

War Makes the State, but Not as It Pleases: Homeland Security and American Anti-Statism

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The shock of war is thought to be closely associated with the growth of the state, in the United States and elsewhere. Yet each proposal to significantly expand state power in the United States since September 11 has been resisted, restrained, or even rejected outright. This outcome—theoretically unexpected and contrary to conventional wisdom—is the result of enduring aspects of America’s domestic political structure: the separation of powers at the federal level between three co-equal and overlapping branches, the relative ease with which interest groups access the policy-making process, and the intensity with which executive-branch bureaucracies guard their organizational turf. These persistent aspects of U.S. political life, designed by the nation’s founders to impede the concentration of state power, have substantially shaped the means by which contemporary guardians of the American state pursue “homeland security.” War does make the state, but not as it pleases. Theoretical approaches to state building should recognize that domestic political institutions mediate between the international shock of war and domestic state building.

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One of the direct consequences of the terrorist attacks of September 11, 2001, was a flurry of proposals to strengthen the whip hand of the American state.¹ In response, critics of U.S. homeland security policy have consistently warned against the incautious adoption of police-state tactics, erosions of civil liberties, and drastic increases in the power of the executive branch.² Now enough time has passed to conclude that the most striking characteristic of the American state in the wake of the terrorist attacks is not the way its powers accumulate, but the way it resists centralized accretions of power. To a surprising extent, initiatives to counter the terrorist threat by expanding the state's domestic powers have been resisted, restrained, and even rejected outright.

This is surprising, because the shock of war is thought to be closely associated with the growth of the state, in the United States and everywhere else.³ Yet each proposal to significantly consolidate or expand state power since September 11 has enjoyed a brief period of momentum followed by a loss of political support. This pattern has repeated itself in a variety of areas, from the development of surveillance technology to the regulation of computer security, from the management of passenger screening at airports

¹ A selection of the proposals to create federal strategies, agencies, and departments to counter the terrorist threat include the following: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, H.R. 3162 (USA PATRIOT Act), 24 October 2001; Homeland Security Act of 2002, H.R. 5005, 22 November 2002; Aviation and Transportation Security Act of 2001, S. 1447, 16 November 2001; Military Order of 13 November 2001; Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism; Bill to Establish a Homeland Intelligence Agency (short title: Foreign Intelligence Collection Improvement Act of 2003), S. 410, 13 February 2003; President's Critical Infrastructure Protection Board, "National Strategy to Secure Cyberspace," draft released 18 September 2002, available at <http://csrc.nist.gov/policies/cyberstrategy-draft.pdf>; and the Pentagon's Total Information Awareness Program.

² Popular books that take this position include James Bovard, *Terrorism and Tyranny: Trampling Freedom, Justice, and Peace to Rid the World of Evil* (New York: Palgrave Macmillan, 2003); and Robert O'Harrow, *No Place to Hide: Our Emerging Surveillance Society* (New York: Free Press, 2005). Major media outlets, such as the *Washington Post* and the *New York Times*, have written countless news stories and editorials about the expansion of executive power under the Bush administration, including "A Travesty of Justice," editorial, *New York Times*, 16 November 2001, A24; "Justice Deformed: War and the Constitution," editorial, *New York Times*, 2 December 2001, Sec. 4, 14; William Safire, "You Are a Suspect," *New York Times*, 14 November 2002, A35; "Too Much Power," editorial, *Washington Post*, 4 January 2004, B06; and Michael Powell, "No Choice, but Guilty," *Washington Post*, 29 July 2003, A01. The American Civil Liberties Union (ACLU) has issued dozens of action items, position papers, and press releases about a perceived government assault on civil liberties, including "ACLU Calls on President Bush to Disavow New Cyber-Spying Scheme That Seeks to Put Every American under Scrutiny," 14 November 2002, available at <http://www.aclu.org>. Conservative politicians have even sounded warning bells. Representative Ron Paul (R-Tex.), for example, issued a number of speeches, statements, and press releases, including "Police State USA," Texas Straight Talk: A Weekly Column, 10 August 2004, available at <http://www.house.gov/paul>; and "Is America a Police State?" statement on the floor of the House of Representatives, 27 June 2002.

³ Recent works on the relationship between war and state building are Bruce D. Porter, *War and the Rise of the State: The Military Foundations of Modern Politics* (New York: Free Press, 1994); and Charles Tilly, *Coercion, Capital, and European States, AD 990-1990* (Oxford: Blackwell, 1992). For a discussion of crisis and state growth in the United States, see Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (Oxford: Oxford University Press, 1987).

to the detention of terrorist suspects, and from the organization of domestic intelligence to the surveillance of the U.S. citizenry.⁴

This article will argue that this virtually uniform outcome is the result of enduring aspects of America's domestic political structure: the separation of power at the federal level between three co-equal and overlapping branches, the relative ease with which interest groups access the policy-making process, and the intensity with which executive-branch bureaucracies guard their organizational turf. Solely and in combination, these three persistent aspects of U.S. political life, designed by the nation's founders to impede the concentration of state power, have substantially shaped the contemporary state's pursuit of "homeland security."

This argument will proceed in five sections. The first section will review the theoretical literature on the relationship between war and state building. The second will provide a method for measuring state power, finding that, contrary to conventional wisdom, state power has not significantly increased since the war on terrorism began. Next, a theoretical framework will be developed to explain the observed pattern of state building in post-September 11 America. Empirical support for this theory will come in three qualitative case studies: the detention of enemy combatants, cyber-security, and domestic intelligence. The concluding section will consider the implications of this argument for both theory and practice. We find that war makes the state, but not as it pleases.⁵ Theoretical approaches to state building can usefully incorporate domestic political structure as an intervening variable that mediates between the shock of war and the growth of state power. In the policy realm, we argue that domestic political pressures may be leading the U.S. government to outsource the garrison state.

WAR MAKES THE STATE

The dominant theoretical understanding of the relationship between war and state building posits a process by which international forces shape domestic

⁴ This article focuses on the state's mobilization strategies and its regulatory and investigative powers. The state's extractive powers have not expanded in the wake of September 11 either; the Bush administration has not raised taxes or reinstated conscription, although it has (controversially) extended tours of duty for both the armed services and the National Guard. Furthermore, although the new Department of Homeland Security has millions of dollars' worth of private contracts, it has not sought to mobilize American industry in any centrally directive way.

⁵ According to Charles Tilly, war makes the state and the state makes war. Tilly, *Coercion, Capital, and European States*, 67–95. Karl Marx once wrote that "men make their own history, but they do not make it just as they please; they do not make it under self-selected circumstances, but under circumstances directly encountered, given, and transmitted from the past." Karl Marx, *18th Brumaire of Louis Bonaparte* (New York: International Publishers, 1963), 1.

political outcomes—a type of argument generally referred to by scholars as the “second image reversed.”⁶ War makes the state, according to Charles Tilly’s famous dictum.⁷ Tilly argued that competitive security environments require states to enhance their military capabilities. Investments in military might are facilitated by extractions of wealth from society. As levels of taxation increase, a more extensive state bureaucracy is needed to collect and process tax revenues. This growth in the state apparatus to deal with an extraordinary circumstance remains even after the security threat subsides. In the end, war makes the state.⁸

Although Tilly’s focus was on the formation of the state system itself, this logic has been extended to incidents of state building in modern political times. In a study surveying Western governments from the fifteenth to the twentieth century, Bruce Porter found that, when states enter war, the state’s coercive powers increase, diminishing individual rights and liberties and limiting the ability of local and private actors to challenge state authority.⁹ Michael Desch also found that the intense security competition of the twentieth century “clearly strengthened states.”¹⁰ Karen Rasler and William Thompson used quantitative analysis to provide support for the argument that “war was a great stimulus to state building, and it continues to be, if not a great stimulus, then at least a major factor.”¹¹

Others have argued that security threats have such an important domestic effect that they can propel the state’s dominance over society to the point of altering regime type. According to these scholars, a particularly threatening international environment will demand an authoritarian government in response.¹²

This dominant approach to the state perceives crisis as ushering in a mismatch between a state and its environment. Weak states cannot survive in a dangerous security milieu. State expansion is a response intended to re-establish symbiosis.¹³

⁶ See Peter Gourevitch, “The Second Image Reversed: The International Sources of Domestic Politics,” *International Organization* 32, no. 4 (Autumn 1978): 881–911.

⁷ Tilly, *Coercion, Capital, and European States*, 67–95.

⁸ For a competing explanation of the rise of the international state system, see Henrik Spruyt, *The Sovereign State and Its Competitors* (Princeton: Princeton University Press, 1996).

⁹ Porter, *War and the Rise of the State*.

¹⁰ Michael C. Desch, “War and Strong States, Peace and Weak States?” *International Organization* 50, no. 2 (Spring 1996): 237.

¹¹ Karen A. Rasler and William R. Thompson, *War and State Making: The Shaping of the Global Powers* (Boston: Unwin Hyman, 1989), 2.

¹² Brian Downing, *The Military Revolution and Political Change* (Princeton: Princeton University Press, 1992); Gourevitch, “Second Image Reversed”; and Otto Hintze, “Military Organization and the Organization of the State,” in *The Historical Essays of Otto Hintze*, ed. Felix Gilbert (New York: Oxford University Press, 1975), 178–215.

¹³ Steven D. Krasner, “Approaches to the State: Alternative Conceptions and Historical Dynamics,” *Comparative Politics* 16, no. 2 (January 1984): 223–46.

This approach is partially correct: war does make the state, but not as it pleases. A second image reversed argument misses the importance of intervening variables that mediate war's effect on state expansion.

Other scholars have taken a more nuanced approach to the relationship between war and state building, examining how international pressures interact with contextual factors before shaping state power. Jeffrey Herbst has argued that low population density has prevented war from making the state in Africa. Without pressure for expansion caused by rapidly growing populations, African states were less likely than states in medieval Europe to come into conflict with one another and to engage in interstate war. Furthermore, because the costs of broadcasting power into the hinterlands tended to outweigh the potential gains in terms of increased tax revenue, African states have had little incentive to expand effective state control beyond the national capital.¹⁴

Fernando López-Alvez has similarly argued that, despite much conflict, war has not made the state in Latin America. Geographic features such as jungles, mountain ranges, deserts, and rivers have impeded interstate war. Natural boundaries have not prevented domestic guerrilla wars, but internal conflicts in Latin America have served to raze the state, not build it.¹⁵

Once again, these studies fail to paint the entire picture. These scholars focus on structural variables such as demography and geography, but they ignore the important role of domestic political institutions. States enter wars, after all, with a historically determined set of institutions. Other branches of political science have captured the important role institutions play in transforming international forces into domestic outcomes. Students of political economy initially predicted that globalization would lead to a "race to the bottom" as national governments adopted liberal policies to compete in an international marketplace.¹⁶ This early example of second image reversed scholarship was soon challenged by institutionalists who demonstrated that states with varied political and economic institutions process international challenges in very different ways.¹⁷

Specialists in American politics have also argued that domestic political crises in the United States have tended to provoke a growth in the size and authority of the federal government.¹⁸ Yet students of American politics have also recognized that, in crisis-induced battles between state and society over

¹⁴ Jeffrey Herbst, *States and Power in Africa* (Princeton: Princeton University Press, 2000).

¹⁵ Fernando López-Alves, "The Transatlantic Bridge: Mirrors, Charles Tilly, and State Formation in the River Plate," in *The Other Mirror: Grand Theory through the Lens of Latin America*, ed. Miguel Angel Centeno and Fernando López-Alves (Princeton: Princeton University Press, 2000).

¹⁶ Dani Rodrik, *Has Globalization Gone Too Far?* (Washington: Institute for International Economics, 1997).

¹⁷ Peter A. Hall and David W. Soskice, eds., *Varieties of Capitalism: The Institutional Foundation of Comparative Advantage* (New York: Oxford University Press, 2001); and Steven Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Democracies* (Ithaca: Cornell University Press, 1998).

¹⁸ Higgs, *Crisis and Leviathan*.

the proper scope of state power, America's decentralized domestic structure tends to favor society.¹⁹ For example, in a groundbreaking work, Aaron Friedberg argued that factors such as interest groups, ideology, and grand strategy helped to prevent the United States from becoming a garrison state during the Cold War.

Although other branches of political science have long understood that pre-existing state institutions vary and serve as a filter through which external shocks are channeled before affecting domestic political outcomes, the literature on war and state building has yet to conceptualize domestic political structure adequately as an intervening variable linking international forces with domestic political outcomes.

International crises do empower states to seek greater power, but power-seeking states also engender resistance, and the institutional arena in which the political struggle plays out varies cross-nationally. In the United States, a liberal institutional structure tilted in society's favor has curtailed state expansion after the September 11 terrorist attacks. Institutional mechanisms such as the separation of powers, interest-group access, and well-positioned bureaucratic actors have prevented the excessive growth of state power.

This article will draw on the American case to argue that domestic political structure can be usefully incorporated into our theoretical understanding of the relationship between war and state building. In the American case, a fragmented institutional structure dissipated the energy of war before it could be fully converted into state power.

THE STRENGTH OF THE U.S. RESPONSE AND CONVENTIONAL WISDOM

According to a prevailing point of view, u.s. homeland security policy in the wake of September 11 was characterized by a Bush administration that quickly implemented a number of proposals to expand state authority, greatly strengthening the hand of the government to deal with terrorist threats while trampling the rights and liberties of individual citizens and other private actors.²⁰ Even defenders of the Bush administration acknowledge that, since September 11, the executive branch has taken unilateral actions to deal with new threats to national security.²¹

Subsequent repeated warnings from leading figures on both the left and the right about the imminent threat of expanding state power have gelled into a sort of collective understanding about the gathering institutional ramifications of September 11 on American politics and law. For example, the

¹⁹ Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities* (New York: Cambridge University Press, 1982).

²⁰ This view was advanced in the various writings cited in note 2.

²¹ John Yoo has argued that unilateral executive-branch measures for dealing with security threats are consistent with the Constitution and have rich historical precedent. See John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005).

American Civil Liberties Union (ACLU) warned that “if the Pentagon has its way, every American—from the Nebraskan farmer to the Wall Street banker—will find themselves under the accusatory cyber-stare of an all-powerful national security apparatus.”²² The authorities claiming witness to a new American garrison state extend well beyond the bounds of civil-libertarian groups. The mainstream media trumpeted the alarm of the state’s encroachment on civil liberties. A *New York Times* columnist warned his readers, “You are a suspect.”²³ Politicians on the political right were concerned about a perceived onslaught on American civil liberties by the Bush administration. Representative Ron Paul (R-Tex.) asserted that “we are not yet living in a total police state, but it is fast approaching.”²⁴

This line of argumentation has become pervasive in public thinking. The assumption that we are in danger of creating a post-September 11 American police state may reflect an ingrained expectation that war makes the state, or it could partially be a product of a tendency to focus on what has happened, rather than what might have happened but has not. Whatever the origins of this point of view, a careful look at the evidence reveals that it is simply inaccurate. What has been most striking about the U.S. counterterrorism response is not how much state power has grown, but how little has changed.

In the wake of such a major attack on U.S. soil, we would expect a significant expansion of the U.S. government to meet the newly perceived threat—perhaps even movements toward the creation of a garrison state. What we have witnessed instead is merely an ostentatious reshuffling of bureaucratic boxes. In most areas relevant to the provision of homeland security, we have seen nothing more than a general maintenance of the status quo. The gradual moves to increase state power have been overwhelmed by stories of resistance, in which individuals, groups, and domestic political institutions have rejected most of the state’s efforts at expansion. Contrary to the conventional wisdom, the war on terrorism has not markedly strengthened the power of the American state.

Measuring State Power

The now well-known measures taken by the Bush administration to deal with the terrorist threat following September 11 do not begin to tell the story of post-September 11 state building in the United States. The additions that have been made to the American state are the few, lonely remnants of what was once a more massive set of proposals that would have significantly increased state power. The most compelling—and most undertold—story of U.S. homeland security policy is not the growth of state power, but the number of proposals that never made it through the wringer of the American political process. Even a focus on the cases usually cited as examples of

²² “ACLU Calls on President Bush to Disavow New Cyber-Spying Scheme.”

²³ Safire, “You Are a Suspect.”

²⁴ Paul, “Police State USA.”

state expansion will serve to reveal the fierce institutional resistance to state expansion inherent in the American system. The overwhelming majority of proposals to increase state powers in the United States after September 11 were resisted, restrained, or even rejected outright.

The state has been defined as “the public bureaucracy or administrative apparatus in its totality.”²⁵ We follow this definition and previous scholarship by operationalizing the state as the executive branch of government and its attendant bureaucracies.²⁶ High-quality scholarship has been devoted to conceptualizing the state, its autonomy, and capacity, but no universally accepted definition of state power has emerged.²⁷ Perhaps the most widely used definition equates state power with the state’s scope of authority.²⁸ For the purposes of this article, and consistent with previous scholarship, state power will be defined here as the scope of authority of the executive branch of government.

State power has typically been coded in dichotomies of strong vs. weak states or maximal vs. minimal states.²⁹ Such distinctions are an efficient way to characterize wide disparities in the scope of state authority across nations, but they are too crude to capture more fine-grained variation within a single state over time. Any change in state power short of a categorical shift would not even register on a simple dichotomous scale.

Others have measured state power by tracking central government expenditures as a percentage of gross domestic product.³⁰ Although this proxy variable is amenable to quantitative analysis, it is an inadequate indicator of a state’s scope of authority, for two reasons. First, increases in state spending are often the result of the increasing costs of carrying out pre-existing state authorities, such as equipping the military or funding pensions, and

²⁵ Other definitions include the state as ruling class, the state as government, and the state as normative order. See Stephen Krasner, “Approaches to the State: Alternative Conceptions and Historical Dynamics,” *Comparative Politics* 16, no. 2 (January 1984): 238.

²⁶ Stephen Krasner operationalizes the state as the central decision makers in the executive branch, specifically the “President and those [executive] bureaus relatively insulated from societal pressures.” Stephen Krasner, *Defending the National Interest: Raw Materials Investments and U.S. Foreign Policy* (Princeton: Princeton University Press, 1978), 62.

²⁷ For literature on the state, see Peter B. Evans, *Embedded Autonomy* (Princeton: Princeton University Press, 1995); Peter B. Evans, Dietrich Rueschmeyer, and Theda Skocpol, eds., *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985); Peter Katzenstein, ed., *Between Power and Plenty: Foreign Economic Policies of Advanced Industrialized Economies* (Madison: University of Wisconsin Press, 1978); Krasner, *Defending the National Interest*; Krasner, “Approaches to the State”; Joel Migdal, *Strong Societies and Weak States* (Princeton: Princeton University Press, 1988); Alfred C. Stepan, *The State and Society: Peru in Comparative Perspective* (Princeton: Princeton University Press, 1978); Ellen Kay Trimberger, *Revolutions from Above: Military Bureaucrats and Development in Japan, Turkey, Egypt, and Peru* (New Brunswick: Transaction, 1978); and Fareed Zakaria, *From Wealth to Power* (Princeton: Princeton University Press, 1999).

²⁸ Desch, “War and Strong States,” 241; Friedberg, *In the Shadow of the Garrison State*, 10; Theda Skocpol, “Bringing the State Back In: Strategies of Analysis in Current Research,” in Evans, Rueschmeyer, and Skocpol, *Bringing the State Back In*, 15; and Krasner, *Defending the National Interest*, 55.

²⁹ On strong and weak states, see Katzenstein, *Between Power and Plenty*. On minimal vs. maximal states, see Desch, “War and Strong States,” 241.

³⁰ Desch, “War and Strong States,” 245; Rasler and Thompson, *War and State Making*, 209.

do not necessarily represent an expansion of state authority into new areas. Second, many of the most important ways in which states can gain power vis-à-vis their own societies, such as by restricting civil and political liberties, are nonmonetary in nature and would not even register on a variable of state spending.

To avoid the problems associated with such indicators, we measure the state's scope of authority as the number of functional issues over which the government exerts control, and the breadth and effectiveness of control within each functional issue. Functional issues relevant to homeland security include domestic intelligence and warning, border and transportation security, domestic counterterrorism, protection of critical infrastructure, defense against catastrophic threats, and emergency preparedness and response.³¹

Following this measure, state power can expand in three ways. First, as more of these issues, or subcomponents of these issues, come under executive-branch control, the state's scope of authority increases, and, by our definition, the state's powers expand. For example, the creation of the Transportation Security Administration (TSA) and the federalization of airport screeners represented a slight increase in state authority, as a component of air-transportation security was transferred from the private sector to the government. Second, state power also expands as the state increases its breadth of control within a functional issue already under its jurisdiction. Breadth of control can be measured as the number of different types of authority exercised within a particular functional area. For example, prisoner detention has always been a key function of the state (in both peacetime and wartime), but after September 11 the question has been whether the restrictions on how the state exercises this function should be relaxed. Third, state power expands as the state increases the effectiveness with which it exercises the authorities within its jurisdiction. Enhanced effectiveness can be indicated by a structural reorganization or by increases in the level of resources, including technologies, on which the state can draw to execute a particular function. For example, the data-mining software that was under development in the Total Information Awareness (TIA) program did not grant the state authority to collect domestic intelligence, but it would have vastly increased the government's ability to exercise this form of control. The expansion of state power can sometimes fill vacuums of authority, as in the case of prisoner detention, or, as in the case of TSA, can usurp powers once exercised by individuals, private actors, or state and local governments.

Since this article's focus is on how institutions influence the degree to which the state can penetrate society in times of war, we are interested in not only an absolute measure of state power, but also a relative one. Our method of measurement must enable us to gauge how much of the impulse for state expansion was dissipated by America's domestic political structure before it was actualized in state power.

³¹ These are the six elements of the U.S. National Strategy for Homeland Security, released July 2002, available at <http://www.whitehouse.gov>.

We thus ground our understanding of the expansion of state power in relation to both the pre–September 11 status quo and the early proposals for improving homeland security in the wake of the terrorist attacks. Cases in which early proposals were adopted without substantial resistance, as expected by theory and conventional wisdom, are scored as “expected” increases in state power. State power is “restrained” in cases in which movements to expand state power were challenged and significantly scaled back. “Rejected” is the score given to cases in which proposals to expand state power were thwarted completely and the status quo was maintained.

A large number of cases in the “expected” category would indicate that a great expansion of state power occurred in the United States after September 11. This finding would validate prevailing beliefs about U.S. homeland security policy and the war-makes-the-state school. A clustering of cases in the “restrained” category would signal that state power did increase, but less than expected by common understandings and traditional scholarship. This finding would be more consistent with our argument that the shock of war provokes attempted expansions of state power, but that the extent of state growth is shaped by domestic institutions. Although the war-makes-the-state school does not necessarily imply that all proposals to expand state power will be implemented, it cannot explain why a large proportion of state-building efforts would fail during wartime. A preponderance of cases in the “rejected” category would indicate little or no expansion of state power. This outcome is not predicted by either approach, although cases in this category would tend to favor the institutional argument presented here.

We treat each case as an equivalent indicator of state power. For example, an “expected” increase of power in domestic intelligence counts no more, and no less, than an “expected” increase in critical infrastructure protection. It is obvious that growth in some functional areas may have a bigger impact on aggregate state power than in others, but in the absence of an a priori theoretical justification for which functional areas are most critical to state-society relations, assigning varying weights to selected areas would be arbitrary and inadvisable.

Rather, to ensure that any measurement bias works against our hypothesis, we selected for analysis only the issues often invoked as evidence of post–September 11 state growth. These cases are the USA Patriot Act, the detention of enemy combatants, the National Strategy for Securing Cyberspace, the creation of the TSA and the Department of Homeland Security (DHS), and the restructuring of domestic intelligence collection and analysis.³² These examples represent critical cases. If commonly held beliefs are correct and

³² For a small sample of the many articles and books citing these cases as real or potential expansions of executive power, see Dhalia Litwak and Julia Turner, “A Guide to the Patriot Act, Part I: Should You Be Scared of the Patriot Act?” *Slate.com*, 8 September 2003, available at <http://slate.msn.com/id/2087984/>; Anthony Lewis, “License to Torture,” *New York Times*, 15 October 2005, A19; Carson Carlson, “IT Warns Against Slippery Slope to Regulation,” *E-Week.com*, 22 November 2002, <http://www.eweek.com/article2/0,1759,1662335,00.asp>; Kate O’Beirne, “Encountering Turbulence: So How Goes the Federal

TABLE 1 State Building in the United States since September 11

| Cases | Change in the level of state power | Institutional restraint |
|-----------------------|------------------------------------|---------------------------------|
| Patriot Act | Expected | None |
| DHS | Restrained | Separation of powers: Congress |
| TSA | Restrained | Separation of powers: Congress |
| Prisoner detention | Restrained | Separation of powers: judiciary |
| Domestic intelligence | Restrained | Bureaucratic politics |
| Cyber-security | Rejected | Interest-group pressure |
| TIA | Rejected | Separation of powers: Congress |

a marked increase in state power has occurred, it will be evident in these cases. If, however, analysis of even these cases reveals that lasting change has been minimal and that full implementation of state-building proposals was the exception rather than the rule, the evidence will lend support to our argument.

Following this coding system, we find that, consistent with the war-makes-the-state model, state power in the United States has expanded to some degree since September 11. In one of the seven cases, that of the Patriot Act, there was an expected increase in executive-branch authority. Contrary to expectation, however, the most striking finding is that resistance to state power has far outweighed its expansion (see Table 1). In four of the seven cases, proposals to increase state power were restrained, and in two of the seven cases, proposals for the expansion of state power were completely rejected. This finding is consistent with our contention that war provokes attempted expansions of state power, but the degree to which those proposals are successful depends on a state's institutional receptiveness to state expansion.

Expected Increase: The USA Patriot Act

Only in the case of the Patriot Act do we see an expansion of state authority as expected by the war-makes-the-state school. The Patriot Act was a clear expansion of state power: it increased the scope of the state's authority to conduct surveillance on U.S. citizens and resident aliens. The act permits expanded access by federal law-enforcement officials to Americans' medical, financial, and academic records. It allows Americans' e-mail and Internet activity to be secretly monitored "for intelligence purposes" rather than for probable cause and allows decisions to investigate to be made by federal law-enforcement officials, not courts. Federal law-enforcement officials can also direct libraries and bookstores to surrender records pertaining

Takeover of Airline Security?" *National Review*, 17 June 2002, available at <http://www.nationalreview.com/issue/kob061702.asp>; Gail Russell Chaddock, "Security Act to Pervade Daily Lives," *Christian Science Monitor*, 21 November 2002, available at <http://www.csmonitor.com/2002/1121/p01s03-usju.html>; ACLU, "ACLU Criticizes Federal Commission Internal CIA Recommendation; Questions Need for Domestic Intelligence Agency," 16 December 2002, available at <http://www.aclu.org>.

to a citizen's choice of reading materials. Government officials are granted virtually complete discretion over the designation of domestic political and religious groups as terrorist organizations. All of these activities can be undertaken without any requirement to notify suspected individuals or organizations that they are under investigation.³³

Unlike the other cases under analysis, the Patriot Act faced little institutional resistance prior to implementation. In the panicked environment following the September 11 attacks, the Patriot Act was passed with limited debate by substantial, bipartisan majorities in both houses of Congress. Although we do not attempt to account for variation in the level of power across cases, the lack of early resistance to the Patriot Act may be the result of the rapidity with which it was instituted. It was signed into law by President George W. Bush on 26 October 2001, just six weeks after the terrorist attacks.³⁴ Perhaps even America's institutional antibodies to state power require time to respond.

Even in the case of the Patriot Act, however, an increase in state power was eventually subject to sustained judicial and congressional scrutiny as well as broad-based resistance by local jurisdictions. At first, the act was met with ideological criticisms by a rare coalition of prominent activists on both the liberal left and the libertarian right.³⁵ Then the judicial branch of the federal government asserted its independent claim, as a separate and co-equal branch of government, to review the executive's unilaterally imposed homeland security initiatives.³⁶ Members of Congress in both parties openly questioned the wisdom of extending provisions of the Patriot Act.³⁷ The pressure from other branches of government became so intense that both the president and the attorney general felt compelled to mount a public defense of the law.³⁸ In December 2005, the Senate stalled on an indefinite renewal of the act, arguing that the law needed to incorporate more protections against potential abuses of civil liberties.³⁹ In March 2006, Congress voted to renew

³³ USA Patriot Act.

³⁴ When Attorney General John Ashcroft first introduced the Patriot Act legislation, he gave Congress one week to pass the bill—without changes. After minor modifications and hurried negotiations, the bill passed the Senate 98-1 and the House 357-66. The bill became law less than one month after the its introduction. Robert O'Harrow, Jr., "Six Weeks in Autumn," *Washington Post*, 27 October 2002, W06.

³⁵ ACLU, "On Eve of War, New Right-Left Coalition Forms to Fight Justice Department Plans for Legislation That Would Diminish Liberty, Fail to Bolster Security," 17 March 2003, available at <http://www.aclu.org>; and Edward Epstein, "Left and Right United to Challenge Patriot Act Provisions," *San Francisco Chronicle*, 23 March 2005, A3.

³⁶ For instance, see John Cristofferson, "Judge Rules against Government in Patriot Act Case," Associated Press, 9 September 2005.

³⁷ Dan Eggen, "Congress Urged to Renew Patriot Act: Minor Changes Would Address Concerns, Gonzales and Mueller Tell Senate Panel," *Washington Post*, 6 April 2005, A17.

³⁸ "Ashcroft Kicks Off Campaign to Defend Patriot Act," CNN.com, 19 August 2003; and Michael Fletcher, "President Calls on Congress to Extend Patriot Act Provisions," *Washington Post*, 21 July 2005, A06.

³⁹ E. J. Dionne, Jr., "Their Own Patriot Act," *Washington Post*, 20 December 2005, A31.

a revised version of the Patriot Act that curbed some executive powers and built in new safeguards to protect civil liberties.⁴⁰

Despite this resistance, the Patriot Act nonetheless represents the study's only case of an expected increase in state power.

Restrained Proposals

In four other cases, early initiatives to increase state power faced substantial resistance and were significantly scaled back.

THE DEPARTMENT OF HOMELAND SECURITY

The creation of the DHS, the largest reordering of the federal government since that produced by the National Security Act of 1947, would seem to be an easy case for the war-makes-the-state school—a new federal department with broad authority over domestic security. In fact, however, the creation of the DHS actually constrained executive ambition by moving the responsibility for coordinating homeland security from the White House and placing it under congressional scrutiny.

The president did not initially seek congressional authorization for the creation of the White House Office of Homeland Security (OHS), not an unheard-of maneuver in the history of executive-legislative relations. Subsequently, however, he refused to let his OHS director, former Pennsylvania governor Tom Ridge, testify before Congress on the administration's homeland security plans, a refusal that significantly heightened institutional tensions between Congress and the White House.⁴¹ As an adviser to the president, Ridge's appointment was not subject to congressional approval; as a result, Ridge could not be compelled to testify before Congress. Moreover, since the OHS was located within the Executive Office of the President, Congress had no oversight powers over the new office.

Only three days after the creation of the OHS, Senators Joseph Lieberman (D-Conn.) and Arlen Specter (R-Pa.) introduced legislation to establish a cabinet-level department to coordinate homeland security.⁴² Ridge initially recommended that Bush veto any legislation creating an office with congressional oversight, arguing that the president was "entitled to a few advisors" and that his ability to coordinate across agencies would be limited if he were "accountable to Congress."⁴³

⁴⁰ Charles Babington, "Congress Renews Patriot Act, with Changes," *Washington Post*, 8 March 2006, A03.

⁴¹ Alison Mitchell, "Letter to Ridge Is Latest Jab in Fight over Balance of Powers," *New York Times*, 5 March 2002, A8.

⁴² Department of National Homeland Security Bill of 2001, S. 1534, 11 October 2001.

⁴³ Quoted in Brody Mullins, "Ridge: Bush Should Veto Cabinet-Level Homeland Security Office," *Congress Daily*, 30 May 2002, available at <http://www.govexec.com/dailyfed/0502/053002cd1.htm>.

Congressional proposals were soon followed by a number of congressional hearings on homeland security and intense criticism in the national press over the government's failure to prevent the attacks of September 11.⁴⁴ Sensing defeat, the Bush administration decided to seize the initiative back from Congress, and in June 2002, it formulated and put forth its own proposal for a cabinet-level department.⁴⁵ After months of debate in Congress and substantial revisions to the White House proposal, the Department of Homeland Security was created in January 2003.⁴⁶ Unlike the White House office that preceded it, this new department would be subject to congressional authorization and appropriations, administrative oversight, and legislative vetting of top appointments. As a federal official subject to Senate confirmation, DHS Secretary Ridge could now be compelled to testify before Congress.

Despite the fact that the process by which the DHS was created challenged executive authority, one could still argue that the DHS remains a clear case of expanded state power. After all, it was the largest reorganization of the federal government in nearly fifty years. Yet the creation of the DHS is better characterized as a case of reorganization without empowerment. The new department simply consolidated twenty-two agencies into a single department, without granting the new department any major authorities not already enjoyed by its component agencies.⁴⁷ Moreover, the performance of the new department, including its response to Hurricane Katrina in September 2005, has demonstrated that centralization did not

⁴⁴ Hearings held by the Senate Committee on Governmental Affairs include "Critical Infrastructure Protection: Who's in Charge?" 4 October 2001; "Has Airport Security Improved?" 14 November 2001; "How Secure Is Our Critical Infrastructure?" 12 September 2001; "Legislative Options to Strengthen Homeland Defense," 12 October 2001; "The Local Role in Homeland Security," 11 December 2001; "Public Hearing to Discuss Legislation to Establish a Department of National Homeland Security and a White House Office to Combat Terrorism," 11 April 2002; "Responding to Homeland Threats: Is Our Government Organized for the Challenge?" 21 September 2001; "Riding the Rails: How Secure Is Our Passenger and Transit Infrastructure?" 13 December 2001; "Weak Links: Assessing the Vulnerability of U.S. Ports and Whether the Government Is Adequately Structured to Safeguard Them," 6 December 2001; and "Weak Links: How Should the Federal Government Manage Airline Passenger and Baggage Screening?" 25 September 2001. Press criticisms include Jo Warrick and Joe Stephens, "Before Attack: U.S. Expected Different Hit: Germ Agents Focus of Preparations," *Washington Post*, 2 October 2001, A01; Matthew Wald, "Earlier Hijackings Offered Signals That Were Missed," *New York Times*, 3 October 2001, B2; and Steve Fainaru and James V. Grimaldi, "FBI Knew Terrorists Were Using Flight Schools," *Washington Post*, 23 September 2001, A24.

⁴⁵ Bush gave a televised address to the nation calling for a cabinet-level department on 6 June 2002. A short report titled "The Department of Homeland Security" was posted on the White House website the same day.

⁴⁶ Homeland Security Act of 2002, H.R. 5005, 22 November 2002.

⁴⁷ According to the Homeland Security Act of 2002, the department's primary responsibilities correspond to the five major functions identified in the bill: information analysis and infrastructure protection; chemical, biological, radiological, nuclear, and related countermeasures; border and transportation security; emergency preparedness and response; and coordination with other parts of the federal government, with state and local governments, and with the private sector. The act also directs the department to continue to carry out other functions of the agencies it will absorb.

produce the greater effectiveness that had been hoped for by the legislation's authors.⁴⁸

Had the DHS greatly expanded the scope of executive authority beyond that held by its already-existing component agencies, had the reorganization turned the DHS into a highly effective department, or had the White House been successful in retaining homeland security as a presidential prerogative not subject to congressional oversight, the DHS may have been considered as a case of expected increase in executive power. But not only did the new department comprise federal agencies that had already existed before the terrorist attacks, the reorganization has created a large but largely dysfunctional department. Most important, by initially proposing the creation of a cabinet-level department, Congress challenged and effectively restrained unilateral presidential authority. The DHS is therefore best scored as a case of restrained state growth.

THE TRANSPORTATION SECURITY ADMINISTRATION

The creation of the TSA and the federalization of airport screeners represented a slight increase in state authority, as the protection of a critical infrastructure—air transportation—was (at least temporarily) transferred from private to government hands. Yet early proposals for the new agency were scaled back, and the law that created it was eventually structured so as to facilitate the eventual return of this function to the private sector.

Prior to September 11, most airlines contracted out security-screening services to private security firms such as Argenbright Security, International Total Services, and Globe Aviation Services.⁴⁹ The airline with the most flights leaving or arriving at a particular concourse was normally responsible for hiring screeners for that concourse; sometimes airlines jointly hired them. Security standards were promulgated by the Federal Aviation Administration, which also occasionally sent agents to test the system; this was basically the entire extent of the federal role.⁵⁰

After the terrorist attacks, calls immediately sounded in the media and the halls of Congress for a federal takeover of airport security.⁵¹ The September 11 hijackers had scouted their targets carefully, taking the chosen flights

⁴⁸ Susan B. Glasser and Josh White, "Storm Exposed Failure at the Top," *Washington Post*, 4 September 2005, A01; Charles Mann, "Homeland Insecurity," *Atlantic Monthly* 290, no. 2 (September 2002), available at <http://www.theatlantic.com/doc/prem/200209/mann>; Tim Naftali, "Department of Homeland Security Screw-Up: What Is the Bush Administration Doing?" *Slate.com*, 6 September 2005, available at <http://www.slate.msn.com>.

⁴⁹ Daniel Eisenberg, "How Safe Can We Get? The System Has Been Vulnerable for Years; Marginal Improvements Aren't Enough," *Time*, 24 September 2001, available at <http://www.time.com/time/covers/1101010924/bsecurity.html>.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

repeatedly to count passenger loads and test airline security. The fact that nineteen hijackers, four of them wanted by law-enforcement officials, had been able to board four transcontinental flights armed with razor-sharp box cutters was enough to convince the Senate to vote 100-0 on 11 October 2001 to federalize airport screening.⁵²

By the time the more conservative House of Representatives debated the bill several weeks later, however, the forces of anti-statism had re-emerged. Arguing against the creation of a new federal bureaucracy that would employ more personnel than the Department of Labor and the Department of Housing and Urban Development combined, House Republicans passed a bill that mandated only federal supervision of private contract screeners, not a wholesale nationalization of the enterprise.⁵³ With public pressure mounting on both sides to find a compromise, a House-Senate conference committee produced a final bill that provided for federalization, at least in the short term.⁵⁴

The compromise legislation included a significant escape clause, though, which allowed airport security to return to private hands. The Airport Screener Privatization Pilot Program (PP5 Program) granted exceptions from the federal program to five of the nation's airports (those at Jackson Hole, Kansas City, Rochester, San Francisco, and Tupelo). Under the PP5 Program, the screening of passengers was carried out by the personnel of private companies under contract with the TSA. U.S. airports were then able to compare the results of the pilot and federal programs and were granted permission to opt out of federalized screening after only two years.⁵⁵

In April 2004, the evidential basis for opting out was provided when Congress reviewed the results of studies performed by the General Accounting Office, the inspector general of the DHS, and BearingPoint, a consulting firm hired by the TSA. The reports indicated that both private and federal

⁵² Aviation and Transportation Security Act, S. 1447, 11 October 2001.

⁵³ The Airport Security Federalization Act, H.R. 3150, 1 November 2001. Representative Don Young (R-Alaska), Chairman of the House Transportation and Infrastructure Committee, said in his statement to the floor that in the House bill, "the Federal government will take over the job of screening passengers and their baggage at our airports. . . . [W]here we differ from some of our colleagues is how do we best achieve the goal of a truly secure federally controlled aviation screening process. We do it by insuring that it is the federal government that will set the compensation for the screeners. It is the federal government that mandates the level of competency and training for the screeners . . . and if the screeners don't do their job and perform well, under our bill they can be removed, their certificates can be revoked and the entire company can be fired and fined for any violations of rules or regulations." Text of Don Young's statement to the floor available at <http://www.house.gov/transportation/press/press2001/release144.html>.

⁵⁴ Aviation and Transportation Security Act of 2001, S. 1447, 16 November 2001. Young stated, "On the issue of expanded screening security, we reached a compromise that will allow total federal oversight and authority of the screening process. We will have a trained federal workforce for the first two years and pilot programs that will be based upon the successful European federal-private sector model. After two years, each airport will then be given the flexibility to work with the new Undersecretary of Transportation Security to determine which program would provide the best screening security for each airport." Statement available at <http://www.house.gov/transportation/press/press2001/release151.html>.

⁵⁵ *Ibid.*

screeners were performing below expectation, but that private screeners performed as well as, if not better than, TSA screeners. The reports also argued that the effectiveness of the screeners in the pilot program had been hampered by heavy TSA oversight, which had limited private initiative on the part of the private security firms.⁵⁶

In April 2005, the TSA began conducting a nationwide contracting process to qualify prospective private screening companies to sign contracts with individual airports and begin replacing TSA screeners. In July 2005, the TSA announced that thirty-four firms had been chosen as “qualified vendors” and that Sioux Falls Regional Airport would become the sixth airport, along with the original five pilot airports, to opt out of the federal program.⁵⁷ Sioux Falls is likely the first step in the state’s abdication of a direct role in airline security. As many as one hundred airports have indicated that they will choose to return to commercial screeners.⁵⁸

In the end, the federalization of airport screeners may have been the most visible growth of state power after September 11. The TSA was large in terms of manpower and budget, but the responsibility for screening air travelers is a trivial power. Moreover, early calls for federalization were weakened by the insistence of the House of Representatives that the legislation contain an escape clause. Current developments indicate that the state is beginning a process to slowly cede this power back to the private sector. Thus the TSA is best scored as a case of restrained state growth.

ENEMY COMBATANTS

The executive authority to indefinitely detain terrorist suspects represented an initial expansion of state power. The executive branch has always had the ability to detain prisoners, but by designating a new type of prisoner—the enemy combatant—it was able to expand its influence within this pre-existing function. Yet this executive privilege has been substantially circumscribed by a series of judicial rulings. Executive powers of detention are on the retreat and may yet return to the pre-September 11 status quo. The case of enemy combatants is best scored as a case of restrained state growth. A detailed discussion of enemy combatants will be the topic of the first in-depth case study later in this article.

⁵⁶ Committee on Transportation and Infrastructure, Aviation Subcommittee, “Hearing on a Review of the Airport Screener Privatization Pilot Program (PP5),” 22 April 2004, transcript available at <http://www.house.gov/transportation/aviation/04-22-04/108-61.pdf>. Similar conclusions were reached in a follow-up report released a year later, which noted that, despite the federalization of most passenger screeners, airport security at passenger checkpoints had not measurably improved since September 11.

⁵⁷ TSA, “Sioux Falls Regional Airport Is to Join TSA’s Screening Partnership Program,” press release, 27 July 2005, available at <http://www.tsa.gov/public/display?theme=44&content=0900051980150f8b>.

⁵⁸ Chris Strom, “TSA Prepares Airport Guidance on Using Private Screeners,” GovExec.com, 23 April 2004, available at <http://www.govexec.com/dailyfed/0404/042304c1.htm>.

DOMESTIC INTELLIGENCE COLLECTION AND ANALYSIS

In the case of domestic intelligence collection and analysis, proposals for a new, domestic version of the Central Intelligence Agency (CIA) represented the potential for a clear increase in state power, expanding the executive's ability to perform the function of domestic intelligence and warning with the creation of a dedicated agency. The proposals for a domestic intelligence agency were rejected, however, by bureaucratic actors protecting their organizational turf. Instead, the decision was made to reorient the focus of the Federal Bureau of Investigation (FBI).⁵⁹ To some degree, an increased capacity for domestic intelligence was still accrued by the state, but the ability of the FBI to exercise this added function effectively will be limited by competing missions and cultures. For these reasons, domestic intelligence is best scored as a case of restrained state growth. A detailed discussion of domestic intelligence will be the topic of the third in-depth case study later in this article.

Rejected Proposals

Some proposals for the expansion of state power were rejected completely. The status quo was maintained in the cases of cyber-security and the Pentagon's Total Information Awareness program. In these cases, attempts by the executive to expand the scope of state authority were thwarted by interest groups and Congress, respectively.

CYBER-SECURITY

The Bush administration released a new National Strategy to Secure Cyberspace in time for the first anniversary of the September 11 attacks. The new strategy would have increased the scope of the state's authority to police and protect cyberspace—a critical infrastructure—but before the strategy could be implemented, it was watered down to the point of meaninglessness by private interest groups.

Cyber-security is best scored as a case of rejected state power. It will be the topic of the second in-depth case study later in this article.

TOTAL INFORMATION AWARENESS

The TIA program presaged a technological cornucopia for government snoops, a set of software tools that enabled federal law-enforcement officials

⁵⁹ Prior to September 11, the FBI was primarily a law enforcement agency that focused on criminal investigations. It was nominally charged with domestic intelligence responsibilities, but intelligence collection and analysis were not high priorities. (Due in part to legal changes that came out of the Church Committee investigations into the executive abuses of the 1970's, a conscious effort had been made to erect legal barriers between law enforcement and domestic intelligence collection.) The lack of attention to intelligence was also the result of the culture at the FBI that rewarded employees for criminal prosecutions, but not for intelligence analysis. Since September 11, the wall between law enforcement and domestic intelligence has been knocked down and the FBI has attempted—unsuccessfully according to most analysts—to better perform the domestic intelligence and counterterrorism functions.

to detect transaction patterns thought to indicate terrorist activity, then to rapidly scan and combine information from multiple public data sources. Suspicious transaction patterns presumably triggered surveillance on potential terrorist suspects.⁶⁰ This program certainly would have represented an increase in the state's ability to collect domestic intelligence—had it survived.

The death knell for the program came with the revelation of a TIA project called "FutureMAP," which would have invited online betting on the probability of terrorist events. Although it was meant simply as an effort to explore the utility of market-like mechanisms for eliciting and aggregating good intelligence information, the implication that market participants might profit from correctly predicting assassinations and other deadly assaults gave the project a ghoulish cast.⁶¹ Congress halted federal funding for TIA and issued instructions for its closure.⁶² The case of Total Information Awareness is thus best scored as a rejected proposal.

Summary

The most striking aspect of post-September 11 American state building is the overall weakness of the state's response to the terrorist threat. This does not mean that state power did not increase. The Patriot Act increased the investigatory powers of federal law-enforcement officials; a new cabinet-level department was created; the federal government, at least temporarily, took over passenger screening at airports; prisoners were detained without charge; and the FBI has wandered into domestic intelligence. This article in no way seeks to minimize the importance of the increases in state power that have occurred.

On the other hand, a function-by-function analysis reveals a fairly low level of aggregate state growth in the realm of homeland security. Domestic intelligence and warning, domestic counterterrorism, defense against catastrophic threats, and emergency preparedness and response were all state responsibilities prior to September 11. Marginal increases in the breadth of authority within these areas have occurred, but their effectiveness has been limited by the assignment of these missions to overburdened and organizationally ill-equipped federal agencies. Responsibility for the other homeland security functions—border and transportation security and protection of critical infrastructure—remains largely in private hands.

Moreover, although many state-building proposals were initially put forward and some were actually implemented, the bulk of the post-September

⁶⁰ See John Poindexter, remarks as prepared for delivery at DARPA Tech 2002 Conference, Anaheim, Calif., 2 August 2002.

⁶¹ Cynthia L. Webb, "FutureMAP Has No Future," *Washington Post*, 30 July 2003, available at http://www.findarticles.com/p/articles/mi_m0NTQ/is_2003_July_30/ai_106042669.

⁶² Audrey Hudson, "Congress Kills Data-Mining Computer Program," *Washington Times*, 25 September 2003, available at <http://www.washingtontimes.com/national/20030925-115156-7992r.htm>.

11 initiatives have been significantly scaled back or completely rejected. Theories that assert that war makes the state, therefore—that war will lead to an increase in state power—are, at best, incomplete. The puzzle that demands explanation is not why state power has expanded in the United States since September 11, but why attempts to expand state power have faced such fierce resistance.

THE MADISONIAN IMPULSE

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

One could argue that the war on terrorism has not generated lasting state building because it is not a genuine war. Some have gone so far to argue that the use of the term “war” in official discourse is merely an effort at strategic framing by the Bush administration to generate domestic and international support for its policy priorities—policies that the administration pursues for reasons unrelated to the terrorist threat.⁶³

While agnostic on the Bush administration's use of language for strategic purposes, we argue that the attacks of September 11 and their aftermath do qualify as war and should have initiated state building according to the war-makes-the-state logic. September 11 was, after all, the first major foreign attack on U.S. soil since Pearl Harbor. For more than fifty years, the United States enjoyed the freedom to deal with security challenges far from its own shores. September 11 shattered the country's sense of geographic invulnerability and revealed the obvious threat that international terrorism posed to the United States.

Furthermore, the U.S. government chose to respond to the security threat, in part, by launching interstate war. As part of its war on terrorism, the United States initiated conflicts against Afghanistan in November 2001 and against Iraq in March 2003. The United States has been engaged in continuous international warfare since November 2001 and—even if the United States was the initiator—these are true wars by any definition of the term.

Finally, and most important, if the war on terrorism is mere discourse, it is impossible to explain the pattern of American state building that followed the September 11 attacks. An immediate state-building impulse reverberated throughout the United States immediately after the attacks, and a

⁶³ Michael Meacher. “This War on Terrorism Is Bogus,” *The Guardian*, 6 September 2003, available at <http://politics.guardian.co.uk/iraq/comment/0,12956,1036687,00.html>.

large number of proposals to expand state power emanated from all quarters of American society—not just from the Bush administration. Almost as soon as these proposals surfaced, they elicited substantial political opposition from many sources, sometimes from within the administration itself. Some of these proposals were implemented; many more of them were disregarded. The argument that the terrorist threat exists only as part of the Bush administration's rhetoric cannot explain the ebb and flow of America's post-September 11 state-building experience.

One could also argue that the large proportion of rejected state-building initiatives merely reflects a basic principle of negotiation: demand more than you are ultimately willing to accept. The initial state-building proposals may have been, rather than realistic requests for expanded executive power, merely the executive's first bid in a negotiating process with the other branches of American government.

This argument, if correct, is not necessarily inconsistent with the theory advanced in this article. It merely suggests that experienced executive-branch officials also understand the anti-statist tendencies inherent in American politics.

The negotiating-tactic theory of U.S. homeland security policy, however, does not mesh well with the empirical evidence. If the administration was purposely high-balling its requests for expanded powers in expectation of being bargained down, it would be difficult to explain the administration's extreme reluctance to compromise on certain issues, such as the indefinite detention of enemy combatants. Moreover, as stated above, proposals for expanded executive powers did not come exclusively from the executive branch, and in many cases Bush administration officials were the main source of resistance to state-building projects. For example, the DHS was a congressional initiative that the Bush administration initially resisted. The post-September 11 tug-of-war over the American state is the result of forces that run deeper than the tactics chosen by individual policymakers.

A superior explanation for the relative weakness of American state building focuses on America's domestic political institutions. The second image reversed logic of "war makes the state" assumes that international constraints are seamlessly transformed into domestic outcomes but ignores the domestic political processes through which these forces are channeled. The degree to which security threats generate an increase in state power is partly a function of an individual state's institutional receptiveness to state expansion. In states with institutional buttresses against the expansion of state power, we should expect most of the energy from a security crisis to be dissipated before it is actualized in state growth.

American antipathy to state power is quite familiar and has a long history. In fact, anti-statism was consciously baked into the American political system. The founders hoped to constrain the unilateral authority of the president to

make war.⁶⁴ Although they recognized the efficacy of a unitary commander in chief, they assigned to Congress the power to “raise and support” armies, a navy, and nationalized state militias.⁶⁵ Writing to Thomas Jefferson, James Madison noted, “What the History of all [governments] demonstrates, that the [executive] is the branch of power most interested in war, [and] most prone to it.”⁶⁶ As the primary author of the U.S. Constitution, Madison’s impulse was thus to create an anti-statist state, a system of overlapping institutions with shared powers, in order to provide “great security against a gradual concentration of several powers” in the executive branch.⁶⁷

The anti-statist character of the U.S. homeland security response is the result of three enduring aspects of the country’s domestic political structure: the division of power at the federal level between three co-equal and overlapping branches, the relative ease with which interest groups access the policymaking processes, and the intensity with which executive-branch bureaucracies guard their organizational turf. Solely and in combination, these three persistent aspects of U.S. political life, designed by the nation’s founders to impede the concentration of state power, have substantially shaped the contemporary state’s pursuit of homeland security.

The Separation of Powers

One of the most important features of the American constitutional system is the division of authority between three separate branches of government. Separate constituencies, powers, and interests create a system of checks and balances in which each branch prevents—or at least attempts to prevent—the others from wielding excessive influence. It is no surprise, therefore, that academic studies of American politics are replete with examples of Congress and the federal judiciary using their constitutionally granted powers to constrain the executive branch.⁶⁸

⁶⁴ This is the prevailing view among leading constitutional scholars. John Yoo, however, has recently argued that the Constitution actually grants the executive wide authority to conduct foreign affairs and national security policy. See Yoo, *Powers of War and Peace*. For proponents of the prevailing view, see Louis Henkin, *Foreign Affairs and the U.S. Constitution* (Oxford: Oxford University Press, 1997); Harold Koh, *National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven: Yale University Press, 1990); and Michael Glennon, *Constitutional Diplomacy* (Princeton: Princeton University Press, 1991).

⁶⁵ Constitution of the United States of America, Art. I, sec. 8.

⁶⁶ Quoted in Arthur Schlesinger, *The Imperial Presidency* (Boston: Houghton-Mifflin, 1973), 5; and cited by Friedberg, *In the Shadow of the Garrison State*, 17.

⁶⁷ Federalist No. 51, “On a Just Partition of Power,” cited by Friedberg, *In the Shadow of the Garrison State*, 17.

⁶⁸ For example, Charles Jones argued that too exclusive a focus on the presidency distorts the picture of how national government really works. He explores how presidents find their place in the permanent government and how they are “fitted in” by others, most notably those on Capitol Hill. Charles O. Jones, *The Presidency in a Separated System* (Washington: Brookings Institution Press, 1994).

Congressional-executive tensions over state power revolve around issues of the creation, maintenance, and growth of the federal bureaucracies that are run by the president but established, funded, and monitored by Congress. The executive branch is not capable of expansion without first garnering congressional legislation and appropriation. Differing constituencies and identities ensure that executive proposals for expansion are rarely met with congressional acquiescence.

Judicial power can also serve as a roadblock to the expansion of executive power. The ability to declare laws unconstitutional is a fundamental power of the federal judiciary, and the judiciary has a long tradition of restricting extraconstitutional state behavior, even in times of crisis. For example, during the Great Depression, the Supreme Court nearly generated a constitutional crisis when it declared a series of New Deal legislation unconstitutional.⁶⁹ Similarly, in April 1952, President Harry Truman ordered seizure of the nation's steel mills to forestall a strike that, he claimed, would have seriously harmed the nation during the Korean War. In *Youngstown Sheet and Tube Co. v. Sawyer*, the Supreme Court declared the seizure unconstitutional, thereby maintaining the balance of power among the three branches of government.⁷⁰

Although the impact of the separation of powers on executive ambition is well understood by students of American politics, the implications for theories of war and state building have yet to be drawn out. Proposals for the expansion of state power have a multitude of origins but tend to signify potential increases of power for the executive branch. Congress and the courts can act as consistent roadblocks to the expansion of state power in the United States. Congress can resist war-induced state building by refusing to establish new executive-branch bureaucracies, by shaping new bureaucracies to limit executive privilege, or by limiting funding for new and existing bureaucracies through its control over the purse strings. The courts can rein in state building by declaring executive excesses unconstitutional. In the United States, the degree to which war can make the state is shaped by decisions made in the Supreme Court and on Capitol Hill.

Interest-Group Pressure

Interest groups can also wield considerable influence over the formation of law and policy in the American political system. Although “iron triangles”

⁶⁹ Franklin D. Roosevelt's proposed legislation to pack the Supreme Court with New Deal sympathizers was resisted and eventually killed in Congress. A more sympathetic Court was realized only when one judge changed his voting pattern and others retired of their own volition. See Kenneth S. Davis, *Into the Storm: 1937-1940* (New York: Random House, 1993); and Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

⁷⁰ Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (Durham: Duke University Press, 1977); and Alan F. Westin, *The Anatomy of a Constitutional Law Case: Youngstown Sheet & Tube Co. v. Sawyer: The Steel Seizure Decision* (New York: Notable Trials Library, 1958).

have begun to give way to “issue networks” as the number of private and public groups have proliferated, close links between executive bureaus, congressional committees, and interest groups with a stake in a particular program still allow private groups a means by which to shape the formation of law and policy to their advantage. Particularly important in this respect is the fact that some of the resources that interest groups can provide to members of Congress—information, campaign contributions, and electoral support—are precisely the resources that are likely to be in greatest demand by legislators. Interest groups leverage the access and influence provided by these resources to, among other things, thwart government oversight, shape policy implementation, and win passage of laws consistent with their goals.⁷¹

As with the separation of powers, insights from academic studies on interest groups in American politics have not been applied to theories of war and state building. The power of private groups to resist state encroachment on their interests persists in times of crisis and has implications for state building. Proposals to strengthen the state by increasing government authority or oversight over organized private groups or by mandating the expenditure of private resources are likely to be vigorously contested by interest groups. As the state seeks to expand power in wartime, interest groups can draw on their institutional influence and access to the policy-making process to oppose expansions detrimental to their particular interests.

Bureaucratic Politics

Bureaucratic politics is a third mechanism constraining the growth of state power in the American system. Students of bureaucracy have consistently demonstrated that organizations are motivated to protect their own parochial interests.⁷² “For large classes of issues—e.g., budget, procurement decisions—the stance of a particular player can be predicted with high

⁷¹ Seminal works on interest-group politics include Jeffrey M. Berry, *Lobbying for the People* (Princeton: Princeton University Press, 1977); Jeffrey M. Berry, *The New Liberalism: The Rising Power of Citizen Groups* (Washington: Brookings Institution Press, 1999); Allan J. Cigler and Burdett A. Loomis, *Interest Group Politics*, 6th ed. (Washington: CQ Press, 2002); Hugh Hecl, “Issue Networks and the Executive Establishment,” in *The New American Political System*, ed. Anthony King (Washington: American Enterprise Institute, 1990); and Jack L. Walker, Jr., *Mobilizing Interest Groups in America: Patrons, Professionals, and Social Movements* (Ann Arbor: University of Michigan Press, 1991).

⁷² The classic work on bureaucratic politics is Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston: Little, Brown, 1971). Allison’s formulation was preceded by other work in a similar vein, including Richard Neustadt, *Presidential Power and the Modern Presidents* (New York: Wiley, 1960). For excellent critiques of Allison see Robert J. Art, “Bureaucratic Politics and American Foreign Policy: A Critique,” *Policy Sciences* 4, no. 4 (December 1973): 467–90; and Stephen Krasner, “Are Bureaucracies Important? Or Allison Wonderland,” *Foreign Policy* 7 (Summer 1972): 159–79; For excellent reviews of the debate, see David Welch, “The Organizational and Bureaucratic Politics Paradigms: Retrospect and Prospect,” *International Security* 17, no. 2 (Fall 1992): 112–46; and Jonathan Bender and Thomas H. Hammond, “Rethinking Allison’s Models,” *American Political Science Review* 86, no. 2 (June 1992): 301–22.

reliability from information about his seat.”⁷³ Bureaucracies have been described as empires constantly seeking the maximization of their own autonomy, resources, and prestige.⁷⁴

Changes to the political status quo that threaten parochial interests can be opposed by entrenched opposition from bureaucratic actors already well placed within the government. The creation of a new bureaucratic organization is one change that is bound to threaten the core interests of existing bureaucracies. When proposals for new agencies are put forward, existing bureaucratic actors can attempt to kill off the proposal or, at the very least, build flaws into the design of the new agency to ensure a weak bureaucratic competitor.⁷⁵

The bureaucratic-politics paradigm has proved valuable in explaining a wide variety of problems in international politics.⁷⁶ Despite a broad application, though, the behavior of organizations has not been applied to the literature on war and state building. Bureaucratic politics is an important inhibitor of state-building projects because war-induced impulses to expand state power often manifest themselves in proposals to create new bureaucracies. The formation of additional organizations threatens the interests of pre-existing bureaucratic actors. When the objectives of a proposed organization overlap, conflict, or compete with the functions performed by existing organizations, the older organizations will seek to smother the newcomer in its cradle. In times of crisis, we should expect the most ambitious efforts at state building, particularly the creation of new agencies with an old mission, to be resisted by pre-existing bureaucracies.

Summary

Taken together, the domestic political mechanisms composing the Madisonian impulse would lead to expectations about the relationship between crisis and state building quite different from those reflected in dominant theoretical understandings. The logic stating that the shock of war

⁷³ Allison, *Essence of Decision*, 176.

⁷⁴ *Ibid.*, 168, 175.

⁷⁵ Amy B. Zegart, *Flawed by Design: The Evolution of the CIA, JCS, and NSC* (Palo Alto: Stanford University Press, 2000).

⁷⁶ For examples, see Steve Chan, “Bureaucratic Politics and Belief System: Explaining the Chinese Policy Debate 1964–66,” *Journal of Peace Research* 16, no. 4 (1979): 333–47; Karen Dawisha, “The Limits of the Bureaucratic Politics Model: Observations on the Soviet Case,” *Studies in Comparative Communism* 13, no. 4 (Winter 1980): 300–346; Morton H. Halperin and Arnold Kanter, eds., *Readings in American Foreign Policy, A Bureaucratic Perspective* (Boston: Little, Brown, 1973); Morton Halperin, *Bureaucratic Politics and American Foreign Policy* (Washington: Brookings Institution, 1974); Roger Hillsman, *The Politics of Policy Making in Defense and Foreign Affairs: Conceptual Models and Bureaucratic Politics* (Englewood Cliffs: Prentice Hall, 1987); David C. Kozak and James M. Keagle, eds., *Bureaucratic Politics and National Security: Theory and Practice* (Boulder: Lynne Rienner, 1988); and Jim Valenta, “Bureaucratic Politics and the Soviet Invasion of Czechoslovakia,” *Political Science Quarterly* 94, no. 1 (Spring 1979): 55–76.

provokes an impulse to expand state power may still hold, but in states with significant institutional roadblocks to the expansion of state power, these impulses will be sapped of their strength as they are filtered through the domestic political system. Bureaucracies, interest groups, and other branches of government, whether alone or working in concert, can seize veto points in the domestic political system to prevent expansions of state power contrary to their parochial interests. War still makes the state, but the magnitude of state expansion is heavily dependent on domestic political institutions.

TRACING INSTITUTIONAL RESISTANCE TO STATE BUILDING

This section will trace the processes by which each of the domestic institutions discussed in the preceding section restrained post–September 11 state building in the United States. The separation of powers limited the executive’s ability to detain enemy combatants, interest-group pressure thwarted a tough national cyber-security plan, and bureaucratic politics prevented the creation of a domestic-intelligence agency.

Definition and Detention of “Enemy Combatants”

The separation of powers limits the degree to which proposals to expand the authority of the executive branch in wartime are actualized in state power. The legislative and judicial branches can act as consistent impediments to the expansion of state power in the United States. In the case to follow, a series of judicial rulings restrained the executive branch’s authority to designate and detain enemy combatants.

In the months that followed the September 11 attacks, the Bush administration proceeded to assert the unilateral right of the president, under the commander in chief clause of the U.S. Constitution, to designate both U.S. citizens and noncitizens as “enemy combatants.”⁷⁷ Such a designation (derived from a single Second World War–era legal case) allowed the president to subject an individual to indefinite detention—without showing a civilian (or military) court any evidence—until the war on terrorism is officially declared to be over, or until the prisoner is no longer found to be a danger to the United States.⁷⁸ Under this policy, 660 Taliban and terrorist suspects, including a handful of U.S. citizens, were imprisoned at the naval base at Guantánamo

⁷⁷ See Military Order of 13 November 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

⁷⁸ *Ex parte Quirin*, 317 U.S. 1 (1942). In 1942, eight Nazi German saboteurs were captured by the FBI. They had entered the United States by submarine, shed their uniforms, and planned to use explosives in attacks on American war industries. The president proclaimed that enemies who entered the United States to commit “hostile or warlike acts should be promptly tried in accordance with the laws of war.” Proclamation No. 2561, of July 2, 1942, 7 Fed. Reg. 5101, 56 Stat. 1964. The Supreme Court denied

Bay, Cuba, and at other U.S. military installations, without meaningful access to legal counsel.⁷⁹

The expansion of executive power in this area did not go unchallenged. The judicial branch began its efforts to rein in the overreaching executive in the cases of two enemy combatants who were also U.S. citizens: Yaser Esam Hamdi and Jose Padilla.

Hamdi, a dual U.S. and Saudi citizen born in Louisiana, was captured in combat in Afghanistan. He was designated an enemy combatant and transferred to a Navy brig in Charleston, South Carolina, where he was kept in solitary confinement and barred from seeing a lawyer for two years. He was not charged with a crime and not allowed to contest the Bush administration's claims against him. Bush administration officials argued that merely allowing Hamdi to meet with a lawyer could jeopardize national security and ongoing intelligence operations. They claimed that Hamdi might even attempt to pass concealed messages through unwitting intermediaries.⁸⁰

In January 2003, the Supreme Court dealt an initial blow to executive privilege and decided to hear Hamdi's case. In late June 2004, the Court rejected the Bush administration's assertions that the president had unilateral authority as commander in chief to detain enemy combatants indefinitely without charge, trial, or access to legal counsel. "Due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker," the Court held, ruling 8-1. In the words of Associate Justice Sandra Day O'Connor, "A state of war is not a blank check for the president when it comes to the rights of the nation's citizens." The Court also noted, significantly, that the president's authority to label someone an "enemy combatant" was not inherent in the Constitution but, rather, an authority bestowed by Congress, through specific legislation.⁸¹

After suffering defeat at the hands of the Supreme Court, the Bush administration faced a decision to either press criminal charges against Hamdi or release him. Surprisingly, after justifying Hamdi's detention on the grounds that he posed a grave threat to U.S. national security, the Bush administration decided not to press criminal charges against him. In September 2004, Hamdi was released from custody and flown home to Saudi Arabia.⁸²

the saboteurs their writs of *habeas corpus* and further argued that citizenship was irrelevant to "enemy belligerent" status.

⁷⁹ "Guantanamo Bay: Empty Beds, Empty Stomachs," *The Economist*, 24 September 2005, 38.

⁸⁰ "Freeing Mr. Hamdi," editorial, *Washington Post*, 24 September 2004, A24.

⁸¹ U.S. Supreme Court, *Hamdi v. Rumsfeld*, Secretary of Defense, et al., no. 03-6696, decided 28 June 2004.

⁸² For more details on the Hamdi case, see "Hamdi Voices Innocence, Joy about Reunion: Man Held as Enemy Combatant Now Back in Saudi Arabia," CNN.com, 14 October 2004, available at <http://www.cnn.com/2004/WORLD/meast/10/14/hamdi/>; and "The Hamdi Backflip," editorial, *Washington Post*, 12 August 2004, A22.

The case of Jose Padilla followed a similar course. Padilla was a U.S. citizen arrested at Chicago's O'Hare airport on suspicion of intent to detonate a "dirty bomb."⁸³ Like Hamdi, Padilla was transferred to a military brig in Charleston, South Carolina. In December 2003, a U.S. Court of Appeals ruled that the president lacked the statutory and constitutional authority to indefinitely hold a U.S. citizen arrested on U.S. soil. The court held that Padilla had to be released from custody within thirty days.⁸⁴ Not yet willing to concede defeat, the Bush administration appealed the decision.⁸⁵

Padilla then lost much time when, in June 2004, the Supreme Court refused to hear his case due to legal technicalities. (Padilla's lawyers had filed his case in New York City against Secretary of Defense Donald Rumsfeld instead of in South Carolina against the commander of the military brig where he was being held.⁸⁶) Eight months later, the appeal was finally heard in its proper venue and again a court contravened the administration's wishes. In February 2005, a federal district judge in South Carolina ruled that the Bush administration had greatly overstepped its authority in detaining Padilla for nearly three years without charging him with a crime, and it ordered that he be released within forty-five days.⁸⁷ Padilla's defense attorney understood the significance of the ruling immediately, noting that "it is confirmation that the Constitution is alive and well and kicking."⁸⁸

The government immediately appealed the decision. In September 2005, a higher court ruled that Padilla's detention was indeed lawful, but that decision was appealed to the Supreme Court.⁸⁹ Legal experts predicted that the circumstances of the Supreme Court case heavily favored Padilla.⁹⁰ Fearing another loss in a Supreme Court showdown, the administration finally

⁸³ A "dirty bomb," or radiological dispersion device, combines a conventional explosive with radioactive material. Most of the deaths from a dirty bomb explosion would likely be due to the conventional munitions. The radioactive materials in a dirty bomb could cause panic but would probably not lead to severe illness or death. For this reason, dirty bombs are sometimes called weapons of mass disruption.

⁸⁴ U.S. Court of Appeals for the Second Circuit, *Jose Padilla v Donald Rumsfeld*, no. 03-2235 (L); 03-2438 (Con.), argued 17 November 2003, decided 18 December 2003.

⁸⁵ David Stout, "Supreme Court Expands Review of Enemy Combatant Cases," *New York Times*, 9 January 2004, available at <http://www.nytimes.com/2004/01/09/national/09CND-SCOT.html?ex=1130821200&en=e8938894a679288a&ei=5070>.

⁸⁶ U.S. Supreme Court, *Rumsfeld v Padilla*, no. 03-1027, decided 28 June 2004.

⁸⁷ U.S. District Court for the District of South Carolina, *Jose Padilla v Commander C. T. Hanft*, no. 2:04-2221-26AJ, decided 28 February 2005.

⁸⁸ Phil Hirschrom, "Federal Judge: Charge Padilla or Release Him," CNN.com, 1 March 2005.

⁸⁹ U.S. Circuit Court of Appeals for the Fourth Circuit, *Padilla v Hanft*, no. 05-6396, decided 9 September 2005; and Gina Holland, "Terror Suspect Takes Case to High Court," Associated Press, 27 October 2005.

⁹⁰ They argued that a key difference between the Padilla and Hamdi cases is that Padilla was arrested in the United States, whereas Hamdi was arrested on a battlefield in Afghanistan. This raises the burden of proof for the government in the Padilla case. See Neil A. Lewis, "Judge Says U.S. Terror Suspect Can't Be Held as an Enemy Combatant," *New York Times*, 28 February 2005, available at <http://www.nytimes.com/2005/03/01/politics/01terror.html?ex=1267419600&en=7f8871e1943f70f8&ei=5090&partner=rssuserland>; and Jerry Markon, "U.S. Can Confine Citizens without Charges, Court Rules," *Washington Post*, 10 September 2005, A01.

relented. In November 2005, the administration released Padilla from enemy-combatant status and charged him in a civilian criminal court.⁹¹

Judicial constraints on excessive executive privilege extended beyond the detention of U.S. citizens. In another case heard by the Supreme Court, *Rasul v. Bush*, the Court ruled 6-3 that foreigners being held by the United States as enemy combatants also have the legal right to challenge their detention in U.S. courts, again effectively repudiating the notion of unilateral presidential authority to conduct the war on terrorism.⁹²

In response to the ruling, the Pentagon released guidelines for the establishment of Combatant Status Review Tribunals (CSRTs), venues in which detainees could contest their status as enemy combatants in front of an independent tribunal with the aid of a personal legal representative.⁹³ Trials began in 2004 and, almost immediately, a slow trickle of prisoners was set free from Guantánamo as the tribunals found that they had been incorrectly classified as enemy combatants. In total, the CSRT process led to the release of thirty-eight wrongfully detained prisoners.⁹⁴

Still, the judiciary was not yet satisfied with the constitutionality of administration detention policy, and it began challenging the legality of the Pentagon's review tribunals themselves. On 1 February 2005, District Judge Joyce Hens Green ruled that the special military reviews were illegal and that foreign prisoners have the right to challenge their detention in U.S. civilian courts.⁹⁵ Legal experts observed that Green's decision reflected the fact that "our democratic institutions are working and are here to make sure we stay in line with the principles upon which our country was founded."⁹⁶ Green's decision eventually paved the way for the detainees to win access to U.S. civilian courts. Contrary to the administration's wishes, Congress passed legislation granting the detainees the right to appeal the verdict of a military tribunal to a federal appeals court.⁹⁷

Partly as a result of this sustained judicial branch pressure, the government apparently decided that the costs of holding enemy combatants were prohibitive. Besides releasing prisoners through the CSRT process, the

⁹¹ Fred Barbash, "Padilla's Lawyers Suggest Indictment Helps Government Avoid Court Fight," *Washington Post*, 22 November 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/22/AR2005112201061.html>.

⁹² U.S. Supreme Court, *Rasul v. Bush*, no 03-334, decided 28 June 2004.

⁹³ "Combatant Status Review Tribunal Order Issued," 7 July 2004, no. 651-04, available at <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>.

⁹⁴ Josh White, "3 Guantanamo Detainees Freed," *Washington Post*, 21 July 2005, A02.

⁹⁵ Joyce Hens Green, U.S. District Court for the District of Columbia, "Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law," in regard to Guantánamo Detainee Cases 02-CV-0299, 02-CV-0828, 02-CV-1130, 04-CV-1135, 04-CV-1136, 04-CV-1137, 04-CV-1144, 04-CV-1164, 04-CV-1194, 04-CV-1227, and 04-CV-1254, decided 31 January 2005.

⁹⁶ Carol D. Leonnig, "Judge Rules Detainee Tribunals Illegal," *Washington Post*, 1 February 2005, A01.

⁹⁷ Jonathan Weisman, "Senators Agree on Detainee Rights: Deal Would Allow Some Court Access," *Washington Post*, 15 November 2005, A01.

Pentagon also began transferring detainees to their home countries. Secretary of Defense Rumsfeld stated, “Our goal is not to have these people. Our goal is . . . to have them . . . in the hands of the countries of origin for the most part.”⁹⁸ According to Deputy Assistant Secretary of Defense for Detainee Affairs Matthew Waxman, “the United States has released or transferred close to 250 Guantánamo detainees, to about a dozen countries, including Afghanistan, Pakistan, Saudi Arabia, Russia, Australia, the United Kingdom, and France.”⁹⁹

The number of released detainees will soon increase further. Recent agreements with the government of Afghanistan will repatriate the 110 remaining Afghans in Guantánamo, and a similar agreement with Saudi Arabia would send another 100 people home.¹⁰⁰ The State Department is currently negotiating other agreements to repatriate many of the remaining Guantánamo inmates.¹⁰¹ The prisons at Guantánamo Bay are slowly being emptied.

It is unlikely that the Guantánamo prisons will have an influx of new occupants anytime soon. No new inmates have been brought to Guantánamo since September 2004.¹⁰² According to Waxman, “terrorists must be captured and prevented from returning to the global battlefield. But it need not—nor in many cases should it—be the United States that detains them for the long term.”¹⁰³

This example of enemy combatants illustrates the way in which the separation of powers has a governing effect on war-induced impulses toward state building. Although the executive branch took the early initiative to increase its powers of detention in fighting the war on terrorism, the federal judiciary has steadily and successfully fought to limit the executive’s ability to indefinitely detain prisoners designated as enemy combatants. Executive powers of detention are on the retreat. In accordance with Madison’s plan, the separation of powers is an institutional mechanism that limits American state building, even in times of war.

Enhancing Cyber-Security to Protect Critical Infrastructures

As the state seeks to expand power in wartime, interest groups draw on their institutional influence to oppose expansions detrimental to their particular interests. Proposals to strengthen the state by increasing government authority or oversight or by mandating private sector action can be vigorously

⁹⁸ As quoted in “Empty Beds, Empty Stomachs,” *The Economist*, 22 September 2005, 38.

⁹⁹ Matthew Waxman, “Beyond Guantanamo,” *Washington Post*, 20 August 2005, A17.

¹⁰⁰ “Empty Beds, Empty Stomachs.”

¹⁰¹ Josh White, “Guantanamo Staffing to Be Reduced about 20%,” *Washington Post*, 22 February 2006, A06.

¹⁰² *Ibid.*

¹⁰³ Waxman, “Beyond Guantanamo.”

contested by interest groups. The American system's openness to interest-group pressure limits the degree to which state power can encroach on private turf, even in times of war. In the following case study, information-technology (IT) organizations used their access to the policy-making process to reject a government proposal to strengthen cyber-security.

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

Americans had already been alerted to the vulnerability of critical infrastructure to security breaches in interconnected computer networks in the 1990s. The explosive growth of the Internet had linked more than 100 million computers, exposing hundreds of thousands of machines to various types of cyber-attack at any hour of the day or night. A series of high-profile viruses such as Melissa and the Love Bug garnered significant media attention.¹⁰⁴ During that period, the Clinton administration prepared a National Plan for Information Systems Protection. Released in January 2000, it was developed under the direction of Richard Clarke, a member of the staff of the National Security Council.¹⁰⁵

Exactly one week after September 11, the Nimda worm (a virus-like computer program that replicates itself) infected and shut down 100,000 computers within twenty-four hours. In response, President Bush issued Executive Order 13231, establishing a more focused effort to protect information systems related to critical infrastructures.¹⁰⁶ Development of the Bush administration's new cyber-security strategy was directed by Clarke, who had already gained widespread attention with his warning that the U.S. risked "a

¹⁰⁴ Computer Emergency Response Team (CERT) Coordination Center, "CERT Advisory 1999-04 Melissa Macro Virus," 27 March 1999, <http://www.cert.org/advisories/CA-1999-04.html>; and "Love Bug Virus Running Amok," *Wired News*, 4 May 2000, http://www.wired.com/news/technology/0,1282,36113,00.html?tw=wn_story_related. This was also the period during which much media-hyped attention was directed at the looming "crisis" that might be caused by "the Y2K problem"—the concern that major computer-controlled systems and infrastructures might go haywire if internal clocks were to mistakenly interpret the date 1 January 2000 as 1 January 1900.

¹⁰⁵ The White House, "Defending America's Cyberspace: National Plan for Information Systems Protection, Version 1.0, An Invitation to Dialogue," January 2000, available at <http://www.fas.org/irp/offdocs/pdd/CIP-plan.pdf>.

¹⁰⁶ CERT Coordination Center, "CERT Advisory 2001-26 Nimda Worm," 18 September 2001, <http://www.cert.org/advisories/CA-2001-26.html>; and the White House, "Executive Order 13231, Critical Infrastructure Protection in the Information Age," 16 October 2001, <http://www.whitehouse.gov/news/releases/2001/10/20011016-12.html>.

digital Pearl Harbor” if strong steps were not taken soon to improve computer security.¹⁰⁷

A draft of the Bush administration’s new national cyber-security strategy was released in time for the first anniversary of the al Qaeda attacks in September 2002.¹⁰⁸ It contained several features aimed specifically at overcoming disincentives for private investment in computer security. Although the strategy was designed to leave implementation in private hands, it employed a combination of regulatory tools to align private incentives with the public interest.

The draft strategy recommended that private IT firms tell the federal government about the security flaws in their software products or the security vulnerabilities of their internal networks.¹⁰⁹ To facilitate industry-wide sharing of this and other pertinent security information, other draft sections of the national strategy proposed that the industry develop government-mandated standards for the interoperability of computer systems.¹¹⁰ Related provisions would have mandated testing to expose security vulnerabilities in products and systems before terrorists were able to exploit them. Periodic testing would have been used to ensure that systems and software complied with new industry-wide security standards.¹¹¹

Another section of the draft proposed that IT firms contribute to a national fund to help the federal government pay for installing security enhancements for the Internet.¹¹² Clarke had been quoted as saying that an Internet service provider selling high-speed Internet access without protective software was like “selling a car today without a seat belt”; Clarke even suggested that Internet service providers should be required to distribute firewall and antivirus software to their customers.¹¹³ The draft even raised the notion of creating a secure new government communications network separate from the Internet that would make the computer systems that control critical infrastructure less vulnerable to terrorist attack.¹¹⁴

¹⁰⁷ Many computer security experts question the Pearl Harbor analogy, believing there are easier targets for terrorists to attack and that there is too much redundancy in most computer-operated infrastructures for them to fail completely or for long. There is, however, a strong consensus that a terrorist cyber attack is possible, probably as an adjunct to a physical attack. Many cyber attacks are now almost completely automated; they can also be embedded with “sleepers” commands that could conceivably be pre-programmed to coordinate a cyber attack with a physical terrorist attack on some future date.

¹⁰⁸ President’s Critical Infrastructure Protection Board, “National Strategy to Secure Cyberspace.”

¹⁰⁹ *Ibid.*, recommendations R2-5, R3-15, R4-25, and R4-26.

¹¹⁰ *Ibid.*, recommendations R2-5, R3-17, and R4-39.

¹¹¹ *Ibid.*, recommendations R2-2, R2-7, R3-1, R3-2, R3-5, R3-10, R3-17, R4-14.

¹¹² *Ibid.*, recommendation R4-4.

¹¹³ Clarke’s “seat belt” analogy appears in many of his speeches; he first made the comment publicly in a speech to computer security practitioners in Las Vegas in August 2002. See Ann Saita, “Cybersecurity Czar Takes Aim at Private Industry,” *Security Wire Digest* 4, no. 58 (5 August 2002); and Robert Lemos, “Security Czar Points Finger of Blame,” CNET News.com, 31 July 2002, available at http://news.zdnet.com/2100-1009_22-947409.html.

¹¹⁴ President’s Critical Infrastructure Protection Board, “National Strategy to Secure Cyberspace,” recommendation R3-6.

Perhaps Clarke's boldest recommendation was that wireless networks be shut down entirely until their security could be demonstrably improved. Wireless communications are especially difficult to secure; Clarke had been quoted as calling them "inherently" insecure.¹¹⁵ As wireless Internet connections became more pervasive, the draft noted, the insecurity of these networks could leave critical systems vulnerable to attack.¹¹⁶

Some IT experts also argued for the immediate inclusion of provisions that would assign clear legal liability for computer-security breaches.¹¹⁷ Software producers or network owners would be made legally accountable for damages caused by security breaches traced to their products or systems. Among other improvements, such a provision would presumably create a strong new economic incentive for Internet service providers to screen data traffic for evidence of possible attacks.

Once again, however, an executive-branch security initiative would be thwarted by America's political institutions. In this case, the system's openness to the influence of private interest groups prevented the expansion of state authority. The U.S. system is permeable to interest-group pressure, and since 85 percent of the computer-operated critical infrastructure in the United States is privately owned and operated, the cyber-security problem demanded heavy private involvement from the beginning.¹¹⁸

The state's inability to formulate an effective cyber-security policy on its own was recognized by the Clinton administration when it formed the President's Commission on Critical Infrastructure Protection on 15 July 1996.¹¹⁹ This commission was charged with developing a national policy and an implementation strategy for protecting critical American infrastructures from both physical and cyber-threats. Fully half of the commission members were executives from private companies and organizations. Moreover, the commission included a presidentially appointed advisory committee made up of key industry leaders. Despite this significant involvement of the private sector throughout the process, the subtitle of the subsequent cyber-plan, "Version

¹¹⁵ Clarke made this recommendation in public speeches. Although the recommendation did not make it into the draft, the IT industry leaders were still troubled by this recommendation, perhaps fearing that it would re-emerge in the final version of the strategy. See Saita, "Cybersecurity Czar."

¹¹⁶ President's Critical Infrastructure Protection Board, "National Strategy to Secure Cyberspace," 41.

¹¹⁷ Erin Kenneally, "Who's Liable for Insecure Networks?" *Computer* 35, no. 6 (June 2002): 93–95; Stewart D. Personick and Cynthia A. Patterson, eds., *Critical Infrastructure Information Sharing and the Law: An Overview of Key Issues* (Washington: Committee on Critical Information Infrastructure Protection and the Law, National Research Council, 2003); Michael Rassmussen, "IT Trends 2002: Security Standards and Compliance," *Ideabyte*, 15 January 2002, available at http://images.telos.com/files/external/Giga.IT_Trends_2002.pdf; and Hal Varian, "Managing Online Security Risks," *New York Times*, 1 June 2000, C2.

¹¹⁸ Percentage cited in Robert Lemos, "Government Unveils Cybersecurity Plan," *CNET News*, 8 September 2002, available at <http://news.com.com/2100-1023-956353.html>.

¹¹⁹ See Robert Marsh, "Critical Foundations: Protecting America's Infrastructure," the Marshall Institute, 12 November 1997, available at <http://www.marshall.org/article.php?id=65>.

1.0, An Invitation to Dialogue,” signaled the desire of the administration for even further input from the private sector.¹²⁰

President Bush invited even more private sector involvement in cyber-security planning by establishing the Critical Infrastructure Protection Board. This board included a standing Committee on Private-Sector and State and Local Government Outreach, as well as a National Infrastructure Advisory Council composed of thirty members from the private sector responsible “for the security of information infrastructure supporting the critical sectors of the economy, including banking and finance, transportation, energy, communications, and emergency government services.”¹²¹

Interest groups used their access to the policy-making process to reshape government cyber-security initiatives to better reflect their private interests. Key industry organizations lobbied to weaken government control over cyber-security, both from the inside (many private officials were on formal governmental advisory groups) and from the outside, speaking out against the government’s cyber-security plans in the media and in public summits with Homeland Security Director Ridge and other officials of his office.¹²²

The draft strategy had suggested a combination of government regulations and mandatory technical standards to overcome the economic disincentives for investment in expensive security enhancements. In a National Infrastructure Advisory Council teleconference with Clarke, IT industry leaders insisted that the government should encourage—but not mandate—improved computer security solely through its procurement decisions.¹²³ “The government [should] settle on a set of standards for their own use, but not dictate a set of standards,” said the Symantec Corporation’s chief executive officer, John Thompson.¹²⁴

The Business Software Alliance (BSA) would not go even that far in the direction of inviting government intervention. In a written response to the Bush administration’s draft strategy, the BSA objected to the notion of a federal certification program, or even a “seal of approval” program for security products, and strongly resisted the notion of a new standards-setting organization. “We can foresee only duplication of existing efforts or, of more

¹²⁰ The White House, “Defending America’s Cyberspace.”

¹²¹ The White House, “Executive Order 13231, Critical Infrastructure Protection in the Information Age.”

¹²² Elise Ackerman, “Summit in California’s Silicon Valley to Focus on Cybersecurity,” *San Jose Mercury News*, 3 December 2002.

¹²³ Archived minutes of meetings of the National Infrastructure Advisory Council (NIAC) are available online at http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0353.xml; see also Carson Carlson, “IT Resists Mandatory Cyber Security,” E-week.com, 8 January 2003, available at <http://www.eweek.com/article2/0,3959,813715,00.asp>.

¹²⁴ As quoted in Carlson, “IT Resists Mandatory Cyber Security.”

concern, government-guided efforts at regulation from such a body, either directly or through the migration of procurement specifications.”¹²⁵

Other IT industry leaders argued that regulations such as mandatory testing and interoperability requirements would be an impossible burden on small companies and would reduce incentives for innovation in the fast-moving IT sector.¹²⁶ They objected that mandatory information sharing about security flaws would open them up to lawsuits for violations of privacy or antitrust laws.¹²⁷ They flatly rejected the notion of mandatory contributions to a fund that would identify and address security enhancements to the Internet. Such a fund, wrote the BSA in its comments, “could become a hidden tax on industry and a mechanism for aggressive regulation.”¹²⁸

Under intense industry pressure, the White House announced that delivery of the draft recommendations to the president would be delayed for two months to allow for additional “public comment.”¹²⁹ During those two months, all of the government mandates were dropped. Information sharing and interoperability requirements, assignment of liability for IT security breaches, mandatory industry contributions to a national computer-security fund, and restrictions on the use of insecure wireless networks all disappeared from government plans. By the time the final National Strategy to Secure Cyberspace was released in February 2003, it depended instead on exhortation and, to a lesser extent, on the indirect impact of government procurement.¹³⁰ Even then, individual federal agencies were left free to set their own, possibly inconsistent, security requirements.

September 11 drew the country’s attention to the vulnerability of America’s ubiquitous computer networks. U.S. officials drafted a tough national strategy to secure cyberspace that would have increased government control over the nation’s information networks, but that would also have greatly impinged on the interests of private IT firms. In response, interest groups leveraged their access to the policy-making process to strip away provisions of the strategy to better align public policy with their private interests, in the process preventing a potential expansion of state power.

The Organization of Domestic Intelligence

Bureaucratic politics is an important inhibitor of state building, because war often triggers attempts to expand state power through the creation of new

¹²⁵ Carlson, “IT Warns Against Slippery Slope.”

¹²⁶ Archived minutes of NIAC meetings; and Carlson, “IT Resists Mandatory Cyber Security.”

¹²⁷ Personick and Patterson, *Critical Infrastructure Information Sharing*.

¹²⁸ Carlson, “IT Warns Against Slippery Slope.”

¹²⁹ “Feds Delay Release of Cyber-Security Plan,” E-week.com, 17 September 2002, available at http://www.findarticles.com/p/articles/mi_zdewk/is_200209/ai_ziff31142.

¹³⁰ White House, *The National Strategy to Secure Cyberspace*, February 2003, available at <http://www.whitehouse.gov/pcipb/>.

bureaucracies. When the objectives of proposed organizations overlap, compete, or conflict with functions performed by existing organizations, those existing bureaucracies can leverage their influence to smother a new organization in its cradle. In the case study to follow, proposals for the creation of a domestic version of the CIA were thwarted by bureaucratic actors with a pre-existing stake in the intelligence game.

As the war-makes-the-state model might anticipate, the attacks of September 11, and the failure of either the FBI or the CIA to stop them, generated significant pressure to strengthen the federal government's ability to gather and analyze domestic intelligence. The most controversial of the proposals toward this end envisioned an American version of the British MI5—basically, a domestic version of the CIA.¹³¹ Yet despite substantial political support and high-level consideration, momentum toward the creation of a domestic spy agency slowed in the face of blistering opposition from civil libertarians and rival bureaucracies within the U.S. national security establishment.¹³² In the end, the option of organizing a new stand-alone domestic-intelligence service was rejected.

The impetus for the creation of a domestic intelligence agency after September 11 emanated from Congress. In October 2002, news began to leak that a domestic intelligence agency would be one of the recommendations from a joint congressional committee looking into the intelligence failures that led up to September 11. Senator Bob Graham (D-Fla.), chairman of the Senate Select Commission on Intelligence, and Senator John Edwards (D-N.C.) were reported to be two early proponents of the proposal.¹³³ Later that year, Edwards hinted at the need for a domestic-intelligence agency by criticizing the inability of the FBI to perform domestic intelligence. He argued that “asking a law-enforcement agency to manage intelligence is like trying to jam a square peg into a round hole.”¹³⁴ Soon other members of Congress came out in support of a domestic spy agency. In November 2002, Senator Richard Shelby (R-Ala.), the ranking member of the Senate Select Committee on Intelligence, declared, “We’re either going to create a working, effective, substantial domestic intelligence unit in the FBI or create a new

¹³¹ The most thorough and best known proposal is the bill introduced by Senator John Edwards (D-N.C.) in February 2003 to establish a Homeland Intelligence Agency: Foreign Intelligence Collection Improvement Act of 2003, S. 410, introduced 13 February 2003.

¹³² For examples of resistance by civil libertarians, see “ACLU Says Intelligence Czar Should Not Spy on Americans,” 9 December 2002, available at <http://www.aclu.org>; and “ACLU Criticizes Federal Commission.” For overviews of bureaucratic resistance, see Dana Priest and Dan Eggen, “Bush Aides Consider Domestic Spy Agency: Concerns of FBI’s Performance Spurs Debate of Options,” *Washington Post*, 16 November 2002, A1; and David Johnston, “Administration Begins to Rewrite Decades-Old Spying Restrictions,” *New York Times*, 30 November 2002, A1.

¹³³ Martin Kady II, “Lawmakers Put Domestic Spy Agency on Their Agenda,” *Congressional Quarterly Daily Monitor*, 15 October 2002, available at <http://www.smithbrandon.com/news.aspx?id=31>.

¹³⁴ Michael Isikoff and Mark Hosenball, “Terror Watch: At Odds,” *Newsweek*, 7 July 2004, available at <http://www.msnbc.msn.com/id/5388509/site/newsweek/>.

agency. . . . The results are dismal to this point.”¹³⁵ In December, the report issued by the joint congressional committee on intelligence recommended that Congress further study the idea of a domestic spy agency.¹³⁶

By November 2002, the idea of creating a U.S. version of MI-5 had migrated to the executive branch and was under serious consideration by the highest levels of the Bush administration. Early that month, Ridge, at that point still director of the White House Office of Homeland Security, traveled to London to be briefed on the operations of MI5. On Veteran’s Day, the principal national security officials in the Bush administration convened for two hours to discuss the possible creation of a U.S. agency modeled on MI5.¹³⁷

In sum, a little over one year after the terrorist attacks, the proposal to establish a domestic intelligence agency had drawn the attention and support of a diverse group of influential figures in both Congress and the Bush administration.

As had been the case with the Patriot Act, the ACLU played the role of the canary in the coal mine, mobilizing early opposition to the proposed domestic spy agency. In a series of press releases in late 2002, the ACLU argued that the creation of a domestic intelligence service would unconstitutionally undermine Americans’ civil liberties.¹³⁸

For others, the growing opposition to an American MI5 was motivated less by principle and more by bureaucratic politics. The creation of a new spy agency would presumably drain resources and prestige from existing departments that were already interested or involved in domestic intelligence. Some of the major bureaucratic players in the field of national security—the Department of Defense, the soon-to-be-created Department of Homeland Security, and the FBI—soon vigorously opposed the creation of a new spy agency that could impinge on their existing autonomy and preclude the expansion of their own bureaucratic missions to include domestic intelligence.

Secretary of Defense Rumsfeld hoped to secure greater clout for the Pentagon in this area and opposed the creation of the new agency. In an attempt by Rumsfeld to increase the intelligence role for the Department of Defense, he won congressional approval to establish a new position, the undersecretary of defense for intelligence.¹³⁹ The position was given to Steven Cambone, who declared that “the [Defense] department has an interest in

¹³⁵ Preist and Eggen, “Bush Aides Consider Domestic Spy Agency.”

¹³⁶ Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, *Report of the Joint Inquiry into the Terrorist Attacks of September 11, 2001*, released December 2002, <http://www.gpoaccess.gov/serialset/creports/911.html>.

¹³⁷ Officials in attendance included National Security Advisor Condoleezza Rice, White House Chief of Staff Andrew Card, Defense Secretary Donald Rumsfeld, Director of Central Intelligence George Tenet, Attorney General John Ashcroft, and FBI Director Robert Mueller. Priest and Eggen, “Bush Aides Consider Domestic Spy Agency.”

¹³⁸ “ACLU Says Intelligence Czar Should Not Spy on Americans,” and “ACLU Criticizes Federal Commission.”

¹³⁹ Johnston, “Administration Begins to Rewrite Decades-Old Spying Restrictions.”

having a robust domestic intelligence capability that can assist the department in its force protection obligations both at home and abroad.”¹⁴⁰

Ridge, who had already been tapped to be secretary of the nascent Department of Homeland Security, also became an outspoken critic of the proposed domestic intelligence agency. In public, Ridge cited constitutional law as a reason for doubting the feasibility of establishing a spy agency within U.S. borders and proposed that, for the time being, the task should remain with the FBI.¹⁴¹ But Ridge also had powerful organizational motives to derail spy agency proposals. In October 2002, a separate bipartisan panel of high-technology experts and former intelligence officials had recommended that the proposed DHS take over from the FBI collection and analysis of domestic intelligence. The DHS was also to be charged with coordinating the sharing of intelligence collected from all other government agencies.¹⁴² Moreover, many of the existing agencies that would soon compose the DHS, including the Customs Service and the Immigration and Naturalization Service, already had their own intelligence divisions. Thus, if he could undermine the creation of a separate spy agency, Ridge had good reason to believe that the DHS would soon enjoy the primary responsibility for domestic intelligence.

Perhaps the stiffest opposition to a domestic spy agency came from FBI Director Robert Mueller. Mueller immediately began reorganizing the FBI to supplement the bureau's traditional focus on law enforcement with a new division devoted to counterterrorist intelligence. Among Mueller's initiatives was the creation of a National Joint Terrorism Task Force at FBI headquarters, including a round-the-clock Counterterrorism Watch Center. Mueller also established sixty-six satellite Joint Terrorism Task Forces across the United States to work with state and local law-enforcement officials to uncover and disrupt terrorist plots. New rapid reaction counterterrorist “Flying Squads” were created to enable the FBI to deploy agents to the field at a moment's notice in response to a terrorist strike.¹⁴³

To advance Mueller's organizational initiatives, the Justice Department introduced a number of changes to its Attorney General Guidelines to unshackle the FBI.¹⁴⁴ The revised guidelines gave the FBI greater freedom to

¹⁴⁰ Doug Sample, “DoD Intel Chief Addresses 9/11 Commission Recommendations,” American Forces Information Service, 11 May 2005, available at http://www.defenselink.mil/news/Aug2004/n08112004_2004081105.html.

¹⁴¹ Johnston, “Administration Begins to Rewrite Decades-Old Spying Restrictions.”

¹⁴² Markle Foundation Task Force on National Security in an Information Age, “Protecting America's Freedom in an Information Age,” 7 October 2002, available at <http://www.markletaskforce.org>. Members of the task force included Ashton Carter, Wesley Clark, Sidney Drell, John Gage, Morton Halperin, John Hamre, Judith Miller, and Philip Zelikow, among others.

¹⁴³ Office of the Press Secretary, the White House, “Fact Sheet: Strengthening Intelligence to Better Protect America,” 14 February 2003, available at <http://www.whitehouse.gov/news/releases/2003/02/20030214-1.html>.

¹⁴⁴ The guidelines had been introduced in the 1970s in response to perceived FBI abuses in the last decades of the J. Edgar Hoover era, which included spying on law-abiding civil rights activists and anti-war protesters.

pursue investigations before a crime had been alleged, to purchase data mined by private companies from public databases, and to conduct secret surveillance of domestic political and religious organizations.¹⁴⁵

Mueller lobbied vigorously to maintain and augment the FBI's intelligence-gathering responsibilities. In a speech to a New York City group in December 2002, Mueller called the creation of a new spy agency "a step backward in the war on terror."¹⁴⁶ Mueller also made a personal appeal to Senator Edwards in an attempt to persuade him not to introduce congressional legislation on a new domestic intelligence agency.¹⁴⁷

In the aforementioned November 2002 meeting with other national security officials and in testimony delivered to Congress, Mueller asserted that the collection of counterterrorist intelligence had become the FBI's number one priority.¹⁴⁸ Mueller was also supported by his boss, Attorney General John Ashcroft, who argued that "the establishment of a separate, distinct agency would be to move in the other direction. . . . Instead of to integrate and cooperate and communicate, it would be to segregate."¹⁴⁹

In late November 2002, it was rumored that a high-level independent commission investigating the intelligence failures that led up to September 11 would also be recommending the creation of a domestic intelligence agency. To prevent this eventuality, Mueller paid a personal visit to the commission's chairman, former Virginia governor James Gilmore.¹⁵⁰ The Gilmore Commission responded by releasing an influential report that same month recommending against the creation of a full-blown domestic intelligence agency. Instead, the commission proposed a fusion center where foreign intelligence and domestic law-enforcement information could be integrated. The center's mission was limited to the issue of counterterrorism.¹⁵¹

In his 2003 State of the Union address, less than six weeks after the release of the Gilmore Commission report, President Bush pre-empted further debate on domestic intelligence by calling for the creation of the Terrorist Threat Integration Center (TTIC).¹⁵² The center outlined by Bush largely matched the one proposed by the Gilmore Commission. The TTIC would be

¹⁴⁵ The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, 30 May 2002, available at <http://www.usdoj.gov/olp/generalcrimes2.pdf>. For background and analysis, see Center for Democracy and Technology (CDT), "CDT's Analysis of New FBI Guidelines," 30 May 2002, available at <http://www.cdt.org/wiretap/020530guidelines.shtml>.

¹⁴⁶ Robert Mueller, "Speech to Citizens Crime Commission of New York City," 19 December 2002, available at <http://www.fbi.gov/pressrel/speeches/milsteinlecture.htm>.

¹⁴⁷ Michael Isikoff and Mark Hosenball, "Terror Watch: At Odds."

¹⁴⁸ Priest and Eggen, "Bush Aides Consider Domestic Spy Agency."

¹⁴⁹ "A New Spy Agency?" editorial, *Washington Post*, 28 November 2002, A46.

¹⁵⁰ Priest and Eggen, "Bush Aides Consider Domestic Spy Agency."

¹⁵¹ "Fourth Annual Report to the President and the Congress of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction" (Gilmore Commission Report), 15 December 2002, available at <http://www.rand.org/nsrd/terrpanel>.

¹⁵² George W. Bush, "State of the Union Address," 28 January 2003, available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

an information clearinghouse staffed by analysts detailed from six federal security agencies and whose director would report to the head of the CIA. The TTIC would be a fusion center, not a stand-alone intelligence agency. The TTIC's first director, John O. Brennan, said that "it is important to note that TTIC does not engage in any collection activities nor does it engage in operations of any kind."¹⁵³ Existing government intelligence agencies and departments seemed satisfied with the TTIC's limited role and the expansion of their empires that it potentially represented.¹⁵⁴

The reformation of the intelligence community did not end with the creation of the TTIC, but high-level consideration of a domestic intelligence agency did. For the next two years, pundits continued to debate the merits and prospects of intelligence reform, and commissions worked and released reports on the need for organizational change.¹⁵⁵ Some experts continued to extol the virtues of a domestic intelligence agency, but the mainstream debate had moved on to discuss the pros and cons of creating a director of national intelligence.¹⁵⁶

Nevertheless, Mueller continued to defend the ability of the FBI to perform domestic counterterrorism, and his public relations campaign continued to reap bureaucratic dividends.¹⁵⁷ In the December 2004 Intelligence Reform

¹⁵³ John O. Brennan, "Statement for the Record of John O. Brennan, Director, Terrorist Threat Integration Center, Before the House of Representatives Committee on the Judiciary and the House of Representatives Select Committee on Homeland Security," 22 July 2003, available at <http://judiciary.house.gov/legacy/brennan072203.htm>.

¹⁵⁴ An FBI representative stated, "The FBI strongly supports the formation of the Terrorist Threat Integration Center (TTIC) and is proud to be a partner with the CIA, the Department of Homeland Security, the Department of Defense, and all the other participating agencies." Testimony of Pasquale J.D. Amuro, executive assistant director for counterterrorism/counterintelligence, FBI, at a hearing before the Senate Governmental Affairs Committee, "Consolidating Intelligence Analysis: Review of the President's Proposal to Create a Terrorist Threat Integration Center," 26 February 2003, available at <http://hsgac.senate.gov/files/shrg10854ttic.pdf>.

¹⁵⁵ Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, "Final Report to the President," 31 March 2005, available at <http://www.wmd.gov/report>; and National Commission on Terrorist Attacks upon the United States (9/11 Commission), *9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (New York: Norton, 2004).

¹⁵⁶ For arguments for and against a director of national intelligence, see Commission Hearings of the 9/11 Commission, 14 October 2003, available at http://www.9-11commission.gov/archive/hearing4/9-11commission_hearing_2003-10-14.htm; Alfred Cumming, "The Position of Director of National Intelligence: Issues for Congress," Congressional Research Service Report for Congress, 12 August 2004, available at <http://www.fas.org>; John Prados, "Intelligence: No Easy Fix," *Bulletin of the Atomic Scientists*, September–October 2004, 17–19; John F. Kerry, "Making America Secure Again: Setting the Right Course for Foreign Policy," Speech to the Council on Foreign Relations, 3 December 2003, available at <http://www.cfr.org/publication.html?id=6576>; Office of Senator Dianne Feinstein (D-Calif.), "Sponsors of Senate Bill to Create Director of National Intelligence Urge President to Support their Legislation," 3 August 2004, available at <http://feinstein.senate.gov/04Releases/r-bush-dni-ltr.html>.

¹⁵⁷ For example, in testimony before the House Appropriations Committee in June 2004, Mueller discussed the FBI's "vision to enhance [its] enterprise-wide intelligence capabilities." He argued that, for two and a half years, the FBI "had been transforming and realigning resources to combat international terrorism" and was now dedicated to strengthening its intelligence program. Robert Mueller, Testimony Before the

Act, the TTIC was expanded and renamed the National Counterterrorism Center, but the subject of domestic intelligence was largely avoided, in essence leaving the authority for domestic intelligence with the FBI.¹⁵⁸ In a final set of institutional reforms, in June 2005, the president formally recognized the FBI's lead position on domestic intelligence.¹⁵⁹

Mueller's bureaucratic maneuvering won the FBI responsibility for domestic intelligence collection and analysis, but it could not improve the FBI's ability to perform this function.¹⁶⁰ Many independent analysts argued that the FBI is institutionally ill suited to perform as a spy agency. John MacGaffin, former associate deputy director of operations of the CIA, summed up the critique, citing unbridgeable "cultural differences" between organizations devoted to intelligence gathering and organizations, such as the FBI, that were traditionally devoted to law enforcement.¹⁶¹ Law-enforcement agencies are reactive, structured to catch and prosecute people who have already committed a crime. In contrast, effective intelligence agencies are proactive, collecting information (and protecting sources) that can help them prevent events from occurring in the first place. Mueller's lobbying, while successful in protecting organizational turf, won the FBI responsibility for a mission that it may not be able to execute.

IMPLICATIONS FOR THEORY AND PRACTICE

After September 11, many analysts presumed that the need to safeguard the U.S. homeland against further attack would lead inevitably to expanded powers and a larger role for the state. Indeed, as we have discussed, several proposals were made and some initiatives were actually undertaken to accomplish just that end. What is most striking about U.S. homeland security policy since September 11, however, is that the anti-statist mechanisms designed into America's domestic institutions have proven remarkably robust, even in a situation of constant danger.

House Appropriations Committee, Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, 3 June 2004, available at <http://www.fbi.gov/congress/congress04/mueller060304.htm>.

¹⁵⁸ Intelligence Reform and Terrorism Prevention Act, PL 104-408, 7 December 2004.

¹⁵⁹ Dan Eggen and Walter Pincus, "Bush Approves Spy Agency Changes," *Washington Post*, 30 June 2005, A01.

¹⁶⁰ For examples of some of the FBI's failures as it sought to remake itself as an intelligence agency, see Dan Eggen, "FBI Lags in Security," *Washington Post*, 21 October 2005, A08; and Terry Frieden, "Report: FBI Wasted Millions on Virtual Case File," *CNN.com*, 3 February 2005, available at <http://www.cnn.com/2005/US/02/03/fbi.computers>. The president's WMD commission also cited FBI problems in its final report. See Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Final Report to the President*, 31 March 2005, available at <http://www.wmd.gov/report>.

¹⁶¹ Gary Thomas, "CIA Identity Flap Sparks Debate over Need for New Domestic Intelligence Agency," *Voice of America*, 30 September 2003, available at <http://www.iwar.org.uk/news-archive/2003/09-30-5.html>.

Three features of the Madisonian design have triggered more or less automatic resistance to a significant expansion or further concentration of state power: the separation of powers at the federal level among three co-equal branches, the openness of the policy-making system to interest-group pressure, and the intensity with which executive-branch bureaucracies guard their organizational turf. Congress and the judiciary have reflexively asserted their institutional prerogatives against declarations of unilateral presidential authority. The case study of prisoner detention showed how the executive branch took the early initiative to increase its powers to fight the war on terrorism, but the federal judiciary has steadily and successfully fought to limit the executive's ability to detain enemy combatants. Private interests have also successfully resisted government proposals, preserving instead a degree of freedom for industry self-regulation. In the case study of cyber-security, we saw that IT industry organizations used their access to the policy-making process to reject government proposals that sought to undermine private independence in cyber-security. Bureaucratic politics prevented the creation of new executive-branch bureaucracies that would compete with existing organizational actors. The case study on the proposed creation of a domestic version of the CIA demonstrated that an initiative to create a new intelligence bureaucracy was thwarted by actors with a pre-existing stake in the intelligence game. These actors leveraged their insider position to effectively guard their organizational turf.

These findings have important implications for both theory and practice. Theoretical approaches to war and state building can usefully incorporate domestic political structure as a key intervening variable. International crises do empower states to seek greater authority, but power-seeking states also engender domestic resistance, and the institutional arena in which the domestic political struggle plays out varies cross-nationally. In the United States, a liberal institutional structure tilted in society's favor curtailed most of the state's efforts at self-empowerment.

In states with less well developed domestic institutional barriers to state expansion, we should expect war-induced state building to face less resistance. For example, after the Chechen terrorist attack on the Beslan schoolhouse in September 2004, Russian president Vladimir Putin sought to strengthen the state's hand to deal with the terrorist threat. Given his country's lack of institutionalized sources of restraint, Putin was able to quickly expand the power of the Russian state.¹⁶²

¹⁶² Fiona Hill, "Governing Russia: Putin's Federal Dilemmas," *New Europe Review*, January 2005, available at <http://apps49.brookings.edu/views/articles/hillf/20050104.htm>; "The Kremlin Is Going Too Far," editorial, *Financial Times*, 14 September 2004, available at <http://www.guardian.co.uk/editor/story/0,1304552,00.html>; and Oksana Yablokova, "Duma Gives Nod to Putin's Governors Bill," *Moscow Times*, 1 November 2004, available at <http://www.rusnet.nl/news/2004/11/01/print/currentaffairs02.shtml>.

Cross-national variation in patterns of state building may be more nuanced than a simple democratic-authoritarian divide. The United States is the prototypical weak state.¹⁶³ In polities with more statist traditions and fewer veto points, societal institutions may be less able to resist the state's efforts at expansion to deal with security threats. This study opens up a potentially rich research agenda on the effect of domestic political structure on the relationship between war and state building.

In locating the causes of U.S. homeland security policy in the interaction between the external environment and the internal politics of the United States, this article contributes to a two-decade-long effort in the field of security studies to incorporate domestic politics into explanations of international security.¹⁶⁴ Most of the extant literature is located at the second-image level of analysis, explaining how domestic characteristics influence international outcomes. This account reverses the causal arrows and focuses on how international forces are funneled through domestic channels before affecting domestic security policies. This type of approach may be uniquely suited to explaining how states develop diverse domestic counterterrorism policies in response to a similar international terrorist threat.¹⁶⁵

The findings presented here also have interesting implications for our understanding of how the power of the American state has changed over time. We largely agree with the conventional view that there has been a pattern of shock-induced state expansion in the United States from the mid-nineteenth century to the present.¹⁶⁶ War does make the state in America. We also believe, however, that the enduring anti-statist mechanisms we identify in this article have governed the magnitude of state expansion in each period

¹⁶³ Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, 1991).

¹⁶⁴ For a review of domestic political explanations in security studies and their origin as a response to systemic theories, see Matthew Evangelista, "Domestic Structure and International Change," in *New Thinking in International Relations Theory*, ed. John Ikenberry and Michael Doyle (New York: Westview, 1997), 202–28; and James Fearon, "Domestic Politics, Foreign Policy, and Theories of International Relations," *Annual Review of Political Science* 1 (1998): 289–313. For seminal works that argue for the importance of domestic politics in security studies, see Bruce Bueno de Mesquita and David Lalman, *War and Reason* (New Haven: Yale University Press, 1992); Paul Huth, *Standing Your Ground: Territorial Disputes and International Conflict* (Ann Arbor: University of Michigan Press, 1996); Elizabeth Kier, *Imagining War: French and British Military Doctrine between the Wars* (Princeton: Princeton University Press, 1997); Jeffrey Legro, *Cooperation under Fire: Anglo-German Restraint during World War II* (Ithaca: Cornell University Press, 1995); Jeffrey Legro, *Rethinking the World: Great Power Strategies and International Order* (Ithaca: Cornell University Press, 2005); Susan Peterson, *Crisis Bargaining and the State: Domestic Politics and International Conflict* (Ann Arbor: University of Michigan Press, 1996); Bruce Russett, *Grasping the Democratic Peace* (Princeton: Princeton University Press, 1993); Jack Snyder, *Myths of Empire: Domestic Politics and International Ambition* (Ithaca: Cornell University Press, 1991); and Alan Stamm, *Win, Lose, or Draw: Domestic Politics and the Crucible of War* (Ann Arbor: University of Michigan Press, 1996).

¹⁶⁵ For another approach to counterterrorism policy, see Peter Katzenstein, "Coping with Terrorism: Norms and Internal Security in Germany and Japan," in *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, ed. Judith Goldstein and Robert O. Keohane (Ithaca: Cornell University Press, 1993), 265–95.

¹⁶⁶ Friedberg, *In the Shadow of the Garrison State*, 19; and Higgs, *Crisis and Leviathan*.

of shock. The size of state expansion in each crisis and the aggregate power of the American state today would be much larger in the absence of these anti-statist forces.

Moreover, we have reason to believe that the relationship between war and state building has weakened over time in the United States. The domestic institutions identified here as links between war and state building are themselves variables. The separation of powers has exerted a fairly constant effect on American life throughout history, but the number of interest groups and executive-branch bureaucracies has proliferated over the course of the last century.¹⁶⁷ As the number of actors with something to lose from state expansion increases, so too do the institutional constraints on further executive expansion. For example, the number of federal departments and agencies is much larger today than during the Second World War, and it is reasonable to expect that the bureaucratic resistance to the creation of new executive-branch bureaucracies is more intense now than it was at the time of the National Security Act of 1947. Paradoxically, as the state expands, so too do the checks on further state expansion.

This expectation, if correct, has implications for the literature in American politics on the modern presidency and the imperial presidency.¹⁶⁸ The United States may be entering an era of the post-imperial presidency, in which other actors are fully capable of restraining executive ambition even in times of war. If the case of the Patriot Act is any indication, acting in the immediate aftermath of a crisis may now be the only way for the executive to pass state-building proposals through the U.S. political system. These propositions and other implications of our argument deserve further study by scholars of the American presidency.

We have demonstrated that America's institutional constraints have prevented the rise of a police state. They have not, however, eliminated the practice of activities threatening to civil liberties, privacy, and human rights. Just as firms transfer production functions offshore when doing so offers increased efficiencies, the United States is in the process of transferring some coercive aspects of the war on terrorism to actors better able to perform the mission. Prevented by domestic politics from pursuing its preferred counterterrorism approach, the executive branch has turned to other actors whose relative lack of constraints endows them with a comparative advantage. The United States is, in effect, outsourcing the garrison state.

¹⁶⁷ Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: Norton, 1979); Jonathan Rauch, *Demosclerosis: The Silent Killer of American Government* (New York: Times Books, 1994); and James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 2000).

¹⁶⁸ Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: Free Press, 1991); and Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Mariner, 2004).

Thus, although the Pentagon's effort at spying on U.S. citizens through the Total Information Awareness program was effectively shut down by Congress, there has been an enormous and rapid growth in the gathering of information on U.S. citizens by companies in the private sector, ostensibly for purposes of market research and enhanced customer service. Much of this information, however, has been marketed to U.S. government agencies responsible for maintaining homeland security.¹⁶⁹

The executive branch has been similarly constrained by domestic public opinion, law, and the courts in the realm of prisoner detention. The government has responded by releasing from its custody large numbers of enemy combatants, but its inability to interrogate and detain prisoners has also given birth to the equally if not more controversial practice of rendition.¹⁷⁰ The United States has been transferring terrorist suspects, as well as the responsibility for interrogating and detaining them, to foreign governments. U.S. officials have announced that they will render prisoners only to countries that promise not to practice torture.¹⁷¹ Yet the reported recipient countries—including Egypt, Syria, and Saudi Arabia—lack American-style checks on state abuses of power.¹⁷²

The outsourcing of the garrison state does not increase the power of the American state, but it is in many ways more threatening than an American

¹⁶⁹ For a thorough overview, see O'Harrow, *No Place to Hide*.

¹⁷⁰ Jane Mayer, "Outsourcing Torture: The Secret History of America's Extraordinary Rendition Program," *New Yorker*, 14 February 2005, available at http://www.newyorker.com/fact/content/2050214fa_fact6.

¹⁷¹ See Glenn Kessler, "Rice Defends Tactics Used against Suspects: Europe Aware of Operations She Implies," *Washington Post*, 6 December 2005, A01.

¹⁷² This finding has implications for a growing body of work on the privatization of security. Scholars have recently begun to chronicle the proliferation of private firms that are performing defense and security functions and to explore the consequences of this phenomenon for accountability, national security, and the future role of the state. See Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge: Cambridge University Press, 2005); Caroline Holmquist, "Private Security Companies: The Case for Regulation," Stockholm International Peace Research Institute policy paper no. 9 (January 2005); Robert Mandel, *Armies without States: The Privatization of Security* (Boulder: Lynne Rienner, 2002); Ann Markusen, "The Case against Privatizing National Security," paper presented at the Study Group on the Arms Trade and the Transnationalization of the Defense Industry, Council on Foreign Relations, New York City, 1 October 1999, available at <http://www.gao.gov/a76panel/fortherecord/amarkusenpaper.pdf>; Ken Silverstein, *Private Warriors* (New York: Verso, 2001); and P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca: Cornell University Press, 2004). This scholarship, however, unnecessarily limits the scope of the phenomenon it seeks to describe. The United States is not merely "privatizing" security but "outsourcing" it. Outsourcing security includes both privatizing security functions to nongovernmental firms and organizations as well as "offshoring" security functions to foreign governments. Although the extant literature has thoroughly explored the consequences of privatizing security, it has not developed a compelling theoretical explanation for why privatization, or offshoring for that matter, occurs in the first place. Our work suggests that the outsourcing of security is at least partly the result of domestic political processes that have thwarted U.S. government attempts to develop new capacities for dealing with nontraditional security challenges.

police state precisely because these other actors lack institutionalized checks on the exercise of power. The real challenge for privacy activists, civil libertarians, and defenders of human rights may be to limit the abuses committed by private firms and foreign governments. Americans can rest assured that bureaucracies, interest groups, Congress and the courts will continue to curb most of the excesses committed by the American state in the name of homeland security.