Introduction

The United States faces four immediate and potentially catastrophic threats. First, there is the threat of terrorist attack using a weapon of mass destruction (WMD) – a chemical, biological, radiological, or nuclear device. Second, in defending against this WMD threat, the United States may take measures that degrade the quality of our democracy and do so permanently, because the threat from catastrophic terrorism is indefinite. Third, we may not agree as a society on the nature of the threat and therefore on the nature of the response. In failing to agree, we may compromise. If we split the difference, we may fail to fully protect against a WMD attack or to preserve those values that underpin both our security and our liberty. Fourth, in addressing the threat of a WMD attack, and perhaps in coping with the war in Iraq and its consequences, we run the risk that we will degrade our ability to address this century's other certain threats – nuclear proliferation, instability in the Middle East, pandemic disease, environmental degradation, and energy and economic rivalry. This may occur because we are distracted or divided, or because we are exhausted.

National security law, by which I mean the substance, process, and practice of law, is central to addressing each of these threats. First, the tools necessary to provide physical security are defined in law, as is the process of decision-making for using them. Second, law is itself a national security tool. It distinguishes the United States from our opponents and underpins the moral authority to lead in conflict and demand in alliance. Third, the law, and in particular the Constitution, provides a framework for a government that is subject to checks and balances, and therefore a society of security with liberty. If well designed, national security process and law improve security.

This book explains why and how the good faith application of law results in better security at the same time that it honors America's commitment to the rule of law. This theme is introduced in Chapter 3 and followed throughout the remainder of the text. The book starts with the threat, for law is not an abstraction. Rather, law reflects societal values and represents an effort to

set substantive and procedural standards for individual and state behavior in context. With national security, context reflects threat. Moreover, sometimes differences in legal outlook in fact reflect differences in perceptions about the threat, and not differences regarding the law.

The book focuses on the risk of a terrorist attack using weapons of mass destruction, in particular a nuclear device. This is not the only threat the United States faces, nor the most certain. But it is potentially the most catastrophic and it is the threat that defines the legal debate over the shape and application of national security law.

The book then explains why this threat presents the prospect of endless conflict and the corresponding pressure such a conflict will place on principles embodied in the concept of liberty and law. Chapter 1 closes by describing how national security law and process can improve national security while at the same time advancing the rule of law. Hence the title: *In the Common Defense*.

The phrase comes from the preamble to the Constitution:

> We the People of the United States, in Order to form a more perfect Union, establish Justice . . . provide for the common defence . . . and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The phrase captures a number of principles essential to national security law. At the outset, for example, the Constitution is a national security document. Seven of the enumerated legislative powers expressly relate to national security. Many others, such as the authority to raise taxes, indirectly do. The executive's responsibilities start in Article 2, Section 2, with the president's designation as commander in chief followed immediately by the specification that the militia shall serve under the president's command "when called into the actual Service of the United States." The Constitution was forged in conflict, and it has as a principal objective the security of the United States – the common defense.

The phrase also signifies that security is a shared endeavor. The president is the central and in some cases essential national security actor; however, the three federal branches of government share this responsibility. When it comes to terrorism or pandemic disease, state and local governments share this responsibility as well. Just how this responsibility is divided is a critical constitutional question discussed in Chapters 4 and 9.

Two additional principles are evident. First, national security has as a goal the defense of liberty as well as of our physical security. This commitment is evident in the preamble, and it is affirmed in the oath government lawyers take "to uphold and defend the Constitution." Second, as the preamble recognizes, the Constitution is a compact among the states established by the people for specific purposes. Consistent with the principle of federalism,

the states have retained the police power under the Tenth Amendment. Thus, in homeland security context, the states share responsibility for the common defense.

Having framed the immediate threat and described the importance of law to security as well as to liberty, Chapter 2 steps back and considers the meaning of "national security." Within the law, invocation of the phrase carries important normative and procedural implications. "National security," for example, is the predicate for many of the president's security tools, including the intelligence, military, and homeland security instruments. A "national security" designation also determines the process of analysis and decision. What should qualify for such treatment and who should determine if it qualifies for such treatment? The chapter concludes with consideration of a working definition of "national security" that comprises an objective element, physical security, and a subjective element, liberty – by which I mean the rule of law founded on respect for constitutional values.

The book then turns to the constitutional framework for national security. The nature and scope of the executive's constitutional authority form *the* question in national security law today. Foremost, is the president's commander-in-chief authority subject to meaningful constitutional check and balance, or is it in some sense inherent? The chapter reviews the sources of constitutional law, including text and case law. Certain framework statutes, such as the National Security Act, also reflect constitutional law, or at least rapprochements among the political branches, defining constitutional expectations and limits.

However, for a number of reasons constitutional law is often indeterminable. The application of constitutional law entails a significant amount of choice. There are few agreed upon statements of black-letter (settled) law. For example, although it is settled that the president is the commander in chief – the Constitution expressly states so – lawyers do not agree on what authority is derived from the commander-in-chief clause. That is a matter of interpretation, which necessarily reflects constitutional theory, historical perspective, and, ultimately, the values practitioners believe should inform the interpretation of constitutional authority. Finally, where national security is concerned, the courts are unlikely to resolve core constitutional questions, deferring instead to the political branches, unless, perhaps, such questions arise during the adjudication of specific cases involving tangible individual rights.

The substance and practice of constitutional law is illustrated with reference to electronic surveillance. Chapter 5 reviews the legal and policy background relevant to electronic surveillance as a domestic intelligence instrument. It then uses that background to illustrate how lawyers might apply the tools of constitutional law – text, theory, gloss, and historical practice – to shape arguments affirming or rejecting the president's authorization of

surveillance outside the Foreign Intelligence Surveillance Act framework. The illustration also serves to identify the importance of legal policy and values to the practice of national security law.

As electronic surveillance illustrates, the meaningful application of law requires that lawyers (and those who evaluate and apply their judgments) understand where, how, and when legal decisions might be taken, and not just where they are recorded. Moreover, the central national security laws, like the National Security Act, are procedural rather than substantive. They are intended to encourage deliberation at the same time that they provide for timely decision. But they do not guarantee a favorable substantive result or outcome. Without knowledge of the process of national security, one cannot appraise whether the law has been applied and is guiding decision-making to lawful result as well as whether it has been applied in a manner that contributes to positive national security impact. The focus in this book is on the process of presidential decision-making and identification of those factors that distinguish effective process from the merely bureaucratic process.

National security decision-making gravitates to the president for legal, policy, and functional reasons. This focus is magnified during wartime. We know this. James Madison knew this. Less understood is the degree to which the practice of national security law is informal, undocumented, and dependent on the moral integrity of the government's officials. The national security lawyer may operate under great pressure. He or she may find a tension between the duty to apply the law faithfully and the duty to enable decisionmakers to protect U.S. security. As the book articulates, the president's foremost duty and focus is on protecting the nation. That means that the lawyer bears primary responsibility for ensuring that the law is applied and that constitutional values are preserved in the context of national security practice.

This tension is emblematic of the tensions endemic to national security process: between speed and accuracy, between secrecy and accountability, between headquarters and the field, and ultimately between security and liberty. This book considers how these tensions are addressed in three contexts: the National Security Council process (Chapter 6), the military chain of command (Chapter 8), and the Homeland Security Council process (Chapter 9). Whether these tensions are addressed effectively will determine whether the United States identifies the intelligence indicators before the next 9/11, or not, or prevents states such as North Korea and Iran from developing, exploiting, or sharing nuclear weapons.

The book next turns to the national security tools in the policymaker's kit. Intelligence, meaning the sources and methods of gathering, analyzing, and using information relevant to national security, is the predicate that informs (or is supposed to inform) whether and how the other national security

tools are used. Intelligence is our early warning radar. Intelligence is also our most agile offensive weapon in a global campaign to counter terrorism. Nonetheless, the legal and bureaucratic structure of U.S. intelligence incorporates two misunderstandings regarding the U.S. response to 9/11. First, law can help to bridge the historic divisions in intelligence function, between national intelligence and military intelligence, between foreign and domestic intelligence, and between the CIA and the FBI; however, in the end, the law cannot solve what is essentially a leadership and intellectual challenge. Second, a director of national intelligence (DNI) may well assist the president (and permit the director of the Central Intelligence Agency to focus on the human intelligence mission). But as a matter of constitutional law, policy, and process, the president remains the central and essential intelligence actor, regardless of bureaucratic template or statutory framework.

The book next considers the five intelligence functions – collection, analysis and dissemination, covert action, liaison, and counterintelligence – in the context of a second overriding intelligence issue: How should a democracy in conflict modulate and appraise the efficacy, legality, and allocation of risk in performing the intelligence functions? These issues have bedeviled the political branches since the advent of congressional intelligence oversight in the 1970s. This suggests that the answer to the question is not found in legal prescript, but in a process of proactive internal appraisal that places emphasis on efficacy as well as legality.

The importance of the appraisal function is illustrated through consideration of the process and law applicable to rendition. Rendition also conveys some of the texture of national security legal practice, describing the questions raised, the nature of informal as well as formal practice, and the pressures brought to bear on the lawyer to "get it right."

Lawyers and intelligence analysts play parallel roles in the national security process – they are supporting actors to policymakers and often operate under the same client pressures. Thus, if you want to know what sort of pressure intelligence analysts encounter, ask a lawyer. Lawyers, like analysts, understand that "law," like "intelligence," rarely answers the policy question. Law and intelligence guide and inform.

The book next addresses three issues involving the use of military force. Question one: When may the president resort to force unilaterally? In the domestic context, this is a constitutional war powers question. The issue: When can the president use force without congressional authorization, concurrence, or even knowledge? The answer starts and ultimately ends with the plain text of the Constitution. But constitutional text is not definitive. As a result, the law remains unsettled, and the answer to most war power questions depends on the constitutional theory applied. Theory in turn depends on personality, which is to say, the views and legal values of the person interpreting the constitutional text.

Question two: Under international law, when can a state use force? The answer may determine whether the United States acts alone or in alliance, as well as the ramifications of action or inaction. In contemporary rhetoric and, what is more important, in contemporary practice, the debate quickly zeros in on the concept of anticipatory self-defense and preemption, and on whether there is a distinction between the two in law or policy.

Question three: What law pertains to the conduct of military operations – the methods and means of warfare? Is the law of war outdated in the context of a conflict against nonstate actors? Do the core concepts of proportionality, necessity, discrimination, and military objective offer continuity and guidance? How is the law of armed conflict applied in U.S. practice, who are the critical actors, and what methodology is used?

The U.S. response to terrorism must include three elements: offensive military and intelligence operations; preventive diplomacy, to stem the tide of recruitment and facilitate allied response; and defense, known today as homeland security. Chapter 9 introduces the bureaucratic structure, legal framework, and decision process applicable to homeland security. To an outside observer, homeland security looks like children's soccer. The players tend to surge toward the ball and do not hold their positions. When the ball is kicked, the players surge anew to convene en masse at the new location, identified perhaps as aviation security, port security, or New Orleans. Similarly, the parents seem more intent on arguing with the referees or with each other, to gain tactical advantage, than they do on investing in the benefits of long-term training and practice (this might be unfair to a majority of soccer moms and dads and dedicated public servants). There has been progress, but there is yet room, through the informed use of law and policy, to better harness the courage and dedication of "first responders" to protect America, and, if attacked, to respond. This chapter introduces the reader to the substance, process, and practice of law in this area so that they are not distracted by the soccer play. However, the law is evolving in this area, as illustrated with reference to two topical regimes, maritime security and public health.

Special emphasis is placed on nonproliferation. The subject might fit within any of the preceding headings, for nonproliferation fuses all the national security tools, including diplomacy, intelligence, and military force. However, given its centrality to the physical safety of the United States, it occupies (or should occupy) the center of the homeland security stage.

We are on borrowed time. Essential resource gaps persist in the homeland security regime. Differences in legal perspective persist regarding two essential areas of law involving federalism and the use of the military in the civil context. Both issues are new to national security law. Both warrant development. Although the principles of the vertical separation of powers, or federalism, may be apparent, they remain uncertain in application to the

relationships among federal, state, and local authorities and private entities. With respect to the military, the law contains permissions and prohibitions relating to the domestic use of the armed forces. Ultimately, the law is permissive; however, political, policy, and cultural barriers cloud expectations as to how the law will or should be applied. The prospect of critical error or delay remains.

As the book stresses throughout, national security law is dependent on the moral integrity of those who wield its power. As a result, Chapter 10 addresses the roles and duties of the national security lawyer. Some scholars argue that the lawyer's role depends on identification of the "client," with candidates including the president, federal agencies, and the public. Other scholars find the answer in identifying the contextual role of the lawyer, as advisor, advocate, counselor, or judge.

National security lawyers should play all of these roles. The key is in determining the appropriate role at the appropriate time and in gaining the confidence of the decisionmaker in order to do so. The duty of the national security lawyer is not based on identification of the client. It is based on the Constitution. National security lawyers swear an oath of loyalty to the Constitution. In some cases the oath is itself required by the Constitution; in other cases it is a product of statute. Constitutional fidelity requires faithful legal analysis. That means good faith application of the law, including good faith application of constitutional structure and principle.

In summary, this book intends to make the substance, process, and practice of national security law accessible to decisionmakers and lawyers. It is also intended for the public. Understanding the law and its role, each of these actors might better perform the duty to appraise the efficacy of U.S. policy in upholding our physical security and in protecting our liberty. We need not choose between the two. That is a false choice. Security is a predicate for liberty, not an alternative to liberty. The Constitution is intended to provide for the common defense of both.

1 *Perilous Times: Describing the Threat*

Al Qaeda has tried, and is trying, to obtain weapons of mass destruction (WMD). Al Qaeda's leadership has said so, and this intent is documented in materials obtained in Afghanistan and elsewhere. Like-minded groups and individuals inspired or informed by Al Qaeda, which also use terrorism as a tactic, are trying to do the same. States such as Iran and North Korea are also in the nuclear arms hunt. Iran's present weapons capacity is uncertain; its intention to obtain nuclear status and its link to a global terrorist network are not. North Korea's status as a nuclear state is certain; its stability and longevity are uncertain.

The jihadists'[1] tactical objectives likely include the physical destruction of New York City and Washington, D.C., and, in the interim, the conduct of symbolic and mass casualty events. For those actors who are not just expressing anger or despair, their strategic objectives likely include the diminution of democracy as a symbol of transitional hope in the Middle East, South Asia, and Africa as well as the diminution of American cultural influence in the Islamic world.

With nuclear weapons as the backdrop, this contest *is* potentially about the survival of the state, as we know it today, its core security and values. The United States has fought for its survival and soul before, in 1812 and during the Civil War, for example. But this conflict is different. Indeed, it is not a conflict so much as it is a threat. Success is not defined militarily by territory seized and held, as in World War II. And, while the capture or death of the opponents' leaders and individual combatants matters, this is not a threat that can be addressed through attrition alone because it requires only a handful of dedicated individuals to sustain. Moreover, the opponent does not need territory, armies, or a chain of command to fight this conflict. Unlike the Cold War or even World War II, the logic of rational deterrence against the use of WMD does not pertain to the nonstate jihadist. Indeed, we do not face an opponent, but a threat from a wide swath of organizations and individuals unified in their hatred and their tactics.

Choose your word. The threat is perpetual, indefinite, endless, and not just long. That, too, makes this conflict different. So long as there is a supply of precursors for WMD in the world's arsenals, laboratories, and power plants, the jihadists will seek to obtain them. So long as there is a supply of young, disgruntled men and women in the world, the jihadists will retain an apparent capacity to deliver them. There is such a source. Indications are that it is growing. Global polls reflect widespread support for jihadists like Osama Bin Laden.[2] Moreover, the war in Iraq has produced at least a generation – the next generation – of jihadists, as Afghanistan produced the generation before. The generation beyond, one suspects, is at work in madrasahs throughout South Asia and elsewhere. As Arnaud de Borchgrave points out, there are 10,000 madrasahs on Mindanao alone; before 9/11 there were a handful of jihadist websites; there are now more than 5,000.[3]

Finally, this conflict is different because for the American public, but not its national security services, this is an intermittent conflict. It requires inconvenience, and for some sorrow and fear, but not to date the sort of societal sacrifice commensurate with the threat. For example, as commentators such as Thomas Friedman argue, we have not taken basic steps to curtail our dependence, and thus the influence of foreign oil, on U.S. policy and U.S. security. Reasonable people might disagree on whether we might better focus on improving vehicle mileage, adopting alternative energy sources, or developing additional reserves, or all three. But are there really divergent views on the national security impact and benefit of doing so? What of port security, public health, and the tax base to pay for them? Clearly, we lack a consensus in all but rhetoric regarding the costs and benefits of response.

Although we might contain the threat from this conflict with sustained commitment, we can lose this conflict in a day. The jihadist may need to get through only once with a WMD weapon to deeply change the nature of American society – its optimism, its humanity, its tolerance, and its sense of liberty. Thus, even if we succeed in deterring an attack over time, we cannot ever know if we have "won." Nor can we ever assume that we have "won," because we cannot ignore a threat that can kill thousands, perhaps millions, and undermine our way of life with a single successful attack. Of course, this judgment depends on one's views about the WMD threat and the probability of its fruition.

The historian Joseph Ellis argues that it is not too soon to debate the meaning of 9/11 and its place in history. Ellis writes:

> Where does Sept. 11 rank in the grand sweep of American history as a threat to national security? By my calculations it does not make the top tier of the list, which requires the threat to pose a serious challenge to the survival of the American republic.[4]

Such discourse is part of the process of finding our constitutional equilibrium after 9/11. But Ellis is wrong. September 11, 2001, was not the beginning of the conflict, nor was it the entirety of the conflict. It was a defining moment, but a moment nonetheless in an ongoing and open-ended conflict. Churchill might have called it the end of the beginning. On 9/11, the jihadists realized that the grand attack works, at least on a tactical level. For our part, we realized that the jihadists have the wherewithal to attack America and do so in sophisticated fashion. On 9/11, the threat of a WMD attack in the United States morphed from a tabletop security scenario to a daily security reality.

Most alarming is the threat of a nuclear attack. Harvard's Graham Allison explains in his book *Nuclear Terrorism* that it does not, in fact, take a rocket scientist to make a nuclear weapon. It takes fissionable material. Indeed, the International Atomic Energy Agency (IAEA), the United Nation's global watchdog for nuclear proliferation, documented at least 175 instances from 1993 to 2001 involving trafficking in nuclear material; 18 of these cases involved weapons-grade fissionable material. Media and IAEA reports indicate that this trend continues five years after 9/11.[5] According to Department of Homeland Security (DHS) officials, "incidents tracked by the Department average about twice the number made public by the IAEA . . . reports of nuclear and radioactive materials trafficking have ranged from 200–250 a year since 2000."[6] Moreover, if a jihadist network cannot find material on the black market, it might find a state sponsor willing to share nuclear technology or know-how. Alternatively, a terrorist network might find itself in transitory alliance with a dying or desperate regime like North Korea, or a regime under military attack and intent on survival.

The potential is there for a catastrophic attack. Whether jihadists will connect the WMD dots and whether they will successfully deploy a weapon into the United States is uncertain.

This threat means that if we value our physical safety we must remain in that state of "continual effort and alarm attendant on a state of continual danger" that James Madison described and feared. There is danger that in facing this threat, presidents and their lawyers may conclude that (1) the process due is no process at all; (2) that every search or seizure is reasonable; and (3) that extraordinary circumstances negate the necessity for meaningful checks and balances on the president's use of the military and intelligence instruments. But there will be no respite, nor return to peace, to reestablish our constitutional equilibrium. Changes in constitutional interpretation today may persist past tomorrow. Thus, assertions of constitutional authority may serve, in effect, as silent and sometimes secret constitutional amendments.

Focused on the terrorist threat, we may fail to realize, or fail to care, that physical security is a means to obtain "the blessings of liberty," not the