, Chairman of the Joint Chiefs of Staff General Peter Pace stated that terrorists sometimes “hide in countries with whom we are not at war,” adding that often the best way to respond “is by augmenting the capacity of those countries to defeat terrorism and increase stability.”⁴⁶⁹ Though some members of Congress objected to the program because they assessed it transferred Department of State responsibilities to the Department of Defense,⁴⁷⁰ the bill was signed into law in August 2007 and military preferences prevailed.

United States Congress

The U.S. Congress has the power to raise military forces and regulate their use, appropriate funding for specific military operations, approve high-level military appointments, and, most notably, declare war. In this context, congressman can serve as policy entrepreneurs regarding use of the military, and have done so in a number of cases over the years.⁴⁷¹ When a clear national consensus on the use of American military forces exists, these congressional limits on executive power are rarely politicized. During times when the national consensus is less cohesive, however, Congress is often the institution through which executive and military authorities are challenged.⁴⁷² Traditionally, Congress has shown a tendency take steps to limit the White House’s

⁴⁶⁸ Pincus, Walter. 13 May 2007. “Pentagon Hopes to Expand Aid Program.” *The Washington Post*. p. A13.

⁴⁶⁹ Ibid.

⁴⁷⁰ In December of 2006, for example, then-Chairman of the Senate Foreign Relations Committee Richard Lugar (R-Ind) reported that “as a result of inadequate funding for civilian programs...U.S. defense agencies are increasingly being granted authority and funding to fill perceived gaps’ in public diplomacy and foreign economic assistance. The result ‘risks weakening the Secretary of State’s primacy in setting the agenda for U.S. relations with foreign countries.’” Ibid.

⁴⁷¹ In the case of the V-22 Osprey, for example, Congress had enough formal budgetary authority to control the fate of Osprey program, continually funding the initiative in spite of widespread military pressure to dismantle it. Jones (2001).

⁴⁷² For example, the Goldwater-Nichols Act is largely interpreted as a reassertion of Congressional oversight authority over executive use of the military. McNaugher & Sperry (1994), p. 248.

concentration of military power in the Secretary of Defense position, but have done so in an incremental and often uncoordinated manner. As a result, many military analysts argue that congressional review and oversight over DoD programs has generated substantial instability in defense policies: “A variety of committees and subcommittees handled portions of the DoD’s operations in stylized and often inconsistent ways, producing confusion and inefficiency in the Pentagon’s operational routines.”⁴⁷³

Congress is highly divided on the two primary counterterrorism initiatives involving the military that have emerged since the 9/11 attacks: the war in Iraq and the use of military courts to try suspected terrorists. As a result of the controversy surrounding these policies, Congress has expanded its involvement in the civil-military debate over the direction of domestic counterterrorism policy, in line with its increased assertiveness in national security policy since the end of the Cold War.⁴⁷⁴ New entities such as the House Task Force on Terrorism and Unconventional Warfare supplement established legislative committees like the Armed Services and Foreign Relations Committees in addressing counterterrorism policy, and the number of resultant hearings has “skyrocketed.”⁴⁷⁵ Congress also has established independent commissions such as the Commission on National Security/21st Century and National Commission on Terrorist Attacks Upon the United States to provide it with alternative sources of policy analysis and advice. Prior to the 9/11 attacks, counterterrorism analyst Martha Crenshaw commented that “Congress frequently plays a critical role in shaping the counterterrorism policy agenda, without the constraint of necessarily having to present an integrated solution to the problem.”⁴⁷⁶ Since 2001, Congress has taken a far more active role in

⁴⁷³ Ibid., p. 236.

⁴⁷⁴ Korb (2000), p. 226.

⁴⁷⁵ This pattern was apparent even prior to 9/11, as committees addressing terrorism issues rose from less than six in 1995 to an average of some 40 in 2000. Donohue, Laura. Autumn 2001. “In the Name of National Security: US Counterterrorist Measures, 1960-2000.” *Terrorism & Political Violence*. 13:3, p. 46.

⁴⁷⁶ Crenshaw (2001), p. 332.

determining how counterterrorism policies will be implemented, but it is still highly dependent on military and bureaucratic personnel for their expertise.

Congressional support is one of the primary tools used by military policy entrepreneurs to gain support for their policy proposals, and, as such, military officials maintain both formal and informal relationships with Congressional members and their staffs. These relationships, while “normal” in the policymaking and lobbying circles of Washington, at times may be detrimental to the principle of objective military expertise. As Marybeth Peterson Ulrich and Conrad Crane argue, “[i]n general, the military leadership should stay within their roles as expert policy advisors to the President and the Secretary of Defense, even when greater influence may be solicited by other forces—particularly congressional—in the policymaking process.”⁴⁷⁷

Congress has also been able to shape the military’s role in domestic counterterrorism policy, especially on making changes to the established restrictions banning the military from engaging in domestic intelligence collection. Following 9/11, the White House sought to ease restrictions to allow the military to increase its domestic security role, but was largely rebuffed by Congress. In 2004, Congress turned down a White House-backed proposal to give the military the authority to analyze the records of U.S. citizens, and in 2003 the Senate blocked funding for a controversial Pentagon intelligence gathering program known as the Total Information Awareness program.⁴⁷⁸ The executive branch has made some progress on its domestic military intelligence initiatives, including the establishment in 2002 of the Counterintelligence Field Activity group, which maintains a domestic law enforcement database with information related to terrorist threats against the Department of Defense.⁴⁷⁹

⁴⁷⁷ Ulrich & Crane (2002), p. 61.

⁴⁷⁸ Block, Robert, and Gary Fields. 9 March 2004. “Is Military Creeping into Domestic Law Enforcement?” *Dow Jones Newswires*.

⁴⁷⁹ *Ibid.*

As the “de-militarization” effect of Congress multiplies,⁴⁸⁰ the opportunity for military leaders to wield more influence in the decision-making process grows as military personnel’s unique expertise becomes increasingly valuable in policy debates. Michael Desch argues that it is precisely because the U.S. Constitution divides authority over the military between both the executive and legislative branches that legislative assertiveness in military policy is “likely to dilute executive authority and thereby weaken civilian control of the military.”⁴⁸¹ In other words, by allying themselves with sympathetic congressional policy entrepreneurs, military officials may be able to circumvent executive branch authority and find ways to avoid engaging the military in missions that do not meet their preferences.⁴⁸²

Discussion

The military has a long history of using its expertise and close proximity to executive and legislative branch leaders to influence the policy choices of the White House and Congress. Debates between executive and congressional authorities over the strategic direction of the military are often the most contentious, with the military working to leverage both sides to support as many of its programs and initiatives as possible. This is rarely an easy balance to strike, as described by Richard Hooker: “Not

480 The number of Congressmen and women with military service on their resumes has declined significantly since the 1980s. As of the mid-1990s, military experience among members of Congress had declined nearly 30%. Schiff, Rebecca. Fall 1995. “Civil-Military Relations Reconsidered: A Theory of Concordance.” *Armed Forces & Society*. 22:1. These biographic characteristics may have a significant impact on legislative and policy outcomes. In their 2002 study, Christopher Gelpi and Peter Feaver found that over the period from 1816 to 1992, the higher the proportion of American policymakers with military experience, the lower the probability that the U.S. would initiate a militarized dispute. Gelpi and Feaver (2002), p. 792.

481 Desch (1999), p. 3.

482 A prime example of Congress and the military leadership allying with one another to impact White House policy is President Reagan’s decision to withdraw American troops from Lebanon following the 1983 bombing of the Marine barracks: “Reagan was apparently dissuaded [from keeping the troops in Lebanon] by congressional and military opposition encountered in the context of an upcoming campaign for reelection....The State Department and the National Security Adviser opposed withdrawal, but DOD and the Joint Chiefs favored it.” Crenshaw (2001), p. 333.

wanting to publicly expose differences with the Administration, yet bound by their confirmation commitments to render unvarnished professional military opinions to Congress, military elites routinely find themselves on the horns of a dilemma.”⁴⁸³ Civilians, in turn, can force the military to acquiesce to their demands, but may pay a high political and social price in doing so: “Because society values the importance of independent, nonpoliticized military counsel, a civilian who publicly discounts that advice in an area presumed to require military expertise runs significant political risks.”⁴⁸⁴

The argument of this chapter is that the ability of a given official to push their agenda in defense policymaking is a key factor in determining policies regarding domestic use of the military for counterterrorism purposes. The relative strength of the President and Secretary of Defense versus the Joint Chiefs of Staff and Congress in the heightened post-9/11 threat environment resulted in an increased domestic role for the military, in opposition to military preferences. All of the experts interviewed for this study emphasized that the military prefers to abstain from domestic activities, and has only engaged in such missions out of deference to the civilian authority.⁴⁸⁵ In this manner, this study falls in line with other preference-based evaluations of civil-military relations,⁴⁸⁶ arguing that the balance between civilian and military preferences is a strong determinant of the policies that will emerge from a given DoD administration. In spite of

⁴⁸³ Hooker (Winter 2003-4), p. 16.

⁴⁸⁴ Ibid., p. 15.

⁴⁸⁵ Author’s interviews with Dr. Dallas Owens (2007), Dr. Antulio Echevarria (2007), and Professor Peter Raven-Hansen (2007).

⁴⁸⁶ See Schiff (1995), Desch (1999), and Gelpi and Feaver (2002). Rebecca Schiff argues that “[w]hen civilians hold significant advantages in professional preparation and dominate the executive branch issue network, policy outcomes will tend to reflect civilian preferences. In contrast, military dominance of the issue network inside the Pentagon is a necessary, but not sufficient condition for an environment that favors military preferences.” Schiff (1995). Dr. Antulio Echevarria of the U.S. Army War College also looks to preference-based explanations of change in U.S. civil-military relations, viewing examples of civilian deference to military advisors as indications of a shift in the relationship. Author’s interview with Dr. Antulio Echevarria (2007).

the executive branch's ability to force the military to adhere to its preferences, the military leadership has exhibited—especially since 9/11—the power to shape how military forces are used to implement White House counterterrorism policy. In this manner, the military has used its unique expertise to place parameters on the military policy options open to the executive and legislative branches.

Personalities—weak or strong—can have a significant impact on policy formulation, but are not in and of themselves sufficient to explain institutional change. For example, the main driver behind passage of the Goldwater-Nichols Act was a Congress that aimed to improve efficiency at the Department of Defense, but a recent history of failed operations by the military was also critical to initiating change. It was the combination of the need for fiscal reform and operational embarrassments in Beirut and Grenada, along with strong personalities such as that of Goldwater, that finally pushed wide scale military reform through Congress.⁴⁸⁷ The same causal pattern can be seen in the case of the military's expanding domestic counterterrorism role. The President and Secretary of Defense have both been strong personalities functioning in a high-threat environment, and have been able to ensure civilian policy preferences trump those of the military to abstain from domestic activity, even when military and congressional preferences are aligned.

This is not to say that the military is functioning in position of weakness, relative to the civilian authority. Several of the military experts interviewed for this study suggested that the executive branch is currently relying heavily on the military for its expertise, especially in the case of the administration's counterterrorism policies in Iraq and Afghanistan. In a 1999 study using the New Institutionalism approach, Christopher

⁴⁸⁷ The Goldwater-Nichols bill was approved 95-3 by the Senate in May of 1986. "The lopsided nature of the full Senate vote testified in large part to Goldwater's prestige, and to the care both he and Nunn had exercised in developing a consensus on defense reform." McNaugher & Sperry (1994), p. 242.

Gibson and Don Snider concluded that the increase in military influence in the national security realm that they detected in the late 1990s had been caused first by “qualitative changes over time in the experience levels of key senior civilian and military leaders, and secondly, as a consequence of the structural changes brought about by [Goldwater-Nichols which] created new political-military positions at the highest levels of the decision-making process.”⁴⁸⁸ In short, the Goldwater-Nichols reforms began to undermine the system of civilian control of the military, and enabled members of the Joint Chiefs of Staff to become policy entrepreneurs in their own right. The ability of military leaders to play the role of policy entrepreneur has strengthened since the 9/11 attacks, and looks to continue down that path as long as the executive and legislative branches remain dependent on the military to implement their counterterrorism initiatives. In spite of the importance of policy entrepreneurs in forming the military’s domestic counterterrorism role, there is no indication that the military has ever shirked its responsibilities or directly disobeyed civilian orders regarding domestic counterterrorism missions, even when these missions do not align with military preferences. There is indication, however, that civilian authorities have disregarded military preferences and advice to pursue their own policy objectives. As the U.S. Army War College’s Max Manwaring described the situation, the military has the responsibility to give sound advice to its civilian master, but the civilian master does not have to take that advice.⁴⁸⁹

⁴⁸⁸ Gibson, Christopher, and Don Snider. Winter 1999. “Civil-Military Relations and the Potential to Influence: A Look at the National Security Decision-Making Process.” *Armed Forces & Society*. 25:2. Gibson and Snider’s findings supported earlier work on the effects of Goldwater-Nichols on civil-military relations: “By mandating more opportunities for high-level political-military experience, this legislation changed the composition of the issue network and reinforced the shift, which was already underway, in the balance of civilian versus military influence in favor of the latter.” Schiff (1995).

⁴⁸⁹ Author’s interview with Max Manwaring (2007).

ISRAEL

The Israeli political system, more so than that of the United States, is dominated by strong individuals. Israeli institutions historically have been weak, due in part to lawmakers' preference for institutional flexibility in order to counter shifting threats in a consistently volatile security environment. The 1976 *Basic Law: The Army*, despite its intent, did not succeed in institutionalizing Israeli civil-military relations. Relationships between the two spheres largely retained their informal, personal character, and "[t]he ascendancy of the informal processes whose significance grew in the absence of a dominant political leadership came to expression in the army's increased strength, status, and influence over the political system despite repeated attempts at truncating it."⁴⁹⁰

This lack of rigid rules to regulate civil-military conduct nurtures a political environment in which strong individuals can dominate the policymaking system and serve as policy entrepreneurs able to shape civil-military relations and Israeli counterterrorism policy in their own vision. The Israeli civil-military relationship has always been marked by tension and discord. In Israel's first years as a state, disputes between Prime Minister Ben-Gurion and Chief of the General Staff (CGS) Yadin were so pervasive that in 1948 Ben-Gurion demanded a full reform of the existing defense structure. The resulting hierarchical system was one in which "[t]he minister of defence would prescribe a general strategy....The General Staff would then provide the minister of defence with a number of alternatives to choose from. The execution of the policy would be left to the discretion of the IDF. However, Ben-Gurion insisted that he monitor the implementation of the policy, even at the lowest levels of command."⁴⁹¹ Under Ben-

⁴⁹⁰ Bar-or, Amir. July 2006. "Political-Military Relations in Israel, 1996-2003." *Israel Affairs*. 12:3, 365-76. p. 367.

⁴⁹¹ Kuperman, Ranan. October 2005. "Who Should Authorize the IDF to Initiate a Military Operation? A Brief History of an Unresolved Debate." *Israel Affairs*. 11:4, 672-94, p 674

Gurion's forceful command, this management structure held. In addition, the relatively quiet regional security situation between 1948 and 1967 allowed political authorities to consolidate their control over the military leadership. The 1967 war caused a shift in this relationship, however, and the military authorities gained greater political power as military expertise became increasingly valued.

Multiple Israeli governments have attempted to rein in the army by establishing professional advisory panels to provide the civilian leadership with independent policy recommendations regarding military development and deployment. However, even the advisory bodies that were blessed with formal governmental status, such as the Prime Minister's National Security Council mandated by the *Basic Law: The Government*, never became important players in the political system:

The appointment of relatively low level, non-influential figures to this body during the Shamir (1986–1992) and Rabin (1992–1995) governments ended in failure mainly because the work style of these two decision-makers left little space for consultation. The vacuum was filled by the army, whose proposals and political–military recommendations were generally accepted by the political echelon.⁴⁹²

Thus, powerful individuals are able to use their positions and personal clout to shape the civil-military relationship and serve their personal policy preferences, and Israeli laws and institutions are unable to significantly hinder their efforts. In the determination of the IDF's use in domestic counterterrorism initiatives, several political figures have performed as policy entrepreneurs. The key actors on the civilian side—to include the Prime Minister, the Minister of Defense, the Knesset, and the Israeli High Court of Justice—have been balanced by the efforts of the Chief of the General Staff and IDF senior officers who strive to determine their own roles in domestic deployments. In

⁴⁹² Bar-or (2006), p. 366.

addition to discussing these actors, I will also address Israeli public opinion, as the Israeli citizenry has proven to be a strong policy entrepreneur in its own right.

The Civilian Authorities: The Prime Minister, Minister of Defense, Knesset and Israeli High Court of Justice

The Prime Minister

Every Israeli prime minister has strived to make changes to the civil-military balance in Israel; some were successful, others not, and the difference largely depended upon the prime minister's domestic and Knesset support bases and the security context within which that individual governed. The prime minister is granted little status by existing institutional statutes, such as *Basic Law: The Government*. The prime minister's power, therefore, has always derived from that individual's ability to push their preferences against those of opponents. Israeli domestic counterterrorism policy is often reflective of the political power balance, and the ability of prime ministers to usher their own counterterrorism policy preferences through the political system is heavily dependent on their capabilities to serve as policy entrepreneurs, as seen in this comparison of the counterterrorism policies advocated by six prime ministers.

As mentioned, Prime Minister Ben-Gurion has been the most successful prime minister to date in terms of shaping civil-military relations to meet his preferences. Not insignificantly, Ben-Gurion governed during the nascent years of Israel's existence, when Israeli institutions were just beginning to coalesce. The individuals in charge of the various political and military institutions at that time were not able to effectively pressure Ben-Gurion to take their own preferences into account. According to Amir Bar-or,

Ben-Gurion wielded his authoritative powers vis-à-vis the senior military staff, and completely changed the game rules in a way that left no doubt where the centre of decision-making stood. This move reflected his basic concept that the overall management of military matters in a democracy, such as Israel, should be in the hands of the democratically elected political authority. When Ben-Gurion

served as both prime minister and defence minister relations between the political and military spheres were maintained on the basis of his leadership, personality and vision, rather than according to formal legalized guidelines.⁴⁹³

Because so much of the tone of a given Israeli government's civil-military relationship is determined by the individuals running the political and military institutions under that government, institutional power struggles often take the form of disputes over operational control. Many Israeli prime ministers have publicly stated their belief that the military should be in full command of its tactical and operational initiatives, but few prime ministers have actually abstained from involvement in military decisions at the tactical level. With each new government, and especially during periods of high domestic or regional insecurity, the military's operational activity is scrutinized by political authorities. Some prime ministers, such as Benjamin Netanyahu, were known for bypassing military channels when setting national security and domestic counterterrorism policy, while others, such as Menachem Begin, "always preferred to obtain the approval of the Cabinet or at least the Defence Committee for military operations...."⁴⁹⁴

Prime Minister Yitzhak Rabin had an unusual relationship with the military, due in part to the worsening domestic threat environment that marked his tenure. Rabin's perception of Israel as a state in constant peril and whose very existence depended on a peaceful relationship with its Arab neighbors meant that Rabin placed a high priority on military prowess,⁴⁹⁵ viewing it as the only way to truly deter Israel's Arab neighbors and force them into peace agreements. Rabin rarely made use of the legally mandated

⁴⁹³ Ibid., p. 375.

⁴⁹⁴ Kuperman (2005), p. 688.

⁴⁹⁵ Inbar, Efraim. Fall 1991. "Israel's Small War: The Military Response to the Intifada." *Armed Forces & Society*. 18:1, pp 29-50.

Ministerial Defense Committee,⁴⁹⁶ choosing instead to look past the civilian leadership to his “Kitchen Cabinet.”⁴⁹⁷ Thus, under the Israeli political system, the prime minister is fully able to bypass institutional safeguards, such as the Ministerial Defense Committee, that were established precisely to prevent such an exclusion of civilian security experts in policymaking. It is, in essence, the prime minister’s choice as to how he prefers to govern and whose opinions he must take into account in providing for the general welfare and security of the Israeli people.

Prime Minister Netanyahu’s troubled relationship with the IDF leadership exacerbated an already tenuous civil-military association, and this tension was compounded by widespread factionalism within Israeli society resulting from disagreements over Israel’s policy toward the Palestinians.⁴⁹⁸ Initially, as the first directly elected Israeli prime minister it appeared as though Netanyahu would have the mandate necessary to push at least some of his military policy preferences through the policymaking process. Netanyahu’s original plan was to transfer responsibility for directing the military directly to the Office of the Prime Minister, granting himself greater leverage in national security policymaking. However, Netanyahu miscalculated, according to Amir Bar-or, and

[t]he gap between the prime minister’s expectations of his power and his actual performance as the *de facto* supreme commander of the IDF intensified the trend in the army toward alienation from political matters...Netanyahu believed that the army should be removed from all aspects of political decision-making. The

⁴⁹⁶ According to Ranan Kuperman, “After Begin resigned, the custom of seeking the approval of the Defence Committee only in extreme and unusual circumstances resumed. It exists until this very day. Indeed, only for a short period, due to the amendment of the Basic Law of Government, did the establishment of a Ministerial Defence Committee become mandatory. This requirement was annulled in the 1992 Basic Law of Government, which did not include such a clause.” Kuperman (2005), p. 690.

⁴⁹⁷ *Ibid.*, pp. 686-7.

⁴⁹⁸ Stuart Cohen assesses that a further negative effect of the close, informal nature of the Israeli political-military complex is that the factionalism that characterizes Israeli society and politics has intruded into the IDF. Cohen, Stuart. Winter 1995. “The Israel Defense Forces (IDF): From a ‘People’s Army’ to a ‘Professional Military’—Causes and Implications.” *Armed Forces & Society*. 21:2, 237-54.

moment he took office, he reversed the previous norm and sought to concentrate power in his own hands and sideline the CGS.⁴⁹⁹

Netanyahu also tried, in accordance with Israeli law, to reinstitute the National Security Council, but even this was viewed by the military leadership as another attempt to “sever the direct communication line between the Prime Minister’s Office and the senior military command.”⁵⁰⁰ Prime Minister Benjamin Netanyahu put forth the strongest effort since Ben-Gurion to assert greater civilian control over the military leadership, but the IDF’s Knesset allies prevented Netanyahu’s proposals from moving forward, and “[i]ronically, the CGS whom he appointed, Lt. General Shaul Mofaz (1998–2002), strengthened both the army’s status and his own position as the IDF’s supreme commander.”⁵⁰¹ Netanyahu’s changes were never institutionalized into the Israeli political system during his term, and Israeli civil-military relations maintained their informal character.

Ariel Sharon’s ascendancy to the position of prime minister placed new emphasis on military responses to terrorism, reflective of his preference for hard-line, proactive counterterrorism responses. In contrast, the counterterrorism policy of Ehud Barak, Sharon’s predecessor, was based on containing the violence enough to allow the

499 Bar-or (2006), pp. 367-8. Yoram Peri comments that Netanyahu “was not enthusiastic about the fact that the senior officers dealt with political matters, and he believed that it was not healthy for IDF commanders to rub shoulders at diplomatic meetings and cocktail parties with Israel’s adversaries, whom they might have to meet later on the battlefield. Thus, tension existed between the prime minister and the senior command as soon as Netanyahu took office, and it grew when he announced that the political negotiations would be conducted solely by civilians.” Peri, Yoram. November 2002. “The Israeli Military and Israel’s Palestinian Policy: From Oslo to the Al Aqsa Intifada.” *Peaceworks*. Washington, DC: United States Institute of Peace. Accessed 20 January 2007 at www.usip.org p. 25.

500 Bar-or (2006), p. 368. “The council was to be headed by Maj. General (Res.) David Ivri, a former air force commander and one of the most respected figures in the national security establishment. Ivri had served in the high-profile role of director general of the defence ministry for over ten years and was now expected to usher in a major overhaul in the prime minister’s capacity to oversee military operations. In addition, the National Security Council was designed to coordinate several interministerial projects, such as the Anti-Terror Unit...The amassing of all these roles in the Prime Minister’s Office should have reduced the IDF’s influence and enabled the prime minister, acting on behalf of the government, to exercise unprecedented control over national security policies.” *Ibid.*, p. 368.

⁵⁰¹ *Ibid.*, p. 367.

Palestinian Authority (PA) to strengthen and eventually take responsibility for maintaining security in the territories.⁵⁰² Sharon's more aggressive strategy reflected the military and political hard-liners' frustration with the PA's inability to stop terrorist attacks that were planned and executed under its watch. Under Sharon, the Israeli military changed its counterterrorism focus from containment to defeating terrorist groups and their facilitators. According to IDF Lieutenant Colonel Ofek Bouchriss, "[t]he consensus in Israel about the urgent need to stop the terror attacks and the understanding that the Oslo process could not continue under these conditions were enough to supply Sharon's government with internal legitimacy to shift away from the former strategy."⁵⁰³ This policy did not always dovetail with military preferences to emphasize political solutions in any strategy against the *intifada*, providing another example of how the military's domestic counterterrorism role often reflects the power of the prime minister to dictate Israeli counterterrorism policy and that individual's relationship with the military elite.

The Minister of Defense

Israel's institutional design has resulted in individual cabinet departments operating with more independence than is seen in many consolidated democracies. In Israel, the prime minister has little control over the various ministries, thus making personal relationships paramount to formulating a unified civilian defense policy. This allows for greater institutional autonomy within the Ministry of Defense, but also permits

502 Bouchriss, Lt Col Ofek, Israel Army. March 2006. "The 'Defensive Shield' Operation as a Turning Point in Israel's National Security Strategy." *USAWC Strategy Research Project*. Available on the U.S. Army's Army War College, Strategic Studies Institute website Carlisle, PA, pp. 10-1. Barak has been classified as one of the weaker Israeli Prime Ministers in terms of his relationship with the military elite. During secret discussions with the Palestinians, for example, Israeli political officials made promises to the Palestinian leadership regarding restrictions on Israeli military activity, some of which were not kept. Barak, by most accounts would not reprimand the military for their disobedience. See Peri (2002), p. 35.

503 Bouchriss (2006), p. 8.

the military leadership to have added influence over civilian authorities because they can counter the Defense Minister's policy preferences with their own by reaching out to allied Knesset members and other high-level political authorities. This "trade-off" of policy preferences, in which the Minister of Defense plays a pivotal role, is a hallmark of Israeli civil-military relations.

The *Basic Law: The Army (1976)* institutionalized the position of Minister of Defense, granting that individual control of national defense by virtue of the authority vested in him by the government. According to the 1976 law, the Defense Minister recommends Chief of the General Staff (CGS) candidate to the Knesset, ensuring civilian control over the military. The text of the 1976 law, however, is so vague as to be nearly inconsequential, as the politically-driven selection process for the top tier military leadership is just as competitive and interest-driven today as it was prior to passage of that law.⁵⁰⁴ The impreciseness of the law's provisions reflected the political consensus at the time that those relationships should remain flexible, further encouraging the importance of personal allegiances in Israeli civil-military relations.

Two examples of the Minister of Defense's influence on the defense policymaking process demonstrate the potentially powerful role that individual can play in power struggles between and among the civilian and military elite. In the early 1990s, Yitzhak Rabin, then serving as Minister of Defense, was a strong promoter of joint political-military solutions to the domestic terrorist threat, and kept the IDF out of the civilian discussions that preceded the Oslo Accords, with the intention of using the position to ensure the political authority's policy preferences were protected. In contrast, Netanyahu's Defense Minister, Yitzhak Mordechai, abetted military efforts to undercut

⁵⁰⁴ "These provisions leave a lacuna regarding the division of powers between the government, the minister, and the chief of staff." Etzioni-Halevy, Eva. Spring 1996. "Civil-Military Relations and Democracy: The Case of the Military-Political Elites' Connection in Israel." *Armed Forces & Society*. 22:3, pp. 401-417.

Netanyahu's reform initiatives by purposely limiting the scope of the National Security Council's advisory authority.

The Minister of Defense is therefore a critical intermediary between the prime minister and IDF leadership, and based on that individual's personal connections to either party may prove to be an effective broker in civil-military disputes. Several Defense Ministers, such as Yitzhak Rabin, who also served as CGS, go on to become Prime Minister.⁵⁰⁵ While conventional wisdom leads to the assumption that individuals who have served in the positions of Defense Minister or CGS would have better relations with the military leadership if they become prime minister, history has shown that this is not always the case, and often intra-Knesset conflict and the threat environment in which the prime minister is governing have a significant impact on the civil-military relationship.

The Knesset

Knesset members have been both vocal critics and supporters of Israeli domestic counterterrorism policy for decades, but for the most part the Knesset has done little—through official channels—to exert the limited control it has been granted to rein in the military and bring domestic military operations more into line with Knesset preferences. Indeed, in one of its earliest acts, the parliament passed a law expressly permitting its own legislation to be suspended, revoked, or altered by the military in cases of national emergency.⁵⁰⁶ It is not a lack of legislative authority that has caused parliamentary members to abstain from direct confrontation with the military, but rather the informal nature of Israeli politics that makes personal relationships between Knesset members and

⁵⁰⁵ Inbar (1991). "The political constellation of the late 1980s allowed him to be the final arbiter in affairs pertaining to the IDF, its use in the territories and outside it, with little interference from other cabinet members. His perceptions of the situation and his prescriptions constituted the most influential input in forming the Israeli response to the intifada." Ibid.

⁵⁰⁶ See Section 9 of the *Law and Administration Ordinance (1948)*.

military officials a far easier channel by which to accomplish parliamentary oversight goals.⁵⁰⁷

This changed in the 1990s when the Knesset began to actively use its budgetary authority over military finances to better control military activities. During the second *intifada*, for the first time “the Knesset Budgetary Committee refused to sanction the defence budget en bloc, and instead demanded that it be scrutinized item by item. Equally significant is the legislation tabled in 2005 by...the chairman of the Foreign and Security Affairs Committee mandating regular appearances on the part of the chief of staff.”⁵⁰⁸ In spite of this show of assertiveness, the Knesset still uses personal relationships to monitor the military, and recent changes to the electoral system—to include direct election of the prime minister and the introduction of a primary system for political parties to choose their electoral candidates⁵⁰⁹—likely will only inflate the impact of personality-based policy entrepreneurship, rather than achieve further institutionalization of the civil-military relationship.

The Israeli High Court of Justice⁵¹⁰

The Israeli judiciary, as befits an advanced democracy, has become increasingly assertive in all areas of jurisprudence, to include national security matters: “[I]n addition to agreeing to adjudicate on cases involving IDF recruitment and placement policies, the Court has also reviewed promotion criteria, training accidents and—most significantly of

⁵⁰⁷ In a 1996 study, Eva Etzioni-Halevy found that a majority of the senior reserve officers who entered politics “reported having had very close, or fairly close, informal social contacts with politicians while they were still on active duty....[S]uch contacts facilitate the movement of officers into the political elite by generating an exchange of information and a similarity of conceptions and outlooks between the two elites.” Etzioni-Halevy (1996).

⁵⁰⁸ Cohen (2006), p. 776. “[A]s a proportion of the overall budget, allocations for defence purposes have successively been cut over the years. At the same time, ministers of finance have made ever more pointed remarks to the effect that the IDF can easily make further savings—especially by reducing the salaries, pensions and benefits traditionally granted to senior officers.” Ibid.

⁵⁰⁹ Lebel, Udi. July 2006. “‘Communicating Security’: Civil-Military Relations in Israel.” *Israel Affairs*. 12:3, 361-64, p. 363.

⁵¹⁰ Also referred to as the “Supreme Court.”

all—the details of some of Israel’s military activities on the West Bank and Gaza Strip.”⁵¹¹ Following Israel’s poor performance in the 1973 war, the Israeli civilian court system created a number of ad hoc committees to investigate specific strategic military issues,⁵¹² but in general the cases that come before the courts today are more granular in nature, addressing specific human rights and resource issues. As a general trend, this shift toward greater judicial activism began with passage of the *Basic Law: The Government* in 1992, and the so-called “constitutional revolution” that ensued: “[T]he Israeli supreme court accepted its institutional empowerment enthusiastically....In a series of landmark decisions in the aftermath of the constitutional revolution, the Israeli supreme court has pursued a distinctly neoliberal and antireligious agenda.”⁵¹³ As will be discussed in greater depth in Chapter 6, the High Court of Justice has played an important role in legitimizing the IDF’s military court system, and has also examined administrative detention laws and the controversial policy of house demolition in the territories, all of which are IDF-administered counterterrorism policies.

The Israeli Military – Expertise Generates Political Power

The Israeli military’s power within the Israeli political system is heavily correlated—as is military power in almost any political system—with the high level of specialized expertise possessed by Israeli military personnel. Israel’s security problems are political problems at their core, but the importance of military capabilities in deterring

⁵¹¹ Cohen (2006), p. 778. For example, “[i]n a defeat of sorts, the Israeli army agreed in court, in the face of much evidence, to stop its practice of using Palestinian civilians as ‘human shields.’ Bletter, Gloria. 2003. “Israel’s Impunity Under International Law.” *Peace Studies*. 15:1, 3-9, p. 6.

⁵¹² “Since 1973, military conduct has been the subject of three major legal tribunals: the Agranat Commission on the 1973 War, the Kahan Commission on the 1982 Sabra and Shatila massacres, and the Shamgar Commission on the 1994 Hebron killings.” Gal, Reuven, and Stuart Cohen. 2000. “Israel: Still Waiting in the Wings,” pp. 224-241, in Moskos, Charles, John Allen Williams, and David Segal, eds. The Postmodern Military: Armed Forces after the Cold War. Oxford, England: Oxford University Press, pp. 232-3.

⁵¹³ Hirschl, Ran. April 2001. “The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel’s Constitutional Revolution.” *Comparative Politics*. 33:3, 315-35, p. 327.

and thwarting the actions of those threatening the Israeli state and its people falls squarely on the shoulders of the Israeli defense establishment and its leadership. The military has always been involved in policy formulation, but

[e]vidence of even more direct military participation in policy formation came to light when the contents of an internal military document were leaked to the press at the beginning of 1995. This document, drafted by Maj. Gen. Uzi Dayan, head of the IDF's Planning Division, calls for the speedy drafting of the IDF's position papers on negotiations with the Palestinians, in order to influence those negotiations.⁵¹⁴

This type of intervention in the political sphere, while worrisome to those looking to ensure that the military does not unduly use its expertise to move civilian policy preferences more into line with its own, is, to a degree, both natural and necessary given the IDF's central role in implementing the government's domestic counterterrorism program. If capable alternative civilian advisory bodies were available to assist the political authorities in policymaking, some of the advantages with which the military is endowed in the policymaking process could be mitigated. It is those instances in which civilian authorities are entirely dependent upon the advice from their military contacts that harm to the democratic nature of civil-military relations may occur. In an example of the negative effects of this dependency, Yoram Peri recounts the difficulty faced by Prime Minister Netanyahu when he replaced Shimon Peres in 1996:

[I]t became clear just how dependent the political leadership had become on the military for information and intelligence assessments, for political planning and the work of the Planning Division, for the practical know-how that the IDF commanders had acquired in the territories, and for the expertise of the other arms of the defense system, primarily the GSS and to a lesser extent the Mossad...[N]ot many months had passed before he came to understand that without the military he lacked the knowledge, tools, and ability to conduct political-security negotiations with the various actors, including the United States, and he had no choice but to bring the officers back."⁵¹⁵

⁵¹⁴ Etzioni-Halevy (1996).

⁵¹⁵ Peri (2002), p. 25.

Israeli history—and the mythologized role of the soldier in that history—further endows the military leadership with power in policymaking debates vis-à-vis its civilian counterparts. Given this background, “it would be surprising indeed, if [military personnel’s] public statements in favor of government policy did not serve to lend legitimation to that policy in the eyes of the public and to enhance the government’s public image while dimming that of the opposition.”⁵¹⁶ Citizens and policymakers alike have a natural tendency to give weight to the opinions of those individuals who have been or will be on the front lines of any conflict. While this certainly does not excuse the military leadership from civilian oversight of its role in the policymaking process, the Israeli military has a far easier time of justifying its intervention in military counterterrorism debates due to the high threat environment in which it must carry out its missions. Indeed, many military officers in both the Israeli and U.S. cases cite the imparting of their knowledge to civilian authorities as a key facet of their sworn duty to protect the sovereignty of the state and its citizens. In the words of one Israeli General,

the chiefs of staff, and no less than the heads of Intelligence, are not only entitled to express their opinions on the significance of strategic military and political action,...it is their duty to do so. If they do not do so, then they make it easier for the politicians in the short term, but make it much harder, in the absence of intellectual integrity, to explain clearly to Israelis the meaning of what happened. . . . It is the duty of the professional level to analyze the meaning of the [leaders’ political] decision and its outcome.⁵¹⁷

Israeli political authorities have not managed to garner the support necessary to establish a parallel civilian advisory structure that would allow civilian authorities to make their own educated decisions on domestic military counterterrorism policy. Civilian leaders have a long history of showing deference to the military leadership on assessments of military competence, and rarely have exercised the most direct source of

⁵¹⁶ Etzioni-Halevy (1996).

⁵¹⁷ Peri (2002), p. 21.

their power over the military by denying in full military requests for funding packages.⁵¹⁸

The result is what has widely been called the Israeli “political-military partnership:”

At the constitutional level, formal decisions are still ostensibly made by elected political leaders. But in practice there is another, concealed, level at which the professional officer class is deeply involved in policymaking. In fact, the military is an equal partner in the policy process. The forces participating in the policymaking game are not officers versus their political bosses, but rather a coalition of officers and politicians versus another coalition of officers and politicians.⁵¹⁹

A discussion of how the Chief of the General Staff and senior IDF leadership are able to serve as policy entrepreneurs will illustrate this point.

The Chief of the General Staff and Israel Defense Forces Senior Officers

The Chief of the General Staff (CGS) is the top commander in the IDF, as defined in the *Basic Law: The Army* (1976). The CGS is explicitly defined as the commander of the army—not the commander-in-chief—meaning that the military is institutionally subordinate to the government. However, the CGS has always maintained an informal, yet highly influential, role as senior military advisor to the prime minister and the Knesset. The CGS is more powerful, both formally and informally, than his American counterpart, the Chairman of the Joint Chiefs of Staff. The CGS’s “position as the only formal link between the political and military echelons, the only [official] military adviser to the government, and the all-powerful commander of the entire military gives him enormous power....⁵²⁰ In addition, since the 1967 war the CGS and his deputies have participated in cabinet meetings, even though they are not official members of that body. “Their presence in government deliberations has lent military commanders

⁵¹⁸ Guttieri, Karen. 2006. “Professional Military Education in Democracies,” in pp. 235-262, in Bruneau, Thomas, and Scott Tollefson, eds. Who Guards the Guardians and How: Democratic Civil-Military Relations. Austin, TX: University of Austin Press, p. 240.

⁵¹⁹ Peri (2002), p. 5.

⁵²⁰ Ibid., pp. 27-8.

considerable influence on government decision making, even though they are not entitled to have a formal vote.”⁵²¹

Two examples of the CGS’s influence on policymaking are illustrative of the significance of that position, as well as the power struggles that surround it. First, CGS Lieutenant General Shaul Mofaz (1998-2002) often drew the military into public disputes with civilian ministries and their personnel. CGS Mofaz’s

public statements, along with an official letter he sent to the Supreme Court were signs of a major rupture in the historical, informal ‘game rules’ that had characterized political–military relations. This may have stemmed from Mofaz’s lack of experience and inability to discern who the supreme commander of the army was: the IDF senior staff or the government of Israel.⁵²²

Quite dramatically, while the Prime Minister Ehud Barak was abroad CGS Mofaz announced that parts of the 1967 border would become military bases for operations, an initiative that endangered Israel’s political goals with respect to the Palestinian issue. The prime minister immediately reaffirmed that “the Israeli government alone was the supreme commander of the army,”⁵²³ publicly chastising CGS Mofaz in his attempt to unilaterally make state policy.

Outside of the CGS, the rest of the Israeli military elite—to include its senior officers in both the active duty and reserves⁵²⁴—also have the potential to significantly

521 Etzioni-Halevy (1996). According to Ranan Kuperman, Chairmen of the General Staff have a history of using their military expertise and proximity to the Prime Minister to manipulate the government into enacting the military’s policy preferences. Kuperman notes that in the 1960s the CGS “would purposely suggest military options so extreme that the government would never accept them. Thus the only choice left was either not to initiate any military response or accept the least extreme proposal, which was the operation that the chief of staff wanted the government to endorse in the first place.” Kuperman (2005), pp. 682-3.

522 Bar-or (2006), p. 374.

523 Ibid., p. 372.

524 Here I use Eva Etzioni-Halevy’s definition: “[T]his elite also includes these officers after their retirement from active duty, when they become reserve officers. They are included because they retain (and are referred to by) their military ranks (with the word “reserve” added to them), because when they are called up for active duty - on a routine basis or in case of war - they continue to serve in high-ranking positions, and because they carry over the prestige of their military ranks into civilian life.” Etzioni-Halevy (1996).

shape Israel's counterterrorism policy. Particularly during the first and second *intifadas*, ground commanders increasingly made public statements that influenced Israel's domestic military operations.⁵²⁵ This is problematic because military officers—as is natural for any interest group in a democratic society—are likely to support and see merit in those policies in which they have a personal or professional investment, regardless of how beneficial these policies may be for the state. There are few civilian institutions that are able to check the power of the IDF to implement domestic counterterrorism policies in the manner in which it so chooses, bestowing the military with a distinct advantage in formulating domestic counterterrorism policy, vis-à-vis their civilian authorities.

Given the high degree to which Israel's foreign and defense policies are intertwined, high-ranking Israeli officers often participate in negotiations with precisely those Palestinian groups against whom they are fighting, creating a very odd environment in which the military must implement counterterrorism policy.⁵²⁶ Military participation has been most prominent in the secondary stages of negotiations, after progress on the political front has been made.⁵²⁷ At this juncture, it is both natural and necessary for military senior leaders to be involved in the tactical decisions about how a specific settlement withdrawal will be made, or how IDF patrols of a specific neighborhood in the

⁵²⁵ “For instance, in the fall of 1993, the then chief of the general staff, Lt. Gen. Ehud Barak, participated in negotiations of the prime minister with another party, Yahadut Hatora, aimed at convincing it to join the government coalition. As part of these negotiations, Barak delineated the security arrangements that would make it possible to implement the government's policy of withdrawal on (not necessarily from) the Golan Heights in the event of a peace agreement with Syria, a policy in total disagreement with that of the opposition.” Ibid.

⁵²⁶ While outside the scope of this paper, the CGS and IDF senior leadership also have a history of participating in state-to-state diplomatic negotiations. According to Motti Golani, CGS Moshe Dayan played the pivotal role in ensuring “full coordination between progress in the military preparations and progress in the diplomatic negotiations with France and Britain” in the months preceding the 1956 Sinai War. Golani, Motti. March 2001. “Chief of Staff in Quest of a War: Moshe Dayan Leads Israel into War.” *The Journal of Strategic Studies*. 24:1, 49-70, p. 67.

⁵²⁷ For example, although military officers were not involved in forging the first Oslo agreement, a military delegation headed by Maj. Gen. Amnon Shahak and Maj. Gen. Uzi Dayan was put in charge of one branch of the negotiations with PLO representatives on the practical agreement for relinquishing Gaza and Jericho.” Etzioni-Halevy (1996).

territories will be handed over to PA personnel. The problems of civilian control are apparent, however, in the influence the IDF has had on shaping the direction of Israeli domestic counterterrorism policy. According to Yoram Peri, in the 1990s the IDF adopted a new policy toward the Palestinians,

which supported achieving a political agreement with the Palestinians in exchange for territorial concessions and the establishment of a Palestinian state. By so doing, the military enabled the governments of Rabin, Peres and Barak to advance the peace process and was itself a power base for the Israeli peace camp at the end of the decade. At the beginning of the first decade of the twenty-first century, on the other hand, the military had become the most powerful interest group in the policy arena supporting the adoption of a policy of offensive war against the Palestinian Authority; of militarily ending the *intifada*; and of terminating Arafat's command. There was, to be sure, a good fit between Prime Minister Sharon's policies and those of the military, but the military was not merely an instrument for the implementation of policy: it was, rather, an active partner in the formulation of policy and in the marketing of policy within the political sphere.⁵²⁸

With the exception of the IDF's 2005 withdrawal from the Gaza Strip, just outside of which it maintains a significant operational presence, Israeli counterterrorism policy still reflects this more aggressive military-based stance.

In addition to the benefits with which military expertise endows military personnel in their relations with civilians, in Israel former military officers move easily into political positions, further entrenching opportunities for senior military leaders to serve as policy entrepreneurs and privilege military preferences in the counterterrorism policymaking process. By statute, officers on active duty are not allowed to engage in political activity, but they are entitled to enter politics just 100 days after their retirement date. In one of the more recent and controversial examples of this career path, shortly before Israel's national elections in 2003 CGS Mofaz retired from the military and was immediately appointed as Ariel Sharon's Minister of Defense. "Although the law has no jurisdiction over ministerial roles...[Mofaz's] appointment aroused widespread public

⁵²⁸ Peri, (2005), p. 336.

criticism over the new defence minister's expected function as a 'super-CGS.' The Supreme Court also berated Mofaz for trying to get elected to parliament before the end of the legally required cooling-off period."⁵²⁹

In a threat environment as tense as that of Israel, this tight collusion between the political and military elite does not simply empower the military vis-à-vis civilian interests; it can also cause critical problems in the military's chain-of-command. Stuart Cohen found that Israel's domestic terrorism environment is especially conducive to civilian interference in IDF operational planning since low-intensity counterterrorism operations offer senior military personnel who have moved into politics "an especially large number of opportunities to continue to exercise what effectively amounts to day-to-day operational command," resulting in civilian interference that further restricts "the freedom of operational choice available to the nominal members of the general staff" and constitutes "one of the means whereby Israel's generals have been made increasingly subordinate to their ministers of defence."⁵³⁰

At times, though infrequent, senior IDF officers have shown their distaste for a specific policy initiative not through outright disobedience, but through hesitance in implementation. In these situations, the political authorities usually have to accept the results of the senior military leadership's actions, as they have little recourse or method by which to punish the military elite, particularly if the CGS and significant factions in the Knesset are not supportive of the political authority's policy. The Israeli military elite is, like Israeli society and other government institutions, heavily factionalized. While insubordination based on ideological divisions is rare, it does occur and support for specific acts of insubordination can usually be found outside the military. The sectarian

⁵²⁹ Bar-or (2006), p. 365.

⁵³⁰ Cohen (2006), pp. 781-2.

nature of Israeli society, then, enables multiple policy entrepreneurs to actively participate in the policy process through the many channels open to them in Israel's fragmented political system. The CGS and IDF senior leadership are two of the primary actors in this regard, best positioned to take advantage of opportunities to push for domestic counterterrorism policies that support their preferences.

Israeli Public Opinion

As befits an established, consolidated democracy, Israeli counterterrorism policies are subject to pervasive and widespread public debate, even more so than what is seen in the U.S. I argue that this difference is due to Israel's unique historical narrative and the existence of a "people's army" in which a large portion of the Israeli public still participates. Direct public involvement in domestic military activity by so many Israelis means that IDF counterterrorism techniques are widely known, inviting public critique. Israeli political cleavages⁵³¹ naturally surface within the ranks of the IDF, though Israelis in general exhibit an inclination to support use of domestic military force against terrorist organizations.⁵³²

The public's deeply held interest in defense affairs is a natural effect of nearly universal military service and a volatile security environment. The Israeli military is a key point of reference in most Israelis' politicization, and public discussion of specific

⁵³¹ Pedahzur, Ami, and Magnus Ranstorp. Summer 2001. "A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel." *Terrorism and Political Violence*. 13:2, p. 14.

⁵³² Barzilai, Gad, and Efraim Inbar. Fall 1996. "The Use of Force: Israeli Public Opinion on Military Options." *Armed Forces & Society*. 23:1, pp. 49-80. "In a recent poll conducted by Yaar and Hermann of the Tami Steinmetz Centre for Peace Research, about 80% of a sample of the Jewish population of Israel supported entry of the IDF into cities in the Palestinian Authority area and staying there as much as needed (practically meaning re-occupation of these cities). Another poll by the same centre found that only 29% of the respondents held the opinion that in planning military operations in the territories, the IDF should take into consideration the possibility of hurting Palestinian civilians as a supreme factor....Apparently, most Israelis view the situation as war rather than as a law and order problem....The readiness to use massive force is, undoubtedly, fed by a feeling of an existential threat to personal and national security. This feeling has presumably been strengthened in the course of the second (current) intifada" Merari, Ariel. January 2005. "Israel Facing Terrorism." *Israel Affairs*. 11:1, 223-37, p. 229.

military counterterrorism policies is neither unexpected nor unwarranted, given the heavy human toll conscripted armies have the potential to inflict upon a country's population. Many assess that Ariel Sharon's election as prime minister "seemed like the ultimate expression of Israeli anger, the choice of a public frustrated by the stagnation of the peace process and the violence of the second Palestinian *intifada*,"⁵³³ given Sharon's stance as a vocal hawk and Israeli militarist. The advent of the second *intifada*, coupled with the aforementioned changes in Israel's electoral system, ushered in a period of transition

from the security establishment's position of immunity from criticism to confrontation with other entities that were gaining in political strength, articulating autonomous public agendas and developing distinctive professional values. This pattern contained profound implications for the ability of the security establishment to protect itself from criticism and external intervention in its policy formulations.⁵³⁴

These fissures within Israeli society become very apparent regarding IDF dismantlement of Israeli settlements. This is the most oft-cited issue by Israeli civil-military scholars when addressing the prospects for military disobedience of civilian orders, and, indeed, the only issue over which analysts could conceive that the military would ever stage a coup, especially if current trends toward increasing religiosity within the rank-and-file continue. Military officials publicly air their concerns about these demographic shifts in the Israeli military. In 2005, "Knesset Member Danny Yatom generated a minor public storm when, reacting to rumours that large numbers of religious IDF troops might refuse orders to dismantle Jewish settlements in the Gaza Strip, he openly expressed his fears that a military 'putsch' might be imminent."⁵³⁵

In light of this trend toward political factionalism, the policy entrepreneur currently showing the most potential to impact the Israeli civil-military relationship is the

⁵³³ Benn, Aluf. May/June 2002. "The Last of the Patriarchs." *Foreign Affairs*. 81:3, pp. 64-78.

⁵³⁴ Lebel (2006), pp. 362-3.

⁵³⁵ Cohen (2006), pp. 769-70.

Israeli public. Voter turnout and political involvement historically have been very high in Israel⁵³⁶ compared to other consolidated democracies. While differences over specific policy options are rampant, the Israeli public shows remarkable unity behind the state in its efforts to combat domestic terrorism. Terrorist activities “have had nuisance value and have, therefore, constituted a political problem for the Israeli leadership. The threat to the personal safety of Israeli citizens has always been an important issue in Israel's social fabric.”⁵³⁷ The “rally around the flag” effect certainly exists in Israel, but is also colored by a preference for military actions that promise only limited IDF casualties. In their mid-1990s study of Israeli attitudes toward military engagement, Gad Barzilai and Efraim Inbar concluded that the

Israeli political leadership can count on the public rendering legitimacy to the uses of force as long as they are consistent with centrist preferences; perceived centrist options toward the use of force are likely to receive popular support...[F]orceful antiterror options have greater support than other military activities. This is apparently a result of the public's sensitivity to challenges to routine daily life and the relatively low cost involved in such military actions.⁵³⁸

The impact of public opinion on specific military counterterrorism techniques can be seen in the IDF policy of “closure,” or blocking the passage of Palestinians from the Palestinian territories into Israel. An important motivation behind the closure policy was to appease Israeli public opinion in the wake of terrorist events, as the government employed “closure as an immediate, visible response, designed to make the public feel that the attack did not pass unanswered and that the government has the methods and means for coping with the situation.”⁵³⁹

The “grass roots” layer of civil society appears to be increasingly important in determining the direction of domestic military counterterrorism policy. Stuart Cohen

⁵³⁶ Ben-Eliezer (1993), pp. 397-8.

⁵³⁷ Barzilai and Inbar (1996).

⁵³⁸ Ibid.

⁵³⁹ Merari (2005), p. 232.

already sees a change in the manner in which discussion of civil-military relations are conducted: “No longer is that dialogue conducted in an atmosphere that is essentially pragmatic and consensual, which in the past allowed for a fair degree of give-and-take and brokerage. Instead, the tone is now far more nuanced and confrontational.”⁵⁴⁰ Udi Lebel has already discerned a difference in the social aspects of military service in Israel, as Israeli civil society has become more critical of the security establishment. As early as the mid-1990s, “[t]hrough the pressure of these social entrepreneurs, the army was forced to relinquish its privileged position in determining the patterns of commemoration and remembrance of the fallen; the sole right of the military to investigate itself for failed operations and training accidents; and the right to decide which officers were to be promoted to senior ranks.”⁵⁴¹ In the future, it will be important to see how the various leftist peace movements that are becoming more vocal within Israel pair up against the religious right that is becoming increasingly prevalent among the IDF rank-and-file.

Discussion

Of particular concern for this study is the ease with which high-level military personnel are able to move almost immediately into Israeli politics following retirement, further blurring the lines between the civilian and military spheres normally found in democratic societies. The lack of enforceable institutional safeguards against such a career path consistently raises the risk that Israel’s defense policy may become politicized and more reflective of military preferences than those of the elected political authorities. Eva Etzioni-Halevy identifies a very specific relationship in which support for political

⁵⁴⁰ Cohen (2006), pp. 775-6. For Cohen, the new layer of civil society “consists of the kaleidoscopic multitude of persons who now claim to express ‘grass roots’ feelings in the country on matters of military concern. Organized within a mixture of ‘here and now’ frameworks, millenarian cells, and single-issue action groups, this category includes, for instance: parents and families of servicemen and women, rank-and-file reservists; members of regional councils (such as that of the West Bank settlers); rabbis, women’s groups, ecological associations, and assorted NGOs who advocate human rights.” Ibid.

⁵⁴¹ Lebel (2006), pp. 363-4.

initiatives may be easily traded for future political involvement: “[T]here is a lack of separation between the military and government elites, or a close connection between them, that entails an exchange of resources: the latter supplies the former with career opportunities, while the former supplies the latter with support and legitimation that endow it with an electoral advantage over the opposition.”⁵⁴² This type of political bargaining obscures the security priorities of the state by privileging the preferences of certain policy entrepreneurs over others.⁵⁴³

There is also an institutional problem with the Israeli defense establishment that further erodes opportunity for democratic oversight of domestic use of the military for counterterrorism purposes. While the specifics of defense policy are widely debated throughout Israeli society, national security decisions generally are made by a small, homogenous group of elite military and political leaders. There is justification for this limitation: “Firstly, only qualified military experts have the ability to evaluate the decisions from an operational perspective. Secondly, the more people involved, the higher the risk that classified information will leak out. Finally, because such decisions often need to be taken immediately, valuable time may be lost assembling large groups and discussing the issue.”⁵⁴⁴ However, other established democracies, while still respecting the need to keep counterterrorism plans secret, have multiple outlets through

⁵⁴² Etzioni-Halevy (1996). “Elites or power centers may be said to be closely connected when each relies significantly on the resources supplied to it by the other. The elites in one political system can never be totally separate; but relative separation (or autonomy) between elites may be said to prevail when neither relies to a significant extent on the resources accruing to it from the other.” Ibid.

⁵⁴³ For example, “[t]he main military body that dealt with the peace process during the 1990s was the [IDF’s] strategic planning division, which was responsible for consolidating the fieldwork done in discussions with the Palestinians, Jordan and Syria... The strategic planning division’s involvement in these matters was so extensive that in September 2001, the state comptroller spoke of a serious obstacle to his work: as a result of the advances it had made with respect to political issues, there existed no other body, outside the IDF, capable of providing the political branch with a comprehensive analysis of the various implications of the political–military situation. The military remained the sole instrument capable of being used by the political branch as a political–military planning body.” Peri (2005), p. 330.

⁵⁴⁴ Kuperman (2005), pp. 690-1.

which those who have a stake in defense policy may insert their policy preferences. The Israeli political system, while opening up slightly in recent years with increasing advocacy by the judiciary and grass roots movements, is still relatively closed and opportunities for policy entrepreneurship from outside the political system on domestic counterterrorism issues remain limited.

“Israel regards itself as an outpost of Western-style democracy, yet it has developed civil-military relations that differ from those of other democratic countries in that Israel lacks the separation between the government/political elite and the military elite...commonly found in Western democracies.”⁵⁴⁵ There is no question that the military elite in Israel exerts a far higher level of influence on counterterrorism policy—and defense policy in general—than the militaries of most consolidated democratic states. Despite this, civilian control of the military in Israel is not in jeopardy; the normative value of remaining obedient to those officials elected by the Israeli people still persists in both the military and society.

UNITED KINGDOM

The British political system is highly centralized, with a significant number of shared responsibilities between the civilian and military spheres. In the highest echelons of the Ministry of Defence (MoD), there exist numerous “mixed management” structures in which civilian chiefs have military deputies, and vice versa. This practice was chosen

⁵⁴⁵ Etzioni-Halevy (1996). Specifically, Stuart Cohen highlights the following inconsistencies between Israeli civil-military relations and that expected of a full democracy: “Generals sometimes feel free to make politically charged observations while in uniform. The swift transition from high military rank to political office has made many in the Knesset uneasy. The conspicuous wooing by the major parties of retiring generals days after they doff their uniforms is unseemly at best. At worst, it risks politicizing the upper echelons of a military necessarily engaged in politically sensitive operations. Israel has no establishment like the National Security Council to counterbalance the general staff, and its intelligence community relies more on military intelligence than do most Western societies. The military is increasingly transparent to a press that stopped many years ago regarding itself simply as an extension of the IDF Spokesman's Office, but the Knesset's oversight role is generally private and discreet.” Cohen, Eliot. Nov/Dec 1998. “Israel After Heroism.” *Foreign Affairs*. 112-28, pp. 125-6.

to ensure that military policies were developed and executed under full civilian guidance and did not deviate from the Foreign and Commonwealth Office's foreign policy goals. The administrative structure "comprises close informal relationships between officials at different departments regardless of which government is in power...[encouraging] interpersonal trust building and mutual understanding."⁵⁴⁶ Further, "[b]ecause of the low political cost of monitoring the armed forces, the military officers, if mindful of their careers, have always had to stay in tune with the wishes of the political leaders."⁵⁴⁷

This network approach to civil-military relations did not, however, successfully prevent conflict between civilian and military authorities over British military policy in Northern Ireland. To further complicate the situation, the British Army technically was deployed in support of the Parliament of Northern Ireland, adding two layers to the British civil-military relationship by requiring the Army to work with both the Northern Ireland political authorities and the local police forces executing counterterrorist operations. The result of this multi-layered civil-military relationship was a policymaking environment in which a vast array of policy entrepreneurs—the parliaments of both Britain and Northern Ireland, British military officials, the British judiciary and international human rights courts, ad hoc commissions, and the British public—had entree into the political system to influence domestic use of the British Army in the context of counterterrorism.

⁵⁴⁶ Egnell, Robert. December 2006. "Explaining US and British Performance in Complex Expeditionary Operations: The Civil-Military Dimension." *The Journal of Strategic Studies*. 29:6, 1041-75, pp. 1052-3. Egnell's 2004 and 2005 interviews with MoD officials indicated that "in terms of defence policy, the cooperation and communication between the Foreign and Commonwealth Office (FCO) and the Ministry of Defence (MoD) is very close." *Ibid.*, p. 1053.

⁵⁴⁷ *Ibid.*, p. 1052. This centralized system of close informal relationships between the civilian and military spheres provides, in Peter Feaver's terms, "low-cost civilian monitoring" of the military. See Egnell's discussion of Feaver, Peter. 2003. Armed Servants: Agency, Oversight, and Civil-Military Relations. Cambridge, MA: Harvard University Press, in Egnell (2006), p. 1052.

Westminster and the Parliament of Northern Ireland

In contrast to the US and Israeli cases, the British Parliament has played only a limited role in determining the extent of British Army powers with respect to domestic counterterrorism operations. On most counterterrorism issues, Parliament—while openly debating executive policy proposals—usually defers to executive preferences. Individual parliamentarians have proven to be vocal critics of executive counterterrorism initiatives, largely due to their reelection-driven efforts to avoid being publicly characterized as “soft on terrorism”⁵⁴⁸ Further, the party-centered British political system, in which the Prime Minister is chosen from the leading party, has meant that Parliament rarely counteracts or limits executive authority on terrorism policies. Indeed, on the topic of policing in Northern Ireland—a pillar of the joint British-Northern Ireland security strategy—policing regulations were debated just once at Westminster over the less violent 1922 to 1969 time period.⁵⁴⁹ Debates became far more common as violence against British interests escalated and public demands for government action increased.

In accordance with parliamentary systems of governance, the British Parliament had the greatest impact on altering counterterrorism policy in the months immediately following changes in government. In the 1980s, for example, the Labour party repeatedly attempted to initiate legislation that would require the government to apply judicial review to the Emergency Powers Act (1978), but the “government rejected the proposal, stating that it would only create unrealistic expectations among those opposing the

⁵⁴⁸ According to Laura Donohue, “[t]he inability to revoke emergency measures once enacted was tied directly to the moral import assumed in their enactment. Withdrawing it would have been akin to surrendering to terrorism.” Donahue, Laura K. 2001. Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000. Dublin: Irish Academic Press, p. 319. For example, following Labour’s decision to oppose the 1996 EPA due to its internment provision, Conservative MP Barry Porter stated, “I do not believe that many people in Northern Ireland, certainly in terrorist organisations, will read the details of the Opposition’s reasoned amendment...the headline will be, ‘Labour Party votes against anti-terrorist legislation.’” *HC Debs.* 9 January 1996. 269:43, as cited in Donohue (2001), p. 320.

⁵⁴⁹ O’Rawe, Mary. 2003. “Transitional Policing Arrangements in Northern Ireland: The Can’t and the Won’t of the Change Dialectic.” *Fordham International Law Journal*. 26: 1015-73, pp. 1027-8.

legislation.”⁵⁵⁰ After gaining control of Parliament in the 1990s, however, Labour was able to push for revisions of the existing emergency legislation, succeeding in reining in executive counterterrorism authorities by restricting use of internment and exclusion. Historical events soon caused yet another policy reversal, as the 1998 Omagh bombing—discussed in Chapter 4—spurred the Labour party to introduce the Criminal Justice (Terrorism and Conspiracy) Act (1998)⁵⁵¹ and expand executive counterterrorism authorities, in part to appease an angry constituency.

The Parliament of Northern Ireland viewed British emergency laws differently than did Westminster.⁵⁵² In general, Northern MPs advocated a more hard-line approach to dealing with domestic terrorists, and tended to support military—vice law enforcement—counterterrorism tactics. Up until the British government imposed direct rule on Northern Ireland in 1972, the Northern Parliament held authority over British military operations in Northern Ireland:

This Protestant-dominated body saw the solution to the disturbances in Northern Ireland as a hard-line security response, not root and branch political reforms. Perhaps contrary to what might have been expected, the Army disliked the Stormont parliament precisely because Stormont wanted to take an unrelenting hard-line approach to the situation. One staff officer noted that the Stormont

⁵⁵⁰ Donahue (2001), p. 177. Executive rejection in this case fit a longstanding pattern of executive refusal of Parliament’s attempts to restrict emergency powers. During committee discussions on the Prevention of Violence (Temporary Provisions) Act (1939), MPs “proposed a number of amendments to try to insert some sort of a judicial review into the process...[but] the government rejected any formal role for the judiciary, saying ‘This is, and in our view should remain, an executive act.’” Ibid., pp. 211-2.

⁵⁵¹ Ibid., p. xxiii.

⁵⁵² Laura Donohue attributes this difference in approach between the British and Northern Ireland authorities to the sectarian biases that colored the way each body viewed the extension of executive powers such as internment and juryless trials: “From 1922 to 1972 the Northern government largely regarded the Special Powers as only infringing on the rights of one portion of the population. Those subject to its provisions had chosen to forego such rights through the adoption of violent means. In contrast, Westminster largely recognized that emergency law infringed the rights of all citizens within the State. However, Parliament justified this incursion by appeal to what might be termed a ‘hierarchy of rights.’ The right to life and property provided a trump card over ‘lesser rights,’ such as the right to silence, the right to free speech and the right to a jury trial.” Ibid., pp. xxiv-xxv.

Cabinet “had no broad political ideas. They just wanted to smash the Catholics.”⁵⁵³

This relatively militant view on behalf of the Northern Parliament had shaped the British response to violence against British interests in Northern Ireland for decades. In 1922, for example, the Northern government’s proposed version of the British SPA “received widespread support in the Northern Parliament, with members proposing even greater powers during the second reading. Of the entire House, only one member opposed the Bill, and this opposition was voiced with an eye towards increasing military measures instead.”⁵⁵⁴

Given the Northern government’s authority over British military activity in Northern Ireland, the Northern Parliament was successful in shaping a more active, interventionist role for the British Army personnel deployed to the province. Though the increased targeting of British interests on the mainland encouraged the broadening of executive authorities, the policy entrepreneurship of the Northern Parliament was critical to encouraging a more hard-line British military response to domestic terrorist activity.

The British Army

The British military, like most government agencies, did not have a monolithic view on the most effective method by which to contain the violence in Northern Ireland and lessen the threat to British interests on the mainland. Despite the joint civilian-military management structure that was intended to alleviate and settle such internal disputes, fissures existing between the civilian government in London and the military commanders on the ground in Northern Ireland were, at times, profound. While these differences rarely resulted in outright disobedience of civilian authority, they did hinder

⁵⁵³ Hamill, Desmond. 1985. Pig in the Middle: The Army in Northern Ireland, 1969-1984. London: Methuen, p. 50, as cited in Tuck, Christopher. June 2007. “Northern Ireland and the British Approach to Counter-Insurgency.” *Defense & Security Analysis*. 23:2, 165-83, p. 167.

⁵⁵⁴ Donohue (2001), p. 21.

effective implementation of Westminster's domestic counterterrorism strategy. At the core of these disputes were significant disagreements over whether a political or military solution could better neutralize the IRA. According to Christopher Tuck,

[E]ven if there existed a general understanding on the part of the British Army and British politicians of the essentially political foundations of any solution, this did not necessarily translate into a consensus on the role that military power should play within British strategy. The idea that British security policy could, and should, accord an important place to the military defeat of the IRA as part of a broader political solution was one that re-surfaced many times.⁵⁵⁵

Civil-military tensions over British military policy in Northern Ireland were compounded by the joint nature of the command governing Army operations in the province. As mentioned, until direct rule was imposed in 1972 the government of Northern Ireland had statutory authority to order the British Army to undertake operations in Northern Ireland in support of both governments. The Army was commanded to obey the policy of "police primacy," requiring British Army forces to serve in a support role to the Northern police forces, and take action only when requested by the police or Northern authorities. Outside of the bureaucratic difficulties of this arrangement, "some senior military officers simply did not believe in the policy of Police primacy, at least as it was expressed in the context of Northern Ireland."⁵⁵⁶ Individual soldiers on the ground in Northern Ireland, therefore, were often the most effective policy

⁵⁵⁵ Tuck (2007), p. 169. "For example, Sir Timothy Creasey, General Officer Commanding in Northern Ireland in the late 1970s, argued that what needed to be done was to 'stop messing around and take out the terrorists'. After the bombing at Warrenpoint and the murder of Lord Mountbatten, Creasey argued, unsuccessfully, for a return to Army primacy and a range of more hard-line initiatives including the reintroduction of internment, hot pursuit across the border and the appointment of an army Director of Operations." Newsinger, John. Spring 1995. "From Counter-Insurgency to Internal Security: Northern Ireland 1969-1992." *Small Wars and Insurgencies*. 6:1, p. 101, and Newsinger, John. 2002. British Counter-Insurgency From Palestine to Northern Ireland. Basingstoke: Palgrave, p. 182, as cited in Tuck (2007), pp. 169-70.

⁵⁵⁶ Newsinger (1995), p. 101, as cited in Tuck (2007), p. 170. According to Tuck, "[o]ne bone of contention, for example, was intelligence, especially the sharing of intelligence and the inter-service frictions between the RUC Special Branch and Army organizations such as the SAS." Tuck (2007), p. 170.

entrepreneurs, in the sense that British military policy in Northern Ireland was only as effective as those who implemented it.⁵⁵⁷

The British Judiciary and International Law

Compared to most consolidated democracies, the judicial branch in Britain has been less effective in checking the power of the executive and legislative branches, a discrepancy largely due to the broad national security powers that have always been afforded the Prime Minister. British courts have a long history of striking down executive actions, especially regarding counterterrorism policies, but these decisions rarely have had a lasting impact. In cases in which the British High Court declares a specific executive action illegal, Parliament typically quickly passes a new law legalizing that action, often including a retroactive clause. In 1972, for example, the High Court found that existing law did not permit the government of Northern Ireland to order the British Army to take action on its behalf and “the British government immediately introduced a bill at Westminster to legalise all action hitherto taken by the British Army in Northern Ireland.”⁵⁵⁸ This bill, known as the Northern Ireland Act (1972), was a joint executive-parliamentary signal to the judicial branch that it could not place limits on the executive’s authority to determine British security policy in Northern Ireland.

In addition to the British judiciary serving as a policy entrepreneur in counterterrorism-related policymaking, international courts have also placed parameters

⁵⁵⁷ “Commenting on his service in the 1980s, one soldier recalls that “If it was a Catholic area, you didn’t particularly bother with hearts and minds,” referring to the British government’s emphasis on public relations as a cornerstone of its counterterrorism policy in Northern Ireland. Arthur, Max. 1987. Northern Ireland: Soldiers Talking. London: Sidgwick and Jackson, p. 149, as cited in Tuck (2007), p. 171.

⁵⁵⁸ Donahue (2001), pp. 110-1. “[O]n 23 February [1972] the courts determined in *Regina (Hume and Others) v. Londonberry Justices* that the basis for army operations in Northern Ireland, S.R.O. 71/1957, 16.4.57 of the 1922-43 Special Powers Acts, violated section 4(1) of the 1920 Government of Ireland Act....While Westminster’s assumption had been that under the terms of the 1922-43 SPAs the army was acting in support of the civil power, the Army’s role, which involved searches, arrests, enforcement of curfew and the stopping of vehicles, had become far more involved than this.” *Ibid.*, pp. 121-2.

on the policy options open to British lawmakers. Largely because it has made itself subject to the jurisdiction of several European and international treaties and legal bodies, the United Kingdom has proven to be more susceptible to influence from international law on its domestic counterterrorism policies than any of the other cases under consideration in this study. The UK has had mixed results in trials brought against the British government before these bodies, with the courts accepting the UK's right to use force to counter domestic terrorist activity, but also ruling that specific aspects of those policies violated international law.

On the question of its right to use military force against domestic terrorists, the British government until 1978 had always framed violence in Northern Ireland as an internal matter, in part to deny legitimacy to Irish nationalist terrorist organizations but also to prevent the application of international human rights law to its operations in the province. In *Ireland v. United Kingdom* (1978), the European Court of Human Rights (ECHR) decided in favor of the British government ruling that "the national authorities are...in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it,"⁵⁵⁹ thereby providing legal cover for British military policy in Northern Ireland. However, as part of the ruling the UK was forced to acknowledge the legitimate stake of the Irish government in determining the course of the conflict in Northern Ireland, widening the body of law that covered the conflict to include international statutes on human rights.

In other cases brought before the ECHR on specific British counterterrorism techniques the UK did not fare as well, and lost several surrounding British internment and interrogation policies.⁵⁶⁰ Significantly, the ECHR ruled that invoking emergency law

⁵⁵⁹ *Ireland v. United Kingdom* 2 Eur. Ct. H.R. 25 (ser. A) at 90-91. 1978, as cited in Wattellier, Jeremie. Winter 2004. "Comparative Legal Responses to Terrorism: Lessons from Europe." *Hastings International and Comparative Law Review*. 27, 397-419, p. 407.

⁵⁶⁰ Wattellier (2004), pp. 405-6.

was not always sufficient to justify drastic counterterrorism measures, in effect throwing into question the British government's long-standing policy of using "temporary measures" to legalize the executive's counterterrorism policies and its domestic use of military force. The ECHR did, however, recognize the right of the British state to defend itself against terrorism, but imposed heavy restrictions on British policy by ruling that the government could only use certain aspects of existing emergency law under specific circumstances.⁵⁶¹ In all of these cases the international courts served as policy entrepreneurs, shaping the domestic counterterrorism policy options open to the British authorities and forcing the British government to align its counterterrorism policies with international human rights standards.

The British counterterrorism policymaking process—particularly since 9/11—has been marked by repeated policy battles between the British judiciary on the one hand and the Prime Minister and Parliament on the other. . In response to the judiciary's threats to strike down the vast expansion of executive domestic counterterrorism powers in the wake of the 7 July 2005 London bombings, for example,

Michael Howard, the Tory opposition leader at the time, accused judges of "aggressive judicial activism" and blocking the will of MPs over the fight against terrorism....The Prime Minister, in turn, warned judges he would repeal parts of the Human Rights Act 1998 if the courts blocked the deportation of extremists to unsafe countries....[T]his proposed intrusion [wa]s absolutely unprecedented.⁵⁶²

Since 9/11, neither the domestic judiciary nor international law has been able to effectively restrain executive counterterrorism powers in the UK.

⁵⁶¹ Donahue (2001), p. xxv.

⁵⁶² Haubrich, Dirk. December 2006. "Ant-terrorism Laws and Slippery Slopes: A Reply to Waddington." *Policing & Society*. 16:4, 405-14, p. 412.

Ad Hoc Commissions

The establishment of independent commissions following a disastrous event to review legislation or evaluate existing policy is common among consolidated democracies. In the case of British military policy toward Northern Ireland, however, ad hoc commissions played an atypically significant role in shaping British counterterrorism policy. These commissions took on a variety of forms, some given specific mandates and expiration dates while others were convened on an “as-needed” basis. Some of the commissions—such as the Joint Security Committee responsible for implementing the Falls Curfew⁵⁶³—had the force of law, while others could only make policy recommendations to the British Parliament. Even for the advisory commissions that did not have the force of law, the impact of their findings was often significant. The Diplock Commission’s recommendations for extending what were essentially law enforcement authorities to British troops in Northern Ireland were quickly incorporated into new counterterrorism legislation,⁵⁶⁴ resulting in the extensive use of juryless trials in Northern Ireland in the 1970s. Though Northern Ireland-related violence today is rare, ad hoc commissions still play key roles in determining British security policy toward the province.⁵⁶⁵

Public Opinion

The British public likely generally expected its government to adhere to democratic norms in implementing its domestic counterterrorism policies, but the

⁵⁶³ The JSC, created in 1970 to oversee the movement of British troops into Northern Ireland, was composed of several high-level civilian and military personnel from both Britain and Northern Ireland. According to Laura Donohue, “Westminster designed this body to guarantee that the British government could force through the Hunt Committee’s recommendations even if they were rejected by the Northern Ireland Parliament.” Donohue (2001), p. 117.

⁵⁶⁴ Donohue (2001), p. 127.

⁵⁶⁵ The Independent Monitoring Commission, for one, began operating in January 2004 “to report on the level of paramilitary activity in Northern Ireland, the normalization of security measures, and the degree to which political parties in the region are upholding their agreements.” Donohue (2007), p. 1330.

citizenry also endowed British authorities with a wide set of moral parameters within which counterterrorism policies could be devised. The impact of public opinion was, not surprisingly, at its most powerful immediately following terrorist attacks, especially those on the mainland such as the 1974 bombing of a Birmingham pub. Widespread calls for Parliament to strengthen the executive's existing emergency powers encouraged the passage of temporary legislation that put such policies into place. In line with the expectations generated by the historical institutionalist paradigm, new waves of emergency legislation were rarely criticized by British citizens because the new laws were almost always a renewal or expansion of existing executive powers derived from the Special Powers Act (1922):

Emergency powers neither contradicted themselves nor placed what could be considered blatantly unreasonable demands on the population. Special powers were employed as a practical means to achieve the aim of the governments—defence of the Northern Irish constitutional structure and protection of citizens and property within the United Kingdom....Emergency enactments did not represent a frequent departure from some previous state of affairs.”⁵⁶⁶

However, British public opinion is not blindly accepting of invasive executive counterterrorism authorities. The post-9/11 widening of law enforcement powers, as in the US, has not gone unchallenged.

Discussion

One lesson of the British experience in Northern Ireland is that in spite of a government's best intentions in structuring the civil-military relationship to encourage integration and communication, circumstances at times are more powerful than individuals in determining policy direction. In British military policy toward the IRA, in

⁵⁶⁶ Donahue (2001), p. 311. For example, the emergency legislation introduced in Parliament in response to public revulsion toward the 1974 Birmingham attack was derived directly from the Special Powers Act (1922), Prevention of Violence Act (1939), the Emergency Powers Act (1973), and the Immigration Act (1971). Donohue (2007), p. 207.

particular, “issues of personality, circumstance and institutional resistance affected the quality of security policy integration, particularly at the lower levels.”⁵⁶⁷ This lack of coordination was exacerbated by an unclear chain-of-command governing British Army operations in Northern Ireland. According to Campbell and Connolly, as of 1969

it was the Home Office rather than the MOD that had the greater role in Northern Ireland policy, though it was to the MOD that the military was administratively responsible. The Army viewed itself as having a simultaneous responsibility under the common law; and for as long as the devolved government at Stormont remained in existence, the Army was required to interact constructively with it. Although Stormont had no direct control over the military, it was its emergency legislation in the shape of the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922±1943 and regulations (‘the Special Powers regulations’) that provided the bulk of the Army’s statutory powers.⁵⁶⁸

The fractured chain-of-command and lack of consensus within the British government on the best way to approach the conflict in Northern Ireland led to a sizable increase in points of access to the policymaking process, and thereby enhanced the ability of policy entrepreneurs to affect policy.

Executive counterterrorism authorities in the UK are expansive relative to most consolidated democracies, but the parliamentary system of governance in Britain makes it unlikely that the Prime Minister may take significant action without the assent of Parliament. Post-9/11 parliamentary battles over reforming the UK’s domestic counterterrorism infrastructure have resurrected questions of placing limits on executive authority. Multiple studies have recommended that the British government strengthen local and regional capabilities for terrorism prevention and disaster response, but these proposals to decentralize what is currently a heavily centralized counterterrorism infrastructure have met with a mixed response. According to Dan Jones, “[w]ithin

⁵⁶⁷ Tuck (2007), p. 171.

⁵⁶⁸ Campbell, Colm, and Ita Connolly. September 2003. “A Model for the ‘War Against Terrorism’? Military Intervention in Northern Ireland and the 1970 Falls Curfew.” *Journal of Law and Society*. 30:3, 341-75, pp. 351-2.

political circles generally there is some concern about local authority control over policing and the discrepancies that may arise between authorities.”⁵⁶⁹ However, current Prime Minister Gordon Brown’s low approval ratings portend that similar expansions of executive authority in the post 9/11 context could face greater scrutiny from Parliament in the future.

SPAIN

For the most part, the significant players in Spanish politics are the same as those identified in the other three cases; the President, Parliament, the courts, and public opinion all played significant roles in shaping Spain’s domestic counterterrorism policy. However, Spain differs significantly from the other cases in two primary respects.⁵⁷⁰ First, the King maintained a highly influential role in shaping the domestic responsibilities of the military during Spain’s transition period in the late 1970s and early 1980s. The only other constitutional monarchy in this study—the United Kingdom—did not allow such a role to be played by its royals. Second, the military’s position fluctuated wildly from the time of transition through today. The military currently is a less powerful institution relative to its civilian counterparts as compared to the other three cases. As such, the evolution of Spain’s domestic counterterrorism regime has clearly reflected the preferences articulated by the more powerful entity at the time the policy was made.

The President

Until 1977, Spain did not have a formal position for Minister of Defense. Under Franco, responsibilities for managing the national defense portfolio were spread among

⁵⁶⁹ Jones, Dan. 2005. “Structures of Bio-terrorism Preparedness in the UK and the US: Responses to 9/11 and the Anthrax Attacks.” *British Journal of Politics & International Relations*. 7, 340-52, p. 348.

⁵⁷⁰ In terms of the democratic transition and consolidation in Spain, the Catholic Church played a very powerful role as mediator and an impetus for democratization, specifically regarding the push for amnesty for individuals of the Francoist regime as well as its imprisoned political appointees. The Catholic Church will not be discussed in this study, however, as its role in shaping the domestic role on the military in counterterrorism operations was limited.

his top advisors, who in turn were fully integrated into the government structure.⁵⁷¹ During the transition period, President Suarez created the Ministry of Defense position to further extend civilian control of the military. A military general initially led the Ministry, but in early 1978 Suarez replaced the general with a civilian official and since that time all Ministers of Defense have been civilians.⁵⁷² The military leadership, for its part, in the late 1970s diligently worked to limited the centralization of civilian control of the military in the Ministry of Defense. According to Felipe Aguero, for military officers the Ministry “was perceived as an encroachment of the civilian democratic government in military affairs and as an interference in the ‘natural’ connection between the armed forces and their supreme commander.”⁵⁷³ “The subsequent gradual empowerment and civilianization of this ministry, together with the elimination of the Joint Chiefs as the top organ in the military chain of command, unequivocally asserted the supremacy of civilian authorities.”⁵⁷⁴

Through these institutional machinations, the President played a key role in institutionalizing civilian control of the military. Without this push for civilian oversight, it is likely that hard-liners in the military—vocal advocates of a military-based counterterrorism policy that would have involved direct military confrontation of ETA terrorists—would have been able to impose their own domestic counterterrorism policy preferences on the civilian elite, given the heightened domestic threat environment in the late 1970s and early 1980s. The President in the position of interlocutor between the political and military leadership was able to rein in the military and civilianize its

571 Under Franco, each of the armed services were represented as separate ministries in Franco’s Cabinet.

572 Zaverucha, Jorge. May 1993. “The Degree of Military Political Autonomy during the Spanish, Argentine and Brazilian Transitions.” *Journal of Latin American Studies*. 25:2, 283-99, p. 289.

573 Aguero, Felipe. 1995. Soldiers, Civilians and Democracy: Post-Franco Spain in Comparative Perspective. Baltimore: The Johns Hopkins University Press, p. 148.

574 *Ibid.*, pp. 6-7.

leadership, with the result that military preferences for a force-based counterterrorism policy lost out to police- and politically-based counterterrorism approaches.

Parliament

Spain has been a parliamentary democracy since the passage of its constitution in 1978. Spanish parliamentary politics are a product of the same type of pact-making that created the democratic Spanish state in the first place, and Parliament is clearly the “ultimate arbiter of national decision-making”⁵⁷⁵ in Spain. According to Mujica and Sanchez-Cuenca, the issues about which the various political parties most often reach a consensus are terrorism, foreign policy, and regional policy.⁵⁷⁶ Particularly on ETA-related counterterrorism policies, Parliament has shown remarkable unity, opting for a multifaceted counterterrorism policy rooted in law enforcement, prosecution, and negotiated truces. This consensus over counterterrorism policy has recently fractured with the rise of Islamic extremism in Spain, especially over whether or not military solutions are the best way to deal with the jihadist threat, both within Spain and abroad. Prime Minister Jose Maria Aznar’s willingness, for example, to involve Spain in the Iraq war was widely repudiated by the Socialists as illegal, immoral, and anti-European.⁵⁷⁷ These ideological splits, in light of Parliament’s primary role in domestic counterterrorism policymaking, look to be one of the most influential factors in shaping future counterterrorism policy decisions.

⁵⁷⁵ Encarnacion, Omar. January 2005. “Do Political Pacts Freeze Democracy? Spanish and South American Lesson.” *West European Politics*. 28:1, 183-203, p. 197. Parliament also plays a key role in determining military leadership, “discuss[ing] extensively which officers deserve to be promoted, and then recommends them to the executive for further approval.” Zaverucha (1993), p. 294.

⁵⁷⁶ Mujica, Alejandro, and Ignacio Sanchez-Cuenca. 2006. “Consensus and Parliamentary Opposition: The Case of Spain.” *Government and Opposition*. 86-108, p. 107.

⁵⁷⁷ Celso, Anthony. 2006. “Spain’s Dual Security Dilemma: Strategic Challenges of Basque and Islamist Terror during the Aznar and Zapatero Eras.” *Mediterranean Quarterly*. 17:4, 121-41, p. 132.

The Military

The point in time in Spain's modern democratic era at which the military could have had the most impact in influencing the state's domestic counterterrorism regime was during the transition itself, when the military was widely perceived to be the most formidable obstacle to democratic reform and institutionalization. As previously mentioned, the military maintained one of the strongest negotiating positions among the various state and public entities involved in forming the pact that led to democratization,⁵⁷⁸ but the military "was not situated at the core decision-making sites at the time of the regime's demise and thus had little influence over the transition's agenda. This, in turn, influenced the actual inability of the military to prevent the successful outcome of the transition sealed in the 1978 constitution."⁵⁷⁹

Thus, the military was the strongest single political player in the transition period, but alone was not strong enough to prevent the opposition coalition from pushing through democratic reforms. In addition, the same democratization forces that were sweeping through Spanish society were also impacting the rank-and-file and political fissures began to emerge within the military itself. According to Felipe Aguero, hard-liners within the Spanish military "utilized the perception of a terrorist and nationalist threat to activate and reunite opposition forces within the army,"⁵⁸⁰ but in the end "[m]ilitary divisions inhibited the development of military opposition by affecting the calculations of military leaders at critical junctures in the transition, leading them to restrain opposition to the unfolding transition."⁵⁸¹ Further, "[u]nified civilian positions on critical subjects

578 According to Felipe Aguero, "[w]ith its monopoly of armed force and political clout, it remained the only organization that could forcefully and drastically reverse political processes and the transition itself." Aguero (1995), p. 5.

579 Ibid., p. 11.

580 Ibid., p. 144.

581 Ibid., pp. 101-2.

and expressions of massive support for these positions were a powerful deterrent to hard-line militaries seeking to block the unfolding transition.”⁵⁸²

The most divisive issue between the military and civilian leadership throughout the late 1970s and early 1980s was over the granting of amnesty to those individuals—including military personnel—that were arrested during the Franco era for opposition-related activities. According to Paloma Aguilar,

[t]he political amnesty was considered by many to be the *sine qua non* for the establishment of democracy in Spain, the foundation stone for the symbolic reconciliation between the victors and vanquished. It represented an attempt to put an end to the repressive consequences of the dictatorship, not only by freeing the political prisoners and ensuring the restitution of their economic and employment rights, but also by modifying the labor and criminal legislation which had led to their imprisonment.⁵⁸³

The political motivations of all sides were apparent in the fight over amnesty. The government engaged in formal negotiations with the military leadership in order to advance its amnesty proposal. Bowing to pressure from the military, the government reportedly secretly promised the opposition that an even wider amnesty would be granted after the transition was complete.⁵⁸⁴

Amnesty had long been discussed, even under Franco, but it was not until Franco’s death and the ensuing transition negotiations that there was any real chance that the civilian leadership could pressure the military into accepting some level of amnesty for imprisoned opposition supporters. Indeed,

[t]he first act taken by the King just three days after his coronation was to decree the reprieve ‘of the punishments and sanctions consisting of the loss of liberty, freedom of movement or economic penalties which may be or have been imposed

⁵⁸² Ibid., p. 94.

⁵⁸³ Aguilar, Paloma. December 1996. “Collective Memory of the Spanish Civil War: The Case of the Political Amnesty in the Spanish Transition to Democracy.” *Working Paper*. Madrid: Juan March Institute. pp. 38-9.

⁵⁸⁴ Ibid., pp. 33-4.

for crimes and offenses established in the Penal Code, the Code of Military Justice and the special laws, for acts committed before 22 November 1975.’⁵⁸⁵

In the end, the military proved able to limit the application of the amnesty for the next several years, illustrating its sustained institutional power. As characteristic of pact-based democratic transitions, the government ceded to many of the military’s demands on the amnesty issue until its civilian authority was fully institutionalized, as granting amnesty to former military members who acted in support of the opposition during their time in uniform “had the greatest potential to put an end to democracy, and which, for this reason, could not be offended: the armed forces.”⁵⁸⁶

The King as Commander-in-Chief

In contrast to the other cases under consideration a monarchical leader played a pivotal role in influencing the shape of post-transition civil-military relations in Spain. The King gained greater power throughout the 1970s as the Spanish monarchy became an important unifying symbol amidst the fracturing political system. Both military and civilian leaders lobbied the King to direct his influence in support of their differing initiatives, creating an environment in which pact-making flourished:

Emphasis on this role as arbiter and moderator strengthened the desire within the military to favor direct links between the king and the armed forces, bypassing the government. The government itself, reflecting its own weakness, was often led to promote an enhanced role for the king....The king, on the other hand, insisted on the role of the government and tried to deflate the pretense of military autonomy or of a relation with the king which bypassed the government....⁵⁸⁷

The King—despite his institutional role as the military’s commander-in-chief—threw his support fully behind the civilian leadership, further ensuring that civilian preferences for the country’s domestic counterterrorism regime would prevail.

⁵⁸⁵ Decree of 25 November 1975, no 2940/75, *Boleun Oficial del Estado*, 25 and 26 November 1975, as cited in *Ibid.*, p. 13.

⁵⁸⁶ Aguilar (1996), pp. 23-4.

⁵⁸⁷ Agüero (1995), p. 173.

The Spanish Courts

Relative to the other three cases under consideration, the Spanish legal system has been less interventionist in placing limits on specific domestic counterterrorism policies that have been enacted by Parliament or the Prime Minister. As in the other cases, however, Spanish courts have been called upon to determine the legal parameters within which terrorist suspects may be surveilled, arrested, detained, and tried. In light of the Spanish courts' strong rulings in support of stringent domestic counterterrorism techniques, it is no surprise, therefore, that terrorists have reportedly turned their sights on the courts themselves. According to Spanish police, in 2004 one group of suspected terrorists planned to undertake "a massive suicide attack on the courts specializing in anti-terrorism...."⁵⁸⁸

Perhaps the most significant action taken by the Spanish courts regarding domestic counterterrorism policy was a series of rulings in 2003 that declared illegal a number of ETA- and Basque-related political and cultural entities. In February 2003 a Spanish judge ordered the closure of a Basque language daily and condoned the arrest of ten of the paper's employees on charges of affiliation with ETA. The Spanish Supreme Court soon after issued a permanent ban of the Basque political party *Batasuna*,⁵⁸⁹ widely acknowledged as ETA's political arm. Interestingly, these legal decisions were handed down during a ceasefire, and as such "[f]rom the point of view of *Batasuna*, and indeed of the Basque nationalist world in general, the aggressive approach of the Spanish judiciary during the ceasefire period seemed to run counter to any spirit of détente."⁵⁹⁰ In

588 Home Office Spain. 3 April 2004. Office of Information and Social Relations, as cited in Jordan and Horsburgh (2006), p. 220.

589 Human Rights Watch. January 2005. "Setting an Example? Counter-Terrorism Measures in Spain." *Human Rights Watch Report*. 17:1(D), pp. 14-5.

590 Woodworth, Paddy. Spring 2007. "The Spanish-Basque Peace Process: How to Get Things Wrong" *World Policy Journal*. 24:1, 65-73, p. 68.

handing down the *Batasuna* ruling the courts stepped outside the state's broader policy of accommodation and negotiation with ETA to formally restrict ETA's activities.

The other primary counterterrorism-related area in which the Spanish courts have been particularly active is the handling of suspected terrorists. Spanish courts for the most part have upheld what is perhaps the strictest counterterrorism legislation in Western Europe to date.⁵⁹¹ Spanish law permits extensive limitations on terrorism defendants' right to counsel.⁵⁹² The Spanish Constitutional Court has ruled that "the restriction on the right of the incommunicado detainee to choose his own counsel 'cannot be called a restrictive, unreasonable or disproportionate measure...because the limitation it imposes on the fundamental right [to legal assistance] is reasonably balanced with the pursued result.'"⁵⁹³ Spanish courts have also ruled repeatedly that the Spanish system of *secreto de sumario*—"a measure that severely restricts access by defense attorneys to the

591 It is important to note that, while largely consistent across courts, there are some issues on which specific courts at different levels have ruled in divergent ways, especially on what constitutes the torture of detainees. "For example in March 2000, the Supreme Court had to twice annul the decision of the Court of Barcelona when it failed to convict two civil guards of a death resulting from the beating of a detainee. Yet, in April 2000, in a reverse proceeding involving suspected ETA prisoners, the Supreme Court annulled the conviction of two civil guards in 1999 for failing to prevent the torture of the suspects." Amnesty International. 1 September 2001. "Concerns in Europe January-June 2001," as cited in MacDonald, Ross B., and Monica C. Bernardo. Fall/Winter 2006. "The Politics of Victimhood: Historical Memory and Peace in Spain and the Basque Region." *Journal of International Affairs*. 60:1, 173-96, p. 183.

592 "[I]ncommunicado detainees do not have the right to designate their own lawyer but rather must be assisted by a legal aid attorney for the duration of the incommunicado period. Second, these detainees do not have the right to see a lawyer from the outset of detention; the first time they see the legal aid attorney is when they are called to give an official police statement, an event that may occur after three and in some cases five days in custody. Finally, incommunicado detainees do not have the right to confer in private with their lawyers at any time, neither before nor after the statement to the police or the testimony before the judge. Human Rights Watch (2005), pp. 31-2.

593 Human Rights Watch (2005), pp. 31-2. According to Human Rights Watch, "the prohibition on appointing one's own lawyer was adopted in response to the concern that Basque separatist detainees were using lawyers themselves connected to ETA to transmit information to the outside world and prejudice the investigation. It may well be, in the words of a high-level advisor in the Ministry of Justice, "a justified precaution given the long history of terrorist groups using lawyers associated [with the same group]." Human Rights Watch interview with Cesareo Duro Ventura, advisor to the Secretary of the Ministry of Justice, Madrid, 13 July 2004, as cited in *Ibid*.

details of an ongoing criminal investigation under the supervision of the examining magistrate”⁵⁹⁴—is legally permissible, and, indeed may be renewed indefinitely.

Public Opinion

The Spanish public’s desire for a democratic state was the primary impetus for democratization. One of the strongest factors that discouraged full democratization and the full subordination of the military to its civilian authority was the growing number of terrorist attacks committed against Spanish citizens by ETA. In the years immediately following the transition the opposition focused on creating a “social climate which would favor economic recovery and not provoke the armed forces, which was already sufficiently tense as a result of both the terrorist attacks they suffered and regionalist demands.”⁵⁹⁵

ETA-linked violence “has created a conflicting normative framework in which democratic standards such as respect for civil rights and inclusion of multiple political ideologies are in direct conflict with devising appropriate responses to an armed separatist group employing terrorist tactics.”⁵⁹⁶ ETA attempts to carefully balance its use of terrorist tactics with its desire to maintain domestic support among the Basque people.⁵⁹⁷ ETA’s tactics have shifted over the years, but its use of violence has always been “precisely targeted to have the maximum effect while maintaining social legitimacy amongst the group's political and social base.”⁵⁹⁸ In spite of these efforts, increasingly large swaths of the Spanish populace disagree with ETA’s use of terrorist tactics,

594 Jordan and Horsburgh (2006), p. 220.

595 Aguilar (1996), p. 37.

596 MacDonald and Bernardo (2006), pp. 174-5.

597 Ignacio Sanchez-Cuneca assesses that “the more indiscriminate the attacks are, the greater the pressure on the State, but also the smaller the popular basis. And the more isolated the terrorist organization, the less threatening armed struggle is for the State....” Sanchez-Cuneca, Ignacio. June 2004. “Terrorism as War of Attrition: ETA and the IRA.” *Working Paper*. Madrid: Juan March Institute. pp. 21-2.

598 MacDonald and Bernardo (2006), p. 182.

particularly as the state makes significant concessions to ETA's drive for a Basque state. While the Spanish government certainly has not fully capitulated to ETA's demands, ETA's use of violence has encouraged the state to negotiate with the terrorist group by driving the Spanish public to push the government to do whatever is necessary to end the violence.⁵⁹⁹

Discussion

Spain—unlike the US, Israel or the UK—underwent a seismic regime shift at the height of its fight against domestic terrorism, shifting from an authoritarian Francist state to a parliamentary-based system designed to restrain the military from intervening in the new government. This was a complex, multifaceted problems for policymakers who were desperately trying to prevent, deter, and punish ETA for terrorist attacks without the deterrent capability of the military. Because the military and associated police forces had always been the primary counterterrorism actors in Spain, this shift was neither simple nor short. The President, Parliament, courts and the public all played roles in restricting the military's domestic counterterrorism authorities, not because the threat from domestic terrorists was abating but because the threat from a military *coup d'etat* was perceived to be even more frightening. The military also played in role in defining its own place in the domestic counterterrorism infrastructure, ceding its domestic authorities on certain issues in order to retain them on others, all in the context of the democratic pact that formed the Spanish state.

CONCLUSIONS: THE POLICY ENTREPRENEUR AND COUNTERTERRORISM POLICY

The primary argument of this chapter is that when military input into the domestic counterterrorism policymaking process is heavily needed and requested—as is

⁵⁹⁹ See MacDonald and Bernardo's discussion of the political power of voter blocs composed of victims of ETA terrorist attacks in *Ibid.*

characteristic of most states that are facing a heightened terrorist threat level—the military will gain strength vis-à-vis its civilian master and will be better able to attain its policy preferences. Under these conditions, participation by military leaders in national security policymaking is both necessary and unavoidable given the technical character of counterterrorism warfare. This argument contrasts with conventional arguments of civil-military relations in consolidated democracies, which stipulate that militaries should abstain from involvement in the policymaking process.

As mentioned in the introduction to this chapter, one of the most surprising findings of this research was how significant the impact of a strong personality can be on inducing policy change, even in cases in which civil-military relations are well-institutionalized. This is not to say that institutions matter less than theorized; rather, what is seen is a conscious effort by political actors to forge strategies based precisely on the existing institutional parameters that they hope to alter. In the four cases at hand I assessed which actors were most effective in driving change (or preventing change) in the military's level of involvement in domestic counterterrorism initiatives. The evident ability of individual actors to impact domestic counterterrorism policy was least surprising in the case of Israel given that country's consistently unstable security environment and the weak institutionalization of the civil-military relationship. The lack of rigid rules to regulate civil-military conduct—especially the lack of restrictions on the movement of military personnel into politics following retirement—nurtures a political environment in which strong individuals can dominate the policymaking system.

In the case of the United Kingdom, it was precisely the institutional design that existed at the height of the conflict over Northern Ireland that allowed such a vast number of policy entrepreneurs—civilian and military alike—to have input into the formation of the British domestic counterterrorism infrastructure. Because the British Army was

responsive to the parliaments of both Britain and Northern Ireland, the fractured chain-of-command, coupled with the lack of consensus within the British government on the best way to approach the conflict in Northern Ireland, led to a sizable increase in the points of access to the policymaking process and enhanced the ability of policy entrepreneurs to affect policy outcomes regarding domestic use of the British Army in counterterrorism operations. In the Israeli case, in contrast, the vast centralized powers bestowed upon the executive branch mean that the Prime Minister is better equipped and more able to make significant policy change with less input from the Knesset, relative to what is seen in the British and Spanish cases. In the U.S., the ability of Congress to block or otherwise shape domestic counterterrorism policy is dependent on its power relative to the executive authority at a given point in time, and this relationship has fluctuated throughout the Bush administration's tenure.

In addition to strong policy entrepreneurship and a flexible institutional design, a catalytic event is necessary to encourage a stronger domestic role for the military. In the U.S. case there is movement toward a stronger military vis-à-vis the civilian authorities due to the necessity of military input in the post-9/11 counterterrorism policymaking process. Interestingly, while the Israeli military has shown a longstanding interest in being intimately involved in domestic counterterrorism activities, military leaders in the U.S., according to the findings of this study, prefer to abstain from greater involvement in domestic counterterrorism operations. In this manner, this study falls in line with other preference-based theories of civil-military relations; despite the executive branch's ability to force the military to adhere to its preferences, the military leadership has exhibited—especially since 9/11—the power to shape how military forces are used, employing its unique expertise to place parameters on the military policy options open to the executive and legislative branches.

Chapter 6: Military Courts as a Counterterrorism Tool

In the four cases under examination—the United States, Israel, the United Kingdom, and Spain—democratic governments have chosen to enact domestic counterterrorism regimes that employ the military in a range of ways. These differences are the result of variances in the institutional parameters, historical context, and effectiveness of policy entrepreneurs in each case. A specific combination of these factors led two governments—the United States and Israel—to make the policy decision to expand executive authority and use military courts to try terrorism suspects, while the other two governments under consideration—the United Kingdom and Spain—opted to utilize military courts in a limited fashion (the U.K.) or not at all (Spain). This chapter explains how differences in the three causal factors identified in this study—existing institutional parameters, historical context, and policy entrepreneurship—resulted in these divergent policy outcomes.

THE UNITED STATES

For the United States military, the domestic security environment is divided into two general areas based on mission. “The first, crisis management, is the prevention of events that threaten national security. The second, consequence management, deals with those times when prevention fails, and the military and others respond to those events...Consequence management also covers the actions taken to provide consequences for the perpetrator of the event.”⁶⁰⁰ It is into this latter category of consequence management that the executive branch’s decision to employ military

⁶⁰⁰ Owens, Dallas. January 2002. “The Military’s Role in the New Democratic Security Environment: Will Army Missions Change?” in Martin, John, ed. Defeating Terrorism: Strategic Issue Analyses. p. 37.

commissions⁶⁰¹ in a counterterrorism context falls. U.S. history is replete with examples of the establishment of military tribunals in a number of high-stakes contexts: “Military commissions have served as the customary form of justice for prisoners who violate the laws of war. They have also acted as courts of justice during occupations and in times of martial law. American generals have used military commissions in virtually every significant war from the Revolutionary War through World War II.”⁶⁰²

For the current war on terrorism, the Bush administration’s ongoing search for a proper legal framework through which to try terrorist suspects is a natural result of the fact that there exists no applicable body of law within which to try individuals accused of the type of crimes with which the combatants detained by the U.S. military are charged. Indeed, the field of national security “has comparatively few judicial precedents to draw upon. In this field, the executive’s own legal explanations often have to substitute for judicial precedents in articulating the law.”⁶⁰³ International law has also been of little help. Few of the suspects to be tried by these commissions were actually caught on the battlefield in traditional prisoner-of-war (POW) scenarios, and the Bush administration has argued that Geneva Conventions regulations do not apply to the detainees. “From the early days of the response after 11 September, the executive branch has understood that counterterrorist operations don’t easily fit within the framework provided by the Geneva Conventions and has incrementally developed strategies to address this problem.”⁶⁰⁴ This

⁶⁰¹ “The term ‘military commission’ is applied to describe a military court trial of an enemy belligerent on charges of violation of the laws of war. A panel of military officers typically presides over such a proceeding, but it is distinguishable from a court martial in that a court martial is a trial of a member of our military forces governed by the Uniform Code of Military Justice.” Crona, Spencer, and Neal Richardson. Summer/Fall 1996. “Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism.” *Oklahoma City University Law Review*. 349, pp. 367-8.

⁶⁰² Ku, Julian, and John Yoo. Summer 2006. “*Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch.” *Constitutional Commentary*. 23:2, p. 207.

⁶⁰³ Raven-Hansen, Peter. Summer 2004. “Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorism.” *Louisiana Law Review*. 64:831, p. 842.

⁶⁰⁴ Hoffman, Michael. Summer 2005. “Rescuing the Law of War: A Way Forward in an Era of Global Terrorism.” *Parameters*. 35:2, p. 20. “There is no treaty that covers (or even imagines) situations where

same incremental pattern pervades most other facets of counterterrorism policymaking in the United States.

In every serious war in which the U.S. military has taken part, legal questions have arisen regarding issues that might bring military necessity and individual constitutional rights into conflict. In this sense, the current debate over the use of military commissions is not unique. In most of these prior situations, the pattern is one of executives exceeding their institutionally-proscribed bounds, then being reigned in by a reactive legislature and judiciary. This does not look to be a pattern that will cease in the near future. As Louis Rene Beres argues, “[t]his does not suggest by any means that law is a peripheral or unimportant factor in military counter-terrorism, but that its role tends to become more and more secondary as the quality of terror increases.”⁶⁰⁵ Thus, as terrorist techniques advance, the U.S. counterterrorism regime is likely to be characterized by executive-directed changes to the homeland security response, to be followed by congressional and judicial evaluation and reform of these executive initiatives.

After detailing how the most recent military tribunal system was created, I will explain the impact of each of the three causal factors—institutional parameters, historical context, and policy entrepreneurship—on the executive branch’s decision to use tribunals for domestic counterterrorism purposes. Then, I address the arguments on both sides of the debate, noting why supporters of military tribunals view them as an effective counterterrorism tool, and measuring these arguments against those that feel such courts are a violation of constitutional rights and legal precedence and an unwarranted extension

privately organized armed forces cross international borders, stalk international sea lanes, or strike at international aviation for their own ideological or political purposes. Such conduct constitutes private international warfare, a deployment bereft of any legality under the laws of war.” Ibid.

⁶⁰⁵ Beres, Louis Rene. Fall 1995. “The Legal Meaning of Terrorism for the Military Commander.” *Connecticut Journal of International Law*. 11:1, pp. 26-7.

of executive power. Finally, I will discuss the comments made by the legal experts interviewed for this project as to the effectiveness of military commissions as a counterterrorism tool, detailing their predictions for the future of this aspect of the U.S. counterterrorism regime.

The Creation and Testing of Military Commissions as a U.S. Counterterrorism Tool

Two months after the 9/11 attacks, the Bush administration issued an executive order authorizing military detention and trial by military commission of individuals whom the President believes to be international terrorists, or persons who have aided, abetted, or harbored such terrorists. The November 13, 2001, order was an executive branch initiative issued under the assumption that judicial approval of the program was not required. The ensuing Department of Defense Military Commission Order No. 1, issued in March 2002, further solidified executive (vice judicial) authority over the detainees at Guantanamo by granting the Secretary of Defense and the President the right of final review over the cases of those tried in the military tribunals.⁶⁰⁶

The core of the White House's claim of executive branch authority over detainees is the classification of these individuals, both aliens and U.S. citizens,⁶⁰⁷ as "unlawful

⁶⁰⁶ Department of Defense. 21 March 2002. "Military Commission Order No. 1." Accessed 9 December 2007 on www.defenselink.mil. The Order specifically states: "The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings, or...forward it to the President with a recommendation as to disposition." Ibid.

⁶⁰⁷ "Although the vast majority of detainees held by the government are aliens, a few citizens have also been captured, detained, and charged. John Walker Lindh, an American convert to Islam, was captured in Afghanistan and, for reasons that were never made clear by the administration, charged in a civilian court, in which he pleaded guilty to fighting for the Taliban and carrying a weapon. He was sentenced to twenty years' imprisonment. Another American convert to Islam, Jose Padilla, by contrast, was held in military custody. A federal appeals court ruled that form of detention unlawful, but the Supreme Court vacated the ruling because it found that Padilla had filed his habeas corpus petition in the wrong federal court. After further proceedings, the government announced, again without explanation, that it would charge Padilla in civilian court after all. Meanwhile, the government chose to prosecute one alien detainee—Zacarias Moussaoui—in civilian court, yet again without explanation for the choice of forum. Moussaoui pled guilty to conspiring with al Qaeda operatives, and was sentenced to life imprisonment." Dorf, Michael. Spring 2007. "The Detention and Trial of Enemy Combatants: A Drama in Three Branches." *Political Science Quarterly*. 122:1, pp. 49-50.

enemy combatants.” Individuals charged with crimes within the U.S. are tried in civilian courts and entitled to the protections afforded them in a Bill of Rights, and war criminals are tried under the dictates of international law.

There is, in addition, an intermediate category between common criminals and prisoners of war: persons who engage in warfare but because of the methods and organization of their forces, sacrifice the protections of the Geneva Conventions. ‘Unlawful enemy combatants’ sacrifice much of the protection afforded by the international law of war—just how much has been one of the most hotly contested questions—either because they target civilians or blend into the civilian population so as to render the enemy unable to distinguish between civilians and combatants.”⁶⁰⁸

This designation, along with the procedures and court system used to attain it, has been at the center of legal challenges to this executive branch counterterrorism initiative.

Since 2001, the Bush administration has worked to reform the military commissions and appease critics by bringing the system further into line with congressional standards and public opinion. Cases regarding the executive’s use of military commissions as a counterterrorism tool have reached the Supreme Court, and it has been through these challenges that the parameters on the executive’s authority on the use of the military in this context have been defined. A brief discussion of these significant cases highlights the legal and political battles that have been (and are still being) fought over the judicial use of the military.

Soon after the beginning of the U.S. military campaign in Afghanistan, Yaser Essam Hamdi was captured by Northern Alliance forces in Afghanistan and turned over to U.S. military custody. When it was discovered in April 2002 that he was a U.S. citizen, he was moved to U.S. territory, and in October 2004 after almost three years of military detention, Hamdi was released to Saudi Arabia. Hamdi’s legal challenge to his detention was based on his contention that U.S. citizens could not be legally detained by

⁶⁰⁸ Ibid., pp. 48-9.

the military. The representatives of Secretary of Defense Rumsfeld and the federal government, however, argued that it was the President's prerogative—not that of the courts—to determine who was an unlawful enemy combatant during the war, and thus military detention of Hamdi had been legal.

The Supreme Court found in favor of Rumsfeld, establishing the precedent that U.S. citizens could be legally detained by the military if suspected of terrorist activity and declared combatants. In the lead opinion, Justice Sandra Day O'Connor "acknowledged that the Constitution poses no bar to military detention of a U.S. citizen, even if he contests the grounds for his detention."⁶⁰⁹ Justice Clarence Thomas addressed the broader issues of Congressional deference to the executive branch in foreign affairs in his opinion, allowing for the possibility that Congress could have limited the President's ability to employ military commissions but had not. Thomas read Congress's 2001 Authorization for Use of Military Force, authorizing the President to "use all necessary and appropriate force" against the perpetrators of the 9/11 attacks and those who aided them, "as adding congressionally sanctioned authority to the president's already considerable powers as Commander in Chief."⁶¹⁰

The case of *Rasul v. Bush*, decided by the Supreme Court the same day as *Hamdi*, addressed the detention of non-U.S. citizens by the military. Shafiq Rasul, a British citizen, had been arrested by U.S. military forces during the 2001 U.S. invasion of Afghanistan, and transferred to Guantanamo Bay in December 2001. Though designated an enemy combatant by the U.S. military, Rasul consistently denied that he had voluntarily joined the Taliban. The finding in the *Rasul* case established the legal precedent that unlawful belligerents have a right to challenge their detention in the

⁶⁰⁹ *Ibid.*, p. 51.

⁶¹⁰ *Ibid.*, citing *Hamdi*, 542, U.S. at 589 (Thomas, J., dissenting).

federal court system, declaring that habeus corpus extends to military detainees held at Guantanamo since Guantanamo Bay was, for all intents and purposes, U.S. territory. *Rasul v. Bush* is largely thought of as a judicial attempt to force Congress to actively assert itself in the debate over the use of military courts and clarify congressional preferences regarding the executive branch's use of military commissions as a counterterrorism tool. Indeed, "[n]othing about the decision precluded Congress, the body that passed that law, from narrowing its scope to restore the status quo from before the decision, which is precisely what Congress did in the Detainee Treatment Act of 2005."⁶¹¹

Perhaps the most significant court decision affecting the military's judicial role in domestic counterterrorism is the 2006 *Hamdan v. Rumsfeld* decision, in which the Supreme Court struck down the Bush administration's first military court system for trying suspected terrorists. The lead opinion in *Hamdan* said that military commissions other than traditional UCMJ-authorized tribunals are constitutionally permissible only if warranted by military exigency or Act of Congress, neither condition of which had been met by the detainees.⁶¹² The result was a reexamination of military commission jurisdiction. Following the *Hamdan* decision, in June of 2007 military tribunals dismissed the charges against Hamdan, who had been designated as an enemy combatant, arguing that the military tribunals that had been created to deal with 'unlawful enemy combatants' had no jurisdiction over detainees who were designated as 'enemy combatants.' The Department of Defense was vocal in its opinion of the Supreme Court's ruling, arguing that Congress intended the Military Commissions Act to include

⁶¹¹ Wittes, Benjamin. June & July 2007. "Terrorism, the Military, and the Courts." *Policy Review*.

⁶¹² Dorf (2007), p. 54.

every individual held as an enemy combatant under the existing system, regardless of their specific status.

In April 2007, the Supreme Court declined to hear the *Boumediene v. Bush* and *Al Odah v. U.S.* cases, two cases that, in essence, were intended to challenge the Military Commissions Act. Just a few months later, the Supreme Court reversed its decision, and opening arguments were heard in December 2007. In the level below the Supreme Court, a federal appeals court charged with reviewing the enemy combatant status of detainees at Guantanamo ruled in July 2007 that the government must provide the court and defense lawyers with classified evidence gathered against the detainees, signaling that the court plans to fully review the military tribunals' performance. This ruling was in opposition to government attorneys who argued

that the court should review only what was in the official record of the tribunals, not all the evidence they had gathered to support the hearings....Chief Judge Douglas H. Ginsberg [of the U.S. Court of Appeals for the District of Columbia Circuit] wrote that the court and the detainees' lawyers must see all the evidence because the Detainee Treatment Act requires the court to determine the validity of the tribunal decisions, and doing so without all available information would be inappropriate.⁶¹³

The body of legislation supporting the executive branch's use of military tribunals to try suspected terrorists is representative of the incremental nature of counterterrorism policy in the U.S. Each piece of legislation was passed with the intention of clarifying congressional objections to text in preceding executive orders. For example, the criteria by which the Combatant Status Review Tribunals may determine someone to be an 'alien unlawful enemy combatant' were provided by the Detainee Treatment Act of 2005, and referenced in section 10 of the Military Commissions Act of 2006. Following a particularly contentious battle between the White House and Congress over the right of

⁶¹³ White, Josh. 21 July 2007. "Government Must Share All Evidence on Detainees." *The Washington Post*. p. A2.

habeas corpus for the detainees, in 2005 Congress passed the Detainee Treatment Act, which bestowed Guantanamo detainees the right to challenge their enemy combatant designations in the U.S. Court of Appeals in Washington, D.C. This back-and-forth process of policy development also suggests the ferocity of the battle between the various branches of government over the direction of domestic counterterrorism policy.

The Use of Civilian versus Military Courts to Try Suspected Terrorists

Prior to 9/11, civilian courts were always considered the first recourse for trying suspected terrorists. From 1993-2001, New York prosecutors convicted nearly three dozen individuals on terrorist-related charges. Most of these convictions were for terrorists acts that had already been committed, such as the 1993 World Trade Center bombing and the 1998 attack on U.S. embassies in east Africa. The U.S. government has had less success in prosecuting terrorists since 9/11,⁶¹⁴ though most of the recent cases are based on charges that the defendants were materially supporting terrorist organizations that *could* stage an attack on U.S. interests in the future, an eventuality that is difficult to prosecute. Though the post-9/11 conviction rate has been lower than prior to the attacks, the shift to trying defendants on material support charges “is itself reflective of a conscious change in Washington’s law enforcement strategy, to prevention from punishment,”⁶¹⁵ and represents advancement in defending the U.S. from terrorist attack via legal means.

⁶¹⁴ “From the Sept. 11 attacks to last July [2007], the government started 108 material-support prosecutions and completed 62....Juries convicted 9 defendants, 30 defendants pleaded guilty, and 11 pleaded guilty to other charges. There were eight acquittals and four dismissals....Material-support cases are just a small fraction of what the Justice Department counts as terrorism prosecutions, and in the larger picture the government is not doing nearly as well. According to the Center on Law and Security at the New York University School of Law, the government has a 29 percent conviction rate in terrorism prosecutions overall, compared with 92 percent for felonies generally.” Liptak, Adam and Leslie Eaton. 24 October 2007. “Mistrial Latest Terror Prosecution Misstep for U.S.” *The New York Times*.

⁶¹⁵ *Ibid.*

The majority, though not all, of the judges and attorneys involved in those civilian cases have since argued that civilian courts are capable of conducting fair and secure trials for suspected terrorists, and that the special procedures afforded by military courts are unnecessary. For example, Stephen Dycus cites Judge Sands' published decisions in the trials of the 1993 World Trade Center bombers as evidence that security problems regarding the introduction of sensitive intelligence and the lack of security clearances among court personnel can be overcome.⁶¹⁶ In addition, following the 2001 trial of Ahmed Ressam, the Algerian charged with planning to bomb the Los Angeles International Airport, John Coughenour, the presiding judge in that case, argued that the experience strengthened his "conviction that American courts, guided by the principles of our Constitution, are fully capable of trying suspected terrorists."⁶¹⁷ For Coughenour and others,⁶¹⁸ the belief is that specific adjustments can be made in the civilian court structure—such as the appointment of a court security officer to oversee the handling of classified information⁶¹⁹—to enable it to handle highly sensitive national security cases.

While it is true that adjustments to the civilian court system could be made, this type of reform is also a controversial policy option. The American judicial system in the past has had only a limited role in adjudicating cases involving the law of war. In these rare instances, judges utilized a canon of law addressing law enforcement, criminal detention, and due process during times of war. Today, there is little precedent for civil

⁶¹⁶ Author's interview with Stephen Dycus, Professor of Law, Vermont Law School, 28 September 2007.

⁶¹⁷ Coughenour, John. 1 November 2007. "How to Try a Terrorist." *The New York Times*. Op-Ed Page.

⁶¹⁸ Professor Peter Raven-Hansen also argues that civilian courts are able to hear terrorism cases with some structural adjustments. Author's interview with Peter Raven-Hansen, Professor of Law, The George Washington University Law School, 24 September 2007.

⁶¹⁹ Coughenour (2007). "Another option, used by several other consolidated democracies, is to invoke the legal concept known as 'derogation,' under which "governments are permitted to suspend certain rights temporarily when they can show that it is necessary to meet a 'public emergency threatening the life of the nation.' The International Covenant on Civil and Political Rights, which the United States has ratified, requires governments seeking derogation to file a declaration justifying the move with the UN Secretary-General....[T]he United States, determined to avoid the formal scrutiny involved, has not bothered." Roth, Kenneth. January/February 2004. "The Law of War in the War on Terror." *Foreign Affairs*. 83:1.

judges to rely upon in formulating decisions on the status of detainees, citizen or non-citizen, and the parameters of the military in providing the judicial structure in which these cases are tried. Civil courts do not necessarily want to become involved in adjudicating military-held suspected terrorists, but because there is no established law to guide executive branch initiatives in that area, courts are being forced into articulating legal doctrine. As such, “judicial intervention in the law of war since 11 September 2001 already far exceeds anything ever before experienced, by any nation, in the history of warfare. It must be understood that this constitutes an experiment with no precedent anywhere.”⁶²⁰

I argue that military tribunals are being used because no other institutional organ is able to achieve executive branch goals with respect to the trial of suspected terrorists. While civil courts have proven to be adequate in a limited number of pre-9/11 cases, anti-terrorism and material support legislation has not kept up with the need to prosecute suspected terrorists more effectively *prior* to committing a violent act. Thus, the executive branch has expanded its authority into areas in which there are no existing legal statutes in order to achieve its policy goals. The lack of a precise definition of terrorism by Congress certainly proves problematic for advancing the judicial branch’s efforts to establish precedent in trying suspected terrorists, and also could pose problems for the military as its domestic counterterrorism role is expanded: “In the absence of such a definition, military commanders with counter-terrorism responsibilities will be unable to know exactly who the enemy happens to be, and prosecuting authorities will not know for certain whether captured insurgents should be tried under long-standing criminal

⁶²⁰ Hoffman (2005), p 34. “Most U.S. judges (like most of their counterparts around the world) are unfamiliar with the law of war, which has been applied infrequently in the course of American history. And, when it has been, decisions on the scope of application almost always have been made by the executive branch.” *Ibid.*, p. 25.

statutes or under the terms of newly-fashioned anti-terrorism legislation.”⁶²¹ Louis Rene Beres argues that unless a clear definition of terrorism is established in legal documents, military commanders could find themselves substituting for domestic policing agencies in ways that are inconsistent with United States law.⁶²²

In spite of the problems, it has been argued that military tribunals, while not perfect, are the best among an inadequate set of policy options, and that by utilizing the military in this manner, the fight against terrorism can be kept at a military vice legal level: “Although the Supreme Court has described trial by military commission off the battlefield as ‘an extraordinary jurisdiction [that]...should not be expanded at the expense of the Bill of Rights,’ the Military Order has been defended, in part because trial by military commission of non-citizen terrorists is preferable to distorting the civilian criminal justice system to accommodate the unique secrecy and security concerns of terrorist cases.”⁶²³ Thus, while there are procedures through which existing civilian courts *could* manage the security requirements of trying suspected terrorists, the costs to long-standing U.S. legal principles could be substantial. Peter Raven-Hansen described civilian court personnel as “troubled” by the degree to which the military tribunal cases depart from the legal model with which they are familiar, but because the U.S. court system is passive in nature⁶²⁴ and its authority over the military is severely limited, there is little that the courts can do to involve themselves more substantively in shaping the military commission structure and its procedures.

⁶²¹ Beres (1995), p. 24. “Although much of the operational literature on terrorism deals with such factors as the intensity and order of the destructiveness...the corresponding jurisprudential literature has ignored these factors altogether. Yet, for the military commander concerned with the lawful applications of counter-terrorist strategy, the quality of terror could prove to be the most important variable in purposeful decisionmaking.” Ibid., p. 25.

⁶²² Ibid.

⁶²³ Raven-Hansen, Peter. Fall 2006. “Symposium: Secret Evidence and the Courts in the Age of National Security: Panel Report: National Security Secrecy in the Courts: A Comparative Perspective from Israel and Ireland.” *Cardozo Public Law, Policy & Ethics Journal*. 5:63, p. 72.

⁶²⁴ Author’s interview with Peter Raven-Hansen (2007).

Institutional Parameters Pushing the Executive Branch toward Use of Military Commissions

The White House attempted to ground its policy for the use of military tribunals in the long-standing pattern in U.S. history to turn toward such courts in times of great insecurity. Indeed, some of the language from the 13 November Order was drawn from President Franklin Roosevelt's World War II proclamation that authorized the trial of enemy combatants by military commission under the laws of war, passed in response to the capture in the U.S. of eight German saboteurs.⁶²⁵ The White House's post-9/11 order authorizing the use of military commissions departed from past precedent, however, in that it did not advocate use of the Uniform Code of Military Justice (UCMJ) in organizing and conducting the trials of suspected terrorists. According to William Banks, the "commissions would not follow the same processes as courts-martial under the Uniform Code of Military Justice, and would afford few of the protections available in the military justice system, much less those provided defendants in civilian courts under the Constitution."⁶²⁶ The UCMJ is considered the bedrock of the military's internal justice system,⁶²⁷ and its removal from the new military tribunal procedure meant that an entirely distinct system had to be created. This would obviously be difficult for those military judicial personnel who had always been trained in UCMJ procedure.

The most significant institutional parameter shaping the executive branch's use of the military in trying suspected terrorists is the *Posse Comitatus Act* (PCA). While discussed in depth in Chapter 3, a few more comments about the importance of the PCA in shaping the executive branch's use of military courts are warranted. The Department

⁶²⁵ Raven-Hansen (2004), p. 835.

⁶²⁶ Banks, William. Autumn 2002. "Troops Defending the Homeland: The Posse Comitatus Act and the Legal Environment for a Military Role in Domestic Counter Terrorism." *Terrorism and Political Violence*. 14:3, p. 22.

⁶²⁷ Author's interview with Eugene Fidell, President, National Institute of Military Justice, 4 October 2007.

of Defense Directive detailing restrictions on the participation of military personnel in civilian law enforcement specifically exempts from the PCA “‘actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States.’ Although the Directive lists as an example of such an action ‘investigations and other actions related to enforcement of the Uniform Code of Military Justice,’ there is no specific provision for trial by military commission.”⁶²⁸ Thus, even when weighed against the strongest institutional parameter for limiting the use of military commissions in domestic terrorism trials, the PCA, there is room for interpretation and argument by the executive branch that the security environment merits such an extension of its power.

While the White House has been careful not to violate the letter of the *Posse Comitatus Act* with its policies on domestic use of the military, many would argue that the administration’s new counterterrorism policy to employ a military court system to try non-military personnel has violated the spirit of the PCA. The executive branch’s handling of suspected terrorists in military courts has been limited primarily to non-U.S. citizens, but critics point to the potential for the court system to be extended to U.S. citizens and non-citizens who are in the U.S. legally. In such cases, it is argued that the “potential for detention and trial of persons lawfully in the United States by military commission with penalties ranging to death, on the basis of the President’s judgment that such persons may have something to do with international terrorism, could mock the PCA and the rule of law principles that the United States stands for.”⁶²⁹ Finally, there is the added problem of the symbolism of using this extrajudicial court system and the lack of confidence in the judiciary suggested by such use, in light of the successful prosecutions in civilian courts of those responsible for the 1993 World Trade Center

⁶²⁸ Banks (2002), pp. 22-3.

⁶²⁹ *Ibid.*, p 34.

bombing and the attacks on the U.S. embassies in Kenya and Tanzania. According to William Banks, the Bush administration's plan to employ extrajudicial military tribunals "for actions taken in the United States shows disrespect for our nation's judiciary and disregard for the high-minded principle codified in the *Posse Comitatus Act*."⁶³⁰

Other existing institutional parameters do not prevent the executive's use of the military to try suspected terrorists on U.S. soil. However, existing statute does suggest that the executive branch will have the burden of proving that such an extension of executive and military authority is absolutely critical to maintaining national security. Much of the legal debate regarding the Bush administration's preference to use military courts in this manner has centered on a Civil War era case, referred to as *ex parte Milligan*, in which the Supreme Court heard the appeal of a civilian charged at a military trial with subversive activities. The Court concluded that

the President is not legally permitted to authorize the military trial of a civilian, at least when the civilian courts are open and operating...Martial law could properly be invoked only in the event of an actual invasion, 'where war really prevails,' and where criminal justice could not be administered according to law. The decision in *Milligan* thus...[supports] extensive discretion for the Commander in Chief to command the military in the United States only in dire circumstances of actual war."⁶³¹

Again, the burden of proof is left to the executive to convince Congress and the public that the country's security situation is so dire as to merit this extrajudicial practice. Until Congress establishes clearer laws regarding executive use of military commissions to try suspected terrorists, the executive branch will be able to defend its use of this court system on legal means alone.

⁶³⁰ Ibid.

⁶³¹ Ibid., p. 12.

The 9/11 Attacks and the Bureaucratic Push for Policy Change

The notion of employing military courts to try suspected terrorists was not a new idea that simply emerged following the 9/11 attacks and the start of the Afghanistan and Iraq military campaigns. The prospect of turning to the military to try cases that involved terrorist acts on U.S. soil was first broached following the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, and gained traction soon after with a widely circulated Oklahoma City University Law Review article that advocated the establishment of a military tribunal system as a counterterrorism tool. For a number of reasons, but largely because the culprits behind the Oklahoma City attack were U.S. citizens, the idea did not take hold and federal civil courts continued to be utilized to try terrorism-related offenses.

The authors of that landmark article, Spencer Crona and Neal Richardson, argued that the existing strategy of

treating terrorists as ordinary criminals, and placing them into the slow and indifferent mill of our criminal justice system, for acts that far transcend ordinary criminal acts, overlooks the essential difference in the nature of their crimes. Terrorism is a form of warfare in which, by design, innocent civilians are indiscriminately killed and civilian property devastated. Terrorist acts, therefore, are properly regarded as war crimes or crimes against humanity. They are more appropriately defined by international law and more appropriately punished by a system of military jurisprudence.⁶³²

Crona and Richardson's argument for a military response to terrorist acts was based primarily on the type of crime committed and the target of the attack, rather than the nationality or ideological motivation of the person committing the crime. They viewed terrorist acts through a military lens, and thus felt a military court was justified as the venue for trial of the Oklahoma City bombing suspects. The authors also argued that

⁶³² Crona and Richardson (1996), p. 354.

military courts would have a stronger deterrent effect and thus would be a more effective counterterrorism tool than the traditional legal process.

Crona and Richardson specifically cited the downing of Pan Am Flight 103 over Lockerbie, Scotland, by Libyan agents as a crime that could not be sufficiently tried and punished through the civilian court system: “When reduced to its essential nature, this act was a mass execution of civilian hostages, via a military operation, planned and conducted by officials of a foreign state and their agents. The downing of the aircraft was nothing more than a reprisal against civilians, strictly forbidden by international law, to retaliate for the American air strike on Tripoli....”⁶³³ As convincing as their argument was, the historical context and the sense of threat in the mid-1990s was not at the level at which such a proposal would have been given serious attention by policymakers. The September 11, 2001, attacks drastically changed this.

As noted in Chapter 4, the 9/11 attacks were especially important in pushing the American military further into the domestic sphere, an area in which it historically operated with significant discomfort. There are many explanations as to why the idea of using military tribunals to try terrorism suspects became more salient after 9/11, the most obvious of which is the severity of those attacks. The Oklahoma City bombing, while certainly tragic in its own right, was not on the scale of the 9/11 attacks, in number of casualties, economic impact, or damage to infrastructure. The 1993 World Trade Center bombing, prior to the Oklahoma City bombing, also did not have the impact of the 9/11 attacks. In addition, the Clinton White House had a far different view of the military than does the Bush administration, and chose to gain retribution for the 1993 and 1995 attacks through the civilian court system.

⁶³³ Ibid., p. 371.

The combination of such a devastating operation and an executive branch that was predisposed to look to the military for solutions to overseas problems pushed the Bush White House to revive the idea of using military tribunals to try suspected terrorists. Congressional and public opinion in support of a strong response to the 9/11 attacks also enabled the Bush administration to quickly usher the original military order to create the tribunals through the federal bureaucracy. However, as time passes it becomes increasingly difficult for those in power to justify substantial policy change on the basis of that event. This is precisely what we have seen with the executive branch's advocacy for military commissions, as Congress, the court system, and the public have begun to rein in what appeared to be unbridled executive and military authority regarding the use of military commissions in the immediate post-9/11 period.

Policy Entrepreneurs and Military Commissions in the United States

The battle over the use of military commissions to try suspected terrorists has engaged most of the major players in the federal government. What began as a small, purposefully quiet White House counterterrorism program has reach the Supreme Court's docket and has been addressed numerous times in Congress. The current organization and use of the military commission system reflects the power of the President and Secretary of Defense to persevere against vocal opposition from other powerful parties, as well as the civilian authority's ability to force its will on its military subordinates.

The President and the Secretary of Defense

The Bush administration from the very beginning has argued that the right to establish military tribunals to try suspected terrorists falls under the powers of the President as granted by the U.S. Constitution. In presenting the federal government's case to the Supreme Court in *Hamdan v. Rumsfeld*, Solicitor General Paul Clement

argued that, because the executive branch did not view al Qaeda detainees as traditional prisoners-of-war and therefore subject to the Geneva Conventions, the President's decision to try them in military tribunals "represents a classic exercise of his war powers and his authority over foreign affairs more generally...and is binding on the courts."⁶³⁴ According to some legal experts, this foreign affairs authority, the details of which are only vaguely outlined by the Constitution, should belong to the executive branch, "which is largely responsible for directing U.S. state practice with respect to the law of war, is likely to have more expertise, information, and ability when assessing the effect of rejecting or accepting conspiracy as a war crime or the right to be privy to evidence on larger U.S. efforts to develop the law of war."⁶³⁵

President Bush argued just this in the text of his November 13, 2001, executive order, which originally established the military tribunal system for counterterrorism purposes. In theory, the Uniform Code of Military Justice, which has always governed the military judicial system and its various tribunals, requires that military commissions maintain at least the same level of protections afforded defendants by federal district courts. Bush specifically denied the UCMJ's applicability to the new court system, stating in the executive order that "[g]iven the danger to the safety of the United States and the nature of international terrorism, [I find] that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."⁶³⁶ The Solicitor General presenting the government's side in the *Hamdan* case reiterated this sense of national peril and its justification of expanding executive authority by

⁶³⁴ "Donald Rumsfeld, et al., Respondents." September 2006. *Supreme Court Debates*. p. 180.

⁶³⁵ Ku and Yoo (2006), p. 204.

⁶³⁶ *Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*. 3 C.F.R. 918 (2001 comp.); 66 Fed. Reg. 57,833 (Nov. 16, 2001), as cited in Fidell, Eugene, Dwight Sullivan, and Detlev Vagts (December 2005) "Military Commission Law" *The Army Lawyer*, p. 49.

arguing against Hamdan’s claim that the use of military commissions is not necessary for the prevention of terrorism, stating that the “punishment of persons who have violated the law of war is an appropriate and time-honored means of deterring or incapacitating them from doing so again, and of discouraging others from doing so in the future.”⁶³⁷

The Bush administration has also tried to justify its use of executive authority to establish military commissions by framing the series of attacks on U.S. persons and installations over the past decade as representative of a larger war that al Qaeda is waging against the United States. Once again, in the Hamdan case, the Solicitor General argued that al Qaeda’s disregard for the law of war (based on its techniques of attacking civilians) does not exempt it from punishment for violating those laws:

[A]l Qaeda has repeatedly declared itself an enemy of the United States, and has inflicted damage on a scale that exceeds previous attacks on our soil by nation-states, and in a manner that, by any common-sense understanding, constitutes an act of war. There is no doubt that al Qaeda’s attacks against American civilians and military targets (including an attack on the headquarters of the Nation’s Department of Defense) have triggered a right to deploy military forces abroad to defend the United States by combating al Qaeda).⁶³⁸

Given this framework, the White House has been able to make that case that even if Congress had not authorized military commissions—which it did with the Military Commissions Act—the President would still have had the authority as Commander-in-Chief. As legal experts Julian Ku and John Yoo assess, “[a]cademics may continue to debate whether the President or Congress should decide whether to begin war, but once war has begun, our constitutional system has usually been content to allow the President as Commander-in-Chief to decide the best strategies and tactics to defeat the enemy.”⁶³⁹

⁶³⁷ “Donald Rumsfeld, et al., Respondents” (2006), p. 171.

⁶³⁸ *Ibid.*, p. 173.

⁶³⁹ Ku and Yoo (2006), pp. 213-4. Ku and Yoo persuasively argue that “[w]hile Congress has sometimes authorized military commissions itself, American history affords many examples of Presidents and military commanders creating them without congressional legislation. The purpose of the military commissions makes clear that they should rest within the discretion of the Commander-in-Chief. Waging war is not limited only to ordering which enemy formations to strike and what targets to bomb. It also involves

In September of 2007, fourteen “high-value” terrorism suspects held in Guantanamo were formally offered the right to request legal representation, potentially allowing them to join several other detainees in challenging their status as “enemy combatants” in a U.S. appellate court. Following the court’s decision to allow representation, military officials noted that the attorneys will have to undergo thorough background checks and agree to special procedural rules for the courts before being granted access to the detainees.⁶⁴⁰ Gitanjali Gutierrez, an attorney for one of the detainees, described the new process to connect detainees with defense attorneys as “the Defense Department ‘trying to put some gloss on the idea that this review process is legitimate and the high-value detainees are being given access to the courts.’”⁶⁴¹ The significance of this decision, therefore, is that the executive, while in theory losing its argument in court, is still allowed to control the process.

Congress

Almost immediately following the Bush administration’s announcement of its plan to use military tribunals to try suspected terrorists, the policy was challenged in federal court. During the time leading up to the 2004 Supreme Court hearing on the related cases, “Congress was almost entirely silent. Indeed, Congress would not legislate on the subject of detainee treatment until it enacted the Detainee Treatment Act (DTA) at

forming policy on how to fight, how to detain enemy combatants, and how to sanction the enemy if it violates the rules of civilized warfare.” Ibid., p. 213.

⁶⁴⁰ White, Josh, and Joby Warrick. 28 September 2007. “U.S. to Allow Key Detainees to Request Lawyers.” *The Washington Post*. p. A1.

⁶⁴¹ Ibid. At a 2004 American Bar Association meeting, Judge Alberto Gonzales “described an impressively elaborate inter-agency process for designating a citizen an ‘enemy combatant’ who could be subjected to military detention...[and] cautioned that ‘there is no rigid process for making such determinations—and certainly no particular mechanism required by law. Rather, these are the steps that we have taken in our discretion to ensure a thoroughly vetted and reasoned exercise of presidential power.’ The process he disclosed, in other words, is provided by executive grade, not by law.” Alberto R. Gonzales, Counsel to the President. 24 February 2004. *Remarks at the American Bar Association’s Standing Committee on Law and National Security*. 11. <http://www.abanet.org/natsecurity/judgegonzales.pdf> as cited in Raven-Hansen (2004), p. 841.

the end of 2005, and even then, it spoke with less than complete clarity,”⁶⁴² providing easily misinterpreted guidance for the prosecution of suspected terrorists. It is possible, however, that Congress is purposely abstaining from intervening too handily in the military courts debate. The Supreme Court’s *Hamdan* decision essentially “requires Congress to enumerate every specific element of its war powers it wishes to delegate to the President....[I]f applied to the administrative state, a rule like *Hamdan*’s requiring the specific enumeration of every specific power would grind the government to a halt.”⁶⁴³ Thus, Congress obviously is keenly aware of the Constitutional provision for presidential discretion in foreign affairs, yet apparently chooses to intervene when it believes the President may have overstepped these constitutionally mandated bounds.

The larger issue, then, is what this debate over military commissions indicates about executive-congressional relations over domestic use of the military. Two weeks following the *Hamdan* decision, Congress appeared highly divided over a plan to replace the Bush administration’s military commission system, and indignant at executive branch assertions that congressional consent was not needed. In July 2006 testimony to Congress, “administration officials signaled that—even if Congress speaks with one voice in revamping the Bush plan for military commissions—the president and the Pentagon don’t need lawmakers’ advice.”⁶⁴⁴ Some legal experts even read Congress’s passage of the Military Commissions Act following the *Hamdan* decision as an

⁶⁴² Dorf (2007), pp. 47-8.

⁶⁴³ Ku and Yoo (2006), p. 205.

⁶⁴⁴ Chaddock, Gail Russell. 13 July 2006. “Senate: How Much Leeway for Bush?” *Christian Science Monitor*. 98:159, p. 1. “Asked repeatedly to engage senators on what should be proper standards for the treatment of detainees, administration witnesses declined to respond....‘I doubt very much that Congress is going to be disposed to leave these issues to the Department of Defense,’ said Sen. Arlen Specter (R) of Pennsylvania, who chairs the Senate Judiciary Committee.” Ibid.

“unusually aggressive [measure] to ensure that the Court would no longer interfere with executive-legislative cooperation in the administration of military commissions.”⁶⁴⁵

Significantly, the judicial branch’s intervention in this issue has also encouraged increased congressional involvement in the debate over the use of military courts, the type of institutional oversight that many analysts see as critically important in forming counterterrorism policy in consolidated democracies. In the *Rasul* and *Hamdan* cases, for example, the Supreme Court

acted on statutory, not constitutional grounds, meaning that if Congress didn’t like what it had to say, it could change the law. ... The [Bush] administration left both cases having suffered [apparently] dramatic setbacks that amounted in practical terms merely to a requirement to seek congressional permission for what it wanted to do—congressional permission that proved, in both cases, relatively easy to obtain.”⁶⁴⁶

Thus, Congress has the potential to be a highly significant policy entrepreneur on the issue of military commissions, if it so chooses. The Supreme Court has made clear that it will involve itself in interpreting the law as it stands on the books, and as of now, the letter of the law is vague enough to permit the executive branch’s use of military tribunals to try suspected terrorists.

The Judiciary

The judiciary’s role in shaping the policy options open to the executive branch regarding the use of military courts is apparent throughout this chapter. While these

⁶⁴⁵ Military Commissions Act, as cited in Ku and Yoo (2006), p. 223. Indeed, “[r]ather than a story of unilateral executive branch action, Congress has supported presidential use of [military commissions] in at least three different ways: a) Section 821 of the UCMJ, which recognizes military commissions; b) the Authorization to Use Military Force enacted on September 18, 2001, which authorized the President to use all necessary and appropriate force against those responsible for the September 11 attacks; and c) the Detainee Treatment Act of 2005, which created a carefully crafted review process for military commission verdicts.” Ibid., p. 214.

⁶⁴⁶ Wittes (2007). Michael Dorf points out the “important difference between, on the one hand, the president’s power to act to defend the country where Congress has remained silent or authorized his action, and, on the other hand, the president’s attempts to act in a manner contrary to congressional mandate. In the latter case, the Supreme Court has repeatedly made clear, the president cannot act contrary to a valid enactment of Congress.” Dorf (2007), p. 55.

judicial initiatives are reflective of an increased desire to involve the judiciary in some of the most controversial legal questions of the post-9/11 period, they should not be viewed as a repudiation of Bush administration authority in this area, merely an effort to check the executive branch's power. While the courts' decisions could significantly alter the executive's counterterrorism policy options for years to come, thus far they have not fully removed executive prerogative from policymaking in this area. The Supreme Court's decisions, in particular, "contain doctrinal seeds of a far more aggressive judicial posture...[T]he Court has positioned itself for a veritable sea change in the relationship between the federal branches in wartime. Yet it has skillfully done so without closing off any policy options for either the executive branch or the legislature in the short-term."⁶⁴⁷

That being said, the Supreme Court, particularly in the *Hamdi* ruling emphasized that even in the highly insecure climate in which the U.S. now exists, the President's authorities as Commander-in-Chief are not unlimited and without oversight. As written in the lead opinion on *Hamdi*, "A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."⁶⁴⁸ Thus, the Supreme Court's decisions on the military commissions cases have been "'democracy-forcing,' in the sense that they have required the President to seek authorization for his approach from Congress."⁶⁴⁹ The message was clear; the executive branch did have substantial authority on these matters, but it still had a responsibility to keep Congress informed of its activities.

The Armed Forces

By most accounts, the military was not extensively consulted about the impact of utilizing its military court system to try suspected terrorists prior to the President's announcement of the program. The full White House process used to issue the 13

⁶⁴⁷ Wittes (2007).

⁶⁴⁸ Dorf (2007), p. 51, citing *Hamdi*, 542 U.S. at 536.

⁶⁴⁹ *Ibid.*, p. 48.

November Order is unknown to the public, but it has been publicized that the White House's Office of Legal Counsel was tasked with advising the President about the legality of using the military court system in this manner. Peter Raven-Hansen writes that

[i]t would have been logical to have given military lawyers the same charge, if for no other reason than to take advantage of their extensive first-hand experience with courts-martial and to help them define the role that they would presumably be required to play under the November 13 Order. But after the Order was promulgated, media reports stated that their advice had either gone unsolicited or ignored in its drafting.⁶⁵⁰

National Institute for Military Justice President Gene Fidell notes that the military indeed had a great deal of trouble with the original outline for the military commissions and was extremely surprised by the White House's decision to use military tribunals in this manner,⁶⁵¹ but very little of the military's dissent has been publicized in unclassified channels.

It is important to note that opinion on the use of military courts differs within the military, and that the military is by no means homogenous in its view of the White House's war on terrorism. Military personnel at the civilian Office of the Secretary of Defense have come out in support of the Bush administration's initiative. The military lawyers participating in the trials, by contrast, have expressed their concern with the design of the tribunals, and their criticism reportedly has had some effect. The Bush administration's original plan for military tribunals, based upon a World War II model, "ran into strong resistance...among military lawyers and judges who resented Bush's effort to bypass the many improvements in the fairness of military justice since then.

⁶⁵⁰ Raven-Hansen (2004), p. 833.

⁶⁵¹ Author's interview with Gene Fidell (2007).

This opposition forced the Pentagon to tinker repeatedly with the rules, improving them in many ways, but delaying their implementation.”⁶⁵²

The Judge Advocate General’s (JAG) Corps was particularly vocal in its criticism of the military commission process. Following the President’s February 2002 decision that the Geneva Convention did not apply to al Qaeda members, senior officers of the Judge Advocate General’s (JAG) Corps “opposed the decision and turned to human rights groups to challenge the decision in court. According to press reports, JAGs argued that the decision violated international law, and they implicitly believed that the president did not have the authority to interpret and apply international law on behalf of the nation’s government or military.”⁶⁵³ In a public show of dissent, during congressional hearings on the Detainee Treatment Act, the head JAGs for the Army and Marines claimed that the military commission rules violated long-standing judicial guarantees to defendants: General James Walker, the Marines’ top uniformed lawyer, said ‘no civilized country should deny a defendant the right to see the evidence against him....’ This directly conflicted with the position of the civilians in the Bush Administration, who concluded that the legislation was consistent with the United States’ international obligations.”⁶⁵⁴ It was even reported that some JAGs who disagreed with the White House’s military commissions policy “went in secret to private attorneys to urge them to bring suit on behalf of detainees held at Guantanamo Bay...Military officers with different policy preferences sought to introduce the judiciary as another actor to disrupt the unified decisionmaking of the principal.”⁶⁵⁵

⁶⁵² Taylor, Stuart. 25 March 2006. “Decommission the Commissions.” *National Journal*. 38:12.

⁶⁵³ Sulmasy, Glenn, and John Yoo. 2007. “Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror.” *UCLA Law Review*. 1815-45, p. 1819.

⁶⁵⁴ Zernike, Kate. 8 September 2006. “Lawyers and G.O.P. Chiefs Resist Proposal on Tribunal.” *New York Times*. p. A1, as cited in Sulmasy and Yoo (2007), p. 1815.

⁶⁵⁵ Sulmasy and Yoo (2007), p. 1833.

In spite of this criticism, there were military lawyers who spoke out in support of the military commissions initiative, usually explaining their defense of the tribunals by arguing that civilian courts are not capable of trying foreign terrorists. Specifically, it has been argued that while rights afforded in the federal court system “are necessary and appropriate for suspected terrorists investigated and apprehended through normal domestic law enforcement methods, some—such as the aggressive discovery rules and strict chain of custody requirements—are incompatible with the realities and unpredictability of the battlefield.”⁶⁵⁶ Major John Smith, a Pentagon attorney involved in the tribunal process, was quoted in the *New York Times* as saying, “We don’t fight a war the same way we conduct a police investigation....We recognize the unique battlefield requirements.”⁶⁵⁷

Every expert interviewed for this study assessed that the military did not want to be involved in adjudicating terrorism cases, especially for suspects who were not members of the U.S. armed forces. Gene Fidell, Stephen Dycus, and Dallas Owens all noted that the allocation of military resources to conduct military trials of enemy combatants detracts from the military’s core missions.⁶⁵⁸ Dycus stated that the military simply is not trained for this type of activity, and it is not what they do best.⁶⁵⁹ Peter Raven-Hansen offered a society-based explanation for why the military may oppose being charged with carrying out these trials, arguing that historically the military has not wanted to participate in activities that could harm its relationship with the American public.⁶⁶⁰ In spite of the fact that the use of the military to try suspected terrorists clearly

⁶⁵⁶ Statement of Judge Advocate General Major General Jack Rives, testifying before the Senate Judiciary Committee on 2 August 2006, as cited in “TJAGC Leaders Testify Before Congress on Detainee Rights.” September 2006. *Reporter*. 33:3.

⁶⁵⁷ Toobin, Jeffrey. 9 February 2004. “Inside the Wire.” *New Yorker*. 79:46.

⁶⁵⁸ Author’s interviews with Gene Fidell (2007) and Stephen Dycus (2007).

⁶⁵⁹ Author’s interview with Stephen Dycus (2007).

⁶⁶⁰ Author’s interview with Peter Raven-Hansen (2007).

does not mesh with military preferences, all of the experts assessed that the military has—as with any mission assigned to it by the executive authority—carried out its duty, viewing this use of its court system as an assigned mission.

The Military Court System as an Expansion of Executive Authority

While Congress, through the Armed Services committees, maintains a potent oversight function over military activities, the judiciary’s role in checking military behavior is far less clear. There are several precedents of judicial involvement in military affairs (i.e., *Milligan*, *Hamdan*, *Padilla*, *Kermatsen*, *Yamushita*), but these cases usually have addressed the need to further define the institutional parameters of the military’s authority to act domestically, and have done little to define military procedure, especially in the context of counterterrorism. Courts have shown a tendency to defer these procedural decisions to Congress and the White House. For example, Supreme Court Justice Anthony Kennedy in his 2004 opinion on the *Rasul v. Bush* case wrote that “[t]he decision in [*Johnson v. Eisentrager*, 1950] indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs.”⁶⁶¹

The executive branch’s *modus operandi* in forming counterterrorism policy, especially on the topic of military courts as a counterterrorism tool, has changed substantially since the 9/11 attacks in 2001:

Early on, the administration advocated a pure view of executive power, one in which the president wielded authorities inherent in his constitutional role as commander in chief of the military and required no congressional backing other than Congress’s initial authorization to use force against al Qaeda. In this view, the judiciary played no legitimate role at all. Following *Rasul* and *Hamdan*,

⁶⁶¹ Swazo, Norman. December 2004. “The Duty of Congress to Check the President’s Prerogative in National Security Policy.” *International Journal on World Peace*. 21:4, p. 23.

however, the administration actively sought congressional involvement and, in seeking to eliminate habeas petitions, accepted a limited form of appeal to the D.C. Circuit Court of Appeals to replace it.⁶⁶²

The driving forces behind this movement to introduce the process of judicial review into the military tribunal system are precisely those democratic entities that the Bush administration pledges to protect through its more aggressive counterterrorism policies. Congress, the courts, and the American public have all played key roles in influencing the executive branch to alter its military court policy, or, at the least, to increase transparency in the process to alleviate some of the widespread concern about the process's non-democratic processes.

The initial orders to form military tribunals to try suspected terrorists were formulated outside of the normally accepted rules for policymaking. Some secrecy on a matter of such sensitivity is certainly to be expected, but the executive branch's tendency to bypass outside actors—to include the military—in the policymaking process raises broader questions about the way in which counterterrorism policy is formed in the U.S., and whether or not the processes through which these policies are formed have been corrupted.⁶⁶³ In his discussion on the November 13 Order that originally established the court system, national security law expert Peter Raven-Hansen asserted that “[e]ven if the November 13 Order’s rules for military detention and trial are lawful, a serious question remains whether any government that operates under the rule of law should make and declare such rules by military order, rather than by laws that are publicly deliberated, transparent, published and judicially reviewable.”⁶⁶⁴ This question of executive

⁶⁶² Wittes (2007).

⁶⁶³ For example, the procedures for military commission trials were issued in March 2002, though not published in the Federal Register for another year. “‘The need to move decisively and expeditiously in the ongoing war against terrorism’ was cited by the Department of Defense as a justification for issuing final procedures without involving the public in the lawmaking process.” “Letter from William J. Haynes, General Counsel, Department of Defense, to Robert E. Hirshon, President, American Bar Association.” 19 March 2002, as cited in Raven-Hansen (2004), p. 837.

⁶⁶⁴ Raven-Hansen (2004), p. 832.

expansion is difficult to settle, given the instability in the current threat environment and the immediacy of the 9/11 attacks. Today's atmosphere is more amenable to allowing the White House to assert executive power and expand into areas that under different conditions would be highly contentious. Presidential accountability in national security decisionmaking becomes less certain (and often less tested) under these conditions. The judiciary tends to defer to the executive branch's authority to make foreign policy, leaving Congress as the most powerful remaining government entity to pressure the White House to justify its policies.

This raises the question, then, of what capacity or responsibility the courts have to evaluate military actions. Dycus claims the courts' responsibility to evaluate military actions is at the center of the current debate over whether federal courts should be involved in regulating activity at Guantanamo Bay. According to Dycus, there has never been any serious argument that courts should be involved in the day-to-day detention of POWs; the federal government has always relied on the U.S. Code of Military Justice to manage POW affairs. However, current activity at Guantanamo brings this involvement into question, since most of the detainees were not apprehended on a battlefield and therefore do not necessarily qualify for military trials under the umbrella of the Geneva Conventions. Indeed, only a limited number of the detainees were arrested by military authorities, and it is currently unclear what the military's interest in these individuals is now.⁶⁶⁵ In addition, the jurisdictional areas have not been clearly defined by Congress or anyone else, making it all the more difficult to ensure democratic accountability.

All of the legal experts interviewed for this study did assess the military tribunal system to be representative of an expansion of military authority, though this expansion is part of a broader enlargement of executive authority in the post-9/11 era. National

⁶⁶⁵ Author's interview with Stephen Dycus (2007).

Institute of Military Justice President Gene Fidell notes that the goal for the executive branch in using the military in this manner is simply to be effective in counterterrorism policy. For Fidell, the military is an easy choice to implement executive branch counterterrorism policy because it is itself a highly effective organization, with a large amount of resources, disciplined workforce, and long history of success as an organization. While the military likely would not have chosen this mission for itself, it will obey its civilian authority.⁶⁶⁶ Thus, the White House has selected the military because as an organization it is perceived as the easiest tool by which to prosecute suspected terrorists in areas in which traditional civilian law may not be adequate as of yet. However, such a policy choice, while it may prove effective in the short-term, is not without negative implications. Raven-Hansen assesses that on this matter the executive has gone too far, creating “legal black holes”⁶⁶⁷ that could prove damaging to the democratic process for years to come.

The Future of the Military Court System

At the time of this writing, the fate of the Bush administration’s military courts policy is unknown, with the Supreme Court and Congress increasing their respective roles in response to public pressure to ground this extrajudicial counterterrorism policy more fully in the U.S. legal code. All of the experts interviewed for this study, however, agreed that the issue of trying suspected terrorists through military tribunals will remain high on the policy agenda of whoever takes over the White House. All of them, in addition, asserted that the situation as it stands now is so volatile that we cannot predict what will happen with the policy in the next ten days, much less the next ten years.⁶⁶⁸ Stephen Dycus highlighted that the recent departure of several hard-liners from the

⁶⁶⁶ Author’s interview with Gene Fidell (2007).

⁶⁶⁷ Author’s interview with Peter Raven-Hansen (2007).

⁶⁶⁸ See, specifically, author’s interview with Gene Fidell (2007).

Department of Justice could have an impact on the direction the policy takes in the future.⁶⁶⁹ For all of the experts, domestic political realities likely will drive the fate of the military court policy, and policy entrepreneurs attuned to these political realities will remain significant in determining policy change. Dycus noted that the Military Commissions Act was itself passed prior to mid-term elections by a Congress that was intimidated by the prospect of being deemed soft on terrorism, and that the now-Democratic majority Congress will find it difficult to rein in the excesses of the MCA with the 2008 elections looming.⁶⁷⁰ Gene Fidell views the military court policy reform process as “incremental,” constituting a “one year at a time sentence for those at Guantanamo.”⁶⁷¹

There are several theories, some discussed previously, as to why the civilian court system has taken such a restricted, hands-off approach to dealing with this issue. While most involved in the process understand that foreign policy is a joint presidential-congressional issue, and that the courts can only interpret what has been previously legislated by Congress,⁶⁷² most also assess that the courts have more power to exercise oversight authority over the military, via the executive, than they have exercised to date. Gene Fidell attributes this lack of aggression to signals from the Supreme Court and Judge Rhenquist to abstain from significant involvement in the issue. He also believes that the cultural composition of the judiciary matters, specifically the fact that fewer and fewer federal judges have military experience than in recent decades,⁶⁷³ making issues of civilian control and executive misuse of the military less prominent on their personal

⁶⁶⁹ Author’s interview with Stephen Dycus (2007).

⁶⁷⁰ Ibid.

⁶⁷¹ Author’s interview with Gene Fidell (2007).

⁶⁷² Peter Raven-Hansen specifically noted that on the political questions of doctrine, within which much of this issue falls, jurors lack a standard for judgment and therefore defer to the legislature. Author’s interview with Peter Raven-Hansen (2007).

⁶⁷³ Author’s interview with Gene Fidell (2007).

agendas. That being said, the courts have shown themselves to be increasingly interested in the procedural issues of these cases, and have “insisted on a role—no matter how deferential—in deciding the legality of military detention of United States citizens.”⁶⁷⁴

Perhaps most important for the future status of the executive branch’s use of military tribunals is the recent confirmation of Michael Mukasey as Attorney General. Mukasey was the presiding judge in 1996 over what is still today the “longest and most complex international terrorism case ever presented in a United States court.”⁶⁷⁵ In January 1996, Mukasey sentenced Sheik Omar Abdel Rahman and nine other individuals to life in prison for their roles in a plan to blow up the United Nations Building, the George Washington Bridge, and the Lincoln and Holland Tunnels. The trial successfully handled the same issues cited by those who support the use of military tribunals, specifically balancing national security with civil liberties, protecting witnesses, and protecting intelligence sources and methods. While Mukasey’s comments following the trial indicated that he had confidence in the ability of civilian courts to try suspected terrorists, his writings and remarks published since the verdict “show that the case left him shaken and deeply skeptical about the ability of civilian courts to try people accused of terrorism without compromising national security.”⁶⁷⁶

None of the experts interviewed in this study, military or civilian, assessed that the military tribunal system as it is currently formulated has been an effective counterterrorism tool for the U.S. government. Their objections to the policy are based on both ideological and legal justifications. Dycus asserts that the tribunals have proven to be an enormous waste of resources and have only embarrassed the Bush

⁶⁷⁴ Raven-Hansen (2004), p. 847.

⁶⁷⁵ Liptak, Adam. 20 September 2007. “Big Terror Trial Shaped Views of Justice Pick.” *The New York Times*.

⁶⁷⁶ *Ibid.*

administration, confirming to the rest of the world that the U.S. government will not adhere to democratic principles and can operate in secret, even if such secrecy is unnecessary.⁶⁷⁷ For Peter Raven-Hansen, the tribunal system simply creates more problems than it solves, and as a court system has proven largely ineffective, failing to prosecute a single detainee.⁶⁷⁸ There is one positive outcome, however. The large body of litigation moving through the federal courts has “admittedly served the important function of forcing the administration to moderate its policies, to put in place administrative structures to more rigorously assess the detainee population, and to go to Congress to get certain rules written into law.”⁶⁷⁹ The new standards for holding detainees that have emerged from these court cases likely will increase the effectiveness of the current military court system.

For most critics, the two primary issues of contention are the limited potential judicial review that exists in the current military tribunal system and the use of the military in cases in which civilian institutions would be better suited. Kenneth Roth argues that “using war rules when law-enforcement rules could reasonably be followed is dangerous. If law-enforcement rules are used, a mistaken arrest can be rectified at trial. But if war rules apply, the government is never obliged to prove a suspect’s guilt.”⁶⁸⁰ At its core, this argument is one aspect of the broader debate over democratic rights in a high-threat environment. For some critics of the White House policy, it is precisely when the situation is most dire that the U.S. must strive to adhere closely to democratic principles. Raven-Hansen, for example, suggests that the global war on terror does not justify a departure from the conventional rule of lawmaking, and that “the exigencies of

⁶⁷⁷ Author’s interview with Stephen Dycus (2007).

⁶⁷⁸ Author’s interview with Peter Raven-Hansen (2007).

⁶⁷⁹ Wittes (2007).

⁶⁸⁰ Roth (2004).

that war especially require observance of the rule of lawmaking when the executive asserts liberty- and life-threatening military powers at home.”⁶⁸¹

One widely proposed alternative, seen to be a compromise solution between trying these types of cases in open civilian courts and closed military tribunals is to establish a special national security court, with its own set of procedures to handle many of the problems with maintaining secrecy that bolster arguments for the use of military tribunals. Most of the legal experts interviewed for this study argued against the creation of a special national security court, stating that federal courts are capable of handling highly sensitive terrorism-related trials⁶⁸² and the establishment of a separate court belies the U.S.’s extensive history of a transparent civil court system.⁶⁸³ Raven-Hansen pointed out that the only existing special security court—the FISA court—has been highly problematic.⁶⁸⁴ For Raven-Hansen,

[t]here is a nearly irrebuttable presumption under the rule of lawmaking that the legal authority and procedures for national security decisions by the executive—as opposed to details of their application to particular cases—should not be kept secret from the public. The executive therefore has a heavy burden of proving a need for keeping legal authority or lawmaking processes secret and a commensurate duty to resist the hydraulic pressure to extend even appropriate secrecy to inappropriate subjects. That burden has not been met by the Administration with respect to the law of military detention or trial by military commission and how it was made.⁶⁸⁵

⁶⁸¹ Raven-Hansen (2004), p. 832. Benjamin Wittes offers a persuasive justification as to why Constitutional rights should extend even to suspected terrorists: It is “hard to see why the Constitution promises people so wholly outside of the compact as al Qaeda or Taliban operatives overseas any of its benefits at all....I can conceive of only two possible answers to this question, and they are closely related. The first is that the Constitution binds the executive branch wherever in the world it operates, and that judicial review must necessarily follow. The second is that judicial review somehow flows from the fact of detention by American forces. That is, someone who suffers injury at the hands of an American behaving illegally under its own or international laws has a claim on its legal system that a normal foreigner abroad would not have.” Wittes (2007).

⁶⁸² Author’s interview with Gene Fidell (2007).

⁶⁸³ Author’s interview with Peter Raven-Hansen (2007).

⁶⁸⁴ Ibid.

⁶⁸⁵ Raven-Hansen (2004), pp. 849-50. Raven-Hansen further argues that “When democracy is under attack, and the nation is at war, public trust in the executive is essential to victory....Precisely because the President makes life and liberty affecting decisions when he orders military detention or trial by military

In contrast Dycus noted that he had in the past made the suggestion to create a national security court for reasons of efficiency, pointing out that the difficulties of dealing with witnesses and classified material in terrorism-related trials cannot be understated.⁶⁸⁶

The strongest institutional conclusion emerging from this portion of the research is that the onus for circumscribing executive authority on the issue of employing extrajudicial military courts to try suspected terrorists falls on the shoulders of the legislative branch. The war on terror has entered a different phase, “one in which the spasmodic bursts of overt military power that characterized the earlier phase and looked most like traditional warfare have given way to something more elastic that takes place in slower motion and that requires a more innovative long-term legal approach.”⁶⁸⁷ The biggest problem in moving ahead with this aspect of U.S. counterterrorism policy is that there exists no body of law adequate to successfully guide the executive branch in using the military in this manner, and this is a vacuum that only Congress can fill. Customarily, “the laws of war presuppose detentions to be a temporary incapacitation of the fighters until the warring parties make peace and arrange their repatriation. No such presumption makes any sense here.”⁶⁸⁸ The *9/11 Commission Report* “identified the customary law of war as an important source to consider in developing rules for military operations against terrorists,”⁶⁸⁹ but little attention was given to what body of law should guide their detention and trial by military forces.

Thus, the “question these days is not how much flexibility the administration requires in an exigent circumstance but what rules should govern as the regime becomes

commission of American citizens, the rule of lawmaking applies with special force, and more, not fewer, lawmaking procedures are required as a check on arbitrary power and as assurance to the public.” *Ibid.*, p. 850.

⁶⁸⁶ Author’s interview with Stephen Dycus (2007).

⁶⁸⁷ Wittes (2007).

⁶⁸⁸ *Ibid.*

⁶⁸⁹ Hoffman (2005), p. 28.

a permanent institutional feature of American power.”⁶⁹⁰ Gene Fidell noted that he was as surprised by the revival of the military commissions as a counterterrorism tool as he was by the 9/11 attacks, and that these tribunals have hurt the U.S. government’s⁶⁹¹ broader counterterrorism goals. However, Fidell also remarked that one positive effect of the debate over the use of military courts to try suspected terrorists has been that important parts of American society have become attuned to the need to more thoroughly examine civil-military relations, a very important development considering that there is so much change occurring within the military at the moment, much of which has little to do with counterterrorism.⁶⁹²

ISRAEL

Israel has the shortest lifespan of any of the four cases under consideration, but also has the most extensive experience with domestic terrorism and the use of military courts as a counterterrorism tool. Israel’s relatively weak institutionalization of the civil-military relationship, heightened threat atmosphere, and permissive policymaking environment in which policy entrepreneurs can easily push for a significant domestic role for the military all contributed to Israel’s choice to use military courts as a domestic counterterrorism tool, rather than channeling such cases through the civilian court system. The impact of the three explanatory factors under consideration in this study is especially apparent in the Israeli case.

The Israeli Military Court System: Form and Function

Unlike the recent turn of the United States toward military courts as a counterterrorism policy option, in Israel a military court system charged with trying

⁶⁹⁰ Wittes (2007).

⁶⁹¹ Author’s interview with Gene Fidell (2007)

⁶⁹² Ibid.

civilians has existed since the birth of the state itself. Initially, this system of military justice was intended to ensure order in a society at war, and peacetime use of the courts was not under consideration. The military court system was originally designed as much to handle Jewish extremist groups as it was Palestinian terrorists:

Following the 1953 bombing of the Soviet Embassy in Tel Aviv by the Zrifin Underground, “the Israeli government decided to establish a special military court in order to prosecute and sentence members of the Underground. Some years later, as political violence subsided, counter-terrorist measures were relaxed and military courts were no longer convened for the trial of Jewish terror organizations.”⁶⁹³

Today, the Israel Defense Forces-run military court system is a key piece of Israel’s domestic counterterrorism program. While many attribute the establishment of the court system to the wartime needs of the Israeli state in 1967, the reality is that the Six Day War was preceded by a waiting period of three weeks, a delay due to the Military Advocate General’s Department’s need to prepare for an interim system of justice in the areas that would be placed under Israeli military control. The military’s legal advisers “had to contend with the problem of relations with the population of the occupied areas, with classifying property for purposes of confiscation, careful recording of confiscated property, proclaiming curfews, and the issue of preliminary orders. At the same time, the process of setting up military courts in the administered territories was started.”⁶⁹⁴

This court system evolved throughout the years of Israel’s military rule of the Palestinian territories, and today Israeli military courts located throughout Palestinian areas⁶⁹⁵ try cases based on a body of law comprised of IDF-issued Military Orders.

⁶⁹³ Pedahzur, Ami, and Magnus Ranstorp. Summer 2001. “A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel.” *Terrorism and Political Violence*. 13:2, 1-26, p. 14.

⁶⁹⁴ Shevi, Brigadier General Dov. Spring 1983. “Article: The Status of the Legal Adviser to the Armed Forces: His Functions and Powers.” *Military Law Review*. 100:119, pp. 131-2.

⁶⁹⁵ “Until 1994, the courts were located in the Palestinian towns of Ramallah, Hebron, Nablus, Jenin, Tulkaram, and Gaza....With the Israeli redeployment, the courts were relocated to Beit El, Adoreim, and

These Orders, in turn, are loosely based on Israeli domestic law. The number of Military Orders that have been issued over the years to govern the Palestinian territories is extensive. As a result, this court system hears cases that address a vast array of offenses, from the most petty to the most lethal. Military Orders

designate specific offenses, including violations of security (e.g., sabotage or attacks on military installations, carrying and possessing firearms, attacks on roads, contacts with the enemy, spying); criminal offenses with security implications (e.g., not preventing attacks or reporting planned attacks, distributing literature that incites disorder); offenses relating to the operation of the military courts (e.g., escaping from custody, perjury, disobeying a summons to appear in court); and criminal offenses not related to security...⁶⁹⁶

In terms of jurisdiction, the military courts are bestowed with the authority to try Palestinians in just about any context. Palestinian residents of the territories may be tried for crimes committed anywhere, any crime committed in the territories (whether or not it involved a Palestinian), and crimes committed anywhere that potentially could negatively impact security operations in the territories.⁶⁹⁷ This combination of personal, territorial, and extraterritorial jurisdictions extends the domestic judicial authority of the IDF to every Palestinian, in most cases supplanting a civilian judicial system that is itself capable of managing those types of cases. For example, “[i]n addition to security offences, all Palestinians from the Occupied Palestinian Territories are submitted to Israeli military courts, even in the case of civil incidents, such as a car accident involving an Israeli.”⁶⁹⁸

Structurally, military courts in the territories have the maximum sentencing power and can decide to put a convicted terrorist to death. Though the military courts have

Erez.” Hajjar, Lisa. 2005. Courting Conflict: The Israeli Military Court System in the West Bank and Gaza. Berkeley: University of California Press, pp. 15-6.

⁶⁹⁶ Ibid., p. 256.

⁶⁹⁷ Ibid., p. 255.

⁶⁹⁸ Bar Human Rights Committee of England and Wales. 2006. *Human Rights Manual for Palestinian Lawyers*. p. 73. Accessed 15 January 2008 at www.barhumanrights.org.uk

indeed used the power to sentence defendants to death, all of these sentences were commuted to life imprisonment.⁶⁹⁹ Military court judges in the territories have thus shown a strong awareness of the potential ramifications of sentencing a Palestinian to death, both in terms of domestic outrage and international condemnation. Lower level sentences do not receive this same consideration, however, and during the first *intifada*, according to Lisa Hajjar, Israel and the Palestinian territories had the highest per capita incarceration rate in the world:

Since 1967, hundreds of thousands of Palestinians have been arrested by the Israeli military. Although not all Palestinians who are arrested are prosecuted in the military court system (some are released, others are administratively detained without trial), of those who are charged, approximately 90 to 95 percent are convicted. Of the convictions, approximately 97 percent are the result of plea bargains.⁷⁰⁰

From the optic of democratic civil-military relations, the somewhat arbitrary incarceration of Palestinians is, ironically, one of the least offensive affronts to Israeli democratic development. The larger and more serious issue is the lack of accountability of the military court system to the broader civilian judiciary and elected government. Military-issued orders to administratively detain an individual—one of the most common acts of IDF personnel acting in a policing and judicial capacity—are issued only by military officers, and are appealed to a military, not civil, judge, and only the military commander is able to reduce a military judge’s sentence. This authority derives from the fact that courts are just one aspect of the IDF administrative apparatus in the territories. The military commander is the supreme administrative figure, with the authority to issue, amend, and repeal Military Orders as he sees fit, and “[a]ll military legislation...draw

⁶⁹⁹ Hajjar (2005), p. 255.

⁷⁰⁰ Ibid., p. 3. Hajjar notes that, in general, sentencing patterns in the Gaza Strip have been higher than those in the West Bank.” Ibid., p. 257.

their validity from the area commander's orders, which are equivalent to 'supreme legislation.'"⁷⁰¹

The Independent Variables and the Israeli State's Use of Military Courts

Institutional Parameters Encouraging Israel's Employment of Military Courts

As explained in Chapter 3, three bodies of law have had a great impact both on Israeli civil-military relations and on the Israeli government's decision to use military courts as part of its domestic counterterrorism strategy: the *Defense (Emergency) Regulations (DER)* (1948), the *Geneva Conventions*, and the *Basic Law: The Army* (1976). The DER was especially crucial in the decision to adopt a military justice system to try suspected terrorists. Regulation 119 of that law specifically grants the IDF commander broad authority to respond to terrorist acts that threaten public order, to include trial of the accused. Initially, IDF courts were intended to be temporary administrative bodies, but the longer the IDF remained deployed in the Palestinian

701 Ibid., p. 253. "Since June 1967, governmental, legislative, and administrative powers of the territories held in Judea Samaria and the Gaza Strip have been in the hands of the IDF. These powers are exercised in consultation with legal advisers. Military prosecutors are subordinate to the legal advisers, and they represent the military prosecution in the courts that operate in the territories. Among other things, legal advisers in the territories are responsible for preparing statutory instruments in their regions; for supervising suspension and detention installations in their regions; for examining applications for administrative arrest; for dealing with applications by advocates, local residents, and various organizations on matters regarding their regions, and so forth. In addition, the international law department of the MAG deals with legal questions regarding the Territories, and is responsible for, among other things, the preparation of statutory instruments, for petitions filed to the High Court of Justice and for legal advice to commanders who operate in the territories." Finkelstein, Major General Menachem, and Yifat Tomer. 2002. "The Israeli Military Legal System—Overview of the Current Situation and a Glimpse into the Future." *The Air Force Law Review*. 52,137, p. 158. "The [Military Advocate General], who is advised on an ongoing basis by the military chief of staff and military commanders in the field, convenes regular meetings at the military headquarters in Tel Aviv with the legal advisor and head prosecutor of each region to discuss the situation on the ground and trends in the military courts (number of arrests, convictions, sentences, etc.). At these meetings, policy directives are formulated about how particular kinds of cases should be prosecuted, and this information is passed on to prosecutors working in the courts." Hajjar (2005), p. 254.

territories, the more entrenched the military court system became and Israeli authorities justified its continued use under the DER.

“The Israeli state has made prodigious use of law to maintain and legitimize its rule over Palestinians in the West Bank and Gaza and to punish and thwart resistance.”⁷⁰² The Israeli state has the political clout and military prowess to assert its own will over the Palestinian territories, but the government has instead chosen to employ aggressive military activity sparingly, preferring to utilize the law to its fullest extent, largely in an effort to justify its activities to both international and domestic audiences. As Lisa Hajjar assesses,

Although force and violence have been integral components of the state’s strategies to maintain order and control and to thwart and punish resistance, the main mode or model of rule has been ‘law enforcement’ rather than ‘war’ (at least until the second *intifada*). Israeli military rule has entailed arresting and imprisoning rather than expelling or massacring Palestinians en masse, and resorting to closures, curfews, and permits rather than aerial bombing to achieve order and subdue resistance. While the legality of these policies is contestable, the state has relied on law to undertake and justify them.⁷⁰³

As a result of the Israeli government’s emphasis on appearing as though it is complying fully with international humanitarian law and the laws of warfare, since the early 1960s the Military Advocate General’s Department has devoted considerable resources to instructing soldiers in the legal standards of military occupation. Indeed, “[i]nstruction in the laws of war through courses and training is now considered the most important and efficient means of disseminating knowledge in this field among the armed forces.”⁷⁰⁴ A further effect of the Israeli emphasis on international law is that the Israeli

⁷⁰² Hajjar (2005), p. 49.

⁷⁰³ *Ibid.*, p. 27.

⁷⁰⁴ Shevi (1983), p. 124. “The legal adviser has a considerable function in instruction and planning of courses of study, both on the theoretical plane, such as delivering lectures and theoretical instruction, and on the practical plane, by practical application of the subjects studied. Every six months, the Army holds courses, arranged by the Military Advocate General’s Department, on the laws of war and the powers of the army in occupied territories. In these courses, the Hague and Geneva Conventions are studied, as well as the two additional protocols of 1977 to the Geneva Convention, although Israel has not signed them. This

government is repeatedly and publicly forced into defending its military counterterrorism policies, arguing that the IDF is in full compliance with international standards. Because the Israeli government does not define its administrative rule over the territories as an “occupation,” Israeli civilian and military authorities have been able to justify their use of the military court system as a domestic counterterrorism tool.

The Israeli government asserts that it is not violating the normative constraints placed upon the Israeli military by international law. However, lawmakers actively write statutes regarding domestic use of the military courts to be exceptionally vague, intentionally allowing leaving open room for interpretation and flexibility of use. The lack of civilian oversight in the civil-military relationship, as articulated in the *Basic Law: The Army*, further enables military autonomy in domestic counterterrorism operations. Former Emeritus Chief Justice of the Supreme Court Meir Shamgar, who served as the head of Israel’s military court system from 1961 to 1968, was quoted in 1999 as saying that the military justice system, upon its creation, specifically chose not to “adopt the restrictions that other military legal systems had adopted over history aimed at limiting as far as possible the influence of the law on the military.”⁷⁰⁵ Indeed, in cases in which local or national laws come into conflict with Israeli military laws, military laws are assumed to supersede other statutes,⁷⁰⁶ emphasizing the autonomy of the Israeli military justice system in the territories. Israeli political and military authorities justify this primacy of military law based on the perilous security environment in which the IDF operates.

series of courses is intended for lawyers in the regular and reserve forces and its aim is to train lawyers to serve as legal advisers, judges, and military prosecutors in areas occupied by the Army” Ibid.

⁷⁰⁵ Finkelstein and Tomer (2002), p. 138, footnote #4.

⁷⁰⁶ Hajjar (2005), pp. 255-6.

Critical Historical Junctures in Israeli Counterterrorism Policy

Israeli history is replete with critical events, given the consistently high risk of conflict both domestically and regionally. Thus, to pinpoint single moments, such as the 9/11 attacks in the United States, that encouraged the Israeli government to opt for military courts as a domestic counterterrorism policy is difficult, as each event in Israeli history is intimately connected to those that preceded it. However, one event can be identified as solidifying Israel's decision to use military courts as a widespread, key domestic counterterrorism policy: the 1967 war. While the Israeli military used military courts within Israel proper prior to the 1967 war, they were employed infrequently and usually only in cases involving right-wing Jewish terrorists. The Israeli government made the decision to establish the military court system as the cornerstone of its domestic counterterrorism program when the IDF captured the West Bank and the Gaza Strip and needed a tool with which to mitigate the threats to Israeli sovereignty emerging from those areas.

The Palestinians living in the West Bank and Gaza already had an established local court system, but the IDF in effect supplanted Palestinian judicial institutions by granting the military court system concurrent jurisdiction with the pre-existing Palestinian courts,⁷⁰⁷ creating an unpredictable and unregulated system of law for those residents under military governance.

This system of military control saw the establishment of the Israeli Military Governor as the supreme legal authority in the West Bank, the setting up of military courts and the passing of numerous military regulations. Prior to 1967 the West Bank courts had had jurisdiction over all persons within the territory. However, following the Israeli occupation, Israeli citizens and Palestinians West Bank identity card holders inside the West Bank were effectively ruled under two

⁷⁰⁷ "In 1967, Israel occupied the West Bank and Gaza as a belligerent occupant and was therefore obliged to leave in place the existing laws and judicial institutions. However, the system superimposed by Israel rested on two pillars, military orders and military courts....Israeli military authorities displaced the Palestinian courts on many issues...." Bar Human Rights Committee of England and Wales (2006), p. 67.

different legal systems....Israeli citizens in the West Bank were heard in Israeli civilian courts largely located in Israel and governed according to Israeli domestic law. West Bank Palestinians were governed through a mixture of military regulations and courts, and the local civilian courts that applied pre-1967 Jordanian law.⁷⁰⁸

Gradually, the military system expanded its jurisdiction and mandate to the point that Palestinian courts became largely ineffective and unused.

The Israeli government's use of a military court system in the territories, therefore, has fluctuated throughout the period of Israel's occupation of the Palestinian territories. As Israel's broader political goals shifted, so to did the jurisdictional lines and caseloads of the military court system. The 1993 signing of the Declaration of Principles, for example, led to an Israeli military redeployment and establishment of the Palestinian Authority, and the ensuing Oslo Accords resulted in a downsizing of the military court system's jurisdiction.⁷⁰⁹ The Israeli government's decision, therefore, to utilize the IDF in this way was a product of the historical context and threat environment in which it was operating, specifically the need to ensure the Israeli government's ability to mitigate terrorist threats coming out of the Palestinian territories over which it gained authority in the 1967 war. In this manner, the "military court system is both a product and site of the Israeli-Palestinian conflict."⁷¹⁰

Policy Entrepreneurs and the Push for a Greater Domestic Role for the IDF

The structural design of the military administrative system in the Palestinian territories, by intention, bestows a great deal of authority upon the military leadership,

⁷⁰⁸ Kelly, Tobias. Winter 2006. "Jurisdictional Politics' in the Occupied West Bank: Territory, Community, and Economic Dependency in the Formation of Legal Subjects." *Law & Social Inquiry*. 31:39, 39-74, p. 46.

⁷⁰⁹ Specifically, "the West Bank and Gaza were divided into three types of jurisdiction: Area A comprised Palestinian towns administered by the PA, Area B comprised Palestinian villages and rural areas under joint Israeli-Palestinian control, and Area C comprised the rest, including Jewish settlements, under full Israeli control. The Israeli military court system was 'downsized,' and the courts were relocated from evacuated based in Palestinian towns to based in Area C." Hajjar (2005), pp. 13-4.

⁷¹⁰ *Ibid.*, p. 1.

especially the local military commanders. These commanders have the power to determine which individuals are brought before the Israeli military courts, the offenses with which they will be charged, and the final penalty with which they are assessed. The military leadership in a given area has no requirement to accept or obey the legal advice given to him by the military lawyers deployed to his area of operations. “[T]heoretically, the commander may disregard the advice of the legal adviser and make decisions contrary thereto, giving preference to military factors which might bring speedy and decisive victory, rather than to legal and humanitarian considerations.”⁷¹¹ Civilian officials, in general, refrain from intervening in specific military court functions, and indeed their authority to do so is limited.

Against this backdrop of significant military autonomy, other actors are beginning to insert their policy preferences into the policy process, attempting to balance the military-political coalition that works to maintain use of the military court system as a domestic counterterrorism tool. The Israeli civilian judiciary, in particular, is forging an increasingly important role for itself in shaping the IDF’s military court system. The High Court of Justice has slowly yet insistently forced its way into debates over IDF policy.⁷¹² Initially, cases that were brought before the civilian courts centered on issues of military recruitment and promotion criteria, but the Court has begun to pass judgment on specific elements of the military’s counterterrorism operations in the Territories. According to Stuart Cohen, “[t]his process has significantly undermined the autonomy of the military justice system, which finds itself under increasing pressure to conform to the standards of civil jurisprudence. It has also generated a feeling amongst several officers

⁷¹¹ Shevi (1983), p. 129.

⁷¹² “[T]he Israeli supreme court enjoys a high level of legitimacy in Israeli public opinion when compared to other important public bodies, including the Knesset, the government, and political parties.” See Barzilai, Gad, et al. 1994. *The Israeli Supreme Court and the Israeli Public*. Tel Aviv: Papyrus, as discussed in Hirschl, Ran. April 2001. “The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel’s Constitutional Revolution.” *Comparative Politics*. 33:3, 315-35, pp. 328-9.

that, to be on the safe side, they had best consult with a lawyer before undertaking specific operations.”⁷¹³

The two issues about which civilian judicial intervention in the military court has occurred are regulations on the treatment of detainees—specifically ensuring the right of habeas corpus for those who have been arrested—and establishing limits on the IDF’s authority to demolish homes of Palestinians suspected of terrorist activity. While debates still surround the IDF’s application of the *Administrative Detention Law*, on the issue of detainees’ right to appeal most policymakers have fallen into agreement that at least some right in that area should exist. This consensus was encouraged directly by the High Court’s recommendation in 1989 that

the military authorities consider setting up an appeal instance, noting that the setting up of such an instance would raise the esteem of the military justice system, since it will embed in it an element that will increase the ability to make legal considerations and the ability for the courts to operate professionally in the eyes of the local community and in the eyes of the world. In addition, the Supreme Court noted that the existence of an appeal court would stress the independence of the military justice system and that this would be an important element in strengthening its status and prestige. ...[I]ndeed, following this proposal, the Order regarding Security Guidelines 5730-1970 was amended and an appeal court was set up for appeals against judgments of courts in the Territories.⁷¹⁴

The only real counterweight to military commanders’ ability to detain anyone whom they choose is the flexibility the military lawyers have in using their own discretion during the hearings of those who have been arrested. The High Court also pushed the Israeli government and IDF to establish uniform requirements by which to determine whether a house in the Palestinian territories should be demolished; as a result,

⁷¹³ Cohen, Stuart. October 2006. “Changing Civil-Military Relations in Israel: Towards an Over-subordinate IDF?” *Israel Affairs*. 12:4, 769-88, p. 778.

⁷¹⁴ Finkelstein and Tomer (2002), p. 158, footnote #78.

IDF standards have become somewhat more uniform,⁷¹⁵ though the military commander on site still maintains the authority to override these criteria in most cases.

Another policy entrepreneur that is shaping the Israeli government's use of military courts in the territories is the Israeli public itself. As discussed in Chapter 5, the Israeli security and defense services are no longer immune to public criticism, and the political fractionalization of Israeli society has resulted in an eruption in grass roots movements within the country, many of which speak openly about the IDF's domestic counterterrorism initiatives. The citizenry-driven push to bring Israeli institutions more into line with international legal standards regarding human rights and domestic use of the military has in turn spurred the civilian judicial system to increase its role in the counterterrorism policymaking process and hear cases that address security and defense policy. There is the chance, then, that the Israeli military court system, at the behest of these policy entrepreneurs, could become increasingly subordinate to the civilian court system.⁷¹⁶ However, civilian court decisions thus far show little potential for becoming a strong counterbalance to the military-political coalition that supports the military court counterterrorism policy, as "the Israeli decisions have lacked any discernible philosophical foundation"⁷¹⁷ that could unite the disparate critics of the military court system. The true impact of these social changes will also depend on shifts in the domestic threat environment, and whether or not the Israeli military will be able to

⁷¹⁵ "The court has implemented a proportionality test and a reasonableness test. The proportionality test requires that the military commander ordering the destruction of a house conform the exercise of his power to the severity of the case or to the gravity of the circumstances. The reasonableness test examines the reasonableness of the military commander's decision and asks whether a reasonable military commander would have adopted a similar decision. Notwithstanding the High Court's efforts, most international organizations are unsatisfied with the prevailing Israeli law regarding house demolitions." Grebinar, Jonathan. November 2003. "Note: Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law." *Fordham Urban Law Journal*. 31:261.

⁷¹⁶ Finkelstein and Tomer (2002), p. 166.

⁷¹⁷ Galchinsky, Michael. Fall 2004. "The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence." *Israel Studies*. 9:3, 115-36, p. 124.

adequately protect Israeli citizens from Palestinian terrorist attacks with the existing counterterrorism infrastructure.

The Israeli Military Court System: An Effective Counterterrorism Tool?

The bulk of criticism of the Israeli military court system centers upon what are perceived to be human rights abuses, specifically the inability of Palestinians to adequately defend themselves in court. According to military court regulations, there is no requirement that a person who has been arrested by the IDF be informed of the reason for his or her arrest at the time they are taken into custody. Palestinians who have been detained have the right to meet with a lawyer, but most attorney-client meetings are prohibited during detainee interrogation periods, which can last the entire time that an individual is in custody. Finally, the Israeli military court system does not function, unlike the U.S. counterterrorism military court, on the basis of precedent, resulting in a great deal of disparity among the sentences handed down for individuals charged with similar offenses.⁷¹⁸

Defendants in the territories are allowed to attain legal representation by local Palestinian attorneys, but these lawyers in the past have voiced the concern that not all of the Military Orders on which the cases are tried are made available to them, and often when they do receive the text of the statutes, they are written in Hebrew with no Arabic translation, or the translations differ substantially in text. “Keeping track of changes, cancellations, amendments and other provisions is exceedingly difficult for Palestinians under occupation—the very people to whom these laws apply.”⁷¹⁹ In addition, finding

⁷¹⁸ Hajjar (2005), p. 256.

⁷¹⁹ Dajani, Souad. May 2005. “Ruling Palestine: A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine.” Geneva, Switzerland: The Centre on Housing Rights and Evictions (COHRE). Accessed 25 January 2008 at <http://www.cohre.org/store/attachments/COHRE%20Ruling%20Palestine%20Report.pdf> p. 80. This is an especially difficult environment in which to work, given that “[a]s of April 2002, the Israeli authorities had

adequate representation for Palestinian detainees brought before the IDF courts has proven difficult:

Trying to defend these detainees has turned into a no-win situation for Palestinian attorneys....They particularly object to the high fines placed against detainees who take the time to fight their causes in court, but often lose. Those fines can reach to more than a defendant's yearly wage. By continuing to place high fines, Palestinian lawyers say, the Israeli government is leaving many defendants with no other choice but to plead guilty."⁷²⁰

Notably, the IDF military court system staff is by no means universally in support of the military's counterterrorism policy in the territories. During the first *intifada*, for example, "[w]hile some of the judges and prosecutors welcomed the increased incarceration and the institution of higher sentences as crucial to deterring resistance, others were ambivalent about the facility of imprisoning such large numbers of people and found their own views increasingly at odds with official policies."⁷²¹

Arguments for the use of military courts in a domestic counterterrorism context are similar to those employed in defense of the U.S. military court initiative, such as the need to protect intelligence sources and methods. In Israel, however, to date the domestic security context is far less stable than that of the U.S., and the prevalence of terrorist attacks on Israeli territory gives use of military courts added resonance. Counterterrorism operations in Israel tend to be more invasive than anything U.S. citizens have experienced, though the more aggressive techniques are used sparingly by the Israeli military. The detention of suspected terrorists is far more common, and while certainly criticized among the Palestinian population, does not generate the same backlash as do

issued some 1 500 Military Orders to regulate virtually every aspect of life in the West Bank. Similarly restrictive Military Orders operate in the Gaza Strip, though they are slightly less in number." Ibid., p. 80.

⁷²⁰ Riedman, Patricia. Spring 1990. "West Bank Struggle: A Call for Human Rights." *Human Rights: Journal of the Section of Individual Rights & Responsibilities*. 17:1, 20-1, p. 21.

⁷²¹ Hajjar (2005), p. 11.

the more forceful military counterterrorism operations, such as house demolitions.⁷²² Despite this, the clearly different law enforcement approaches taken for Palestinians as opposed to Israelis in the territories generate a great deal of societal friction and resentment among the Palestinian population.⁷²³

Human-rights based critiques of the Israeli military court system mirror those that have already been discussed in the case of the United States,⁷²⁴ but what is significant is that these issues have existed in Israel for decades, and still remain unresolved. This is largely due to the perilous security environment in which Israelis live their daily lives, one in which security interests consistently rank at the top of the public agenda.⁷²⁵ This is instructive in the case of the U.S. in the sense that, while the use of military courts as a

⁷²² Scholars have often analyzed the IDF's "security ethic," and Mira Sucharov assesses that the Israeli security ethic is one in which the Israeli public and its military would prefer more often than not to incarcerate suspected terrorists rather than kill them. According to Sucharov, "[i]ntrinsic to the evolution of a security ethic is how attitudes about the frequency and degree to which force should be used against enemies evolves within the leadership stratum of the state. The Israeli attitude toward the use of force against the Arabs emerged from the debates that took place within the pre-IDF forces over adopting a policy of restraint (*havlaga*) versus reaction (*tguva*). 'In advocating that the Yishuv (the pre-state Jewish community in Palestine) employ restraint in dealing with the local Arabs, Ben-Gurion condemned his citizens for smashing the doors to an Arab shop, asking "whether this will be the Land of Israel or the Land of Ishmael.'" Sucharov, Mira. Winter 2005. "Security Ethics and the Modern Military: The Case of the Israel Defense Forces." *Armed Forces & Society*. 31:2, 169-99, p. 186.

⁷²³ Jurisdiction over residents of the territories and Israeli settlements located therein is unclear. "The Israeli position is that only Israelis can enforce laws over themselves, even if they are living in occupied territory settlements, or are traveling in Palestinian-controlled areas." Fricker and Hengstler, pp. 62-65. In addition, "Palestinians are afforded no due process rights when arrested, interrogated, or convicted. In contrast, Jewish settlers in the occupied territories enjoy all civil liberty protections embodied in Israeli law." Bar Human Rights Committee of England and Wales (2006), p. 69.

⁷²⁴ "Commonly cited problems [of the Israeli military court system] include the inherent blurring and contradictions between military and legal dimensions of control, the use of soldiers in a policing capacity, administrative and legal provisions that permit the holding of detainees incommunicado for prolonged periods and impede lawyer-client meetings, the prevalent and routine use of coercive interrogation tactics to obtain confessions, the use of 'secret evidence' to detain and convict people, the complexities and vagaries of the laws enforced through the courts, and the disputable competence of the various categories of legal professionals." Hajjar (2005), p. 5.

⁷²⁵ For example, the divergent Israeli opinions on how the Israeli state should govern the West Bank are, in essence, security-based concerns: "Full annexation of the West Bank [means] the political and legal incorporation of the Palestinian population into the Israeli state and therefore potentially undermin[ing] the Jewish majority in Israel. In the face of this quandary, the Israeli government has not defined its boundaries in the West Bank.... While the West Bank may not have been formally annexed to Israel, the Israeli government has also refused to recognize the West Bank as occupied territory. In this context, the relationship between the Israeli state and the West Bank has been left deeply ambiguous." Kelly (2006), p. 46.

domestic counterterrorism policy is already controversial, another 9/11-style attack likely would reduce some of the public criticism of U.S. policy, just as has occurred in Israel. The primary difference between the two court systems is the pervasiveness of the Israeli military administration and its rules into the everyday lives of the Palestinians,⁷²⁶ whereas in the case of the U.S., the use of military courts is concentrated in Guantanamo Bay, far from mainstream America, and is not intended to be anything other than a venue in which to try hardened terrorists under very specific conditions. The petty crimes with which many Palestinians brought before Israeli military courts are charged would have no place in the U.S. counterterrorism military tribunals.

Thus, Israeli military officials labor to give the IDF's military court system the image and structure of one that provides fair trials to Palestinians, but the reality is that the institutionalization of the military court procedures is so weak—and civilian oversight of military judicial activities so limited—that the courts have become the epitome of the politicization of the military in Israel's domestic counterterrorism policy. As Lisa Hajjar argues, “[i]f the military court system were a purely political instrument of the Israeli state to control and punish Palestinians, frankly it would not be very interesting. But it is not purely political; it is also legal and as such opens up to questions, debates, and controversies about law, legality, and legitimacy.”⁷²⁷

THE UNITED KINGDOM

The United Kingdom used military courts to try domestic terrorism offenses sporadically, employing a tribunal system of juryless trials from the late 1800s through

⁷²⁶ “The military and emergency laws enforced through the military courts criminalize Palestinian violence, as well as a wide array of other types of activities, including certain forms of political and cultural expression, association, movement, and nonviolent protest—anything deemed to threaten Israeli security or to adversely affect the maintenance of order and control of the territories. The scope of these laws is expansive, penetrating virtually all aspects of Palestinian life, and their enforcement by the military has affected all Palestinians, albeit in varying ways.” Hajjar (2005), p. 3.

⁷²⁷ *Ibid.*, p. 4.

the 1970s. The British government's authorities for using military courts domestically were institutionalized in the series of laws detailed in Chapter 3, most clearly in the precursor documents to the Special Powers Act. The 1920 Restoration of Order in Ireland Regulations (ROIR) permitted the British Army to utilize courts martial to try suspected terrorists, an institutional arrangement that was originally established in 1914 with the Defence of the Realm Acts.⁷²⁸ To expand the reach of Westminster's domestic counterterrorism capabilities, the ROIR also authorized the creation of special courts outside the system of courts martial because outside of courts martial because with the existing law no authority lower than a county court could impose flogging or the death penalty,⁷²⁹ the preferred punishments at that time for terrorist offenses. This policy initiative was further codified with the 1922 Criminal Procedure Act (Northern Ireland), which permitted the creation of special courts for trying violent political offenses.⁷³⁰

These policy initiatives advocating extrajudicial military behavior culminated with the passage in 1973 of the Emergency Provisions Act, which strengthened state authorities with regard to the already extensive detention system used to hold individuals suspected of involvement in politically-motivated violent acts. The detention process was heavily criticized from a human rights perspective, but beyond this there were political implications of using detainees as tools in political negotiations with IRA and other national group representatives, as was commonly the practice. Laura Donohue argues that the release of detained individuals as part of a political bargain "meant that such individuals would escape the punishment given their counterparts who had been

⁷²⁸ Donahue, Laura. 2001. Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000. Dublin: Irish Academic Press, p. 17.

⁷²⁹ Ibid., pp. 17-8.

⁷³⁰ Ibid., xxi.

found guilty in a regular court. This tainted both the quasi-judicial process and the normal rule of law.”⁷³¹

In practice, British Army activity with respect to domestic counterterrorism operations was less restricted the farther away from the mainland that the activity occurred. The British Army was granted significant operational autonomy—as is typical for deployed forces engaging in low-intensity combat operations—to take any action it deemed necessary on the ground, within established legal guidelines. This broad discretionary authority was provided as justification for many violent military acts, including the event known as Bloody Sunday, in which the British Army opened fire on unarmed civilians engaged in nonviolent political protest. Following widespread international condemnation of the British government in light of the deadly episode, Westminster established the Widgery Tribunal to conduct an independent inquiry to determine how existing institutional safeguards failed to prevent the military from engaging in lethal, extralegal counterterrorism activity. According to Christine Bell, the Widgery Tribunal effectively indicated “the difficulty of any domestic Tribunal in holding the State's military actors to account, even when the State, through its Prime Minister, has asserted its commitment to being held to account.”⁷³²

In response to competing pressures from the international community to reform the British detention process and the British citizenry to eradicate the domestic terrorist threat posed by the IRA, Westminster in the 1970s enacted a “supergrass” system of extrajudicial courts to try suspected Northern Irish terrorists. The supergrass system—also known as the Diplock courts—was a series of single-judge courts, juryless courts. Unlike most of the other counterterrorism measures that were enacted throughout the

⁷³¹ *Ibid.*, p. 166.

⁷³² Bell, Christine. 2003. “Dealing With the Past in Northern Ireland.” *Fordham International Law Journal*. 26:1095, p.1105.

British Army's deployment to Northern Ireland, the supergrass system was not directly written into emergency legislation and was instead intended as a stopgap counterterrorism policy at the height of an unusually violent period. The courts were not seen as an effective counterterrorism measure, however, and the "use of supergrasses swiftly declined as a result of their minimal impact on levels of violence, a more critical stance by the judiciary and recognition that the use of the trials was bringing the law further into disrepute."⁷³³

Since the disbanding of the Diplock courts in the late 1970s, the British government has chosen not to use military courts to try domestic terrorism suspects. Even as security concerns intensify due to the threat from homegrown Islamic extremists, Westminster has opted to try suspects in civilian courts of law only. Part of the explanation for this policy choice lies in the nature of the type of terrorism at hand; the Islamic extremists staging attacks in Great Britain are not using violence to attain a nationalist goal, but are instead working to force policy change toward Muslims and Muslim states. Military courts in the current context are less "natural" than they were in Northern Ireland in the context of a British military deployment. In assessing the effectiveness of this aspect of the British government's counterterrorism policy in Northern Ireland, it has been argued that despite the costs to human rights certain parts of that military-based counterterrorism regime—such as internment—strengthened the British Army's ability to deter and disrupt terrorist attacks against British interests. This same tradeoff is at the root of debates over British domestic counterterrorism policy today.⁷³⁴

⁷³³ Donahue (2001), pp. 178-9.

⁷³⁴ See, for example, Wattellier, Jeremie. Winter 2004. "Comparative Legal Responses to Terrorism: Lessons from Europe." *Hastings International and Comparative Law Review*. 27, 397-419, pp. 414-5.

SPAIN

At various points in Spain's history—and frequently under Franco's rule—the Spanish state used military courts to try non-military related offenses ranging from peaceful political dissent to violent terrorist acts against the state. The military trials “had less procedural safeguards than normal courts. Summary procedures were particularly harsh: for example, the accused did not have a lawyer and his representative only had a few hours to draw up a written defense.”⁷³⁵ It was through a vast net of legislation that the Franco regime justified its use of military courts to try non-military offenders. For example,

the Code of Military Law (1945) and the Decree on Banditry and Terrorism (1960) permitted military courts to try civilians for crimes such as disobedience, resistance, or offenses to the armed forces, including the police. Military courts retained discretionary power to decide on their own jurisdiction over crimes by civilians. On the other hand, the existing legislation precluded the intervention of civilian courts for crimes perpetrated by members of the armed forces.⁷³⁶

Even in cases in which the military tried military personnel, the offenses being examined were most often related to political dissent as opposed to traditional courts martial.

Not surprisingly, the Francist regime's politicization of the military court system invited significant criticism from the Spanish public, and was one reason why the Spanish citizenry urged civilian authorities to place strong safeguards on the military's domestic activities as part of the democratic pact. In the late 1970s the Spanish state abandoned the use of military courts for trying terrorist- or dissent-related offenses. The 1978 Constitution officially established a single jurisdiction for both civilian and military offenses, granting military courts authority only over cases linked to breach of discipline

⁷³⁵ Vercher, Antonio. 1991. Terrorism in Europe: An International Comparative Legal Analysis. p. 239, as cited in Wattellier (2004), pp. 400-1.

⁷³⁶ Aguero, Felipe. 1995. Soldiers, Civilians and Democracy: Post-Franco Spain in Comparative Perspective. Baltimore: The Johns Hopkins University Press, p. 52.

and desertion-related offenses by active duty military personnel.⁷³⁷ The military judicial system was fully integrated into the reformed civilian court system with Parliament's vote to eliminate the Supreme Council of Military Justice and replace it with a Supreme Court unit that was charged with military affairs.⁷³⁸

The supremacy of the civilian court system was apparent with the trial—in civilian courts—of the group of military officers charged with planning the failed February 1981 *coup d'état*. A military court had already tried those implicated in the event, but the government—deciding that the military court's sentences were too soft—appealed to the civilian court system, which then sentenced the plotters to longer terms.⁷³⁹ According to Felipe Aguero, the goal of President Calvo Sotelo's decision to appeal the sentences “was not to alter the severity of the punishment but, rather, to establish that the last word regarding crimes of such overriding national importance should be left to the Supreme Court—*Tribunal Supremo*—and not to a military court.”⁷⁴⁰

The political environment surrounding the trial was quite tense as it was unclear that the Spanish military would obey civilian orders to allow the trial to take place.⁷⁴¹ The trial did take place, however, and the plotters were imprisoned. The entire incident established the precedent that future violent offenses targeted at the state—terrorist or

737 “In the same spirit, the Organic Laws 12 (November 1985) and 13 (December 1985) regulated discipline in the armed forces and the terms of the Military Penal Code. Violations within military jurisdiction, or any behaviour that may hamper the constitutional performance of the armed forces, would fall under the Military Penal Code. However, offences such as involvement in a coup, or lack of respect towards civilian authorities, would bring the military before a civilian court.” Ministerio de Defensa. 1986. *Memoria de la Legislatura (1982-1986)*. Madrid, p. 279, as cited in Zaverucha, Jorge. May 1993. “The Degree of Military Political Autonomy during the Spanish, Argentine and Brazilian Transitions” *Journal of Latin American Studies*. 25:2, 283-99, p. 295.

738 Aguero (1995), p. 203.

739 Zaverucha (1993), p. 295.

740 Aguero (1995), pp. 176-7.

741 *Ibid.*, pp. 171-2. “One of the most demanding tasks for the government was, in fact, to make sure that the trial actually took place, and it became clear during the preparations and later in the hearings that excessive care was taken not to irritate military sensibilities.” *Ibid.*

military in nature—would be punished through the civilian court system. Spain’s long history with military-based domestic counterterrorism policies that did not uphold or protect civil rights and liberties meant that the Spanish authorities were largely unwilling to allow the military any significant role in the legal management of domestic counterterrorism offenses. It is unclear whether Spain’s law enforcement- and legally-based counterterrorism approaches have allowed fewer ETA-directed terrorist attacks to occur than would have occurred under the previous military-based approach, but these procedures likely reduced some terrorist activity or at least made it more costly to ETA and other terrorist organizations.⁷⁴²

CONCLUSIONS

Israel provides the strongest example in which the three explanatory factors—weak institutionalization of the civil-military relationship, unique historical experience, and pervasive strength of military leaders relative to the civilian leadership—led the state to use military courts as a domestic counterterrorism tool. Because Israel’s civil-military relationship is so loosely institutionalized, however, generalizations to be made from the Israeli case are limited. Instead, casting the use of military courts as an extension of executive authority is far more meaningful in the American and British cases, where the civil-military relationship is more clearly institutionalized. In both cases, the executive encroached upon what is typically the judiciary’s domain in determining the legality and application of its military-based domestic counterterrorism policies:

For example, in Great Britain, the executive's commissioners determined whether a detainee was to be detained any further. In the United States, the President ordered military tribunals be used to try suspected terrorists without any judicial

⁷⁴² Wattellier (2004), pp. 414-5. Wattellier acknowledges, however, that “it is difficult—if not impossible—to test how many more terrorist acts would have been undertaken but for the use of these terrorist procedures.” Ibid.

review. In this particular situation, the U.S. response might be even more severe because the British response allowed judges to review cases, albeit reluctantly.⁷⁴³

Interestingly, in none of the four cases under consideration have we seen civilian courts exercise the extent of their authority to rein in the executive in its expansion of power in the context of domestic counterterrorism policy; indeed, the courts in all four countries—with the exception of a recent decision handed down in the U.S.—have generally shown a pattern of *abstaining* from involvement. This, however, is starting to change. Civilian courts in all four countries have ruled in recent years on the legality of specific counterterrorism measures, such as arrest and detention powers, and in the U.S. the Supreme Court in the past six months has levied a decision that brought the Bush administration's power to use military courts domestically into question. Despite these instances in which civilian courts have served as moderating forces in counterterrorism policymaking, overall they have deferred to the legislative branch to clarify the application of vaguely worded executive domestic counterterrorism authorities.

The findings of this study raise questions about the effectiveness of military courts as a domestic counterterrorism tool. Israel and the United Kingdom clearly have a mixed record on the effectiveness of their use of military tribunals. On the one hand, the courts in both cases likely took terrorists off the streets for at least a short period of time and disrupted numerous terrorist operations. The long-term costs of the use of the military court systems, however, are unclear; one questions whether the anger generated by the use of the systems only perpetuates the problems that encouraged terrorist activity in the first place. In the UK, public and international outrage at the military's internment and trial system in Northern Ireland was one of the primary reasons the system was eventually discontinued. According to Campbell and Connolly, the British experience

⁷⁴³ Wattellier (2004), pp. 412-3.

with military-based domestic counterterrorism strategies illustrates that “where a state opts for a strategy calculated to evade legal accountability (for example, the holding of detainees at Guantanamo Bay beyond the jurisdiction of domestic courts), this damping effect is absent, creating a potential for long-term harm.”⁷⁴⁴ Spain serves as the extreme case. Military courts have not been used under the Spanish democratic state, but were a key tool of control under Franco’s regime; as such, the courts themselves became a symbol against which the Spanish people rebelled, eventually spurring democratic change. In the case of the United States, it is far too soon to make a definitive assessment of the efficacy of the military tribunal system; only one “test” case has been completed. However, every expert interviewed for this study argued that the high costs of designing and implementing the military court system, coupled with the high costs to the American reputation overseas, were not worth the extra protections that may be attained from successfully trying and holding suspected terrorists.⁷⁴⁵ Indeed, according to Jeremie Wattellier, the U.S. is not paying close enough attention to the European experience with military-based domestic counterterrorism solutions, and he sees the U.S. choice to use military courts as

an overreaction in light of European history. Bush's military tribunals are reminiscent of authoritarian regimes, such as Franco's military tribunals in Spain. When Spain transitioned to a democracy, it abandoned these vestiges of dictatorship. Great Britain, whose democratic traditions are closely related to U.S. democratic traditions, abandoned its use of internment and has not created any courts void of judicial review like the military tribunals in Cuba. While the

⁷⁴⁴ Campbell, Colm, and Ita Connolly. September 2003. “A Model for the ‘War Against Terrorism’? Military Intervention in Northern Ireland and the 1970 Falls Curfew.” *Journal of Law and Society*. 30:3, 341-75, pp. 373-4.

⁷⁴⁵ Jeremie Wattellier, for example, argues that the U.S.’s new military court procedures “have imposed high costs in terms of democratic values. All of the procedures represent a shift from standard Western judicial practice. It is argued that such practices are necessitated by terrorism. When the benefits from these procedures are so few, however, it is more likely that these harsher procedures are either an emotional response or an attempt by governments to show they are in control.” Harding, Christopher. 2002. “Special Feature: Terrorism, Security, and Rights International Terrorism: The British Response.” *Singapore Journal of Legal Studies*. 16, as cited in Wattellier (2004), pp. 414-5.

September 11 attacks on the United States were unprecedented in magnitude, it does not follow that traditional legal values should be put aside.⁷⁴⁶

Wattellier further argues that the benefits from the U.S.'s military court strategy are so few that "it is more likely that these harsher procedures are either an emotional response or an attempt by governments to show they are in control."⁷⁴⁷

⁷⁴⁶ Wattellier (2004), p. 418.

⁷⁴⁷ Harding (2002), p. 16, as cited in Wattellier (2004), pp. 414-5.

CONCLUSION

Chapter 7: Findings, Policy Implications and Future Research

*In a democracy, law is not ‘outside’ the conflict; rather, it provides one site on which the conflict can be conducted, and is thus partly constitutive of it.*⁷⁴⁸

One prevailing question in the field of civil-military relations is whether the blurring of the theoretical line between the two spheres should alter the way in which we think about civil-military relations, especially in democracies. My answer to this question is a resounding yes. For the first time since the height of the Cold War, many consolidated democracies are having to consider how they can quickly and effectively turn their domestic territories into a deployment zone for their militaries. As we reconsider civil-military relations in the context of counterterrorism, I posit that the core characteristics of the old paradigms of democratic civil-military relations will remain the same. For example, the increased threat of terrorism on domestic soil does not change the standard in consolidated democracies that the military—even if it is better able to identify the source, severity, and response to threat—will not take on the civilian authority’s responsibility to determine the level of acceptable risk for society and the price society is willing to pay to achieve success.⁷⁴⁹ In spite of these similarities with the past, new civil-military paradigms will have to place greater emphasis on delegation,

⁷⁴⁸ Campbell, Colm, and Ita Connolly. September 2003. “A Model for the ‘War Against Terrorism’? Military Intervention in Northern Ireland and the 1970 Falls Curfew.” *Journal of Law and Society*. 30:3, 341-75, p. 348.

⁷⁴⁹ Feaver, Peter, and Christopher Gelpi. 2003. Choosing Your Battles: American Civil-Military Relations and the Use of Force. Princeton, NJ: Princeton University Press, p. 6.

intelligence collection,⁷⁵⁰ implementation, and interagency coordination in order to accurately assess civil-military relations in consolidated democracies.

This study examined, through the Historical Institutionalism paradigm, the factors that determine the range of policy options open to policymakers regarding domestic military authorities as they strive to more effectively counter the rising terrorist threat. Some governments use aggressive military tactics to control their domestic environment, while others use only police forces, specifically abstaining from expanding their military's domestic role. In consolidated democracies, it is rare to see an expansive domestic use of military power. The cases under consideration in this study touched on several levels of military involvement in domestic counterterrorism policy: Israel is at one end of the spectrum with high domestic involvement, the U.K. and Spain are at the other end of the spectrum with limited domestic activity; the U.S. stands between the two extremes, in the midst of a policymaking process which appears to be moving it more toward Israel's end of the spectrum.

In all of the cases examined here, the effects of path dependence on shaping domestic counterterrorism policy were clear. Pre-emptive counterterrorism policies based on existing infrastructure could be implemented at a lower cost than those developed as the threat became more advanced and required greater institutional reform to effectively counter it. According to David Borrow, this notion of policy costs "advantages counterterrorism lines of policy whose initial steps look very feasible and effective by exaggerating the likely success of later steps, [and] disadvantages courses of

⁷⁵⁰ For one of the most recent and comprehensive studies of the new wave of intelligence challenges facing militaries today, see Bruneau, Thomas, and Kenneth Dombroski. 2006. "Reforming Intelligence: The Challenge of Control in New Democracies," in Bruneau, Thomas, and Scott Tollefson, eds., Who Guards the Guardians and How: Democratic Civil-Military Relations. Austin, TX: University of Texas Press, pp. 145-77.

action for which the opposite seems to be the case.”⁷⁵¹ Counterterrorism policies that are based in military capabilities are even more likely to adhere to the patterns dictated by path dependence, as the high costs and extensive planning required for allocating defense assets requires that there be a sizeable shock to the system to justify a reallocation. The problem in most states—and all of the cases examined in this study, with the exception of Israel—is that the counterterrorism infrastructure present at the turn of the century was not well-positioned to counter even the most nascent Islamic extremist threat.

THE EMPIRICAL FINDINGS

In spite of differences, both nuanced and significant, among the states under consideration, all operate under the rule of law and all have all faced the same problem of “how to use the law against terrorism without compromising it.”⁷⁵² That being said, the U.S. is unique among the four cases in that until the 1990s it never experienced the type of widespread, lethal terrorism that was for decades a primary characteristic of Israeli, British, and Spanish political life. Further, the Islamic extremist-derived terrorist threat faced by the U.S. is quite different from the other three cases, which face a mixture of Islamic extremist and nationalist aspiration-based violence. Historical Institutionalism exhibits significant explanatory power in identifying the reasons why all four cases chose to employ military courts as a domestic counterterrorism tool at certain points in history and not others. This study aimed to address the three causal factors, or “conditions,” under which these governments would opt to employ military courts as a domestic counterterrorism tool.

⁷⁵¹ Borrow, David. April 2004. “Losing to Terrorism: An American Work in Progress.” *Metaphilosophy*. 35:3, 345-64.

⁷⁵² Raven-Hansen, Peter. Fall 2006. “Symposium: Secret Evidence and the Courts in the Age of National Security: Panel Report: National Security Secrecy in the Courts: A Comparative Perspective from Israel.” *Cardozo Public Law, Policy & Ethics Journal*. 5:63, p. 64.

Condition 1: Militaries will expand their authority—or have it expanded for them by the executive—through the adoption of civilian responsibilities in the context of counterterrorism policy when military authority is only loosely circumscribed by state constitutional and legislative documents. In those states in which the military’s domestic role is only vaguely defined by the constitution and other governing documents, I expected the military’s responsibilities to expand in response to the state’s implementation of more stringent counterterrorism policies. Indeed, this proved to be the case. The Israeli state maintains the fewest restrictions on the policymaking activities of its military, allowing military leaders significant political involvement and access to the policymaking process. At the other end of the spectrum, in light of the state’s extensive experience with military coups, the Spanish state has passed numerous laws to severely limit the military’s ability to intervene politically. The U.S. and U.K. political systems do maintain institutional restrictions on military autonomy, but these restrictions were eased as the threat from terrorism became more potent. Today, the U.S. military’s primary role in waging counterterrorism campaigns overseas has endowed the Joint Chiefs of Staff with wide-reaching powers, and in the 1970s the British Army held wide discretionary authorities at the height of Irish nationalist terrorist attacks on the British mainland. However, both the American and British military establishments are more limited by laws circumscribing the executive’s unbridled use of military resources than what is seen in the Israeli case.

Condition 2: Militaries will expand their authority—or have it expanded for them by the executive—through the adoption of civilian responsibilities in the context of counterterrorism policy when the military maintains an exalted role in national history, and the government is facing both high internal and external threat levels to the safety of its citizens and installations. Due to the heightened terrorist threat level

faced by both the U.S. and Israel, I expected the executive branch in both states to rely heavily on the military for domestic security and implementation of its counterterrorism policy. In these contexts, I expected the military's vested interest in maintaining an expanded sphere of influence to further encourage the institutionalization of this expansion through public military support of legislation beneficial to the military and increases in military allocations. These expectations largely were met, with the exception of the U.S. case. While the U.S. military pushed for additional resources and greater *international* authorities in the post-9/11 era, the military leadership exhibited strong reluctance to the prospect of becoming more visibly engaged domestically. Thus, the findings in this case must be qualified to explain the U.S. military's increased power vis-à-vis the civilian authorities because ironically that power meant that it could push back civilian attempts to increase its domestic role beyond military preferences.

Further, in countries in which the military has played a key role in the founding and development of the state—such as Israel—I expected that the military would be more likely to be tasked by the executive branch with responsibilities normally handled by civilian actors. In no case was this clearer than in the case of Israel, a prime example of a historically-revered military playing a highly significant role in the implementation of a state's counterterrorism policy, adopting responsibilities that in peacetime would be delegated to civilian entities. In this sense, Israel perhaps presages the role that the militaries in the other three cases may come to play if the domestic terrorist threat grows in potency. According to Yoram Peri,

[a]dvanced democracies are increasingly undertaking the same type of military interventions that Israel has carried out for decades—counterterrorism operations, subconventional warfare, and peacekeeping missions—the kinds of operations that were the direct cause of the current transformation in Israeli civil-military

relations. The current war on terrorism, so strikingly similar to Israel's armed struggle, may even be the catalyst for such change.⁷⁵³

Americans, though inundated with military culture during the two World Wars of the twentieth century and in the early decades of the Cold War, today do not place as much emphasis on the military as the primary tool of domestic security. This is due in part to the fact that Americans have rarely experienced direct attacks on U.S. soil. This obviously has changed, and as such the U.S. is facing decisions that Israel made decades ago.

As discussed in Chapter 4, specific events served as critical junctures in all four states with respect to the development of their domestic counterterrorism policies. In addition to the 9/11 attacks that proved to be a critical juncture for three of the four cases under consideration, domestic attacks also were drivers of change, though in varying ways. The London bombings ushered in pervasive institutional change in the British case, killing more people than the accumulated number of IRA-bombing victims throughout the 1970s and 1980s.⁷⁵⁴ Spain, in contrast, did not see as much of a policy shift following the Madrid bombings, as the country was still facing a significant threat from ETA and already had its domestic counterterrorism infrastructure in place and functioning. Further, Spain's negative experience with domestic military activity was perhaps the decisive factor in discouraging the Spanish state from employing military vice civilian courts to try those involved in the Madrid bombings.

Condition 3: Militaries will expand their authority—or have it expanded for them by the executive—through the adoption of civilian responsibilities in the context of counterterrorism policy when the military has a history of strong participation in

⁷⁵³ Peri, Yoram. November 2002. "The Israeli Military and Israel's Palestinian Policy: From Oslo to the Al Aqsa Intifada." *Peaceworks*. Washington, DC: United States Institute of Peace. p. 54. Accessed 20 January 2007 at www.usip.org

⁷⁵⁴ Haubrich, Dirk. December 2006. "Ant-terrorism Laws and Slippery Slopes: A Reply to Waddington." *Policing & Society*. 16:4, 405-14, p. 411.

the formulation (versus simply implementation) of a state's national security doctrine. In states in which there existed significant military participation (either formal or informal) in the political process as it relates to national security, I expected the military would be more likely to be tasked by civilian authorities with domestic counterterrorism responsibilities.⁷⁵⁵ Further, when legislative and executive entities consider the military leadership to be highly knowledgeable, I expected that it would be more likely that the military would be tasked with developing and implementing a state's counterterrorism policy. I argued that the military's specialized knowledge of counterterrorism tactics and technologies deems its expertise absolutely essential to civilian authorities' consideration of counterterrorism policy options. Therefore, I expected to find that when civilians increased their emphasis on counterterrorism initiatives, the military would gain more relative power in the civil-military balance.

The findings of this study supported the significance of Condition 3 in determining the military's domestic counterterrorism role. While the election or appointment of military leaders to executive posts is less common in the U.S. than in Israel, in both states there are enough institutionalized channels of influence that the military will nearly always have influence over development of the state's counterterrorism policy. The more interesting examples of the impact of Condition 3 are the U.K. and Spain. The U.K., prior to the spike in IRA-generated violence in the mid-twentieth century, had only limited experience with domestic terrorism, and the U.K.'s police forces were neither designed nor equipped to handle counterterrorism operations. The British Army, however, with its long experience with low-intensity conflict in British colonies was far better trained and capable of dealing with the terrorist threat, and the

⁷⁵⁵ Examples of military involvement in the political process that empower military policy entrepreneurs are the existence of institutionalized channels for direct lobbying of the legislative branch and discretionary control by the military over a relatively large share of the national budget.

strong civilian-military nexus in top defense policymaking positions encouraged Westminster to use the military for domestic counterterrorism operations. In Spain, on the other hand, it was precisely the Spanish people's drive to limit domestic military activity in all fashions that drove civilian leaders during the transition period of the 1970s to place severe institutional restrictions on military leaders' access to the policymaking process, limiting their ability to act as policy entrepreneurs.

One of the primary aims of this study was to determine the type of institutional arrangement that is most conducive to a powerful military role in the development and implementation of a state's domestic counterterrorism policy. I found that the military is most powerful when existing laws permit a strong policymaking role for the military leadership; the military has an entrenched and positive history in a country; and there exists a cadre of military policy entrepreneurs representing military interests that are both willing and able to inject their preferences into the system. Further, this study illustrated the two primary ways by which the military can gain significant influence relative to its civilian counterparts in policymaking. First, the military becomes more powerful when the civilian leadership is actually dependent upon it for policy expertise and implementation, a condition that is particularly acute when the risk of a domestic terror attack is high.⁷⁵⁶ The U.S. Department of Defense, for example, has both a huge budget and a high degree of lower-level discretion on how to spend its funding, giving military personnel even more opportunities to influence policymaking on the civilian level. Second, the military gains a stronger voice in negotiations with its civilian authorities (namely the President/Prime Minister and Congress/Parliament) when either or both of those institutions are divided and weak, or when the military is led by a particularly

⁷⁵⁶ This power to give advice should not be overstated: "The American experience during the Cold War suggests that it is easiest for bureaucrats to appear powerful when their advice matches and reinforces the preexisting views of the political officials responsible for policy." Rourke, Francis. 1984. *Bureaucracy, Politics and Public Policy*. Boston: Little, Brown, p. 21.

strong individual that has wide popular support. The Israeli and British cases provided particularly strong examples of states in which the military leadership has been able to push its own preferences through the political system with little to no interference from the civilian authorities because Parliament was divided or weak at a time of high domestic threat.

FUTURE CHALLENGES FOR COUNTERTERRORISM POLICYMAKERS

Is terrorism a crime, an act of war, or both? The primary legal challenge facing counterterrorism policymakers in the near future will be settling the legal issue of whether terrorist events are crimes or acts of war. According to Ariel Merari, the determining factor in this debate is whether the terrorist act in question originated within or outside of the state: “In cases where the terrorists are based outside the targeted state’s borders and cannot be stopped either because they control the territory where they are located or because they enjoy the protection of a host country, the situation resembles a state of war in all practical respects,”⁷⁵⁷ but “[r]elating to the conflict as a war situation is much more problematic in the case of ‘domestic’ terrorism, where the terrorists are based inside the targeted state’s territory and jurisdiction.”⁷⁵⁸ In the latter cases, consolidated democracies have a far more difficult time justifying any response other than law enforcement-based strategies.

What type of threat should we be preparing ourselves for? Over the past twenty years increasing emphasis has been placed on preventing and disrupting terrorist acts that involve biological, chemical, or nuclear weapons, such as “suitcase” bombs that could be exploded in the middle of an urban area. While this is certainly a threat and states should

⁷⁵⁷ Merari, Ariel. January 2005. “Israel Facing Terrorism.” *Israel Affairs*. 11:1, 223-37, p. 224. “This was the case, for example, of Israel’s struggle against Palestinian groups in Jordan (in the 1950s and 1960s) and in Lebanon (1970s and 1980s), against Hezbollah in Lebanon (since the 1980s), and of the recent United States confrontation with al-Qaeda in Afghanistan.” *Ibid.*

⁷⁵⁸ *Ibid.*, pp. 225-6.

prepare for non-conventional terrorist attacks, terrorist attacks worldwide over the past twenty years have been almost exclusively conventional in nature:

Despite the frequent focus on weapons of mass destruction, it is conventional explosives that continue to kill or threaten Americans in considerable numbers, be it the Oklahoma City bombing, the attack on the World Trade Center, the Yousef-led attempt to blow up eleven airliners, the 1996 Khobar Towers bombing in Saudi Arabia, the 1998 embassy bombings in Africa, or the 2000 bombing of the U.S.S. destroyer *Cole*.⁷⁵⁹

In most consolidated democracies, the militaries are the “first responder” for terrorism attacks involving WMD, but greater attention should be paid to their role in conventional terrorist attacks.

What are militaries actually *willing* to do domestically? In the Israeli and British cases (during the height of IRA-generated violence in the 1970s), we see militaries that are willing, capable, and actually prefer to be the primary domestic counterterrorism actor. This is not the case with the U.S. military. By no means would the American military leadership shirk its responsibilities or refuse an order by the civilian leadership to take domestic action in the event of an attack; it is clear, however, that extensive domestic deployments for counterterrorism purposes do not meet the military’s preferences, a level of cooperation that has become essential in today’s threat environment. The Israeli and British cases already exhibit significant civilian and military overlap in counterterrorism operations; the U.S. military, however, may require greater prodding by the civilian authorities to develop an effective civilian-military nexus for the purpose of domestic counterterrorism. Mitchell Thompson writes that the

multi-agency imperative of the Global War on Terrorism [and the poor interagency coordination in Operations Enduring Freedom and Iraqi Freedom]...indicate that nothing less than a Goldwater-Nichols act for the interagency structure will suffice to meet the challenge. Ad hoc reforms, such as

⁷⁵⁹ O’Hanlon, Michael. 2002. Defense Policy Choices for the Bush Administration. 2nd edition. Washington, DC: Brookings Institution Press, p. 133.

the JIACGs, have been nowhere near sufficient. Experience in Afghanistan and Iraq demonstrates clearly that there are powerful, probably insurmountable barriers rooted in institutional cultures that prevent military and civilians agencies from working together synergistically and at all levels beyond the short-term crises. In order to change these cultures, it is necessary to transform the institutions.⁷⁶⁰

What are the long-term costs of increasing the military's role in domestic counterterrorism operations? The high domestic threat level faced by Israeli citizens has meant that the IDF has been able to operate domestically, in general, without significant backlash from the Israeli people. The British case—while based on a different type of terrorist threat in the 1970s than the U.S. faces today—is actually more instructive for identifying the potential costs of continued expansion of the military's domestic counterterrorism responsibilities. Dirk Haubrich notes that the U.K.'s use of internment and juryless trials in the 1970s “alienated the public from the authorities, severely compromised intelligence gathering in that region as a result, and further polarized an already fractured political environment.”⁷⁶¹ The British Army already had a negative reputation among most residents of Northern Ireland, even those whom it was there to protect, and the damage done by the military during the Falls Curfew, for example, permeated all future relations between military personnel and local citizens. According to Campbell and Connolly, the lesson of the British experience in Northern Ireland “for the ‘war on terrorism’ is that a sufficiently strong regular military force can always achieve domination of territory in conventional military terms, but such rapidly achievable gains may have a high long-term price.”⁷⁶² Further, “[i]t can be significantly de-legitimizing for a democratic state faced with political violence and terrorism to depart markedly from rule-of-law standards, since its self-definition may depend to a large

⁷⁶⁰ Thompson, Mitchell. Winter 2005/06. “Breaking the Proconsulate: A New Design for National Power.” *Parameters*. 62–75, pp. 73–4.

⁷⁶¹ Haubrich (2006), p. 406.

⁷⁶² Campbell and Connolly (2003), p. 372.

extent on the contra-distinction between the democratic, law-upholding ‘us,’ and the undemocratic, violent ‘other/terrorist.’”⁷⁶³

FUTURE RESEARCH

Writing in early 2001, Martha Crenshaw stated that “[d]espite its significance, little systematic attention has been paid to the politics of the counterterrorism policy process.”⁷⁶⁴ This study addresses that gap. From a long-term view, the U.S. experience with military counterterrorism operations is fairly limited, as low-intensity counterterrorism (vice insurgent) operations only became a key part of U.S. military doctrine in the post-9/11 period. Following the Oklahoma City bombings, President Clinton worked to give the U.S. military a larger internal security role, an initiative deemed by Michael Desch to be “ill-advised,” as it was “likely to exacerbate rather than ameliorate U.S. civil-military tensions.”⁷⁶⁵ It is too early to make any definitive judgments on what the U.S. military’s current domestic counterterrorism role has meant for civil-military relations; early analysis appears to show that the military—while preferring to abstain from domestic involvement in the counterterrorism infrastructure—accepts this mission as part of its mandate to ensure national security, particularly in light of the 9/11 attacks. As both domestic and foreign counterterrorism operations continue to comprise a large part of the military’s missions, the impact of civil-military relations will need to be closely monitored.

In the future, I hope to expand this study of civil-military relations in the context of counterterrorism policy to non-democratic states. Most of the recent research on institutional responses to terrorism has been performed on liberal democratic states and

⁷⁶³ Ibid., pp. 347-8.

⁷⁶⁴ Crenshaw, Martha. 2001. “Counterterrorism Policy and the Political Process.” *Studies in Conflict & Terrorism*. 24, 329-37, p. 335 (footnote #1).

⁷⁶⁵ Desch, Michael. 1999. Civilian Control of the Military: The Changing Security Environment. Baltimore, MD: Johns Hopkins University Press, p. 121.

the challenges and policy choices such governments face in trying to ensure the physical safety of their constituents. For many reasons, less work has been done on military involvement in the counterterrorism policies of authoritarian states, which is odd considering civilian oversight of the military is widely acknowledged as a key to overall political form. While a shift in civil-military relations is no guarantee of overall political change, precedents in Asia and Latin America suggest that military reform can provide a good baseline from which to launch more pervasive liberal political development. Building on this study's analysis of the military structure most conducive to effective counterterrorism policy implementation is therefore a strong basis from which to launch future research.

More attention also needs to be paid to counterterrorism resource disparities among states. Some analysts argue that militaries should be directed externally only, and not used to address domestic issues such as narcotics trafficking. While I can see the value in this arrangement in terms of encouraging cooperative civil-military relations, how realistic is this in states with limited resources? Michael Desch's solution to divide coercive power between the military and an internal security force so that no single organization will have a monopoly on the use of force sounds good in theory,⁷⁶⁶ but may only be an option for wealthier states. Solutions that call for the creation of entirely new institutions often just mask the problem of insufficient institutional capacity which could be remedied through better laws and increased accountability. This is certainly not an easy feat, especially in large bureaucracies where reform efforts must overcome the strong institutional inertia that makes change difficult.

Given the heightened, shifting threat level for domestic terrorism at which the U.S., U.K. and Spanish governments are operating, we must watch for what could

⁷⁶⁶ Ibid.

become “over-reliance” on military expertise, endowing the military with greater relative power than what is healthy for a consolidated democracy, potentially moving these cases closer toward the Israeli model of civil-military relations. Indeed, it has been said that the “Pentagon may be the only agency of the federal government that George Bush believes in, so it’s little wonder that he wants it to keep expanding its powers, not only overseas, but right here at home. Ever since Hurricane Rita, the one consistent message out of Bush’s mouth has been: Bring in the Pentagon.”⁷⁶⁷

⁷⁶⁷ “Preserve Posse Comitatus.” November 2005. *Progressive*. 69:11, 8-10.

Bibliography

- Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction. 15 December 2001. *Third Annual Report to the President and the Congress*.
- Aguero, Felipe. 1995. Soldiers, Civilians and Democracy: Post-Franco Spain in Comparative Perspective. Baltimore: The Johns Hopkins University Press.
- Aguilar, Paloma. December 1996. "Collective Memory of the Spanish Civil War: The Case of the Political Amnesty in the Spanish Transition to Democracy." *Working Paper*. Madrid: Juan March Institute.
- Allen, Mike, and Barton Gellman. 11 December 2002. "Preemptive Strikes Part of U.S. Strategic Doctrine; 'All Options' Open for Countering Unconventional Arms." *The Washington Post*. p. A1.
- Almog, Doran. Winter 2004-05. "Cumulative Deterrence and the War on Terrorism." *Parameters*. 34:4, 4-19.
- Avant, Deborah. Winter 1996-97. "Are the Reluctant Warriors Out of Control: Why the U.S. Military is Averse to Responding to Post-Cold War Low-Level Threats." *Security Studies*. 6:2, 51-90.
- Avant, Deborah. 1993. "The Institutional Sources of Military Doctrine: Hegemons in Peripheral Wars." *International Studies Quarterly*. 37.
- Avant, Deborah, and James Lebovic. Fall 2000. "U.S. Military Attitudes Toward Post-Cold War Missions." *Armed Forces & Society*. 27:1.
- Ballbe, M. 1985. Orden Publico y Militarismo en la Espana Constitucionat (1812-1983). Madrid: Alianza Editorial.
- Banks, William. Autumn 2002. "Troops Defending the Homeland: The Posse Comitatus Act and the Legal Environment for a Military Role in Domestic Counter Terrorism." *Terrorism and Political Violence*. 14:3, 1-41.
- Bar Human Rights Committee of England and Wales. 2006. *Human Rights Manual for Palestinian Lawyers*. Accessed 15 January 2008 at www.barhumanrights.org.uk
- Bar-or, Amir. July 2006. "Political-Military Relations in Israel, 1996-2003." *Israel Affairs*. 12:3, 365-76.
- Barzilai, Gad, and Efraim Inbar. Fall 1996. "The Use of Force: Israeli Public Opinion on Military Options." *Armed Forces & Society*. 23:1, 49-80.

- Basic Law: The Army*. Adopted by the Knesset 31 March 1976. Accessed 27 January 2008 at the Israeli Ministry of Foreign Affairs website, www.mfa.gov.il/MFA
- Bell, Christine. 2003. "Dealing With the Past in Northern Ireland." *Fordham International Law Journal*. 26:1095.
- Bell, J. Bowyer. 1993. The Irish Troubles, A Generation of Violence 1967-1992. New York: St. Martin's Press.
- Benn, Aluf. May/June 2002. "The Last of the Patriarchs." *Foreign Affairs*. 81:3, 64-78.
- Beres, Louis Rene. Fall 1995. "The Legal Meaning of Terrorism for the Military Commander." *Connecticut Journal of International Law*. 11:1, 1-27.
- Bland, Douglas. Summer 2001. "Patterns in Liberal Democratic Civil-Military Relations." *Armed Forces & Society*. 27:4, 525-40.
- Bland, Douglas. Fall 1999. "A Unified Theory of Civil-Military Relations." *Armed Forces & Society*. 26:1, 7-25.
- Bletter, Gloria. 2003. "Israel's Impunity Under International Law." *Peace Studies*. 15:1, 3-9.
- Block, Robert, and Gary Fields. 9 March 2004. "Is Military Creeping into Domestic Law Enforcement?" Dow Jones Newswires.
- Borrow, David. April 2004. "Losing to Terrorism: An American Work in Progress." *Metaphilosophy*. 35:3, 345-64.
- Bouchriss, Lt Col Ofek, Israel Army. March 2006. "The 'Defensive Shield' Operation as a Turning Point in Israel's National Security Strategy." USAWC Strategy Research Project. Available on the U.S. Army War College Strategic Studies Institute website.
- Brooks, Risa. 2002. "The Military and Homeland Security." *Policy and Management Review*. 2:2.
- Bruneau, Thomas, and Kenneth Dombroski. 2006. "Reforming Intelligence: The Challenge of Control in New Democracies," in Bruneau, Thomas, and Scott Tollefson, eds. Who Guards the Guardians and How: Democratic Civil-Military Relations. Austin, TX: University of Texas Press, pp. 145-77.
- Bulloch, G. 1996. "The Application of Military Doctrine to Counterinsurgency (COIN) Operations: A British Perspective." *Studies in Conflict & Terrorism*. 19:3, 247-59.
- Burk, James. September 2002. "Theories of Democratic Civil-Military Relations." *Armed Forces & Society*. 29:1, 7-29.
- Bush, George W. 10 March 2003. "Directive on Management of Domestic Incidents." *Weekly Compilation of Presidential Documents*. 39:10, p. 281.

- Bush, George W. 24 June 2002. "Message to Congress Transmitting Proposed Legislation to Create the Department of Homeland Security." *Weekly Compilation of Presidential Documents*. 38:25, p. 1035.
- Campbell, Lieutenant Colonel James D., Maine Army National Guard. March-April 2005. "French Algeria and British Northern Ireland: Legitimacy and the Rule of Law in Low-Intensity Conflict." *Military Review*.
- Campbell, Colm, and Ita Connolly. September 2003. "A Model for the 'War Against Terrorism'? Military Intervention in Northern Ireland and the 1970 Falls Curfew." *Journal of Law and Society*. 30:3.
- Cardinal, Charles. Autumn 2002. "The Global War on Terrorism: A Regional Approach to Coordination." *Joint Forces Quarterly*. 32.
- Carlton, Charles. 1981. "Judging Without Consensus: The Diplock Courts in Northern Ireland." *Law & Policy Quarterly*. 3.
- Cassidy, US Army Lieutenant Colonel Robert M. May-June 2005. "The British Army and Counterinsurgency: The Salience of Military Culture." *Military Review*. 53-9.
- Catignani, Sergio. February 2005. "The Strategic Impasse in Low-Intensity Conflicts: The Gap Between Israeli Counter-Insurgency Strategy and Tactics During the Al-Aqsa Intifada." *The Journal of Strategic Studies*. 28:1, 57-75.
- Celso, Anthony. 2006. "Spain's Dual Security Dilemma: Strategic Challenges of Basque and Islamist Terror during the Aznar and Zapatero Eras." *Mediterranean Quarterly*. 17:4, 121-41.
- Chaddock, Gail Russell. 13 July 2006. "Senate: How Much Leeway for Bush?" *Christian Science Monitor*. 98:159.
- Clinton, William. 20 August 1998. "Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan." *Public Papers of the Presidents*. 1998:2. Washington, DC: U.S. Government Printing Office.
- Cogan, Charles. January 2003. "Desert One and Its Disorders." *The Journal of Military History*. 67:1.
- Cohen, Eliot. November/December 1998. "Israel After Heroism." *Foreign Affairs*. 112-28.
- Cohen, Stuart. October 2006. "Changing Civil-Military Relations in Israel: Towards an Over-subordinate IDF?" *Israel Affairs*. 12:4, 769-88.
- Cohen, Stuart. Winter 1995. "The Israel Defense Forces (IDF): From a 'People's Army' to a 'Professional Military'—Causes and Implications." *Armed Forces & Society*. 21:2, 237-54.

- Cohen, Stuart. Spring 2003. "Why Do They Quarrel? Civil-Military Tensions in LIC Situations." *Review of International Affairs*. 2:3, 21-40.
- Cottey, Andrew, Timothy Edmunds, and Anthony Forster. October 2002. "The Second Generation Problematic: Rethinking Democracy and Civil-Military Relations." *Armed Forces & Society*. 29:1, 31-56.
- Coughenour, John. 1 November 2007. "How to Try a Terrorist." *The New York Times*. Op-Ed Page.
- Coughlan, Elizabeth. Summer 1998. "Democratizing Civilian Control: The Polish Case." *Armed Forces & Society*. 24:4, pp. 519-33.
- Coughlan, Elizabeth. Fall 1996. "Review of Solders, Civilians, and Democracy: Post-Franco Spain in Comparative Perspective." *Armed Forces & Society*. 23:1, 126-8.
- Crane, Conrad. January 2002. "Maintaining Strategic Balance while Fighting Terrorism," in Martin, John R., ed. Defeating Terrorism: Strategic Issue Analyses. Carlisle, PA: U.S. Army War College, Strategic Studies Institute.
- Crenshaw, Martha. 2001. "Counterterrorism Policy and the Political Process." *Studies in Conflict & Terrorism*. 24:5, 329-37.
- Crona, Spencer, and Neal Richardson. Summer/Fall 1996. "Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism." *Oklahoma City University Law Review*. 349, 367-8.
- Currier, Donald. September 2003. "The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?" Carlisle, PA:U.S. Army War College, Strategic Studies Institute.
- Dajani, Souad. May 2005. "Ruling Palestine: A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine." Geneva, Switzerland: The Centre on Housing Rights and Evictions (COHRE). Accessed 25 January 2008 at <http://www.cohre.org>
- DeBianchi, Jessica. December 2006. "Military Law: The Winds of Change—Examining the Present-Day Propriety of the Posse Comitatus Act After Hurricane Katrina." *University of Florida Journal of Law & Public Policy*. 17:3, 473-510.
- Desch, Michael. May/June 2007. "Bush and the Generals." *Foreign Affairs*. 86:3.
- Desch, Michael. 1999. Civilian Control of the Military: The Changing Security Environment. Baltimore, MD: Johns Hopkins Press.
- Dixon, Paul. 2001. Northern Ireland: The Politics of War and Peace. Basingstoke: Palgrave.
- "Donald Rumsfeld, et al., Respondents." September 2006. *Supreme Court Debates*.

- Donohue, Laura. July 2002. "Bias, National Security and Military Tribunals." *Criminology & Public Policy*. 1:3, 339-44.
- Donohue, Laura. 2001. Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000. Dublin: Irish Academic Press.
- Donohue, Laura. Autumn 2001. "In the Name of National Security: U.S. Counterterrorist Measures, 1960-2000." *Terrorism & Political Violence*. 13:3, 15-60.
- Donohue, Laura. March 2007. "Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law." *Stanford Law Review*. 59.
- Dorf, Michael. Spring 2007. "The Detention and Trial of Enemy Combatants: A Drama in Three Branches." *Political Science Quarterly*. 122:1.
- Dycus, Stephen. Professor of Law, Vermont Law School. Author's interview, 28 September 2007.
- Echevarria, Antulio. Director of Research, Strategic Studies Institute, U.S. Army War College. Author's interview, 21 September 2007.
- Echevarria, Lieutenant Colonel Antulio. January 2002. "Homeland Security Issues: A Strategic Perspective," in Martin, John R., ed. Defeating Terrorism: Strategic Issue Analyses. Carlisle, PA: U.S. Army War College, Strategic Studies Institute.
- Egnell, Robert. December 2006. "Explaining US and British Performance in Complex Expeditionary Operations: The Civil-Military Dimension." *The Journal of Strategic Studies*. 29:6.
- Encarnacion, Omar. Winter 2004. "Democracy and Federalism in Spain." *Mediterranean Quarterly*. 15:1, 58-74.
- Encarnacion, Omar. January 2005. "Do Political Pacts Freeze Democracy? Spanish and South American Lessons." *West European Politics*. 28:1, 183-203.
- Eppright, Charles. 1996-97. "'Counterterrorism' and Conventional Military Force: The Relationship between Political Effect and Utility."
- Etzioni-Halevy, Eva. Spring 1996. "Civil-Military Relations and Democracy: The Case of the Military-Political Elites' Connection in Israel." *Armed Forces & Society*. 22:3, 401-17.
- Executive Order No. 12656*. 21 November 1988.
- Falkenrath, Richard, Robert Newman, and Bradley Thayer. 1998. America's Achilles' Heel: Nuclear, Biological, and Chemical Terrorism and Covert Attack. Cambridge, MA: The MIT Press.
- Farrell, William. 1982. The U.S. Government Response to Terrorism: In Search of an Effective Strategy. Boulder, CO: Westview Press.

- Feaver, Peter. 2003. Armed Servants: Agency, Oversight, and Civil-Military Relations. Cambridge, MA: Harvard University Press.
- Feaver, Peter. January 1996. "The Civil-Military Problematic: Huntington, Janowitz and the Question of Civilian Control." *Armed Forces & Society*. 23:1, 149-78.
- Feaver, Peter. 1999 "Civil-Military Relations." *Annual Review of Political Science*. 2:1, 211-41.
- Feaver, Peter, and Christopher Gelpi. 2003. Choosing Your Battles: American Civil-Military Relations and the Use of Force. Princeton, NJ: Princeton University Press.
- Feaver, Peter, and Richard Kohn, eds. 2001. Soldiers and Civilians: The Civil-Military Gap and American National Security. Cambridge, MA: The MIT Press.
- Fidell, Eugene. President, National Institute of Military Justice. Author's interview, 4 October 2007.
- Fidell, Eugene, Dwight Sullivan, and Detlev Vagts. December 2005. "Military Commission Law." *The Army Lawyer*.
- Finkelstein, Major General Menachem, and Yifat Tomer. 2002. "The Israeli Military Legal System—Overview of the Current Situation and a Glimpse into the Future." *The Air Force Law Review*. 52.
- Foster, Gregory. 2000. "Civil-Military Gap: What Are the Ethics?" *United States Naval Institute Proceedings*. 126:4.
- Foster, Gregory. Winter 2005. "Civil-Military Relations: The Postmodern Democratic Challenge." *World Affairs*. 167:3, 91-100.
- Freysinger, Robert. June 1991. "US Military and Economic Intervention in an International Context of Low-Intensity Conflict." *Political Studies*. 39:2, 321-34.
- Fricker, Richard, and Gary Hengstler. February 1994 "From Military Rule to Civil Law." *ABA Journal*. 80:2, 62-5.
- Gal, Reuven, and Stuart Cohen. 2000. "Israel: Still Waiting in the Wings," in Moskos, Charles, John Allen Williams, and David Segal, eds. The Postmodern Military: Armed Forces after the Cold War. Oxford, England: Oxford University Press, pp. 224-41.
- Galchinsky, Michael. Fall 2004. "The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence." *Israel Studies*. 9:3, 115-36.
- Gelpi, Christopher, and Peter Feaver. December 2002. "Speak Softly and Carry a Big Stick? Veterans in the Political Elite and the American Use of Force." *American Political Science Review*. 96:4.

- Gibson, Christopher, and Don Snider. Winter 1999. "Civil-Military Relations and the Potential to Influence: A Look at the National Security Decision-Making Process." *Armed Forces & Society*. 25:2.
- Golani, Motti. March 2001. "Chief of Staff in Quest of a War: Moshe Dayan Leads Israel into War." *The Journal of Strategic Studies*. 24:1, 49-70.
- Graebner, Norman. January 1993. "The President as Commander in Chief: A Study in Power." *The Journal of Military History*. 57:1.
- Grebinar, Jonathan. November 2003. "Note: Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law." *Fordham Urban Law Journal*. 31:1, 261-84.
- Green, Clyde. April-June 2003. "Doctrine Corner: The Challenge of Homeland Defense." *Military Intelligence Professional Bulletin*. 29:2.
- Greenberger, Michael. April 2007. "Symposium: Extraordinary Powers in Ordinary Times: Did the Founding Fathers Do 'A Heckuva Job?' Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City." *Boston University Law Review*. 87:397.
- Gross, Emanuel. Spring 2005. "Symposium: Balancing Security and Liberty in the New Century: Article: Thought is Self-Defense against Terrorism—What Does It Mean? The Israeli Perspective." *Temple Political & Civil Rights Law Review*. 14, 579.
- Grove, Gregory. October 1999. The U.S. Military and Civil Infrastructure Protection: Restrictions and Protections Under the Posse Comitatus Act. Stanford, CA: Center for Strategic and International Cooperation.
- Guttieri, Karen. 2006. "Professional Military Education in Democracies," in Bruneau, Thomas, and Scott Tollefson, eds. Who Guards the Guardians and How: Democratic Civil-Military Relations. Austin, TX: University of Austin Press.
- Hall, Peter, and Rosemary Taylor. December 1996. "Political Science and the Three New Institutionalisms." *Political Studies*. 44:4, 936-57.
- Hajjar, Lisa. 2005. Courting Conflict: The Israeli Military Court System in the West Bank and Gaza. Berkeley, CA: University of California Press.
- Hammes, Colonel Thomas X., U.S. Marine Corps. November 2004. "4th-Generation Warfare." *Armed Forces Journal*.
- Harding, Christopher. 2002. "Special Feature: Terrorism, Security, and Rights International Terrorism: The British Response." *Singapore Journal of Legal Studies*. 16.
- Harlan, Charles. July-September 2002. "U.S. Army Counterintelligence Support to Homeland Security." *Military Intelligence Professional Bulletin*. 28:3.

- Harper, Rickey and Wendy Ryberg. July-September 1999. "Joint Global Counterterrorism Detachment (JGCTD)." *Military Intelligence Professional Bulletin*. 25:3.
- Haubrich, Dirk. December 2006. "Ant-terrorism Laws and Slippery Slopes: A Reply to Waddington." *Policing & Society*. 16:4.
- Hendrickson, Ryan. 2000. "American War Powers and Terrorists: The Case of Usama Bin Laden." *Studies in Conflict & Terrorism*. 23, 161-74.
- Henriksen, Thomas. February/March 2007. "Security Lessons from the Israeli Trenches." *Policy Review*. 141, 17-31.
- Hill, Kim Quaile. April 1979. "Military Role vs. Military Rule: Allocations to Military Activities." *Comparative Politics*. 11:3, 371-77.
- Hillen, John. July-August 1999. "Defense's Death Spiral." *Foreign Affairs*. 78:4.
- Hirschl, Ran. April 2001. "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel's Constitutional Revolution." *Comparative Politics*. 33:3, 315-35.
- Hoffman, Michael. Summer 2005. "Rescuing the Law of War: A Way Forward in an Era of Global Terrorism." *Parameters*. 35:2.
- Homeland Security Act*. 2002. Accessed 14 July 2007 at www.dhs.gov.
- Holsti, Ole. Winter 1998-99. "A Widening Gap Between the U.S. Military and Civilian Society? Some Evidence, 1976-1996." *International Security*. 23:3, 5-42.
- Hooker, Richard. Winter 2003-4. "Soldiers of the State: Reconsidering American Civil-Military Relations." *Parameters*. 33:4.
- Hopkinson, William. 2000. The Making of British Defence Policy. Norwich, UK: The Stationary Office.
- Human Rights Watch. January 2005. "Setting an Example? Counter-Terrorism Measures in Spain." *Human Rights Watch Report*. 17:1(D).
- Huntington, Samuel. 1957. The Soldier and the State: The Theory and Politics of Civil-Military Relations. Cambridge, MA: Belknap Press of Harvard University Press.
- Inbar, Efraim. Fall 1991. "Israel's Small War: The Military Response to the Intifada." *Armed Forces & Society*. 18:1, 29-50.
- Jablonsky, David. Winter 2002-03. "The State of the National Security State." *Parameters*.
- Jervis, Robert. Spring 2002 "An Interim Assessment of September 11: What has Changed and What has Not?" *Political Science Quarterly*. 117:1, 37-54.

- Jones, Dan. 2005. "Structures of Bio-terrorism Preparedness in the UK and the US: Responses to 9/11 and the Anthrax Attacks." *British Journal of Politics & International Relations*. 7:340-52.
- Jordan, Javier, and Nicola Horsburgh. July 2006. "Spain and Islamist Terrorism: Analysis of the Threat and Response 1995-2005." *Mediterranean Politics*. 11:2, 209-29.
- Johnston, Alastair Iain. 1995. "Thinking About Strategic Culture." *International Security*. 19:4.
- Jones, Christopher. Summer 2001. "Roles, Politics, and the Survival of the V-22 Osprey." *Journal of Political and Military Sociology*. 29:1.
- Kamen, Al. 7 September 2001. "Donny, We Hardly Knew Ye." *The Washington Post*. p. A27.
- Kaplan, Fred. 26 August 2007. "Challenging the Generals." *The New York Times*. Op-Ed.
- Kaplan, Robert. September 1996. "Fort Leavenworth and the Eclipse of Nationhood" *Atlantic Monthly*. 278:3.
- Kastenbergh, Major Joshua. 2004. "The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption." *The Air Force Law Review*. 55, 233-67.
- Kelly, Terrence. Summer 2003. "Transformation and Homeland Security: Dual Challenges for the US Army." *Parameters*.
- Kelly, Tobias. Winter 2006. "'Jurisdictional Politics' in the Occupied West Bank: Territory, Community, and Economic Dependency in the Formation of Legal Subjects." *Law & Social Inquiry*. 31, 39-74.
- Kemp, Kenneth, and Charles Hudlin. Fall 1992. "Civil Supremacy over the Military: Its Nature and Limits." *Armed Forces & Society*. 19:1, 7-26.
- Kester, John. July 2007. "Bush May Be Stubborn but He's Not Tough." *Washingtonian*.
- Kier, Elizabeth. 1997. Imagining War: French and British Military Doctrine Between the Wars. Princeton, NJ: Princeton University Press.
- Kingdon, John. 1995. Agendas, Alternatives, and Public Policies. 2nd edition. New York, NY: HarperCollins College Publishers.
- Kober, Avi. June 2001. "Israeli War Objectives into an Era of Negativism." *Journal of Strategic Studies*. 24:2.
- Kohn, Richard. Spring 1994. "Out of Control: The Crisis in Civil-Military Relations." *The National Interest*. 35, 3-17.
- Korb, Lawrence. November 2000. "DoD in the 21st Century," in Stuart, Douglas, ed. Organizing for National Security. Carlisle, PA: U.S. Army War College, Strategic Studies Institute.

- Krause, Col. Merrk, and Jeffrey Smotherman. 2006. "An Interview with Assistant Secretary of Defense for Homeland Security." *Joint Forces Quarterly*. 40:1, 10-15.
- Ku, Julian, and John Yoo. Summer 2006. "Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch." *Constitutional Commentary*. 23:2.
- Kuperman, Ranan. October 2005. "Who Should Authorize the IDF to Initiate a Military Operation? A Brief History of an Unresolved Debate." *Israel Affairs*. 11:4, 672-94.
- La Porte, Pablo. Winter 2004. "Civil-Military Relations in the Spanish Protectorate in Morocco: The Road to the Spanish Civil War, 1912-1936." *Armed Forces & Society*. 30:2, 203-26.
- Lasswell, Harold. January 1941. "The Garrison State." *American Journal of Sociology*. 46:4, pp. 455-68.
- Lasswell, Harold. 1950. "The Universal Peril: Perpetual Crises and the Garrison Prison State," in Lyman, Bryson, Louis Finkelstein, and R.M. ManIver, eds. Perspectives on a Troubled Decade: Science, Philosophy, and Religion, 1938-1949.
- Leahy, Patrick. 29 September 2006. "Remarks of Sen. Patrick Leahy, National Defense Authorization Act for Fiscal Year 2007." *Conference Report, Congressional Record*. Accessed 25 October 2007 at <http://leahy.senate.gov>
- Leahy, Patrick, and Christopher Bond. 6 September 2006. "Open letter to John Warner (R-Va), Carl Levin (D-Mi), Duncan Hunter (R-Ca), and Ike Skelton (D-Mo)." Accessed 25 October 2007 at <http://leahy.senate.gov>
- Lebel, Udi. July 2006. "'Communicating Security': Civil-Military Relations in Israel" *Israel Affairs*. 12:3, 361-64.
- Legro, Jeffrey. 1995. Cooperation Under Fire: Anglo-German Restraint during World War II. Ithaca, NY: Cornell University Press.
- Legro, Jeffrey. 1994. "The Transformation of Policy Ideas." *American Journal of Political Science*. 44:3, 419-32.
- Lleixa, Joaquim. 1986. Cien Anos de Militarismo en Espana. Barcelona: Anagrama.
- Lijphart, Arend. 1971. World Politics. 2nd edition.
- Liptak, Adam. 20 September 2007. "Big Terror Trial Shaped Views of Justice Pick." *The New York Times*.
- Liptak, Adam and Leslie Eaton. 24 October 2007. "Mistrial Latest Terror Prosecution Misstep for U.S." *The New York Times*.
- Lowry, Richard. 3 September 2001. "Bombing at the Pentagon." *National Review*. 53:17.

- Lujan, Thomas. Autumn 1997. "Legal Aspects of Domestic Employment of the Army." *Parameters*. 82-97.
- Lutterbeck, Derek. 2004. "Between Police and Military: The New Security Agenda and the Rise of Gendarmeries." *Cooperation and Conflict*. 39:1, 45-68.
- MacDonald, Ross, and Monica Bernardo. Fall/Winter 2006. "The Politics of Victimhood: Historical Memory and Peace in Spain and the Basque Region." *Journal of International Affairs*. 60:1, 173-96.
- Manwaring, Max. Professor, Strategic Studies Institute, U.S. Army War College. Author's interview, 5 October 2007.
- March, James, and Johan Olsen. September 1984. "The New Institutionalism: Organizational Factors in Political Life." *American Political Science Review*. 78:3, 734-49.
- Maloney, Sean. Autumn 1997. "Domestic Operations: The Canadian Approach." *Parameters*. 27:3, 135-52.
- Malvesti, Michele. Summer 2001. "Explaining the United States' Decision to Strike Back at Terrorists." *Terrorism & Political Violence*. 13:2, 85-106.
- Margolis, Joseph. April 2004. "Terrorism and the New Forms of War." *Metaphilosophy*. 35:3, pp. 402-13.
- McEvoy, Kieran. December 2000. "Law, Struggle, and Political Transformation in Northern Ireland." *Journal of Law and Society*. 27:4, 542-71.
- McEvoy, Kieran, and John Morison. April 2003. "Constitutional and Institutional Dimension: Beyond the 'Constitutional Moment': Law, Transition, and Peacemaking in Northern Ireland." *Fordham International Law Journal*. 26.
- McNaugher, Thomas, and Roger Sperry. 1994. "Improving Military Coordination: The Goldwater-Nichols Reorganization of the Department of Defense," in Gilmour, Robert S. and Alexis Halley, eds. Who Makes Public Policy? The Struggle for Control between Congress and the Executive. New York, NY: Chatham House Publishers.
- Melillo, Michael. Autumn 2006. "Outfitting a Big-War with Small-War Capabilities." *Parameters*.
- Merari, Ariel. January 2005. "Israel Facing Terrorism." *Israel Affairs*. 11:1, 223-37.
- Metz, Steven. Autumn 1997. "Which Army After Next? The Strategic Implications of Alternative Futures." *Parameters*.
- Ministry of Defence (UK). 1969. *Manual of Military Law*.
- Morgan, Matthew. 2001. "Army Recruiting and the Civil Military Gap." *Parameters*. 31:2, 101-17.

- Morgan, Matthew. March 2004. "The Garrison State Revisited: Civil-Military Implications of Terrorism and Security." *Contemporary Politics*. 10:1, 5-19.
- Moskos, Charles, John Allen Williams, and David Segal. 2000. "Armed Forces after the Cold War," in Moskos, Charles, John Allen Williams, and David Segal, eds. The Postmodern Military: Armed Forces after the Cold War. Oxford, England: Oxford University Press, pp. 1-13.
- Mujica, Alejandro, and Ignacio Sanchez-Cuenca. 2006. "Consensus and Parliamentary Opposition: The Case of Spain." *Government and Opposition*. 86-108.
- National Commission on Terrorist Attacks Upon the United States. 2004. The 9/11 Commission Report. Authorized Edition. New York, NY: W.W. Norton & Company.
- National Defense Panel. 1997. *Transforming Defense: National Security Strategy in the 21st Century*. Washington, DC: Government Printing Office.
- Neustadt, Richard. 1960. Presidential Power and the Modern Presidents. 1990 Edition. New York: Free Press.
- Newsinger, John. Spring 1995. "From Counter-Insurgency to Internal Security: Northern Ireland 1969-1992." *Small Wars and Insurgencies*. 6:1.
- Nunez, Florencio. 2000. R. Las Espanas de 1898. San Juan: Lea.
- O'Hanlon, Michael. 2002. Defense Policy Choices for the Bush Administration. 2nd edition. Washington, DC: Brookings Institution Press.
- O'Rawe, Mary. 2003. "Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic." *Fordham International Law Journal*. 26:1015-73.
- Owens, Dallas. Professor, Strategic Studies Institute, U.S. Army War College. Author's interview, 21 September 2007.
- Owens, Dallas. January 2002. "The Military's Role in the New Democratic Security Environment: Will Army Missions Change?" in Martin, John, ed. Defeating Terrorism: Strategic Issue Analyses.
- Page, Michael von Tangen, and M. L. R. Smith. Fall 2000. "War by Other Means: The Problem of Political Control in Irish Republican Strategy." *Armed Forces & Society*. 27:1, 79-104.
- Paul, Christopher. Summer 2004. "The U.S. Military Intervention Decision-Making Process: Who Participates, and How?" *Journal of Political and Military Sociology*. 32:1.
- Pedahzur, Ami, and Magnus Ranstorp. Summer 2001. "A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel." *Terrorism and Political Violence*. 13:2, 1-26.

- Perez-Diaz, Victor. June 1990. "The Emergence of Democratic Spain and the 'Invention' of a Democratic Tradition." *Working Paper*. Madrid: Juan March Institute.
- Peri, Yoram. November 2002. "The Israeli Military and Israel's Palestinian Policy: From Oslo to the Al Aqsa Intifada." *Peaceworks*. Washington, DC: United States Institute of Peace, accessed 20 January 2007 at www.usip.org
- Peri, Yoram. April 2005. "The Political-Military Complex: The IDF's Influence Over Policy Towards the Palestinians Since 1987." *Israel Affairs*. 11:2, 324-44.
- Phelps, Glenn, and Timothy Boylan. June 2002. "Discourses of War: The Landscape of Congressional Rhetoric." *Armed Forces & Society*. 28:1, 641-67.
- Pierson, Paul. June 2000. "Increasing Returns, Path Dependence and the Study of Politics." *American Political Science Review*. 94:2, 251-67.
- Pincus, Walter. 13 May 2007. "Pentagon Hopes to Expand Aid Program." *The Washington Post*.
- Pion-Berlin, David. 2001. "Introduction," in Pion-Berlin, David, ed. *Civil-Military Relations in Latin America: New Analytical Perspectives*. Chapel Hill, NC: The University of North Carolina Press, pp. 1-35.
- Powell, Colin, John Lehman, William Odom, Samuel Huntington, and Richard Kohn. Summer 1994. "Exchange on Civil-Military Relations." *National Interest*. 36, 23-32.
- "Preserve Posse Comitatus." November 2005. *Progressive*. 69:11.
- Rabin, Yitzakh. 1967. *The Rabin Memoirs*.
- Raven-Hansen, Peter. Professor of Law, The George Washington University Law School. Author's interview, 24 September 2007.
- Raven-Hansen, Peter. Summer 2004. "Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorism." *Louisiana Law Review*. 64:831.
- Raven-Hansen, Peter. Fall 2006. "Symposium: Secret Evidence and the Courts in the Age of National Security: Panel Report: National Security Secrecy in the Courts: A Comparative Perspective from Israel." *Cardozo Public Law, Policy & Ethics Journal*. 5:63.
- Reynolds, Kevin. November 2006. *Defense Transformation: To What, For What?* Carlisle, PA: U.S. Army War College: Strategic Studies Institute.
- Ricks, Thomas. 2006. *Fiasco*. New York, NY: The Penguin Press.
- Ricks, Thomas. 1997. *Making the Corps*. New York, NY: Scribner.
- Riedman, Patricia. Spring 1990. "West Bank Struggle: A Call for Human Rights." *Human Rights: Journal of the Section of Individual Rights & Responsibilities*. 17:1.

- Robles, Luis de la Calle. June 2007. "Fighting for Local Control: Street Violence in the Basque Country." *International Studies Quarterly*. 51, 431-55.
- Roth, Kenneth. January/February 2004. "The Law of War in the War on Terror." *Foreign Affairs*. 83:1.
- Sanchez, Miguel Revenga. 2003. "The Move Towards a (and the Struggle for) Militant Democracy in Spain." Paper presented at the 2003 ECPR Conference, Marburg. Accessed 13 September 2008 at <http://www.essex.ac.uk/ECPR/events/generalconference/Marburg/papers/10/7/Sanchez.pdf>
- Sanchez-Cuenca, Ignacio. 2001. ETA Contra el Estado. Las Estrategias del Terrorismo. Barcelona: Tusquets.
- Sanchez-Cuenca, Ignacio. June 2004. "Terrorism as War of Attrition: ETA and the IRA." *Working Paper*. Madrid: Juan March Institute.
- Schiff, Rebecca. Fall 1995. "Civil-Military Relations Reconsidered: A Theory of Concordance." *Armed Forces & Society*. 22:1, 7-24.
- Serrano, Carlos Seco. 2002. *La Espana de Alfonso XIII*. Madrid: Espasa Calpe.
- Shamgar, Meir. April 2005. "On the Need for a Constitution." *Israel Affairs*. 11:2, 345-58.
- Shevi, Brigadier General Dov. Spring 1983. "Article: The Status of the Legal Adviser to the Armed Forces: His Functions and Powers." *Military Law Review*. 100:119.
- Smith, Lieutenant Colonel Andrew J., Australian Army. January-February 2002. "Combating Terrorism." *Military Review*. 82:1, 11-8.
- Smith, Paul. Autumn 2000. "Transnational Security Threats and State Survival: A Role for the Military?" *Parameters*. 30:3, 77-92.
- Steinmo, Sven, Kathleen Thelen, and Peter Hall, eds. 1992. Structuring Institutions. Cambridge, England: Cambridge University Press.
- Stepan, Alfred. 1998. Rethinking Military Politics: Brazil and the Southern Cone. Princeton, NJ: Princeton University Press.
- Stuart, Douglas. November 2000. "Conclusion," in Stuart, Douglas, ed. Organizing for National Security. Carlisle, PA: U.S. Army War College, Strategic Studies Institute.
- Sucharov, Mira. Winter 2005. "Security Ethics and the Modern Military: The Case of the Israeli Defense Forces." *Armed Forces & Society*. 31:2, 69-99.
- Sulmasy, Glenn, and John Yoo. 2007. "Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror." *UCLA Law Review*. 1815-45.

- Swazo, Norman. December 2004. "The Duty of Congress to Check the President's Prerogative in National Security Policy." *International Journal on World Peace*. 21:4.
- Taylor, Stuart. 25 March 2006. "Decommission the Commissions." *National Journal*. 38:12.
- Terrorism Prevention Act*. 1995. Accessed 28 October 2007 at <http://thomas.loc.gov>
- Thompson, Mitchell. Winter 2005-06. "Breaking the Proconsulate: A New Design for National Power" *Parameters*.
- "TJAGC Leaders Testify Before Congress on Detainee Rights." September 2006. *Reporter*. 33:3.
- Toobin, Jeffrey. 9 February 2004. "Inside the Wire." *New Yorker*. 79:46.
- Townsend, Frances. 2006. *The Federal Response to Hurricane Katrina: Lessons Learned*. Accessed 28 October 2007 at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>
- Troyer, Lon. June 2003. "Counterterrorism: Sovereignty, Law, Subjectivity." *Critical Asian Studies*. 35:2, 259-76.
- Tuck, Christopher. June 2007. "Northern Ireland and the British Approach to Counter-Insurgency." *Defense & Security Analysis*. 23:2.
- Tucker, David. October 2006. "Confronting the Unconventional: Innovation and Transformation in Military Affairs." *The Letort Papers*. Carlisle, PA: U.S. Army War College, Strategic Studies Institute.
- Tucker, David. 1997. Skirmishes at the Edge of Empire: The United States and International Terrorism. Westport, CT: Praeger.
- Ulrich, Marybeth Peterson, and Conrad Crane. January 2002. "Potential Changes in U.S. Civil-Military Relations," in Martin, John R., ed. Defeating Terrorism: Strategic Issue Analyses. Carlisle, PA: U.S. Army War College, Strategic Studies Institute.
- United States Commission on National Security/21st Century. 2001. *Road Map for National Security: Imperative for Change*. Washington, DC: Government Printing Office.
- U.S. Department of Defense. November 2003. *Joint Operations Concepts*. Washington, DC: Department of Defense.
- U.S. Department of Defense. 21 March 2002. "Military Commission Order No. 1." Accessed 9 December 2007 on www.defenselink.mil.
- U.S. Department of Defense. 30 September 2001. *Quadrennial Defense Review Report*. <http://www.defenselink.mil/pubs/qdr2001.pdf>
- Van Creveld, Martin. 2002. The Sword and the Olive: A Critical History of the Israeli Defense Force. New York: PublicAffairs.

- Van Evera, Stephen. 1997. Guide to Methods for Students of Political Science. Ithaca, NY: Cornell University Press.
- Walsh, Mark, and Michael Harwood. Winter 1998-99. "Complex Emergencies: Under New Management." *Parameters*. 28:4.
- Watson, Cynthia. June 2000. "Civil-Military Relations in Colombia: A Workable Relationship or a Case for Fundamental Reform?" *Third World Quarterly*. 21:3, 529-48.
- Wattellier, Jeremie. Winter 2004. "Comparative Legal Responses to Terrorism: Lessons from Europe." *Hastings International and Comparative Law Review*. 27.
- Weigley, Russell. October 1993. "The American Military and the Principle of Civilian Control from McClellan to Powell." *The Journal of Military History*. 57, 27-58.
- Weiss, Aaron. Fall 2001. "When Terror Strikes, Who Should Respond?" *Parameters*. 31:3, 117-33.
- The White House. October 2001. "President Establishes Office of Homeland Security." Press Release. Accessed 28 October 2007 at www.whitehouse.gov
- White, Josh. 21 July 2007. "Government Must Share All Evidence on Detainees." *The Washington Post*.
- White, Josh, and Joby Warrick. 28 September 2007. "U.S. to Allow Key Detainees to Request Lawyers." *The Washington Post*. p. A1.
- Wittes, Benjamin. June & July 2007. "Terrorism, the Military, and the Courts." *Policy Review*.
- Wood, B. Dan, and Richard Waterman. September 1991. "The Dynamics of Political Control of the Bureaucracy." *American Political Science Review*. 85:3.
- Woodworth, Paddy. 2001. Dirty War, Clean Hands: ETA, The GAL and Spanish Democracy. Cork: Cork University Press.
- Woodworth, Paddy. Spring 2007. "The Spanish-Basque Peace Process: How to Get Things Wrong." *World Policy Journal*. 24:1, 65-73.
- Zaverucha, Jorge. May 1993. "The Degree of Military Political Autonomy during the Spanish, Argentine and Brazilian Transitions." *Journal of Latin American Studies*. 25:2, 283-99.

Vita

Jennifer Michelle Bean attended North Little Rock High School in North Little Rock, Arkansas. In 1995 she entered Rhodes College in Memphis, Tennessee. In 1997 she entered the University of Arkansas at Fayetteville, and graduated from the University with a Bachelor of Arts in Political Science in 1999. Jennifer attended graduate school at the University of Arkansas at Fayetteville as a King Fahd Middle East Studies Center Graduate Fellow, graduating with a Master of Arts in Political Science in 2002. In August of 2003, she entered the Department of Government's Doctoral program.

Permanent address: 5208 Crestwood Drive, Little Rock, Arkansas 72207

This dissertation was typed by the author.