Introduction

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As the twenty-first century dawned, the public in the western world awakened to a new and heightened concern about terrorism as a consequence of the Al Qaeda attacks on the United States on September 11, 2001. Efforts to control and eliminate terrorism inevitably present a conundrum for democratic governance and the rule of law. Indeed, plans for a new U.S. embassy in London unveiled in 2010 can serve as a metaphor of the tensions terrorism introduces into a democracy. The structure, described as architecture serving "as a form of camouflage," appears more like a fort than a welcoming democratic symbol (Ouroussof, 2010). Must democracies become fort-like entities rather than ones fostering freedom and self-actualization? Although the democratic promise is that liberty and security can be reconciled, how that reconciliation is achieved varies over time and by country.

Courts stand as the fulcrum to achieve a balance between protecting national security successfully and preserving democratic governance. Unfortunately, too often repression is the governmental response to violence, but repression and violence can develop a symbiotic relationship, with "each feeding off the other, in a mutually sustaining fashion" (Campbell and Connolly, 2006: 955). Democratic governance requires adherence to the rule of law, and the rule of law intrinsically entails respect for human rights (Tsoukala, 2006: 615). This book brings together analyses of how courts in the United States and eight other jurisdictions have treated governmental responses to terrorist threats and have balanced violence and repression, rights and security. It emphasizes the British and American experiences to provide reference points for how newer democracies have coped with similar dilemmas.

Terrorism is not a new phenomenon. Assassinations, bombings, kidnapping, and hostage-taking as means of political action can be dated

to the ancients, as seen in the tyrannicides of Greece and Rome, the Zealots of Palestine, and the medieval Hashashin of Islam. "The one characteristic common to terrorist acts against states was a belief, usually mistaken, that individual acts of violence could in some way accelerate change and achieve goals that other, more conventional forms of political action could not" (Halliday, 2001: 830). "Political violence" was the commonly used terminology before the events of 2001 and could be applied to domestic terrorism in the United States in the 1960s and 1970s that was sponsored by Students for a Democratic Society, the more violent Weathermen, and other fringe groups (O'Neill, 1971), as well as the bombing of the Oklahoma City federal building in the 1990s.

Other nations have also battled terrorism. Spain was the target of anarchist bombings as early as the 1890s, and "repression threw the movement into the hands of wild men bred by clandestinity" (Carr, 1980: 58). Italians confronted leftist terrorism from the Red Brigades and a less discriminating form from the extreme right throughout the 1960s and 1970s. The Red Brigades' most spectacular feat was the kidnapping and ultimate murder of former Prime Minister Aldo Moro in 1978 (LaPalombara, 1987). ETA in Spain, Direct Action in France, the Irish Republican Army and the Ulster Volunteers in Northern Ireland, and the Baader Meinhof gang in Germany wreaked havoc during those same decades. Israel confronted a variety of Arab and Palestinian terrorist groups for more than forty years. Though not necessarily acting on a political agenda, narco-trafficking cartels and other organized crime groups also have used terror to intimidate both politicians and the populace across several continents. Interestingly, between 1980 and 2003 the largest number of suicide terrorism acts were committed by the Tamil Tigers in Sri Lanka, a secular Marxist and Hindu group (Macgregor et al., 2008).

Ironically, the consequence of most acts of terrorism or political violence was not to achieve their desired ends, but rather to "harden them in the opposite direction" (Halliday, 2001: 830). That hardening usually involved strong actions by the state to identify, locate, and prosecute the perpetrators of terrorist acts. To accomplish those goals, the liberties of all citizens were in some ways restricted to facilitate apprehension of the few discontents. Often the net that the state cast brought in more than a few innocents along with the guilty.

A parallel development during the late twentieth century has been a rise in the power of courts (Tate and Vallinder, 1995). This phenomenon has been labeled the "judicialization" of politics and has been defined

variously, from the pejorative phrase "judicial activism" to the "reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies" (Hirschl, 2008: 121). The term "judicialization" suggests that judicial power is displacing political power (Ferejohn and Pasquino, 2003: 248). Whether judges around the world have usurped political power or politicians have willingly subjected political behavior to judicial control (Grimm, 2004: 26), judicial power is perceived to have increased through the last decades. If, indeed, the "world has witnessed a profound transfer of power from representative institutions to judiciaries" (Hirschl, 2008: 138), then courts should be expected to flex their judicial muscles to preserve rights and block repressive measures adopted in the "War on Terror" that violate the rule of law. Indeed, the International Commission of Jurists declared in 2003 that "states must ensure that any measures taken to combat terrorism must comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law" (ICJ, 2009). Yet, all courts function in a larger political milieu and engage in a peculiar type of dialogue with other political bodies. Those interactions color judges' views of the potency of the threats and the necessity for governmental actions that may infringe rights.

Part of the judicial and political dilemma of the so-called "War on Terror" derives from the nature of the war. This war does not conform to our ordinary understanding of war; what would constitute a victory is not even clear. Philip Gordon argued that the Cold War represents the closest thing in our experience to the "War on Terror," because it also was a conflict between ideologies. Instructively, the Cold War was a "long-term, multidimensional struggle against insidious and violent ideologies" (Gordon, 2007: 54), lasting from 1948 until perhaps the collapse of the Berlin Wall in 1989.

Indeed, we may not know when the "War on Terror" ends, any more than we can agree on a precise event or date when the Cold War concluded. In fact, when did this round of virulent terrorism begin? Suicide terrorism can be traced to as early as 1990, with three attacks in Lebanon and Sri Lanka, and the frequency has been accelerating since ("Globalization of Martyrdom," 2008). The 2001 attacks in the United States may have been the ones that crystallized world attention, but Al Qaeda operatives bombed U.S. embassies in Kenya and Tanzania in 1998 (Van de Walle, 2008). This war has no beginning date and may continue for decades. Therefore, actions of governments and decisions of courts will serve as the precedents governing how security and liberty are balanced

for years to come, and understanding how judges in various places have responded is crucial to setting the parameters for how the war will be waged.

Governments fashion responses to or in anticipation of terrorist attacks, but knowledge about the current enemies is woefully limited. Even though the published work on terrorism is voluminous, the evidence presented is often contradictory. Khan and Azam (2008) concluded that terrorists were most likely to be people with a religious ideology who were young and poor, with little education and living in a large household. Yet others have found only a weak correlation between poverty and terrorism, possibly because poverty serves only as a necessary condition for one to become a terrorist but requires a catalytic agent to motivate one to act (Gupta, 2008). However, the nineteen men who carried out the 9/11 attacks were neither from poor families nor poorly educated, and many of them were citizens of the wealthy nation of Saudi Arabia. Robert Pape's review of 315 so-called martyr videos found that the religious element was minimal and instead that the messages focused on a specific secular and strategic goal, with religion serving merely as a symbol (Macgregor et al., 2008). With so little understanding of who the potential terrorists may be, governments are more inclined to use sledge-hammer approaches to secure their nations because more precise, laser-like tools are not available.

Terrorists reject law and choose means beyond the law. How then can governments through law respond to terrorism and remain true to democratic values and the rule of law? Respect for human dignity lies at the core of all of the international and transnational declarations of rights that have been promulgated since the end of World War II (Chaskalson, 2008: 71). Respect for human dignity also rests at the heart of the rule of law in a democratic society, but there must be incentives for political officials "to honor the rights of citizens, respect the outcome of elections and refrain from using force to settle conflicts" (Weingast, 2003: 110). Only two checks on official actions exist in democracies – elections and judiciaries – and the two may favor different outcomes. In an age of terrorism, political officials are caught in a bind between providing the physical security demanded by the electorate and respecting civil liberties as might be expected by the courts. Even in normal times, however, rights and security must be balanced. Are rights always the trump cards, and are constitutions and the rights they assert a suicide pact (Waldron, 2003)? Cannot democratic government exercise democratic self-defense? The answers that the United States and other nations have made to these

questions are the subject of this book. How have courts, as the supposed arbiters, balanced the rights and liberties of citizens against governmental assertions that some reduction in liberties lies at the base of strategies to combat terrorism successfully and prevent future attacks?

What seemingly distinguishes the 9/11 attacks and those that followed are the international character of the terrorists and their ability to inflict significant human and material damage in the United States, in Bali, in Madrid, in London, in Egypt, and elsewhere, combined with the rhetoric that has accompanied governmental efforts to thwart future attacks. The rhetoric does not intend to play only to domestic audiences around election times. Indeed, the choice of the term "war" to describe these governmental efforts against terrorism carries implications beyond mere domestic partisan political gains. War, whether declared against terrorism or drugs, implies the "need for implacable action against a serious, potentially lethal enemy" (Provine, 2007: 117). It evokes the necessity of an all-encompassing effort and of personal sacrifice – sometimes of rights and liberties – to protect national values and ways of life.

The enemy in the "War on Terror" is also an unlikely one, an idea. "Terrorists have crafted and disseminated a compelling narrative that resonates with audiences around the world, expanding and energizing their ranks," and "[m]ilitary force alone will never beat this narrative" (Macgregor et al., 2008: 6). Yet, attempts at conciliation with terrorism have typically been followed by increased terrorist activity (Bueno de Mesquita, 2005). Crafting security measures to contain a virulent form of international, loosely linked networks of terrorists and simultaneously to conform to democratic values and the rule of law presents governments around the world with unprecedented challenges. Judges serve as the guardians, often the only ones, charged with preserving democracy and upholding the rule of law.

The contributions to this volume raise a number of recurring themes. When does the exception become the norm? How can the domestic be distinguished from the international? When does governmental repression aimed at stopping terrorism develop a symbiotic relationship with the terrorism that it aims to defeat? Is politics always primary to the rule of law? Do courts regularly defer to executive strategies to protect national security? How can state secrets impede the protection of rights and foster executive impunity? To what extent do international and transnational treaties define judicial options and responses? Must security always prevail over liberty or the reverse? How and when do international treaties designed to protect rights and regulate treatment in war become absorbed

into domestic law and policy? Does the ideology of judges and politicians determine where the line between rights and security should be drawn? What authority must be ceded to the executive and low-level law enforcement or military personnel to protect against terrorism and apprehend those who have perpetrated or might commit terrorist acts?

The book opens with a study by David M. O'Brien that traces how the U.S. Supreme Court historically has treated measures taken by Congress and the president that curtailed liberties when confronted with national emergencies. This chapter begins with thoughts and writings of the founders and follows the Supreme Court's relevant decisions through the Civil War, World Wars I and II, and to the current "War on Terror." Aya Gruber's chapter follows, in which she dissects the treatment of "unlawful combatants" in light of the Geneva Convention to which the United States is a signatory. She considers the "exceptionalist" position that U.S. courts have taken toward international human rights norms and the acceptance – or not – of international treaties into U.S. domestic law.

Louis Fisher writes in Chapter 3 about the role of state secrets supposedly involving national security in blocking investigations of rights violations and fostering executive impunity. Since 1953, U.S. courts have confronted cases in which the executive branch invoked the state secrets privilege to prevent litigation in which illegal or even unconstitutional acts were alleged against it. Similarly, the executive branch can thwart release of documents under the Freedom of Information Act under the rubric of national security and thereby possibly conceal embarrassing or even illegal actions.

The United States is not the only nation to have confronted terrorism and threats to national security. One of the more seemingly intractable conflicts in which terror was a primary tactic was the strife, euphemistically called "the Troubles," in Northern Ireland. In Chapter 4 Richard Finnegan explores the British, Irish, and Northern Irish responses to violence perpetrated by the Irish Republican Army (IRA) from 1922 to 1998 and the judicial response. In Chapter 5, Mary Volcansek also considers terrorism in Northern Ireland, but from the perspective of how the highest British courts treated governmental attempts to curtail terrorism. She then looks at how those same courts have responded to parliamentary legislation passed to combat the current "War on Terror" and assesses how much the passage of the Human Rights Act of 1998 has altered judicial logic.

In Chapter 6, Donald W. Jackson analyzes the European Convention on Human Rights and decisions of the European Court of Human Rights

that deal with treatment of terrorists and terror suspects. He considers that court's decisions involving cases arising from Northern Ireland, as well as national security cases coming from Turkey, Cyprus, Corsica, Russia, and Chechnya.

Australia, like Great Britain, has a commonwealth model that limits the authority of the judiciary. Moreover, Australia has no national bill of rights, which further restricts the potential for judicial action. In Chapter 7, Michael C. Tolley analyzes the role of Australian courts in coping with the twenty-eight antiterrorist laws passed in Australia since the events of September 2001. This chapter is particularly relevant because the Australian parliament has acted strongly to thwart potential threats of terrorism even though no act of international terrorism has occurred on the continent. Notably, however, some Australians were victims of the Bali bombing.

Chapter 8 considers the case of Israel, a nation that has confronted various forms of terrorism over its sixty years of existence. Menachem Hofnung and Keren Weinshall-Margell empirically analyze a sample of cases decided by the Israeli Supreme Court from 2000 to 2008 to ascertain how that high court has balanced security and rights while living in a constant state of emergency.

Italy has thus far not had any terrorist acts committed on its soil during the current wave of international terrorism, but the Italian government confronted a virulent form of domestic terrorism from both the extreme right and extreme left and by organized criminal syndicates during the 1970s and into the 1990s. In Chapter 9, Carlo Guarnieri analyzes how the inquisitorial nature of the Italian legal system and the fragmented Italian political system affected the ability of courts to protect rights while confronting a terrorist threat.

Spain, like Italy, has an inquisitorial judicial system and has been battling domestic terrorism – anarchists, Basque separatists, and right-wing death squads – for decades. In 2004, Spain was also hit by a violent Islamic terrorist attack on a Madrid commuter rail line. In Chapter 10, Blanca Rodríguez Ruiz looks at the role played by the Spanish judiciary in balancing the preservation of democratic values and civil liberties with the provision of public safety.

In Chapter 11, Victor M. Uribe-Urán and Harry Mora consider the role of the judiciary in Colombia, a country that has likewise lived in a perennial state of emergency for years because of the onslaught of domestic political terrorists and terrorism perpetrated by powerful drug cartels. In Colombia, as in Spain, when coping with seemingly

resilient terrorists, judicial and political responses pit security against liberty.

Finally, John F. Stack Jr. and I provide an overview of the eleven case studies and tease out the lessons that can be gleaned from the experiences of these various nations in their battles with terrorism. Comparison offers a healthy antidote to national ethnocentricism and permits one to measure each nation's response and results against a different yardstick. What have been the common themes? How has the judicial role in protecting civil rights and civil liberties been shaped by events, politics, and constitutional arrangements? Is judicialization of politics evident in judicial reactions to government antiterror tactics? Do unintended negative consequences sometimes result from executive, legislative, and judicial decisions? This book does not pretend to offer policy prescriptions, but rather presents a comparative lens through which we can view the balance between liberty and security, between the rule of law and national security.

The standards for human dignity proclaimed in the United Nations Universal Declaration of Human Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and People's Rights may prove only to embody aspirations incapable of harmonization with the needs of national security in an age of terrorism. Philippe Sands reminds us that "there are good reasons why international laws have been adopted [and] for the most part they work reasonably well" (Sands, 2005: 238). That optimism must, however, be tempered by the reality noted by Walter Laqueur: "There is a self-regulating mechanism for . . . terrorism: the more massive its onslaught, the more severe its repression" (1987: 320). Can courts in democracies permit law enforcement officials to apprehend terrorists and prevent their attacks and also hold the line against governmental repression? This is the judicial quandary for democratic governance and the rule of law in the twenty-first century.

1

Detentions and Security versus Liberty in Times of National Emergency

David M. O'Brien

Times of perceived national emergency and "war" bring into bold relief the fundamental tensions between security and liberty, along with those between democratic passions and the exercise of judicial review to enforce the rule of law. Historically, this has been the case in the United States and most recently with the "war against international terrorism." Throughout the history of the United States – from the founding period to the Civil War, to World Wars I and II, and to the present "war against terrorism" – the president and Congress have tended to curtail, if not at times excessively curb, civil liberties in the asserted interest of safeguarding "national security." The Supreme Court also has generally, though with some notable exceptions, proven reluctant to second-guess the president and Congress or to defend civil rights and liberties in times of perceived national emergency.

As Justice William J. Brennan Jr. once succinctly observed, the political history of times of perceived national emergency "teaches that the perceived threats to national security that have motivated the sacrifice of civil liberties during times of crisis are often overblown and factually unfounded" (Brennan, 1987: 8). The tendency to overreact, such as by detaining individuals who are perceived as alleged threats to national security, has arguably been grounded in a political tradition of isolationism and reinforced by the country's geographical isolation secured by two great oceans. To be sure, in the twentieth century isolation was eroded by increased international transportation, communications, and the development of weapons of mass destruction. Still, recent public opinion studies underscore that as "[i]n previous national security crises, Americans have shown a willingness to limit the liberties of political minorities, even when they recognize that only a minority of that group actually poses a threat" (Goux, Egan, and Citrin, 2008: 310).

Shortly after the devastating airplane attacks on the World Trade Center in New York and the Pentagon in Virginia on September 11, 2001 (9/11), President George W. Bush declared "war" against both Al Qaeda forces in Afghanistan and international terrorism generally. He also pressed Congress to enact a joint resolution on the Authorization for the Use of Military Force (AUMF), which it did on September 18, 2001. The AUMF authorizes the president to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. Less than two months later, Bush signed into law the 342-page USA PATRIOT Act (which was renewed in 2006). Among its provisions, that law removed those designated by the president as "enemy combatants" from the procedural guarantees of the Bill of Rights, expanded surveillance capabilities by law enforcement agencies, provided for greater cooperation among federal agencies, and created new federal crimes. Bush also issued a military order authorizing the indefinite detention of captured enemy combatants without appeal or judicial review. His order invited a continuing controversy because the detainees were not treated as prisoners of war according to international law. Under the Third Geneva Convention of 1949, prisoners of war are entitled to an independent and impartial trial, the assistance of counsel, and the right of appeal.

President Bush's assertion of broad executive powers included the detention of American and foreign citizens deemed "enemy combatants" on the naval base at Guantanamo Bay, Cuba. In addition to relying on the AUMF's provision authorizing all appropriate means to combat international terrorism, Bush claimed he had inherent powers and, under Article II of the Constitution as commander in chief, could detain enemy combatants indefinitely without judicial review or other constitutional guarantees, including that of filing for a writ of habeas corpus. Subsequently, in 2005, Bush opposed an amendment to an appropriations bill, sponsored by Senator John McCain (R-AZ), prohibiting the "cruel, inhumane, or degrading" treatment of detainees in U.S. custody. Although Bush eventually signed the bill into law, he issued a presidential signing statement declaring that the provision, among others, was only "advisory:"

> The executive branch shall construe sections . . . which purport to prohibit the President from altering command and control relationships within the Armed Forces, as advisory, as any other construction would be inconsistent with the constitutional grant to the President of the authority of Commander in Chief. . . . The executive branch shall construe [provisions] relating