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BATTLEFIELD BORDERS, THREAT RHETORIC, AND THE MILITARIZATION OF STATE AND LOCAL LAW ENFORCEMENT

DANIELLE C. JEFFERIS¹

I. INTRODUCTION

I have my own army within the N.Y.P.D., which is the seventh biggest army in the world.
- New York City Mayor Michael Bloomberg, Nov. 2011²

The “war on terror” is a war anchored in rhetoric.³ It is a war of abstract words — evil, good, and freedom — and words of emotion — anger, hatred, and patriotism. And as a war anchored in rhetoric, the sovereign authority possesses significant discretion in choosing the words with which to color the abstractions and shape the contours of the conflict.

This article analyzes the rhetoric of the war on terror and the particular role that rhetoric plays

1 Danielle C. Jefferis received her Juris Doctor from Georgetown Law in 2012. She thanks Professor Frances DeLaurentis and the 2011-12 Senior Writing Fellows for their ideas toward developing this article, as well as the editors of the National Security Law Brief for their tireless efforts preparing it for publication. She also owes immeasurable gratitude to Mike German and Professor Sahar Aziz for their keen insight and invaluable support.

2 Hunter Walker, *Mayor Bloomberg: 'I Have My Own Army'*, N.Y. OBSERVER (Nov. 30, 2011, 10:06 AM), <http://www.politicker.com/2011/11/30/mayor-bloomberg-i-have-my-own-army-11-30-11/>.

3 See, e.g., Richard Jackson, *Security, Democracy, and the Rhetoric of Counter-Terrorism*, 1 DEMOCRACY & SECURITY 147, 148 (2005) (“The language of the ‘war on terrorism’ is not a neutral or objective reflection of policy debates and the realities of terrorism and counter-terrorism. Rather, it is a very carefully and deliberately constructed — but ultimately, artificial — discourse that was specifically designed to make the war seem reasonable, responsible, and ‘good,’ as well as to silence any forms of knowledge or counter-argument that would challenge the exercise of state power.”).

in defining the geographic scope of the “battlefield” on which the war is waged.⁴ The article posits that in the war on terror, where traditional markers of conflict are largely absent, the Executive has substantial latitude to define and shape the contours of the conflict, employing carefully designed threat rhetoric to garner support for the use of force in regions and areas that are far removed from any site of actual armed conflict or hostilities. The rhetoric surrounding the homegrown terrorism threat is an apt example: the Executive’s carefully crafted threat rhetoric concerning the danger of al-Qaeda “reaching in” to the United States to recruit and radicalize American Muslims necessarily implies that the battlefield extends into U.S. borders. And where the battlefield extends, characteristics of the war paradigm follow — notably, the militarization of state and local law enforcement. From acquiring military weapons and equipment to adopting military tactics and a soldier’s ethos, the militarization of state and local police threatens to disrupt a vital separation between the police and military in domestic affairs and, consequently, detrimentally transform the ways in which police officers and citizens perceive each other. With that transformation comes substantial risk of the erosion of fundamental constitutional protections inherent to our criminal law paradigm.

Part II introduces the war paradigm and discusses the importance of defining the geographic scope of the battlefield; Part II also shows the divergent views of the battlefield in the war on terror since September 11, 2001 — while the Executive has characterized the war on terror as a global, borderless battlefield, the Judiciary was initially reluctant to accept this conceptualization. Part III discusses the ambiguity of the term “terrorism” and the power of threat rhetoric in defining and shaping the nontraditional conflict, particularly in light of our modern conception of “national security” anchored in executive expertise and secrecy. The rhetoric surrounding the 2003 invasion of Iraq provides a potent example of the power of threat rhetoric in garnering public support for the use of force. As Part III argues, the Executive’s rhetoric concerning the homegrown terrorism threat is likely to function similarly. But where the Iraq threat rhetoric garnered support for the use of force in Iraq, the homegrown terrorism rhetoric is aimed to garner support for aspects of the war paradigm in the United States — that is, extending the battlefield to include the United States. And by exercising increased deference to the Executive on national security matters, including declining to address the geographic scope of the battlefield, the Judiciary is unlikely to employ sufficient scrutiny over the extension of the battlefield. Part IV discusses one particularly troubling implication of this extension of the battlefield into the United States, which necessarily follows

4 This article does not address the legality of the “war on terrorism” itself under international or domestic law, nor does it analyze the legality of a borderless war. Volumes have been written on varying aspects of whether the “war on terrorism” is truly an armed conflict under international humanitarian law or the law of war. *See e.g.*, Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429 (2010); David Turns, *The “War on Terror” Through British and International Humanitarian Law Eyes: Comparative Perspectives on Selected Legal Issues*, 10 N.Y. CITY L. REV. 435 (2007); Bruce Ackerman, *This is Not a War*, 113 YALE L.J. 1871 (2004); Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT’L L. 341 (2003); Marco Sassoli, *Use and Abuse of the Laws of War in the “War on Terrorism”*, 22 LAW & INEQ. 195 (2004). Similarly, for a discussion of the legality of a borderless war, *see, e.g.*, Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT’L & COMP. L. 1 (2010); Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT’L L. 349 (2004).

from the Executive's homegrown terrorism threat rhetoric: the militarization of state and local law enforcement. This shift threatens the delicate but critical separation of law enforcement officers and military personnel in domestic affairs and risks transforming police — protectors of peace and public safety — into soldiers and citizens into enemies.

II. THE WAR PARADIGM AND CONFLICTING VIEWS OF THE “BATTLEFIELD”

Before 2001, the United States generally treated terrorist attacks by international groups against U.S. interests, domestically and internationally, as criminal acts and alleged terrorists as suspected criminals.⁵ Like others suspected of “ordinary” crimes, individuals allegedly involved in terrorist acts passed through the criminal justice system: they were charged under criminal statutes⁶ and, consequently, the constitution guaranteed them due process and a fair trial by their peers.⁷

The events of September 11, 2001 and the Executive's response to those events fundamentally changed the public's collective conception of terrorism.⁸ Whereas the Clinton administration consistently characterized the 1993 World Trade Center bombing as a heinous criminal act and assured

5 *E.g.*, *United States v. Salameh*, 152 F.3d 88, 107-08 (2d Cir. 1998) (criminal conviction of Ramzi Yousef for 1993 World Trade Center bombing); *United States v. Rahman*, 854 F. Supp. 254, 258 (S.D.N.Y. 1994) (criminal prosecution for plans to bomb buildings and tunnels in New York City); *United States v. Yousef*, 927 F. Supp. 673, 675-76 (S.D.N.Y. 1996) (criminal prosecution of Ramzi Yousef for conspiracy to bomb U.S. commercial airliners overseas); *see also* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y 343, 347 (2010) (noting statements made by United States political figures stating that terrorists should be subject to criminal laws); Lloyd C. Anderson, *The Detention Trilogy: Striking the Proper Balance Between National Security and Individual Liberty in an Era of Unconventional Warfare*, 27 WHITTIER L. REV. 217, 232-33 (2005) (discussing U.S.'s initial response to al-Qaeda, pre-2001, as one of criminal prosecution); Tom A Gizzo & Tama S. Monoson, *A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT'L L. REV. 149, 150 (2003) (“[T]errorism is defined as a law enforcement issue rather than a national security issue.”); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 310-11 (2003) (discussing civilian criminal prosecutions of terrorist attacks on U.S. interests throughout the 1990s). *But see* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 3-4 (2011) (discussing a finding of the 9/11 Commission that pre-9/11, the CIA played lead role in confronting al-Qaeda and law enforcement was secondary).

6 Prior to September 11, 2001, federal criminal statutes of which individuals suspected of terrorism or acts related to terrorism were commonly charged were contained in Title 18, Part I, Chapter 113B and included provisions against the use of weapons of mass destruction and providing material support to designated terrorist organizations.

7 For example, the convicted perpetrator of the 1993 World Trade Center bombing — arguably the most significant terrorist attack by an international group or figure on domestic soil before September 11, 2001 — was tried on criminal counts of conspiracy and transporting explosives, among others. *See* *Salameh*, 261 F.3d at 274.

8 *E.g.*, Richard Jackson, *WRITING THE WAR ON TERRORISM* 38 (2005) (“Almost simultaneously, the [September 11] attacks began to be grammatically reconstructed as acts of ‘war’ rather than terrorism or criminal exploits.”); O’Connell, *supra* note 5, at 368 (“On 9/11, the United States made a radical change in its choice of law in defending against terrorism. After a century of pursuing terrorists using criminal law and police methods, the United States invoked the law of armed conflict and military means.”); Anderson, *supra* note 5, at 233 (“The United States had abandoned the policy of treating al Qaeda’s acts of war as criminal acts, and declared war on its network of transnational terrorism.”).

the nation that law enforcement authorities would apprehend the suspected perpetrators,⁹ the Bush administration characterized the September 11 attacks as acts of war,¹⁰ pitting “good” versus “evil” in a “monumental struggle,”¹¹ and vowed to “conquer the enemy.”¹² In his Address to the Nation on the day of the attacks, President Bush declared, “[W]e stand together to win the war against terrorism.”¹³ And in one of the clearest expressions of the shift in the Executive’s conception of terrorism, President Bush declared in his 2004 State of the Union address:

I know some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.¹⁴

Why this conceptual shift? As this section explains, shifting the paradigm under which harmful acts are conceived simultaneously shifts the sovereign’s expected response to those acts: under the

9 *E.g.*, President’s Radio Address, 1 PUB. PAPERS 215, 215 (Feb. 27, 1993) (assuring officials that “full measure of Federal law enforcement resources will be brought to bear on this investigation,” including cooperation with local law enforcement); President’s Remarks on Receiving the Rotary International Award of Honor and an Exchange With Reporters, 1 PUB. PAPERS 236, 236 (Mar. 4, 1993) (praising law enforcement authorities’ response to bombing); President’s Interview With Dan Rather of CBS News, 1 PUB. PAPERS 346, 350 (Mar. 24, 1993) (noting suspect in bombing was arrested in Egypt and brought to U.S.); *see also* Op-Ed., *Day of Terror, and Questions*, N.Y. TIMES, Feb. 28, 1993, *available at* <http://www.nytimes.com/1993/02/28/opinion/day-of-terror-and-questions.html> (“[A]uthorities are operating on the assumption that a bomb caused the explosion [at the World Trade Center] and are pursuing a criminal investigation.”); Anderson, *supra* note 5, at 232 (noting the Clinton administration treated 1993 bombing as a “criminal act that should be resolved within the criminal justice system”).

10 *E.g.*, President’s Remarks Following a Meeting With the National Security Team, 2 PUB. PAPERS 1100, 1100 (Sept. 12, 2001) (“[The attacks] were acts of war.”); President’s Remarks in a Telephone Conversation With New York City Mayor Rudolph W. Giuliani and New York Governor George E. Pataki and an Exchange with Reporters, 2 PUB. PAPERS 1103, 1104 (Sept. 13, 2001) (discussing “new kind of war” that “has been declared on America”); President’s Remarks at the National Day of Prayer and Remembrance Service, 2 PUB. PAPERS 1108, 1108 (Sept. 14, 2001) (“War has been waged against us by stealth and deceit and murder.”); President’s Remarks in a Meeting with the National Security Team and an Exchange with Reporters at Camp David, Maryland, 2 PUB. PAPERS 1111, 1111-12 (Sept. 15, 2001) (“Underneath our tears is the strong determination of America to win this war. . . . We’re at war. There has been an act of war declared upon America by terrorists, and we will respond accordingly.”); President’s Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001) (“Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”).

11 President’s Remarks Following a Meeting With the National Security Team, *supra* note 10, at 1101 (“The freedom-loving nations of the world stand by our side. This will be a monumental struggle of good versus evil, but good will prevail.”).

12 *Id.* at 1100.

13 President’s Address to the Nation on the Terrorist Attacks, 2 PUB. PAPERS 1099, 1100 (Sept. 11, 2001).

14 President’s Address Before a Joint Session of Congress on the State of the Union, 1 PUB. PAPERS 81, 83-84 (Jan. 20, 2004).

criminal law paradigm, the sovereign's expected response is to investigate, arrest, and prosecute the suspect;¹⁵ under the war paradigm, the expected response is to attack, kill, and defeat the enemy.¹⁶ According to classical theories, both responses aim to achieve some version of "justice,"¹⁷ but the legal frameworks under which the responding government operates differ starkly.¹⁸ The choice is one of policy, and the consequences vary significantly.¹⁹

The "battlefield" is the notion around which these paradigmatic principles coalesce. Section A of this part shows why defining the geographic scope of the battlefield matters in establishing the operative legal framework. Sections B and C describe the positions of the Executive and the Judiciary with regard to the geographic scope of the battlefield post-September 11, 2001. Both the Bush and Obama administrations have conceptualized the battlefield as a global one, encompassing a worldwide war against al-Qaeda. In the first few years after September 11, 2001, the Judiciary exhibited restraint in adopting a similar position, adhering to a more traditional notion of a battlefield constrained by active hostilities. As Part III posits, however, judicial restraint has waned. Courts have exhibited increased deference to the Executive on national security policy matters and, specifically, have declined to address the geographic scope of the battlefield in at least two cases that squarely presented the issue. Simultaneously, the Executive has put forward increased rhetoric concerning the threat posed by al-Qaeda "reaching into" the United States to recruit and radicalize Americans. In doing so, the Executive is shaping the conflict as a global war on a borderless battlefield, which, accordingly, includes the United States.²⁰ With that extension of the battlefield comes significant changes in the conception and role of state and local law enforcement.

15 *E.g.*, Cynthia A. Brown, *Divided Loyalties: Ethical Challenges for America's Law Enforcement in Post 9/11 America*, 43 CASE W. RES. J. INT'L L. 651, 670 (2011) ("Police . . . enforce laws and keep the peace applying the minimal force necessary, bound by law to ensure civil liberties and protect life. The goals of law enforcement center around the capture of criminal suspects in order to bring them to trial. . . ."); Kris, *supra* note 5, at 19-23 (discussing the benefits of involving law enforcement and criminal law paradigm — investigation, arrest, and prosecution — in counterterrorism operations).

16 *E.g.*, Brown, *supra* note 15, at 670 ("The military, employed almost exclusively against external enemies in times of war, are trained to kill by the use of overwhelming force.").

17 The "just war" theory around which the Uniform Code of Military Justice is formulated seeks to examine the "justice of war" and serves as a guide for determining whether any particular act of war is "just" or "moral." *Id.* at 662; *see also* John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 234 (2004) ("The starting point in classic just war theory was an injustice that needed to be remedied, and war was viewed as a potential way of remedying that injustice."); Mark Edward DeForrest, *Just War Theory and the Recent U.S. Air Strikes Against Iraq*, 1 GONZAGA J. INT'L L. 4 (1997/98) (discussing the origins and principles of just war theory).

18 *See infra* Section II.A; *see also* Jackson, *supra* note 3, at 151 ("Re-constructing [the attacks] primarily as an 'act of war' however, conferred on the state powers reserved for the supreme emergency, as well as domestic and international justification for military-based self-defense.").

19 *See, e.g.*, David B. Rivkin, Jr. & Lee A. Casey, *Claims and Counterclaims*, WALL ST. J., Oct. 5, 2006, at A20 (discussing "which legal paradigm — war or law enforcement — makes most sense in meeting the threat"); Jackson, *supra* note 3, at 150-51 (arguing that shifting the framework under which the attacks were conceptualized "was central . . . to justifying a war-based, rather than a criminal justice-based, counter-terrorist response.").

20 *See, e.g.*, Nick J. Sciuillo, *On the Language of (Counter)terrorism and the Legal Geography of Terror*, 48 WILLAMETTE L. REV. 317, 328 (2012) ("Because if there is not some geopolitical locus where we might act, might engage in war, then war is justifiable everywhere.").

A. Why Defining the Battlefield Matters

Defining the geographic scope of the battlefield²¹ is a fundamental exercise of sovereign power with significant implications for the rule of law because it triggers the legal framework under which the sovereign authority operates.²² Typically when operating within the battlefield, the law of war applies.²³ When operating outside the battlefield, human rights law and, domestically, civilian criminal law applies.²⁴

The criminal law paradigm and the war paradigm are distinct in the actions lawfully permitted and the rights and protections afforded to individuals. Under the U.S. criminal law paradigm, in most circumstances the sovereign authority may only arrest an individual upon probable cause that the individual has committed a crime.²⁵ Lethal force is a last resort: the sovereign is restricted from taking lethal force against individuals to situations in which a law enforcement officer has probable cause to believe the individual poses a threat of serious physical harm — and lethal force may only

21 For a discussion of defining the temporal scope of the battlefield, *see, e.g.*, Adam Klein, Comment, *The End of Al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865 (2010).

22 *See, e.g.*, Blank, *supra* note 4, at 15 (“Thus, above all else, when leaders invoke the battlefield . . . they seek to harness the authority to use force as a first resort against those identified as the enemy.”); Rivkin, Jr. & Casey, *supra* note 19 (discussing the policy choices behind operating within criminal law or war paradigm in responding to terrorist acts); Nick J. Sciuillo, *supra* note 20, at 321-22 (“Law is intimately tied to space. Our geographical imagination helps order the law. Place matters, whether one speaks of jurisdiction, the law’s reach, sovereignty, or many other questions common in legal discourse.”).

23 This article focuses on the law governing conduct during war, also known as *jus in bello*, and not the law governing the justifications for entering or declaring war, known as *jus ad bellum*. The *jus in bello* war paradigm, also known as the “law of armed conflict” (LOAC) or “international humanitarian law” (IHL) is shaped largely by the two Hague Conventions and the four Geneva Conventions (August 12, 1949) and their Additional Protocols. *See* Hague Convention (II) on the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1817; Hague Convention (IV), Oct. 18, 1907, 36 Stat. 2301; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Geneva IV]; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

24 *E.g.*, Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, (describing rights and duties of neutral powers); *see also* Blank, *supra* note 4, at 14-15 n.53; Ved P. Nanda, *Introductory Essay: International Law Implications of the United States’ “War on Terror”*, 37 DENV. J. INT’L L. & POL’Y 513, 514 (2009).

25 *United States v. Watson*, 423 U.S. 411, 422-24 (1976) (permitting warrantless arrest if officers have probable cause to believe individual has committed crime); *see also* Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 152 (2010) (discussing the implication of *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), on the authority of officers to make warrantless arrests when probable cause is satisfied).

be used to prevent the individual's escape.²⁶ Criminal suspects receive fundamental constitutional protections and civil liberties, including the presumption of innocence,²⁷ the right to due process,²⁸ the right to counsel,²⁹ the right to be tried by a jury of one's peers,³⁰ and the right to confront one's accusers.³¹

In contrast, under the war paradigm the sovereign is lawfully permitted to use coercive, including lethal, force against any individual deemed to be part of the enemy.³² Those fundamental individual protections under the criminal law paradigm quickly give way to the exigencies of battle. Although the laws of war afford some basic protections to enemy soldiers, those protections are a far cry from the substantive and procedural rights of criminal suspects.³³ Ultimately, when a soldier confronts an enemy during war, the soldier's fundamental mission is clear: overcome the enemy for the sake of victory.³⁴ Achieving that mission often demands lethal force.³⁵

B. *The Executive: A Global War on a Worldwide Battlefield*

Under both Presidents George W. Bush and Barack Obama, the Executive has defined the post-September 11, 2001 conflict as a war on terror waged on a worldwide, borderless battlefield.³⁶ In his address to Congress just nine days after the attacks, President Bush intrepidly vowed to fight terror-

26 *Tennessee v. Garner*, 471 U.S. 1, 10 (1985) (“The use of deadly force to prevent the escape of *all* felony suspects, whatever the circumstances, is constitutionally unreasonable . . . [But w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”); see also Geoffrey S. Corn, *Back to the Future: De Facto Hostilities, Transnational Terrorism, and the Purpose of the Law of Armed Conflict*, 30 U. PA. J. INT’L L. 1345, 1353 (2009) (“At the most basic level, law enforcement treats the use of deadly force as a measure of last resort.”); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 386-87 (2003) (“[P]olice officers have a duty to use minimum force, and only when reasonably justified, in accomplishing their mission.”).

27 See *Coffin v. United States*, 156 U.S. 432, 453 (1895) (establishing presumption of innocence of persons accused of crimes).

28 U.S. CONST. AMENDS. V & XIV.

29 U.S. CONST. AMEND. VI.

30 U.S. CONST. AMEND. VII.

31 U.S. CONST. AMEND. VI.

32 Cf. Geneva IV, art. 3(1) (prohibiting use of force against persons taking no active part in hostilities); see also O’Connell, *supra* note 5, at 345, 351–52 (“Under international law, in an armed conflict enemy fighters may be targeted and killed in situations not permitted in peace. . . . Within an armed conflict, lawful combatants are not restricted to killing only to save a human life immediately [as in the criminal law paradigm]. Opposing combatants and civilians taking a direct part in hostilities may be killed in a zone of armed conflict hostilities unless they surrender or an alternative is available and dictated by the principles of humanity.”).

33 See generally Geneva IV (establishing the rights of prisoners of war).

34 E.g., Arthur Rizer and Joseph Hartman, *How the War on Terror Has Militarized the Police*, THE ATLANTIC (Nov. 7, 2011, 3:11 PM), <http://www.theatlantic.com/national/archive/2011/11/how-the-war-on-terror-has-militarized-the-police/248047/#> (discussing the role of soldiers).

35 E.g., Blank, *supra* note 4, at 14-15 (noting LOAC permits use of force as “first resort against legitimate targets”); Corn, *supra* note 26, at 1353 (“[A]rmed conflict is defined by the authority to use deadly force as a measure of first resort.”).

36 *Infra* Section II.B.

ism in every corner of the earth.³⁷ Although not as expressly expansive, the Obama Administration has echoed that policy, affirming that we are at war with al-Qaeda wherever the group's members may be.³⁸

In his address to the nation on the evening of September 11, 2001, the nation's response to the attacks appeared to be consistent to the response throughout preceding decades — within the criminal law paradigm: President George W. Bush proclaimed, “The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and bring them to justice.”³⁹

However, the following day the administration's discourse changed. The attacks no longer necessitated law enforcement resources; to the contrary, the President declared the attacks acts of war,⁴⁰ and the necessary and appropriate response was to engage in battle.⁴¹ In public remarks on September 12, 2001, following a meeting with the national security team, Bush proclaimed, “The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war.”⁴² On September 19, 2001, Bush urged that “[t]he mindset of war must change.”⁴³ Specifically rebuking the need for a defined battlefield, Bush stated, “[T]his is a new type of struggle . . . [T]errorism knows no borders.”⁴⁴

As the days passed and the Executive formulated and commenced its response to the attacks, it became clear that President Bush's rhetoric meant something more than inspiration for a grieving nation. The rhetoric was carefully designed to shift the paradigm under which the nation's response to the September 11 attacks would operate.⁴⁵ By declaring war on “terrorism”— an indefinable abstraction⁴⁶ — the Executive seized the power to shape the conflict and thus apply the paradigm

37 President's Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1142 (Sept. 20, 2001) (“Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”).

38 *Infra* Section II.B.

39 President's Address to the Nation on the Terrorist Attacks, 2 PUB. PAPERS 1099, 1100 (Sept. 11, 2001).

40 *Supra* note 9 (collecting official statements).

41 *E.g.*, President's Radio Address, 2 PUB. PAPERS 1113, 1113 (Sept. 15, 2001) (“Those who make war against the United States have chosen their own destruction.”); President's Remarks on Arrival at the White House and an Exchange with Reporters, 2 PUB. PAPERS 1114, 1116 (Sept. 16, 2001) (“This crusade, this war on terrorism is going to take a while, and the American people must be patient.”).

42 President's Remarks Following a Meeting with the National Security Team, *supra* note 10, at 1100.

43 President's Remarks Prior to Discussions with President Megawati Sukarnoputri of Indonesia and an Exchange with Reporters, 2 PUB. PAPERS 1129, 1130 (Sept. 19, 2001).

44 *Id.* at 1131 (emphasis added).

45 *See, e.g.*, Wojtek Mackiewicz Wolfe, WINNING THE WAR OF WORDS 45 (2008) (“Up until September 11, all mentions of terrorism and war were separate. Nearly all references of war were historical in nature, usually mentioned on military holidays and aimed at specific rather than general audiences. By framing war and terror as a single concept, Bush seized the moment to combine two traditionally separate forms of foreign policy.”); Jackson, *supra* note 12, at 38 (“In probably the most important discursive move of all, the [September 11] attacks were remade from acts of terrorism, symbolic violence and political murder by non-state actors, to acts of ‘war.’”).

46 *Infra*, Section III.A.

wherever “terrorism” may occur.⁴⁷

The Bush administration’s aggressive position concerning the global battlefield did not wane, even as it was increasingly confronted with allegations of abusive policies and practices that were enacted shortly after the September 11 attacks. The Department of Justice, a key voice of the administration’s policy positions, repeatedly argued before the courts that the United States is engaged in a global war. In *Rasul v. Bush*, the administration characterized the case as “aris[ing] in the midst of the *global armed conflict* in which the United States is currently engaged against the al Qaeda terrorist network and its supporters.”⁴⁸ In *Hamdi v. Rumsfeld*, the administration argued again that the United States is engaged in a global armed conflict.⁴⁹ And in *Rumsfeld v. Padilla*, the administration boldly asserted that the “authority of the Commander in Chief to engage and defeat the enemy encompasses the capture and detention of enemy combatants wherever found, *including within the Nation’s borders*.”⁵⁰ In 2006 the acting head of the Department of Justice’s Office of Legal Counsel testified before a closed session of Congress that the President was authorized to order targeted killings *inside* the United States on the basis of the global war on terror.⁵¹

Taking office in January 2009, President Barack Obama’s administration publicly announced that it had “dropped [the phrase] ‘war on terror’ from its lexicon,”⁵² In place of the oft-cited phrase of

47 See, e.g., Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) (expressing no geographical limits in authorization for President to “use all necessary and appropriate force” against those responsible for September 11, 2001 attacks); Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 222 (2001) (containing no geographical limit for waging war on terror).

48 Brief for the Respondents at 7, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739, at *1 (emphasis added).

49 Brief for the Respondents at 11, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020, at *15 (“[T]he military’s settled authority to detain captured enemy combatants in wartime applies squarely to the global armed conflict in which the United States is currently engaged.”).

50 Brief for the Petitioner at 10, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 542777, at *14.

51 Katerina Ossenova, *DOJ Official: President may have power to order terror suspects killed in United States*, JURIST (Feb. 5, 2006, 2:39 PM), <http://jurist.org/paperchase/2006/02/doj-official-president-may-have-power.php>.

52 National Strategy for Counterterrorism, WHITE HOUSE 2 (2011) (“The United States deliberately uses the word ‘war’ to describe our relentless campaign against al-Qa’ida. However, this Administration has made it clear that we are not at war with the tactic of terrorism or the religion of Islam. We are at war with a specific organization—al-Qa’ida.”); see also *Obama team drops ‘war on terror’ rhetoric*, REUTERS (Mar. 30, 2009, 7:46 PM), <http://www.reuters.com/article/2009/03/30/us-obama-rhetoric-idUSTRE52T7MH20090330>.

the Bush-era, the administration asserts instead that the nation is at war with al-Qaeda.⁵³ Yet as an entity constrained by no borders, such rhetoric remains consistent with the notion that our nation is engaged in a global, borderless war.

The National Strategy for Counterterrorism, the Executive's official strategy position, again declares that the "preeminent security threat to the United States continues to be from al-Qaeda and its affiliates and adherents"⁵⁴ and the "United States remains at war with al-Qaeda."⁵⁵ This strategy paper emphasizes al-Qaeda's "regional and global agenda"⁵⁶ and states that "[g]lobal communications and activity place al-Qaeda's calls for violence and instructions for carrying it out within easy reach of millions."⁵⁷ Its areas of focus broadly include "the Homeland," the Arabian Peninsula, East Africa, Europe, Iraq, the Maghreb and Sahel, Southeast Asia, Central Asia, South Asia.⁵⁸ Although some regions are not expressly identified, the paper then warns that al-Qaeda has the means to "shar[e] information and ideas globally,"⁵⁹ leaving no corner of the world safe from its reach.

Echoing this position, in September 2011 Deputy National Security Advisor John O. Brennan reaffirmed that "we are at war with al-Qaeda,"⁶⁰ explaining that the "use of military force against al-Qa'ida [is not] restricted solely to 'hot' battlefields like Afghanistan."⁶¹ Harold Koh, Department of State Legal Adviser, has stated that "we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda [and the Taliban]."⁶² And Attorney General Eric Holder reaffirmed in March 2012:

[The executive's] legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the

53 President's Remarks on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09 ("Now let me be clear: We are indeed at war with al Qaeda and its affiliates."); *see also* Anthony Dworkin, *Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism*, 13 EUR. COUNCIL ON FOREIGN REL. 1, 5 (2009) (describing conflicting views of counterterrorism efforts between U.S. and Europe: "Many Europeans recognize the existence of an armed conflict against the Taliban and al-Qaeda in Afghanistan; where the United States goes further is in extending the boundaries of the conflict to take in al-Qaeda's operations around the world."); Nanda, *supra* note 24, at 532-33 (arguing Obama Administration continues to pursue global war on terror); John B. Bellinger, III, *Terrorism and Changes to the Laws of War*, 20 Duke J. Comp. & Int'l L. 331, 332 (2010) ("The main point is that the legal framework that the Obama administration is applying continues to be a law of war framework. The President dropped the label of 'a Global War on Terror,' and I think this was a good idea because this label did more harm than good. But he is still pursuing, as a legal matter, a global war on al Qaeda and, more significantly, he is applying the laws of war for detention and for targeting").

54 National Strategy for Counterterrorism, *supra* note 52, at 3.

55 *Id.*

56 *Id.* at 4.

57 *Id.*

58 *Id.* at 11-17.

59 *Id.* at 17.

60 Remarks of John O. Brennan, *Strengthening our Security by Adhering to our Values and Laws*, WHITE HOUSE (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

61 *Id.*

62 Remarks of Harold Hongju Koh, *The Obama Administration and International Law*, STATE DEP'T (March 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. . . . Our government has both a responsibility and a right to protect this nation and its people from such threats.⁶³

Indeed, both Presidents Bush and Obama have employed carefully crafted rhetoric concerning a worldwide war waged on a global battlefield. As Part III argues, this rhetoric, when combined with the rhetoric concerning the threat of homegrown terrorism, operates to bring the battlefield — and characteristics of the war paradigm — to within our borders.

C. The Judiciary: A More Traditional View Early On

In the first cases that eventually made their way to the courts after September 11, 2001, the federal judiciary was reluctant to accept the Executive's expansive conception of a global battlefield.⁶⁴ As this section describes, the Supreme Court specifically opted to adhere to a more traditional notion of a "theater" of war or zone of conflict akin to the site of actual combat activities. Lower courts also distinguished the "hot" battlefield of Afghanistan from the United States, notwithstanding an apprehended individual's suspected threat or connection to al-Qaeda. It seemed the courts were struggling to reconcile the Executive's expansive view of the battlefield with the reality of the new, non-traditional conflict with al-Qaeda: where were the markers of war, such as artillery and trenches? Unfamiliarity with the "war on terror" led to the courts' hesitancy to baldly accept the Executive's conceptualization of the battlefield.⁶⁵

The war on terror arrived to the courts in one form as cases of unlawful detention and enemy combatant designations arising from arrests and captures in the aftermath of the September 11 attacks and the commencement of U.S. military strikes on Afghanistan. Two paramount cases demonstrate the Judiciary's traditional view of the battlefield early on: Jose Padilla and Yaser Hamdi, two U.S. citizens designated and detained as enemy combatants soon after September 11, 2001.

Jose Padilla was suspected of associating with al-Qaeda and of planning terrorist attacks in the United States.⁶⁶ He was not, however, accused of being a member of al-Qaeda.⁶⁷ Padilla was arrested in 2002 pursuant to a material witness warrant at Chicago's O'Hare International Airport as he returned from a trip to Pakistan.⁶⁸ After a month in maximum-security detention, the President designated Padilla an enemy combatant, and he was transferred to the high-security Naval brig in

63 Remarks of Eric Holder, DEP'T OF JUSTICE (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

64 See, e.g., *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003) (describing the U.S. as "outside a zone of combat"); *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting) (noting that the U.S. is "distant from a zone of combat"); see also Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1177 (2011).

65 See *Padilla v. Rumsfeld*, 352 F.3d at 711 (emphasizing that the court's holding is limited to the case of an American citizen detained in the United States and says nothing about individuals detained on the foreign battlefield.).

66 *Id.* at 698.

67 *Id.* at 701 ("Notwithstanding Padilla's extensive contacts with al Qaeda members and his actions under their direction, the government does not allege that Padilla was a member of al Qaeda.").

68 *Id.* at 699.

South Carolina.⁶⁹ Padilla’s attorney petitioned for habeas corpus relief on Padilla’s behalf.⁷⁰

Despite the Executive’s allegations that Padilla had received explosives training from al-Qaeda members, as well as instructions from high-level al-Qaeda officials to carry out attacks in the United States *in the name of* al-Qaeda, the Second Circuit refused to accept the government’s assertion that the battlefield extends beyond the zone of active combat.⁷¹ The court consistently distinguished between capture in Afghanistan and apprehension in the United States, holding that the President’s inherent war powers imbued in his constitutional authority as Commander-in-Chief do not permit the detention of a U.S. citizen “seized within the country *away from a zone of combat*.”⁷²

The Supreme Court ultimately dismissed the Second Circuit’s holding on jurisdictional grounds, concluding that Padilla did not properly file his habeas petition in the Southern District of New York.⁷³ The majority did not reach the merits.⁷⁴ Justice Stevens did, however, echo the Second Circuit’s traditional notions of the battlefield in his dissent, writing that detention of enemy soldiers may be appropriate to prevent them from returning to the battlefield,⁷⁵ a concept integral to the lawfulness of enemy combatant detention. Such detention may not, however, “be justified by the naked interest in using lawful procedures to extract information.”⁷⁶ For Justice Stevens, detention of an enemy combatant *on or near* the “hot” battlefield, or zone of combat, is legitimate to prevent that individual from returning to the battlefield. But Padilla, from within the United States, posed little risk of returning to that active zone of combat and therefore, his indefinite, process-less detention as an enemy combatant was problematic.⁷⁷

Yaser Hamdi, on the other hand, was captured in Afghanistan in 2001 by members of the Northern Alliance and turned over to the U.S. military.⁷⁸ Like Padilla, he was not accused of being a member of al-Qaeda, but he was alleged to have associated and trained with the Taliban⁷⁹ — a regime known for its support of al-Qaeda.⁸⁰ Hamdi was transferred to and detained at Guantánamo Bay for several months, and in April 2002, upon learning that Hamdi was a U.S. citizen, officials transferred him to the military brig in South Carolina.⁸¹ Labeled an “enemy combatant,” Hamdi was

69 *Id.* at 700.

70 *Id.* at 698.

71 *See, e.g., id.* at 710 (“We reemphasize, however, that our review is limited to the case of an American citizen arrested in the United States, *not* on a foreign battlefield or while actively engaged in armed conflict against the United States.”) (emphasis added); *id.* at 712 (“Here, we find that the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil *outside a zone of combat*.”) (emphasis added); *id.* at 717 (distinguishing *Hamdi* on basis that Hamdi was captured “in a zone of combat in Afghanistan”).

72 *Id.* at 721 (emphasis added).

73 *See* *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

74 *Id.* at 430.

75 *Id.* at 465 (Stevens, J. dissenting).

76 *Id.*

77 *Id.* (“For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.”).

78 *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

79 *Id.* at 512–13.

80 *Id.* at 510.

81 *Id.*

detained at the brig indefinitely without formal charges or proceedings.⁸² Hamdi's father, acting as his son's next friend, petitioned for habeas corpus relief⁸³ and challenged the constitutionality of Hamdi's detention.⁸⁴

The Fourth Circuit refused to extend the due process protections to Hamdi that the Second Circuit had afforded to Padilla.⁸⁵ Judge Wilkinson, concurring, confronted the battlefield issue, bluntly stating that to “compare *this* battlefield capture [in Afghanistan] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples to oranges.”⁸⁶ He emphasized the sensitive nature of judicial review of decisions made on “foreign battlefields”⁸⁷ and distinguished Hamdi from Padilla — both citizens — on the basis of the location of capture: “[W]hen an American citizen is captured in an enemy country where we are engaged in active hostilities, we will require no more legal justification than what the government voluntarily provided to us in this case.”⁸⁸

Hence, despite Hamdi and Padilla's similar connections to and associations with al-Qaeda, the locus of their apprehension strongly guided the circuit courts' analysis of their detention. Although the Supreme Court reversed the Fourth Circuit's decision, holding that due process required that Hamdi receive a meaningful opportunity to contest the factual basis for his detention due to his citizenship and the fact that he was detained *in* the United States,⁸⁹ the Court similarly echoed the Fourth Circuit's traditional conceptualization of a battlefield limited to the zone of active hostilities.⁹⁰

The Judiciary's reluctance to accept the Executive's expansive view of the battlefield was a natural response to the launch of the non-traditional war on terror — the courts lagged behind the executive in conceptualizing a “new” form of armed conflict. Ten years after the launch of the war, however, courts have recently exhibited the opposite reluctance — shying away from addressing the difficult question of how far the war on terror truly extends when squarely presented with the issue. In subsequent cases involving the use of force beyond Afghanistan, courts have increasingly refused to confront the issue of defining or limiting the geographic scope of the battlefield, resting instead on canons of deference to the executive.⁹¹ Deference to the Executive — the entity defining and shaping the contours of the war — extends the battlefield far beyond Afghanistan. As such, the Ex-

82 *Id.*

83 *Id.* at 511.

84 *Id.*

85 *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J. concurring) (“The [*Padilla*] panel did not suggest that its holding would apply to any part of the world where American troops might happen to be present.”).

86 *Id.* (emphasis added).

87 *Id.* at 343; *see also id.* at 342 n.2 (noting distinct nature of “foreign battlefield capture”); *id.* at 347 n.5 (“[A]s one moves away from a foreign battlefield to the United States where civil courts are open and functioning, the deference due to the military's battlefield decision decreases.”).

88 *Id.* at 349.

89 *Hamdi*, 542 U.S. at 509.

90 *See, e.g., id.* at 523-24 (“Justice Scalia largely ignores that context of this case: a United States citizen captured in a *foreign* combat zone.”) (emphasis in original).

91 *Infra* Section III.D.

executive's mounting rhetoric of the threat of homegrown terrorism in the United States,⁹² combined with the courts' refusal to scrutinize the scope of the battlefield,⁹³ threatens to bring the battlefield to the homeland.

III. THREAT RHETORIC, HOMEGROWN TERRORISM, AND THE LEGITIMACY DEFICIT

Where markers of traditional war are absent, defining the battlefield is in part an exercise in rhetoric. In the nontraditional conflict labeled the war on terror, the geographic scope of the battlefield is heavily influenced by the shape, color, and reach of the Executive's rhetoric concerning the present threat of terrorism's reach and influence. Section A of this Part introduces the concept of threat rhetoric in the context of a war on terror and our modern notion of "security." Then, to demonstrate the efficacy of threat rhetoric in garnering support for the use of force and, in turn, in enlarging the geographic scope of the battlefield, Section B describes the threat rhetoric successfully employed by the Bush administration leading up to the 2003 invasion of Iraq. Section C draws parallels from the threat rhetoric surrounding the Iraq War to argue that the executive, with congressional support, is employing similar rhetoric concerning the threat of homegrown terrorism within the United States to garner support for waging the war on terror on a global battlefield and, accordingly, importing characteristics of the war paradigm into the United States. Section D argues that the homegrown terrorism threat rhetoric, premised primarily on secret intelligence in the hands of experts within the Executive, reinforces a perceived legitimacy deficit within the Judiciary so that courts are likely to exercise increasing deference to the executive on matters of post-September 11 national security. As Part IV argues, a global battlefield that includes the homeland leads to characteristics of the war paradigm employed within our borders — most notably for present purposes, the militarization of state and local law enforcement.

A. Terrorism, Threat Rhetoric, and Security

Declaring war on an indefinable abstraction like terrorism affords the Executive discretion to shape, shift, and stretch the contours of the conflict. This includes the geographic scope of the battlefield on which the conflict is waged. The war on terror is in part an exercise of power defined by the Executive's own rhetoric identifying, coloring, and shading the present threat. The Executive employs threat rhetoric to garner public support for increased executive power exercised in the name of the war.⁹⁴ And, as this part demonstrates, where our modern conception of "security" — *national* security — rests on expertise and secrecy, the threat rhetoric is particularly powerful.

92 *Infra* Section III.C.

93 *Infra* Section III.D.

94 *See, e.g.*, Brown, *supra* note 15, at 664-65 (2011) (arguing that America's leaders use carefully crafted rhetoric and propaganda to fit new war on terror into confines of "just war" theory).

As a general concept divorced from any factual context, terrorism is an indefinable abstraction.⁹⁵ Despite the intense focus on terrorism in the recent decade, the international community has yet to settle on a single workable definition,⁹⁶ and the U.S. domestic criminal code boasts numerous different standards.⁹⁷ Often, the government's "official definition" of terrorism depends solely on the responding agency — the Department of State, Department of Defense, and Federal Bureau of Investigation each has its own official definition.⁹⁸ Many state criminal codes also include some version of the crime of "terrorism."⁹⁹

Terrorism is indefinable partly because no single definition could encompass the totality of what it is defining.¹⁰⁰ A definition must include general traits common to all manifestations of the object defined: "[t]he definition is the reduction of the multiplicity of the phenomena to the unity of a common background."¹⁰¹ But there is no common background for acts of terrorism: terrorism is merely a label for a particular type of political violence, but the acts to which that label is assigned

95 Many have, however, argued that crafting a single definition of "terrorism" is in fact possible and necessary. *See, e.g.,* Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, 27 CARDOZO L. REV. 1987, 1995-97 (2006); Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J. INT'L & COMP. L. 357, 360-62 (2003); Boaz Ganor, *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?*, 3 POLICE PRAC. & RESEARCH 287 (2002).

96 *E.g.,* Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1, 6-8 (2011) (discussing inability of international community to settle on definition of terrorism); Alex Schmid, *Terrorism — The Definitional Problem*, 36 CASE W. RES. J. INT'L L. 375 (2004) (same); Tiefenbrun, *supra* note 95, at 363 (same). *But see* Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law*, 29 B.C. INT'L & COMP. L. REV. 23, 64-68 (2006) (arguing that one can discern a core international law definition of terrorism from common elements and themes in United Nations resolutions).

97 Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, J. OF LEGISLATION 249 (2004) (discussing twenty-two different definitions or descriptions of terrorism in domestic law); *see also* Young, *supra* note 96, at 76-79.

98 *Compare* 22 U.S.C. § 2656f(d)(2) (Dep't of State definition: "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents") *with* 28 C.F.R. § 0.85 (FBI definition: "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives") *and* Dep't of Defense Directive 2000.12 (DOD definition: "the calculated use of violence or threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological"); *see also* Mike German, THINKING LIKE A TERRORIST 33 (2007); Schmid, *supra* note 96, at 377.

99 *See, e.g.,* ALA. CODE § 13A-10-151(1) (defining "terrorism"); CAL. PENAL CODE § 11416 (declaring "threat of terrorism" involves weapons of mass destruction); MICH. PENAL CODE § 750.543B(a) (defining "act of terrorism"); N.Y. PENAL LAW § 490.05(1) (defining "terrorism").

100 *See, e.g.,* German, *supra* note 98, at 29 ("Part of the problem of defining terrorism is semantic. We use one word to describe too many different things, which . . . inevitably leads to unnecessary confusion.") (citation omitted); Begorre-Bret, *supra* note 95, at 1989-90 ("In order to define an object, one has to show the traits which are common to all the manifestations of that object. . . . But when terrorism is studied, that reduction appears to be doomed to fail, for the word 'terrorism' applies to phenomena which have nothing in common. Terrorism is so protean that no synthetic formula can grasp it."); Perry, *supra* note 97, at 252 (citing "changing nature of terrorism" as reason for lack of definitional consensus: "no definition can possible cover all varieties of terrorism that have appeared through history") (internal quotation marks omitted).

101 Begorre-Bret, *supra* note 95, at 1990.

have no inherent characteristics in common.¹⁰² Simply put, “[w]hen we look for the definition of terrorism, we are the victims of a nominalistic fallacy: we believe that all the phenomena called ‘terrorism’ have the same nature because they have the same name.”¹⁰³

Terrorism is also indefinable because it is subjective.¹⁰⁴ Terrorism is a “performative” term¹⁰⁵ not a descriptive term.¹⁰⁶ Labeling a particular act “terrorism” does not describe the act — it condemns that act and immediately identifies an enemy.¹⁰⁷ The power of performance, thus, is purely in the hands of the labeler: he who employs the term “terrorism” unleashes its power.¹⁰⁸ Hence, the oft-

102 See, e.g., Begorre-Bret, *supra* note 95, at 1990 (“There are several forms of violence which are called ‘terrorism,’ but they have nothing in common aside from their name.”); John Collins and Ross Glover, *COLLATERAL LANGUAGE* 165 (2002) (“‘Terrorism’ is nothing more than a name given to a small subset of actions within the much larger category of political violence.”).

103 Begorre-Bret, *supra* note 95, at 1990.

104 See, e.g., German, *supra* note 98, at 33 (“If terrorism is considered a subjective notion that can change depending on the perspective of the actors involved, then the terrorist’s point of view is as relevant as anyone else’s.”); Noëlle Quéniwet, *The World After September 11: Has it Really Changed?*, 16 EUR. J. INT’L L. 561, 562 (2005) (“Authors unanimously concede that there is no commonly agreed upon definition [of terrorism], although there is widespread agreement that the concept carries with it a pejorative and subjective connotation.”); Jean-Marc Sorel, *Some Questions About the Definition of Terrorism and the Fight Against Its Financing*, 14 EUR. J. INT’L L. 365, 366 (2003) (“[T]he border between resistance and terrorism remains subjective and contested.”). *But see* Begorre-Bret, *supra* note 95, at 1995 (arguing that there are nevertheless common, objective characteristics of terrorism — namely, its violent and political nature).

105 See J. L. Austin, *HOW TO DO THINGS WITH WORDS* (1962) (discussing the linguistic concept of performative terms, where the utterance of a term gives it part of its meaning).

106 E.g., Nick J. Sciallo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561, 566 (2011) (“To define something as terrorism is to politically assign values, and it results in constructing the terrorist as Other. Defining terrorism is a political act that demands the oppressive politics of Otherization.”); Begorre-Bret, *supra* note 95, at 1991 (“The notion of terrorism is not a descriptive one. It is not used to describe an act and to ascribe certain traits to it. Instead, the word ‘terrorism’ is used to condemn the act.”); Sami Zeidan, *Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT’L L.J. 491, 491-92 (2004) (“The difficulty of defining terrorism lies in the risk it entails of taking positions. Left to its political meaning, terrorism easily falls prey to change that suits the interests of particular states at particular times.”).

107 See, e.g., Upendra D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, 37 DENV. J. INT’L L. & POL’Y 653, 656 (2009) (“The problem of defining terrorism is further complicated in modern days by one party’s tactical use of characterizing another party as a terrorist.”); Begorre-Bret, *supra* note 95, at 1991 (“Terrorism is only the activity of the enemy, whoever the enemy may be and whatever his activity may be.”); Quéniwet, *supra* note 104, at 564 (“[I]o classify a group as a terrorist organization or freedom fighters using partly terrorist methods[] is a political decision.”) (quotations omitted); Sorel, *supra* 104, at 366 (“The expressions *Terrorism* and *Terrorist* . . . have always had a pejorative connotation. In other words, these expressions are used in order to oppose someone or something and to justify this opposition.”) (emphasis in original).

108 See, e.g., Sciallo, *supra* note 20, at 336 (“Describing a person as a terrorist kills that individual and gives birth to a new subjectivity: the Terrorist.”); Acharya, *supra* note 107, at 655 (“In the absence of a definition of [terrorism], there is a free and open tendency for the persons using the term, whether states, organized groups or scholars, to define it as suits their purposes at the moment.”). Collins & Glover, *supra* note 102, at 165 (“What distinguishes ‘terrorism’ from other acts of political violence, of course, depends on who is doing the defining.”);

cited cliché: “one man’s terrorist is another man’s freedom fighter.”¹⁰⁹

It thus follows that a sovereign’s declaration of war on an indefinable abstraction like terrorism begs for concretization and contextualization. Consider a traditional war fought on a traditional battlefield: the enemy army is generally uniformed and clearly defined, as are the battlefield borders. In the chaos of conflict, a traditional war is — to some degree — predictable. But the war on terror provides few markers and little predictability.¹¹⁰ Who is the enemy?¹¹¹ If it is al-Qaeda, how do we identify a member of al-Qaeda?¹¹² Where does al-Qaeda operate?¹¹³ Do sovereign borders in fact confine al-Qaeda?¹¹⁴ Are its self-professed affiliates also enemies?¹¹⁵ The responding military necessarily demands the parameters of the conflict, and the fearful public insists on knowing the contours of the threat. Threat rhetoric then permeates the gaps that the absence of a single definition of terrorism creates, providing the concretization and contextualization necessary to wage the war.

Threat rhetoric is the language employed by the sovereign — the Executive — to identify and communicate to the citizenry the internal and external threats to the homeland.¹¹⁶ Notwithstanding the absence of traditional markers of conflict in the war on terror, the citizenry looks to the

109 Gerald Seymour, *HARRY’S GAME* (1975); see also Begorre-Bret, *supra* note 95, at 1992 (“To say that one person’s terrorist is another person’s freedom fighter is perhaps a cliché, . . . [b]ut it manifests the semantic problem caused by the indexical nature of the word ‘terrorism.’ . . . When somebody uses the word ‘terrorism,’ he takes a stand in a friend/enemy relation of a Schmittian type.”).

110 *But see* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2068 (2005) (arguing that “despite its novel features, the post-September 11 war on terrorism possesses more characteristics of a traditional war than some commentators have acknowledged”).

111 *See generally id.*, at 2107-16 (discussing which organizations and entities are covered by AUMF); Joseph I. Lieberman, *Who’s the Enemy in the War on Terror?*, WALL ST. J. (June 15, 2010), available at <http://online.wsj.com/article/SB10001424052748703509404575300420668558244.html> (arguing that the declared enemy in the war on terror should be violent Islamic extremism rather than a specific organization).

112 *See generally* Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT’L L.J. 1 (2011); Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C.L.REV. 769 (2011); David Mortlock, *Definite Detention: The Scope of the President’s Authority to Detain Enemy Combatants*, 4 HARV. L. & POL’Y REV. 375 (2010); Thomas J. Bogar, *Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror*, 21 FLA. J. INT’L L. 29 (2009); Matthew C. Waxman, *Administrative Detention of Terrorist: Why Detain, and Detain Whom?*, 3 J. NAT’L SECURITY L. & POL’Y 1 (2009).

113 *See generally* Blank, *supra* note 3.

114 *See generally id.*

115 *See generally* Bardley & Goldsmith, *supra* note 110.

116 *See, e.g.*, Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1480 (2011) (“[R]ecent work on the history of emergencies indicates that, far from being a temporary divergence from a background of normality, the rhetoric of emergency has regularly punctuated recent national discussions of both internal and external threats to order and security. In short, threat rhetoric has burrowed so deep into the fabric of our society that it may be impossible to dislodge.”); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1850 (2010) (discussing the politics of emergency and arguing that “the President and his supporters repeatedly use emergency rhetoric to shore up public support or distract attention from failed policies”).

Executive to identify, describe, and respond to threats.¹¹⁷ Like terrorism, threat rhetoric is in part performative: while it may describe an actual threat to some degree, threat rhetoric also performs the function of identifying the enemy and shaping the conflict.¹¹⁸

Threat rhetoric is particularly powerful in the war on terror because our collective conceptualization of “security” has shifted dramatically since the early-to-mid twentieth century from a personal “democratic security” to a collective “national security.”¹¹⁹ As Aziz Rana describes, before World War II security was understood as the protection of individual property and well-being.¹²⁰ Drawing on the philosophies of John Locke, it followed that individuals possessed the knowledge and reasoning necessary to best look after their own security.¹²¹ Based on that collective knowledge, the institutions and policies employed in the interests of security were largely relegated to the “people” as democratic matters — hence, “democratic security.”¹²² Democratic security emphasized transparency and civilian control and deemphasized secrecy and expertization.¹²³ In other words, the people — collectively — were capable of discerning what was best for their own security.

Beginning in the early twentieth century, however, against the backdrop of economic collapse, industrialization, and the New Deal, the complexities of the new century became clear: ordinary citizens no longer understood the controlling forces nor possessed the capacity to provide for their own well being.¹²⁴ The United States faced numerous new external threats — threats to the home-

117 See, e.g., Wolfe, *supra* note 45, at 27 (“In essence, if the public cannot assess the war based on traditional evaluations and causal events such as gained territory or destroyed targets, they then look to the leader for that evaluation.”); Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1, 3 (2011) (“Citizens of this country tend not to carefully analyze those claim [of threat rhetoric] so long as we are frightened sufficiently by those we are supposed to trust and in whom we have imposed the trust of our national safety and security.”).

118 Austin, *supra* note 105 and accompanying text; see also Brown, *supra* note 15, at 659-60 (arguing that drug trafficking only became a “national security threat” when President Reagan labeled it as such).

119 See generally Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417 (2012).

120 *Id.* at 1423 (“[T]roughout most of the American experience, the dominant ideological perspective saw security as grounded in protecting citizens from threats to their property and physical well-being”).

121 *Id.*

122 *Id.* (“A widespread knowledge of security needs was presumed to be embedded in social experience, indicating that citizens had the skill to take part in democratic discussion regarding how best to protect their property or to respond to forms of external violence.”); see also Aziz Rana, *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. 5099, 5103 (2011).

123 Rana, *supra* note 119, at 1451 (“Presumptions against both secrecy and heightened bureaucracy were believed to be necessary for curtailing the ability of centralized actors — particularly Executive officials and military personnel — to make unilateral judgments about defense and emergency.”).

124 *Id.* at 1453 (“[I]n the past, the U.S. was primarily a society of independent homesteaders and artisans. This meant that individuals and families were often self-sufficient, and that as long as they had access to property or the tools of a trade, they could ensure their own material survival. By contrast, the rise of industrial wage labor and salaried work meant that individuals no longer controlled their own fortunes.”).

land.¹²⁵ The external threats were complex: they were foreign, and they required specialized experts to gather and analyze intelligence from abroad.¹²⁶ The threats required shifting the U.S. foreign policy focus from diplomacy to military affairs.¹²⁷

The new conceptualization of security — *national* security — could no longer be governed democratically.¹²⁸ While ordinary citizens may have been capable of deciding matters of their own personal security, they no longer held the capacity to decide matters of national security.¹²⁹ Democratic deliberation on national security matters, it was thought, “would only lead to conflict and to decision-making driven by special interests rather than those with actual knowledge about social conditions.”¹³⁰ Thus, the notion of transparency and public decision-making fell away and was replaced by a growing industry of government experts bound by secrecy.¹³¹ “National security” became something “pre-political”¹³² and removed from democracy — an all-encompassing, “unifying commitment [that] transcended ordinary popular disagreement and thus was appropriately removed from the regular political process.”¹³³

This commitment to secrecy and the “non-democratic” nature of national security policy is precisely why threat rhetoric is effective. With no check on the veracity or reliability of the intelligence and information guiding decision-making, the Executive is free to control the substantive information and its presentation — to shape the rhetoric. The flexibility and lack of accountability permit the Executive to shape the information, not to reflect an actual threat, but to fit policy goals.

125 *Id.* at 1453-54; *see also* Rana, *supra* note 122, at 5104 (“[T]he rise of totalitarian regimes meant that the United States now faced external enemies that, due to ideology, could not be deterred in the same way as old European rivals. Moreover, technological improvements — especially the rise of air power — indicated that the United States was no longer safe behind the oceans.”); *see also* Laura 1654 (“[D]emocratic countries were losing ground to authoritarian regimes, which were more effective at exploiting new technologies.”).

126 Rana, *supra* note 119, at 1453-54.

127 *Id.*

128 *Id.* at 1464-65 (explaining that national security powers such as intelligence gathering, technological development, and military preparedness should be centralized and insulated in the Executive Branch because the ordinary citizen was increasingly incapable of understanding the global political arena); *see also* Brown, *supra* note 15, at 655 (noting that World War I marked “turning point” for America toward militarization, “taking a major and seemingly irrevocable step in the direction of becoming a warfare or national security state”) (internal quotation marks omitted).

129 Rana, *supra* note 119, at 1464 (“While individuals had an interest in their own physical protection, they had limited capacities to gauge the seriousness or immediacy of potential dangers [to national security].”).

130 *Id.* at 1440.

131 *Id.* at 1464-65 (“[B]ut of significant importance was a] focus on secrecy and a rejection of old presumptions in favor of political transparency and public access. In order to respond to threats from abroad, the state needed to remain one step ahead of its potential enemies. This required developing a new formalized network of spies as well as linguistic and technological experts skilled in collecting and sifting through intelligence.”).

132 *Id.* at 1465 (“[I]f a balance between liberty and security must be struck, security had to enjoy primacy of place as both pre-political and the foundation of American unity.”).

133 *Id.*; *see also id.* at 1423-24 (“Insulated decision-makers in the Executive Branch, armed with the specialized skills of the professional military, are assumed to be best equipped to make sense of complicated and often conflicted information about safety and self-defense.”).

B. Threat Rhetoric and the Iraq War

In no other recent era was the efficacy of threat rhetoric to garner support for a literal war clearer than in the months before the 2003 invasion of Iraq.¹³⁴ Through speeches, interviews, congressional briefings, and public documents, the Bush administration's threat rhetoric involved hundreds of claims regarding Saddam Hussein and the Iraqi regime's possession of biological and chemical weapons and, quite simply, the general threat that Iraq posed to the United States. Coupled with ominous images of mushroom clouds and a vial of anthrax brandished by then-Secretary of State Colin Powell at a United Nations Security Council speech,¹³⁵ the Executive sought to link Iraq to the war on terror,¹³⁶ thereby instilling fear in the public¹³⁷ and convincing Congress that the use

134 See, e.g., Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 CONST. COMMENT. 433, 436 (2010) (“In the year before the Iraq War, President Bush, in combination with others in his Administration, used threat claims as the primary component of a strategic and coordinated communications campaign to build consent to his policy choice to use force.”).

135 See Secretary of State Colin Powell, Address to the United Nations Security Council (Feb. 5, 2003) (transcript available at <http://www.cnn.com/2003/US/02/05/sprj.irq.powell.transcript.05/index.html>); see also Steven R. Weisman, *Powell Calls His U.N. Speech a Lasting Blot on His Record*, N.Y. TIMES (Sept. 9, 2005) available at http://www.nytimes.com/2005/09/09/politics/09powell.html?_r=0.

136 E.g., President's Address to the United Nations General Assembly in New York City, 2 PUB. PAPERS 1572, 1576 (Sept. 12, 2002) (“If the Iraqi regime wishes peace, it will immediately end all support for terrorism and act to suppress it.”); President's Radio Address, 2 PUB. PAPERS 1582, 1583 (Sept. 14, 2002) (“Saddam Hussein's regime continues to support terrorist groups and to oppress its civilian population.”); President's Radio Address, 2 PUB. PAPERS 1696, 1696 (Sept. 28, 2002) (“The [Iraqi] regime has longstanding and continuing ties to terrorist groups, and there are Al Qaida terrorists inside Iraq.”); President's Remarks Announcing Bipartisan Agreement on Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, 2 PUB. PAPERS 1707, 1707-08 (Oct. 2, 2002) (“On its present course, the Iraqi regime is a threat of unique urgency. We know the treacherous history of the regime. It has waged war on its neighbors. It has sponsored and sheltered terrorists. . . . Countering Iraq's threat is also a *central commitment on the war on terror.*”) (emphasis added); President's Radio Address, 2 PUB. PAPERS 1735, 1736 (Oct. 5, 2002) (“Iraq has longstanding ties to terrorist groups.”); President's Address to the Nation on Iraq from Cincinnati, Ohio, 2 PUB. PAPERS 1751, 1753 (Oct. 7, 2002) (“We know that Iraq and the Al Qaida terrorist network share a common enemy — the United States of America. We know that Iraq and Al Qaida have had high-level contacts that go back a decade. Some Al Qaida leaders who fled to Afghanistan went to Iraq. . . . We've learned that Iraq has trained Al Qaida members in bombmaking and poisons and deadly gases. And we know that after September the 11th, Saddam Hussein's regime gleefully celebrated the terrorist attacks on America. . . . Saddam Hussein is harboring terrorists and the instruments of terror, the instruments of mass death and destruction.”); President's Radio Address, 2 PUB. PAPERS 2080, 2080-81 (Nov. 16, 2002) (“To win the war on terror, we're also opposing the growing threat of weapons of mass destruction in the hands of outlaw regimes [like Iraq].”); President's Radio Address, 2 Pub. Papers 2170, 2170-71 (Dec. 7, 2002) (“Disarming [the Iraqi] regime is a central commitment of the war on terror.”); President's Radio Address, 2 PUB. PAPERS 2214, 2214 (Dec. 28, 2002) (“The war on terror also requires us to confront the danger of catastrophic violence posed by Iraq and its weapons of mass destruction.”); President's Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 82,89 (Jan. 28, 2003) (“Evidence from intelligence sources, secret communications, and statements by people now in custody reveal that Saddam Hussein aids and protects terrorists, including members of Al Qaida.”).

137 Wolfe, *supra* note 45, at 27 (noting that war and public opinion are directly correlated, such that presidents now often address the public directly to garner support for war, rather than Congress) (citations omitted).

of force in Iraq “was a necessity[,] not a choice”¹³⁸ — that is, that the battlefield in the war on terror must extend to Iraq.

Briefly, the threat rhetoric progressed as follows: In September 2002, President Bush claimed before the United Nations General Assembly that Iraq possessed weapons of mass destruction and that the Saddam Hussein regime posed a “grave and gathering danger”¹³⁹ and a “threat to peace.”¹⁴⁰ Thereafter, the terrorism theme of the threat rhetoric — necessary to link Iraq to the war on terror,¹⁴¹ which already enjoyed public support — dominated presidential discourse.¹⁴² At that early point, a majority of the public believed that the President should get the approval of Congress, the UN, Western allies and Arab states before confronting the threat with force.¹⁴³ By President Bush’s State of the Union Address in late January 2003, however, just five months later, public opinion echoed the Executive’s position — that the use of force via military action in Iraq was necessary.¹⁴⁴ And by early March 2003, a majority of the public was persuaded that toppling the Hussein regime was necessary and worth the loss of troops.¹⁴⁵

We now know that the threats were false,¹⁴⁶ but at the time the threat rhetoric worked.¹⁴⁷ In just half a year, the Executive had convinced more than half the American public and Congress¹⁴⁸ that

138 Jacobs, *supra* note 135, at 438 (citations omitted) (explaining that the administration accomplished this by representing the threat Iraq posed as imminent and possibly directed within the United States).

139 President’s Address to the United Nations General Assembly, *supra* note 137, at 1575.

140 *Id.*

141 Legally, the war in Iraq enjoyed congressional authorization distinct from the authorization for the use of force against al-Qaeda. Compare Authorization for Use of Military Force Against Iraq, PUB. L. NO. 107-243, 116 STAT. 1498 (2002) (authorizing military force against Iraq) with Authorization for Use of Military Force, PUB. L. NO. 107-40, 115 STAT. 224 (2001) (authorizing force against the nations, organizations, or persons responsible for the terrorist attacks on September 11, 2001). The contention here is not that linking Iraq to the war on terror was *legally* necessary, but that it was necessary to garner public support. A nation reeling from the September 11 terrorist attacks was more likely to collectively support *retaliation* for the attacks and against “terrorism” and “terrorists” generally, rather than *preemptive* action against a foreign regime. See, e.g., Wolfe, *supra* note 29, at 65-66 (arguing that the Iraq threat rhetoric was framed along a terrorism theme because the public was more likely to accept an invasion designed to prevent further losses, rather than an invasion intended to procure future gains). That is not to say, however, that in actuality the invasion of Iraq was not a preemptive strike.

142 *Supra* note 137 and accompanying text; see also Wolfe, *supra* note 45, at 68-69, 79-80.

143 Galip Isen, *Discourse of Evil: Speaking Terrorism to Silence*, RECONSTRUCTION (2006), <http://reconstruction.eserver.org/033/isen.htm>.

144 *Id.* (contending that President Bush successfully convinced the public through his State of the Union address).

145 *Id.*; see also Public Attitudes Toward the War in Iraq: 2003-2008, Pew Research Center (Mar. 19, 2008), <http://www.pewresearch.org/2008/03/19/public-attitudes-toward-the-war-in-iraq-20032008/>; Lloyd De Vries, *Poll: U.S. Backs Bush on War*, CBS News, http://www.cbsnews.com/2100-500160_162-545009.html.

146 See S. REP. NO. 109-331 (2006).

147 See, e.g., Isen, *supra* note 144 (“[T]he drift of intellectual concentration and political discussion visibly turned from acts of terror to open and out warfare against Afghanistan and Iraq as sponsor states of terrorism while shifts of public opinion manifested an impressive parallel with government rhetoric and policy.”).

148 Jacobs, *supra* note 135, at 439 (“The Report of the House Committee on International Relations explained that it embraced the Executive Branch’s factual assertions about the Iraq threat and based its recommendation that the body vote to authorize the use of force upon it.”) (citation omitted).

the national security danger of Iraq demanded a military response. Indeed, the rhetoric was so powerful that some congressional members who had initially been reluctant to authorize the use of force eventually “explained their votes in favor as based on their belief that the threat claims advocated by the executive department were true.”¹⁴⁹ And even after knowing that the threats were false, the public still believed that the United States is more secure without Saddam Hussein in power.¹⁵⁰

The Executive crafted the Iraq threat rhetoric with particularly heavy reliance on our modern conception of security and its primacy on expertise and secrecy. Controlling the sources and methods of intelligence collection¹⁵¹ and then carefully selecting the information that was disseminated publicly,¹⁵² the Bush administration shaped and colored its threat rhetoric to contextualize the indefinite war on terror, instill fear in public, and justify extending the geographic scope of the battlefield. The war on terror had arrived in Iraq.¹⁵³

C. Threat Rhetoric and Homegrown Terrorism

The Bush administration’s threat rhetoric leading up to the invasion of Iraq was carefully designed and executed to garner public support for the war and congressional consent for the use of force or extending the geographic scope of the battlefield in the war on terror to Iraq. The Obama administration is employing similar threat rhetoric surrounding the purported danger of al-Qaeda-recruited extremists within the United States known as “homegrown terrorists.” Echoed loudly by some congressional members,¹⁵⁴ the Executive’s homegrown terrorism threat rhetoric is directed to the public to garner support for increasingly intrusive counterterrorism policies and tactics in the United States — that is, extending the geographic scope of the battlefield to the homeland and bringing characteristics of the war paradigm within our borders.

Although whispers of rhetoric from the Executive concerning the homegrown terrorism threat

149 *Id.*

150 Isen, *supra* note 144.

151 Jacobs, *supra* note 135, at 446 (“At the very least, members of the Bush Administration did not encourage the independent and thorough intelligen[ce] gathering and analysis that can be expected to produce the most accurate threat assessments. . . . Instead, executive department officials, particularly the Vice President, aggressively prodded intelligence analysts to discover information and provide threat assessments that would substantiate threat claims and support the use of force.”).

152 *Id.* at 443–44 (“The President and his top officials relied on controlled information release in a number of wars to support their use of force advocacy. . . . They selectively released pieces of raw intelligence that supported their claims, without disclosing that intelligence experts disagreed about whether the evidence was significant or whether its source was credible. They did not release raw intelligence or intelligence community assessments that undercut their argument that Iraq presented an immediate threat.”) (citations omitted).

153 *Id.*, at 437 (describing that the administration repeatedly asserted as fact that Iraq had the weapons capabilities to immediately attack both its neighbors and the United States, was inclined to attack these countries, and was offering support to terrorist organizations like al-Qaeda).

154 See Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L.REV. 429, 483-86 (2011) (discussing Rep. Peter King’s 2011 congressional hearings on homegrown terrorism).

began around 2006,¹⁵⁵ the homegrown terrorism threat rhetoric has increased significantly since 2010.¹⁵⁶ The rhetoric focuses on the perceived threat of al-Qaeda and its affiliates “reaching into” the U.S. to recruit and radicalize American Muslims.¹⁵⁷ For instance, in 2010 Director of National Intelligence Dennis Blair warned that influential members of al-Qaeda and its affiliates “will increasingly motivate individuals toward violent extremism.”¹⁵⁸ In a speech to Muslim communities in March 2011, Denis McDonough, Deputy National Security Advisor, warned that “al Qaeda and its adherent have increasingly turned to another troubling thematic: attempting to recruit and radicalize people to terrorism here in the United States.”¹⁵⁹ And in language harkening back to the grand rhetoric of the Bush administration immediately after September 11, McDonough warned, “For a long time, many in the U.S. thought that our unique melting pot meant we were immune from this threat. . . . That was false hope, and false comfort. This threat is real, and it is serious.”¹⁶⁰

The Executive perceived this threat to be so serious that in late 2011, President Obama launched the White House’s official strategy to combat homegrown terrorism.¹⁶¹ Entitled the “Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States,”¹⁶² the plan is premised on the notion of “[p]rotecting American communities from al-

155 For instance, in 2006 FBI Director Mueller stated, “Today, terrorist threats may come from smaller, more loosely-defined individuals and cells who are not affiliated with al Qaeda, but who are inspired by a violent jihadist message. These homegrown terrorists may prove to be as dangerous as groups like al Qaeda, if not more so.” Robert S. Mueller, Director, Fed. Bureau of Investigation, *The Threat of Homegrown Terrorism*, Speech at The City Club of Cleveland (June 23, 2006) (transcript available at <http://www.fbi.gov/news/speeches/the-threat-of-homegrown-terrorism>).

156 See Glenn Greenwald, *The Grave Threat of “Homegrown Terrorism”*, SALON (Feb. 8, 2012, 8:51 AM), http://www.salon.com/2012/02/08/the_grave_threat_of_homegrown_terrorism/ (detailing statements from Executive Branch officials concerning homegrown terrorism threat since 2010). The infamous 2007 report by the New York Police Department concerning “radicalization of the west” and the FBI’s 2006 report regarding the “radicalization process” may have provided the unofficial roadmap for the official homegrown terrorism threat rhetoric. See New York City Police Dep’t, *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* (2007), http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf; Federal Bureau of Investigation, *THE RADICALIZATION PROCESS: FROM CONVERSION TO JIHAD* (2006), available at <http://cryptome.org/fbi-jihad.pdf>.

157 See Greenwald, *supra* note 157 (providing examples of rhetoric involving the mention of “homegrown terrorists”).

158 Annual Threat Assessment of the U.S. Intelligence Community for the House Permanent Select Committee on Intelligence, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE 11 (Feb. 3, 2010), http://www.dni.gov/testimonies/20100203_testimony.pdf; see also Gordon Lubold, *Homegrown terrorism a growing concern for US intelligence*, CHRISTIAN SCI. MONITOR (Feb. 4, 2010), <http://www.csmonitor.com/USA/2010/0204/Homegrown-terrorism-a-growing-concern-for-US-intelligence> (reporting that Blair told the Senate that “the threat to the homeland from Americans with links to radicals abroad remains troubling”).

159 Denis McDonough, Deputy Nat’l Security Advisor to the President, “Partnering with Communities to Prevent Violent Extremism in America” (Mar. 6, 2011) (prepared remarks available at WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2011/03/06/remarks-denis-mcdonough-deputy-national-security-advisor-president-prepa> (last visited Apr. 3, 2012)).

160 *Id.*

161 See, e.g., Dina Temple-Raston, *Officials Detail Plans to Fight Homegrown Terrorism*, NPR (Dec. 8, 2011), <http://www.npr.org/2011/12/08/143319965/officials-detail-plans-to-fight-terrorism-at-home>.

162 Press Release, *Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States*, WHITE HOUSE (Dec. 8, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/08/strategic-implementation-plan-empowering-local-partners-prevent-violent->

Qa'ida's hateful ideology" and, specifically, protecting Muslim Americans' "sons and daughters from al-Qa'ida's murderous ideology."¹⁶³ The administration recognizes that "violent extremism in America is nothing new" and that many ideologically variant groups "have engaged in horrific violence to kill our citizens and threaten our way of life,"¹⁶⁴ but its rhetoric focuses exclusively on the danger of al-Qaeda, the enemy in and focal point of the war on terror.

The Obama administration's threat rhetoric concerning homegrown terrorism, like the Bush administration's rhetoric leading up to the invasion of Iraq, is carefully designed: the language is consistently anchored to al-Qaeda and the group's efforts to recruit and radicalize Americans. Anchoring the rhetoric to al-Qaeda ensures a mere extension of the war on terror. And even in the face of evidence that the actual homegrown terrorism threat is not as dire as purported,¹⁶⁵ the rhetoric has not diminished.¹⁶⁶ The Executive is defining, shaping, and coloring a perceived threat to the homeland to garner public support for the use of force against individuals far from the battlefield of Afghanistan — in the United States.¹⁶⁷ In other words, where al-Qaeda goes, the battlefield grows.

D. The "Legitimacy Deficit" and Judicial Deference

The shift in our collective conception of security described above — from personal security to national security — has created a self-perceived legitimacy deficit in the Judiciary.¹⁶⁸ From executive expertise and secrecy — the hallmarks of modern national security — grew a tradition of judicial deference to the Executive that "pervades the area of national security."¹⁶⁹ Now more than a decade after September 11, 2001, the "new national security canon"¹⁷⁰ that has grown out of an increasingly deferential stance before the Executive on national security matters risks establishing national security policy as "an area over which the political branches exercise near-plenary control."¹⁷¹ In the

163 *Id.*

164 *Id.*

165 See, e.g., Charles Kurzman, *Muslim-American Terrorism in the Decade Since 9/11*, TRIANGLE CENTER ON TERRORISM AND HOMELAND SECURITY (2012); Scott Shane, *Radical U.S. Muslims Little Threat, Study Says*, N.Y. TIMES, Feb. 7, 2012, at A10, available at http://www.nytimes.com/2012/02/08/us/radical-muslim-americans-pose-little-threat-study-says.html?_r=1&hp ("Charles Kurzman, the author of the report for the Triangle Center on Terrorism and Homeland Security, called terrorism by Muslim Americans 'a miniscule threat to public safety.'"); Greenwald, *supra* note 157.

166 See, e.g., U.S. News Staff, *Homegrown Terrorism Attacks Still Cause for Alarm Among Intelligence Officials*, U.S. NEWS (June 26, 2012), <http://www.usnews.com/news/blogs/dotmil/2012/06/26/homegrown-terrorism-attacks-still-cause-for-alarm-among-intelligence-officals> (reporting NCTC Director Olsen recently "spent ample time discussing the burgeoning homegrown terrorism threat").

167 *Id.*

168 Rana, *supra* note 119, at 1424; Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 891 (2007) ("Aroused publics concerned about issues such as national security sometimes have little tolerance for robust judicial oversight of executive discretion, which can always be condemned as 'activism' by 'unelected judges.' This charge sometimes succeeds and sometimes fails, but for the judges [the legitimacy deficit] is always a concern that acts as a drag on attempts to monitor executive behavior.").

169 *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992).

170 See, e.g., Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295 (2012).

171 *Id.* at 1300.

absence of judicial scrutiny over national security policy matters, particularly those as fundamental as the geographic scope of the battlefield in the war on terror, the Executive harbors substantial latitude to shape and define the conflict, making a truly “global” battlefield less of an overstatement and more of a reality.

The Judiciary has internalized a self-perceived legitimacy deficit.¹⁷² As explained above, the modern notion of national security conceptualizes the citizenry as incapable of making democratic policy choices in the best interests of national security because the citizenry does not possess the knowledge or the capacity to do so.¹⁷³ Likewise, where matters of security expertise and secrecy are invoked, the Judiciary often perceives itself as ill equipped and incapable of scrutinizing Executive security decisions.¹⁷⁴ “Today, a central feature of American legal and political life is the pervasive tendency of courts to tread lightly with respect to [E]xecutive [B]ranch determinations of external threat.”¹⁷⁵ Where security expertise is invoked, courts have been increasingly unwilling to intercede.¹⁷⁶

Notwithstanding the courts’ initial reluctance after September 11, 2001 to accept the Executive’s conceptualization of a worldwide war fought on a global battlefield,¹⁷⁷ the Judiciary’s self-perceived legitimacy deficit is leading to increased deference to the Executive as more matters of national security reach the courts.¹⁷⁸ From habeas review for men detained at Guantanamo Bay¹⁷⁹ to the justiciability of a targeted killing in Yemen¹⁸⁰ to accountability for torture of a U.S. citizen in a U.S. detention facility,¹⁸¹ the federal Judiciary’s confidence in its ability to inquire and scrutinize Executive policies on national security matters has waned significantly. Within the new national security canon, courts have altogether avoided confronting the issue of the geographic scope of the battle-

172 Rana, *supra* note 119, at 1469-70 (“At first glance, this fact is rather surprising, given the common image of the courts as an all-knowing and elevated priesthood. Yet, the clear trend in recent decades has been the steady reduction in judicial confidence to intercede where security expertise is invoked. . . . Such a reduction in confidence underscores how judges have come to see themselves as trapped in the same law position of uncertainty as ordinary citizens and — therefore like the public writ large — ill equipped to intervene in matters of security.” (internal citations omitted)).

173 *Id.* at 1423.

174 *Id.* at 1469-70.

175 *Id.*

176 *Id.*

177 *Id.*

178 See, e.g., Vladeck, *supra* note 170 (arguing that ten years of post-September 11 jurisprudence has created a new national security canon, under which (1) the political branches now possess near-plenary control over national security policy and (2) the state of exception is normalizing).

179 See, e.g., Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011).

180 *Al-Aulaqi v. Obama*, 727 F. Supp.2d 1 (2010).

181 *Lebron v. Rumsfeld*, 670 F.3d 540, 551 (4th Cir. 2012) cert. denied (2012) (“In short, Padilla’s complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affective sensitive matters of national security to the prospect of searching judicial scrutiny.”).

field.¹⁸² As cases involving the Executive's use of force in locales far removed from Afghanistan are presented, courts nearly inevitably dismiss or decide the matter on grounds that fail to address the battlefield issue.

Of particular importance for purposes of the geographic scope of the battlefield is *Al-Aulaqi v. Obama*, in which plaintiffs challenged the Executive's use of force — specifically, a program of targeted killings by drones — in Yemen.¹⁸³ The plaintiff, Nasser Al-Aulaqi, sought to challenge the Executive's alleged authorized killing of his son, Anwar Al-Aulaqi, by drone strike in Yemen.¹⁸⁴ Anwar Al-Aulaqi, a U.S. citizen, was¹⁸⁵ labeled a Specially Designated Global Terrorist in 2010 on allegations that he was “acting for or on behalf of al-Qa’ida in the Arabian Peninsula (AQAP) and providing financial, material or technological support for, or other services to or in support of, acts of terrorism.”¹⁸⁶ Al-Aulaqi was believed to have “taken on an increasingly operational role in AQAP since late 2009,” and public sources reported that he had ties to Farouk Abdulmutallab¹⁸⁷ and Nidal Malik Hasan.¹⁸⁸ Nasser Al-Aulaqi, Anwar's father, based his belief that his son was on a “kill list” on media reports citing anonymous military and intelligence sources.¹⁸⁹ Among the reports, *The Washington Post* stated in early 2010 that, according to an anonymous U.S. official, Al-Aulaqi was the “first U.S. citizen added to a list of suspected terrorists the CIA is authorized to kill.”¹⁹⁰

Judge Bates dismissed the suit on a number of grounds, including a finding that the case presented a non-justiciable political question — the ultimate form of judicial deference to the Executive.¹⁹¹ Despite recognizing that the issues raised by the case are “of great public interest,”¹⁹² Bates held that resolution of the case would require the court to decide a number of questions more aptly reserved for the Executive, including “whether AQAP and al Qaeda are so closely linked to the [government's] targeted killing of Anwar Al-Aulaqi in Yemen [to] come within the United States's

182 See generally *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing the case regarding the targeting killing of an American in Yemen based on the court's finding that the case presented a non-justiciable political question).

183 *Id.* at 9, 10.

184 *Id.* at 9.

185 The past tense is used here because Anwar Al-Aulaqi was killed by U.S. drone strike in September 2011. See Mark Mazzetti, Eric Schmitt, and Robert F. Worth, “Two-Year Manhunt Led to Killing of Awlaki in Yemen,” *N.Y. TIMES*, Oct. 1, 2011, at 1A, available at <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all> (“After several days of surveillance of Mr. Awlaki, armed drones operated by the Central Intelligence Agency took off from a new, secret American base in the Arabian Peninsula, crossed into northern Yemen and unleashed a barrage of Hellfire missiles at a car carrying him and other top operatives from Al Qaeda's branch in Yemen.”).

186 727 F. Supp.2d at 10.

187 Associated Press, *Abdulmutallab handed life sentence*, *GUARDIAN* (Feb. 16, 2012, 3:42 PM), <http://www.guardian.co.uk/world/2012/feb/16/underwear-bomber-sentenced-life-prison>.

188 Brian Ross, *How Anwar Al-Awlaki Inspired Terror From Across the Globe*, *ABC WORLD NEWS*, (Sept. 30, 2011), available at <http://abcnews.go.com/Blotter/anwar-al-awlaki-inspired-terror/story?id=14643383#.UIPdII6I2fE>.

189 727 F. Supp.2d at 11.

190 *Id.*

191 See *id.* at 8–9, 46 (“[P]laintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.”).

192 *Id.* at 9.

current armed conflict with al Qaeda.”¹⁹³ In other words, the court declined to address whether the geographic scope of the battlefield extends to Yemen — a state thousands of miles from Afghanistan — in an exercise of substantial deference to the Executive.

Jose Padilla’s civil lawsuit similarly raised issues of the geographic scope of the battlefield, which the Fourth Circuit declined to examine. Padilla, a U.S. citizen, and his mother, Estela Lebron, sued for declaratory relief and damages based on Padilla’s 2002 arrest on U.S. soil and his military detention as an “enemy combatant” in the South Carolina naval brigade.¹⁹⁴ The court specifically noted that Padilla’s claims of abuse and torture against the high-level Executive Branch defendants sought to impose liability “for developing the *global* detention and interrogation policies that he contends were unconstitutional.”¹⁹⁵ The “global detention and interrogation policies” were those developed under the authorization for the use of force — that is, under the war paradigm.

Presented squarely with the question of whether the Executive’s war power authority extends to actions taken in the United States, the court refused to face the issue. Instead, the court affirmed the dismissal of Padilla’s suit, declining to recognize a cause of action for Padilla’s claims under the *Bivens* doctrine.¹⁹⁶ Relying on the “special factors” exception to *Bivens* claims, the court held that deference to the political branches on “military affairs” precluded judicial review of enemy combatant detentions,¹⁹⁷ seemingly regardless of where they occur. Moreover, invoking the self-perceived legitimacy deficit, the court found that “judicial review of military decisions would stray from the traditional subjects of judicial competence.”¹⁹⁸

Eric Holder was certainly correct in his assertion that “neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan.”¹⁹⁹ But failing to exact such scrutiny provides the Executive with near-unchecked latitude to shape the battlefield and the power to dictate where the war paradigm operates. And when the battlefield includes the United States, a necessary consequence of a truly “global” war, characteristics of the war paradigm follow.

IV. IMPLICATIONS OF A WORLDWIDE WAR ON A GLOBAL BATTLEFIELD: MILITARIZATION OF STATE AND LOCAL LAW ENFORCEMENT

When the Executive operates within a global war paradigm, unrestrained by the Judiciary, the geographic scope of the battlefield necessarily extends to the homeland. The carefully crafted homegrown terrorism threat rhetoric and the Judiciary’s increasing deference discussed in Part III combine to create the perfect storm with which to bring the battlefield within U.S. borders — to

193 *Id.* at 46.

194 *Lebron*, 670 F.3d at 544.

195 *Id.* at 547.

196 *Id.* at 547–48.

197 *Id.* at 549. (“[J]udicial deference is the Constitution’s parallel commitment of command responsibility in national security and military affairs to the President as Commander in Chief.”) (citations omitted).

198 *Id.* at 548.

199 *See supra* Section II.B.

“Battlefield Main Street”²⁰⁰ — and with the battlefield comes characteristics of the war paradigm.²⁰¹

Importing characteristics of the war paradigm into domestic activities is troubling because it occurs quietly and incrementally, thereby evading widespread public attention and scrutiny.²⁰² In the absence of both judicial and public scrutiny, there is a substantial risk that those war paradigm characteristics will become entrenched and normalized, thereby transforming them from the temporary requirements of exigency to the permanent practices of the routine.²⁰³

One disturbing aspect of extending the war paradigm into the United States is the increasing militarization of state and local law enforcement and the risk that the militarization will become entrenched in our culture — fundamentally shifting our collective conception of law enforcement’s role toward and relationship with citizens and communities.²⁰⁴ From acquiring military-grade equipment to adopting war-like tactics and behaviors, the militarization of state and local law enforcement disrupts the apt historical division between law enforcement and military activities in the U.S. and, accordingly, threatens to transform police departments from agencies designed to protect and serve the public to military units designed to quickly identify and eliminate enemies.²⁰⁵ With this transformation, we risk eroding many of the fundamental constitutional protections embodied within the criminal law paradigm.

A. Historically Distinct Boundaries

The American ethos has historically drawn a distinct line between the military and civilian law enforcement — between war and peacetime.²⁰⁶ “Soldiers, after all, go to war to destroy, and kill the enemy. The police, who are supposed to maintain the peace, ‘are the citizens, and the citizens are

200 Benjamin Carlson, *Battlefield Main Street*, THE DAILY (Dec. 5, 2011), <http://www.thedaily.com/page/2011/12/05/120511-news-militarized-police-1-6/>.

201 See, e.g., Brown, *supra* note 128, at 658 (describing martial rhetoric which “worked to militarize the whole of American society to the war paradigm.”).

202 See Stuart, *supra* note 117, at 5 (“We as a people tend not to be very reflective about the truth underlying those claims or the wisdom of the actions we are asked to take because war ‘is an enticing elixir.’”) (citation omitted).

203 See, e.g., Vladeck, *supra* note 172, at 1300 (discussing “normalization of the exception” as “the accommodation into existing law of practices and policies typically embraced only by virtue of their exigency and fleeting duration.”) (internal citations omitted).

204 See, e.g., Brown, *supra* note 128, at 658 (“Most certainly, the ‘war on terror’ has proved to be an unprecedented contributor to America’s militarization and, some would argue, digression toward militarism.”).

205 See, e.g., Justin Elliott, *How the feds fueled the militarization of police*, SALON (Dec. 24, 2011, 12:00 PM), http://www.salon.com/2011/12/24/how_the_feds_fueled_the_militarization_of_police/; David Edwards, *Ex-Seattle police chief: ‘Appalling’ to use tear gas on peaceful protestors*, RAW STORY (Nov. 29, 2011, 1:13 PM), <http://www.rawstory.com/rs/2011/11/29/ex-seattle-police-chief-appalling-to-use-tear-gas-on-peaceful-protesters/>.

206 E.g., Brown, *supra* note 15, at 669; Kealy, *supra* note 26, at 384 (“[The Posse Comitatus Act] reflects a strong American tradition against the domestic use of the military that stretches back before the founding of the nation.”); see also Al Baker, *When the Police Go Military*, N.Y. TIMES, Dec. 4, 2011, at SR6, available at <http://www.nytimes.com/2011/12/04/sunday-review/have-american-police-become-militarized.html?pagewanted=all> (noting that police officers share a “soldier’s ethos” because they carry deadly weapons and wear uniforms with patches denoting rank, “[b]ut beyond such symbolic and formal similarities, American law and tradition have tried to draw a clear line between police and military forces”).

the police.”²⁰⁷ This clear separation traces its origins to the early days of the Republic when our Founders, drawing from the English development of police forces, feared the persistent presence of a standing army.²⁰⁸

The separation was codified just over a decade after the Civil War, as a result of the President’s use of the army to enforce the law and keep order at polling places in the South during the Reconstruction era.²⁰⁹ The Posse Comitatus Act of 1878²¹⁰ prohibits U.S. military personnel from participating in domestic law enforcement activities, unless expressly authorized by the Constitution or Congress. The Act is a proscriptive law: facially, it imposes criminal penalties for those who employ the military to enforce civilian laws.²¹¹

B. *Blurring Lines*

Notwithstanding the historical origins, those stark boundaries between the military and law enforcement are blurring. A series of laws passed in the 1980s in connection with the War on Drugs,²¹² beginning with the Military Cooperation with Law Enforcement Act in 1981,²¹³ paved the

207 Baker, *supra* note 208 (quoting Chief Walter A. McNeil, President of the International Association of Chiefs of Police); see also David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619, 620 (1997) (“The idea was that law enforcement and the military are completely different, with the Army geared toward destroying enemies of a different nationality, while law enforcement must serve persons largely friendly, who are guaranteed presumptions of innocence and rights not appropriate when dealing with an enemy during times of war.”).

208 See, e.g., Brown, *supra* note 15, at 665-67; Candidus Dougherty, “Necessity Hath No Law”: *Executive Power and the Posse Comitatus Act*, 31 CAMPBELL L. REV. 1, 4-6 (2008); Raj Dhanasekaran, *When Rotten Apples Return: How the Posse Comitatus Act of 1878 Can Deter Domestic Law Enforcement Authorities from Using Military Interrogation Techniques on Civilians*, 5 CONN. PUB. INT. L.J. 233, 245-48 (2006); Michael T. Cunningham, *The Military’s Involvement in Law Enforcement: The Threat is Not What You Think*, 26 SEATTLE U. L. REV. 699, 700-01 (2003); Kealy, *supra* note 26, at 390-92.

209 E.g., *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948) (“[T]he immediate objective of the [Posse Comitatus Act] was to put an end to the use of federal troops to police state elections in the ex-Confederate states where the civil power had been reestablished.”); see also Cunningham, *supra* note 210, at 703; Kealy, *supra* note 26, at 394-96.

210 The Posse Comitatus Act of 1878, ch. 263, § 15, 20 STAT. 152 (1878) (current version codified at 18 U.S.C. § 1385 (2012)) (The statute names only the Army and Air Force; however, the Navy and Marines are similarly restricted by Department of Defense Directive 5525.5 (Jan. 15, 1986). The Act does not apply to the Coast Guard or National Guard.); see also Cunningham, *supra* note 210, at 702-04 (explaining some court have interpreted the Act to apply to other branches, except the Coast Guard).

211 18 U.S.C. § 1385 (“Whoever . . . willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”); see also Cunningham, *supra* note 210, at 702-03 (noting that it does not appear that anyone has ever been prosecuted under the Act); Dan Bennett, *The Domestic Role of the Military in America: Why Modifying or Repealing the Posse Comitatus Act Would Be A Mistake*, 10 LEWIS & CLARK L. REV. 935, 940 (2006).

212 E.g., Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, CATO INSTITUTE 7 (2006) (listing and describing laws).

213 10 U.S.C., ch. 18.

way for increased cooperation and sharing between the military and law enforcement.²¹⁴ Moreover, the black-letter law does not prohibit law enforcement departments themselves from behaving more like soldiers than police officers.²¹⁵ In effect, the Posse Comitatus Act — and the apt division between forces with distinct objectives that it embodies — is increasingly closer to falling moot.

The war on terror has accelerated the militarization of state and local law enforcement. From body armor to assault rifles to pilotless surveillance drones to bomb robots, state and local law enforcement have indeed received the go-ahead and the resources to militarize their departments.²¹⁶ For instance, the Fargo, North Dakota police department now boasts an armored truck, “complete with a rotating turret.”²¹⁷ Many beat cops now carry assault rifles, and in some jurisdictions, assault rifles are standard issue in patrol cars.²¹⁸ Approximately 17,000 local law enforcement agencies “are equipped with such military equipment as Blackhawk helicopters, machine guns, grenade launchers, battering rams, explosives, chemical sprays, body armor, night vision, rappelling gear and armored vehicles.”²¹⁹ The small town of Keene, New Hampshire recently received a grant to purchase an “eight-ton armored personnel vehicle” — a tank.²²⁰ The Nebraska State Patrol similarly boasts three “amphibious eight-wheeled tanks.”²²¹

Since September 11, 2001, the federal government has reportedly provided more than \$34 billion in grants to state and local law enforcement agencies to purchase military equipment.²²² In

214 See, e.g., *Id.* (describing Military Cooperation with Law Enforcement Act as “wide-reaching legislation [that] encouraged the military to give local, state, and federal police access to military bases, research, and equipment for drug interdiction . . . , authorized the military to train civilian police officers to use the newly available equipment . . . , [and] encouraged the military to share drug-war-related information with civilian police”); Kealy, *supra* note 26, at 409-14.

215 E.g., Kopel & Blackman, *supra* note 209, at 623 (discussing various loopholes in Posse Comitatus Act that allow law enforcement to use military equipment and receive military training); Rizer & Hartman, *supra* note 31.

216 E.g., Edwards, *supra* note 207, (reporting local police department purchases of a \$300,000 pilotless surveillance drone, \$600 bulletproof shields, and \$180,000 bomb robots); see also Radley Balko, *Scenes From Militarized America*, HUFF. POST (Nov. 19, 2012, 10:34 PM), http://www.huffingtonpost.com/radley-balko/scenes-from-militarized-a_b_2162360.html (photos depicting police officers in full camouflage and face masks).

217 Andrew Becker & G.W. Schulz, *Local police stockpile high-tech, combat-ready gear*, CENTER FOR INVESTIGATIVE REPORTING (Dec. 21, 2011, 12:00 AM), <http://americaswarwithin.org/articles/2011/12/21/local-police-stockpile-high-tech-combat-ready-gear>.

218 *Id.*

219 John W. Whitehead, *Tanks on Main Street: The Militarization of Local Police*, HUFF. POST (Jan. 4, 2012, 10:53 AM), http://www.huffingtonpost.com/john-w-whitehead/police-militarization_b_1180875.html.

220 Radley Balko, *Police ‘Tank’ Purchase Riles New Hampshire Town*, HUFF. POST (Feb. 16, 2012, 8:41 AM), http://www.huffingtonpost.com/2012/02/16/police-tank-purchase-new-hampshire_n_1279983.html.

221 Lorenzo Franceschi-Bicchierai, *Small-Town Cops Pile Up on Useless Military Gear*, WIRED (June 26, 2012, 6:31 AM), <http://www.wired.com/dangerroom/2012/06/cops-military-gear/all/>.

222 Becker & Schulz, *supra* note 218; see also Radley Balko, *A Decade After 9/11, Police Departments Are Increasingly Militarized*, HUFF. POST (Nov. 12, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/09/12/police-militarization-9-11-september-11_n_955508.html.

2011, the Department of Defense through the “1033 program”²²³ gave away nearly \$500 million worth of “leftover military gear” to law enforcement agencies, including grenade launchers, military robots, assault rifles, and armored vehicles.²²⁴ In 2010, state and local departments received \$212 million in similar “leftover” military equipment.²²⁵ Indeed, the give-away program has been so broad that the Defense Department recently halted issuing any additional military weapons to law enforcement agencies, but just “until [the Department] is satisfied that state officials can account for all the surplus guns, aircraft, Humvees and armored personnel carriers it has given police.”²²⁶

Beyond acquiring military weapons and equipment, state and local police officers have begun to adopt military tactics and *act* more like soldiers.²²⁷ This militarized behavior was especially clear in the responses to the Occupy movements across the country.²²⁸ From Zuccotti Park in Manhattan to the Occupy camp in Oakland, police officers entered many of the protest sites as if they were military units invading an enemy camp.²²⁹ In one particularly violent encounter, officers donning

223 The “1033 Program” is named after Section 1033 of the National Defense Authorization Act of 1997 and is intended to assist law enforcement agencies primarily with “counter-drug and counter-terrorism activities.” PUB. L. 104-201, 110 STAT. 2639 (Sept. 23, 1996); *see also* Balko, *supra* note 214, at 8 (“The National Defense Authorization Security Act of 1997, commonly called “1033” for the section of the U.S. code assigned to it, created the Law Enforcement Support Program, an agency headquartered in Ft. Belvoir, Virginia. The new agency was charged with streamlining the transfer of military equipment to civilian police departments. It worked.”).

224 Carlson, *supra* note 202; *see also* Franceschi-Bicchierai, *supra* note 222 (“In 2011 alone, more than 700,000 items were transferred to police departments for a total value of \$500 million.”).

225 Carlson, *supra* note 202.

226 Associated Press, *Pentagon halts free weapons for police amid fears of unaccounted guns, Humvees, planes*, N.Y. DAILY NEWS (June 8, 2012, 1:17 PM), <http://www.nydailynews.com/news/national/pentagon-halts-free-weapons-police-fears-unaccounted-guns-humvees-planes-article-1.1092140>; *see also* Franceschi-Bicchierai, *supra* note 222 (reporting that DOD suspended the program after local police department was accused of using the program to acquire and resell military equipment to others).

227 *See, e.g.*, Rizer & Hartman, *supra* note 31 (noting the increase of S.W.A.T. teams in American police departments and their use in executing “minor operations such as serving warrants” exemplify the militarization of the police department); *see also* Bob Ostertag, *Militarization Of Campus Police*, HUFF. POST (Nov. 19, 2011, 7:00 PM), http://www.huffingtonpost.com/bob-ostertag/uc-davis-protest_b_1103039.html (arguing that even campus police are now militarized).

228 *See, e.g.*, Baker, *supra* note 208 (describing the militarized response of police officers to Occupy protestors); Brad Lockwood, *The Militarizing of Local Police*, FORBES (Nov. 30, 2011, 11:49 AM), <http://www.forbes.com/sites/bradlockwood/2011/11/30/the-militarizing-of-local-police/> (“During the crackdown on ‘Occupy’ protestors recently, police appeared like soldiers—armed with automatic weapons, Tasers, pepper spray, riot gear et al. . . .”).

229 *See e.g.*, Baker, *supra* note 208; Norm Stamper, *Paramilitary Policing From Seattle to Occupy Wall Street*, NATION, NOV. 28, 2011 (“[T]he police response to the Occupy movement, most disturbingly visible in Oakland — where scenes resembled a war zone and where a marine remains in serious condition from a police projectile — brings into sharp relief the acute and chronic problems of American law enforcement.”).

full riot gear wielded tear gas canisters to clear Occupy Oakland protesters,²³⁰ one of who was critically injured after he was hit with a beanbag projectile at close range.²³¹ Such trends have since been duplicated in officers' encounters with other protestors throughout the country, including in Burlington, Vermont, where the police deployed riot shields, rubber bullets, and physical force to clear a group of unarmed protesters.²³²

To be sure, law enforcement agencies throughout the country have demonstrated their willingness to adopt military-like tactics and behaviors before September 11, 2001 and the war on terror.²³³ Most notably, the federal government's declaration of a "War on Drugs" injected millions of dollars in military equipment into state and local law enforcement agencies,²³⁴ and thereafter police units across the country began employing heavily armed, militarized SWAT units.²³⁵ Since then, militarized SWAT units have proliferated nationwide,²³⁶ and are frequently "deployed" to respond to nonviolent crimes²³⁷ and execute routine search warrants²³⁸ — in stark opposition to the hostage situations or dangerous standoffs for which they were originally conceived.²³⁹

230 *E.g.*, Sarah Maslin Nir & Matt Flegenheimer, *Hundreds Held in Oakland Occupy Protest*, N.Y. TIMES, at A11 (Jan. 30, 2012), available at <http://www.nytimes.com/2012/01/30/us/occupy-oakland-protest-leads-to-hundreds-of-arrests.html>; Ruben Navarrette Jr., *Are police becoming militarized?*, CNN (Nov. 9, 2011, 11:26 AM), <http://www.cnn.com/2011/11/09/opinion/navarrette-militarized-police/index.html> ("The siege in Oakland, where police have repeatedly clashed with protesters, reminds us that there's one other thing that police officers shouldn't do: impersonate soldiers."); Malia Wollan, J. David Goodman, & Sarah Maslin Nir, *Police Fire Tear Gas at Occupy Protesters in Oakland*, N.Y. TIMES (Oct. 26, 2011, 12:22 AM), <http://thelede.blogs.nytimes.com/2011/10/26/police-said-to-fire-tear-gas-at-protesters-in-oakland-calif/>.

231 Gavin Aronsen, *Scott Olsen, Iraq Vet Hurt by OPD Projectile: 'I'm Not Alright'*, MOTHER JONES (May 1, 2012, 10:13 AM), <http://www.motherjones.com/mojo/2012/05/scott-olsen-occupy-oakland-may-day>.

232 Dylan Kelley, *Peaceful Protesters Put Down by Militarized Police Force*, VERMONT COMMONS (July 31, 2012, 3:22 PM), <http://www.vtcommons.org/blog/peaceful-protesters-put-down-militarized-police-force>.

233 *See, e.g.*, Balko, *supra* note 215, at 1 ("Over the last 25 years, America has seen a disturbing militarization of its civilian law enforcement, along with a dramatic and unsettling rise in the use of paramilitary police units (most commonly called Special Weapons and Tactics, or SWAT) for routine police work); Brown, *supra* note 15, at 654-57 (describing generally America's militarization throughout twentieth century); Dhanasekaran, *supra* note 210, at 251 (noting that "by 1997 SWAT teams could be found in ninety percent of cities with populations of 50,000 or above"); Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1 (1997).

234 Michelle Alexander, *THE NEW JIM CROW* 73-77 (2010); *see also* Lockwood, *supra* note 229 (noting that the Clinton administration gave 1.2 million military items to law enforcement "under the guise of the 'War on Drugs'"); Balko, *supra* note 215, at 7 ("The election of Ronald Reagan in 1980 brought new funding, equipment and a more active drug-policing role for paramilitary police units across the country.").

235 *See* Balko, *supra* note 215, at 6-7 (describing history of SWAT units, beginning with Los Angeles police chief Daryl F. Gates in 1966, and through their increased use in the 1980s).

236 *Id.* at 9 (reporting that in 1997, ninety percent of U.S. cities with populations of 50,000 or more had at least one SWAT team — twice as many as in mid-1980s); Kealy, *supra* note 26, at 386.

237 Balko, *supra* note 215, at 6-7 (SWAT teams used for routine marijuana policing).

238 *Id.* at 11 ("In small- to medium-sized cities . . . [eighty] percent of SWAT callouts are now for warrant service. In large cities, it's about [seventy-five] percent.").

239 *E.g.*, Kealy, *supra* note 26, at 385 ("Developed in the late 1960s to respond to particularly dangerous situations, such as hostages, barricaded suspects, or hijackers, SWAT teams were originally much like regular police officers, but better equipped and utilized on only rare occasions.").

The current, post-9/11 phase of militarization builds upon this trend in two ways. First, the “war” from which the militarization is derived is no longer metaphorical. Although the U.S. has declared war on abstractions in the past,²⁴⁰ this war on an abstraction is literal — real battles have been fought in Afghanistan and thousands of lives have been lost.²⁴¹ Drone strikes have claimed real casualties and struck true fear of battle in the minds of those living in the targeted regions.²⁴² Against this backdrop, and bolstered by the pervasive threat rhetoric concerning the risk of homegrown terrorism, there is a real risk of mission creep — an impetus for law enforcement officers to carry forward and execute the military’s mission to protect the homeland, to be on the side of “good” in the wider struggle for moral order.²⁴³

Second, the militarization of state and local law enforcement has transcended the bounds from which it arose. Police officers are acting like soldiers in operations far removed from purported counterterrorism operations, including in criminal justice and immigration contexts.²⁴⁴ Law enforcement agencies are acquiring military weapons and equipment free of restrictions on use, leading to an increasingly militarized border and militarized responses to protests and rallies.²⁴⁵ As the trend continues, retreating from a soldier’s ethos to a public safety officer will become increasingly difficult.²⁴⁶ Employing such characteristics of the war paradigm absent judicial scrutiny over whether the

240 See, e.g., Stuart, *supra* note 117, at 2 (discussing metaphorical wars on policy matters, such as War on Poverty and Cold War).

241 See, e.g., *id.* at 2-3 (“[T]oday’s increasing use of militaristic rhetoric by politicians and pundits goes beyond its metaphorical use as a war against an abstraction. Instead, the use of such language is becoming literal, and that rhetorical shift matters. Today’s militaristic rhetoric is increasingly identifying fellow citizens as enemies in a literal war.”); Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT’L L.J. 135, 145 (2008) (discussing U.S.’s “literal use of the term war on terror”); David A. Bosworth, *American Crusade: The Religious Roots of the War on Terror*, 7 BARRY L. REV. 65, 105 (2006) (“[T]he War on Terror has been interpreted as a literal war rather than a metaphorical one . . .”).

242 See, e.g., Scott Shane, *Drone Strikes to Be Investigated*, N.Y. TIMES, Oct. 25, 2012, at A10, available at <http://www.nytimes.com/2012/10/26/world/americas/drone-strikes-to-be-investigated.html>.

243 See, e.g., Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable With the Others?*, 34 GA. L. REV. 1253, 1263-67 (2000) (discussing “occupational subculture” of reform-era policing, dominated by belief that policing “reflected a wider moral struggle” and officers as “strong and courageous warriors who demonstrated their bravery by intervening in potentially dangerous situations”); Charles P. Pierce, *Occupy Oakland and the Militarization of America’s Police*, Esquire (Oct. 26, 2011, 11:38 AM), <http://www.esquire.com/blogs/politics/occupy-oakland-6530274> (“You put enough war propaganda into the heads of young men, hand them weapons, and give them license to use them, and they are not going to see fellow citizens through the visors on their helmets. They are going to see enemies. Wars have enemies.”).

244 See, e.g., Rizer & Hartman, *supra* note 15 (“[P]olice departments have employed their newly acquired military weaponry not only to combat terrorism but also for everyday patrolling”); Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 382 (2012) (“[I]n the period since September 11, 2001, the drastic enhancement and militarization of law enforcement overall has worsened conditions for those targeted by [the U.S. criminal and immigration systems].”).

245 See Associated Press, *supra* note 227.

246 Carlson, *supra* note 173, (“If you look at the police department, their creed is to protect and to serve. A soldier’s mission is to engage his enemy in close combat and kill him. Do we want police officers to have that mentality? Of course not.”)

battlefield in the war on terror is truly a global one risks normalizing the exception — permatizing a militarized police force throughout the United States. The threat of, effectively, a standing army executing the laws within the U.S. —the very notion feared by our Founders — is real.²⁴⁷

C. *Dangerous Consequences*

Although, in time, threat rhetoric may shift, permatizing the militarization of state and local law enforcement carries dangerous consequences.²⁴⁸ Our fundamental conceptualization of a law enforcement officer is shifting in multiple ways, both in the minds of the officers and in the minds of the public, leading to changes in the ways in which both groups perceive each other. Accordingly, we risk inflicting damage to the paramount constitutional protections due to civilians under the criminal law paradigm.²⁴⁹

Incorporating military training and military tactics into civilian life leads to a shift in the mind of an officer.²⁵⁰ When officers' equipment and training mirror that of a soldier, their presumption and outlook toward their duties shift.²⁵¹ In an officer's mind, the public ceases to be comprised of fellow citizens, and instead becomes the enemy. When the police confront citizens as enemies, their traditional role to "protect and serve" the public fades away.²⁵² As former Chief of the Seattle Police Department explains, "What emerges is a picture of a vital public-safety institution perpetually at war with its own people."²⁵³

247 See, e.g., Dougherty, *supra* note 210, at 48-49 ("Having a police force that uses the same techniques as the military is not far from having a standing army executing laws. At the end of the day, the difference between a militarized police force and a military force policing is nonexistent.").

248 For a compelling discussion of the consequences of a militarized police force in Northern Ireland, see Kealy, *supra* note 26, at 420-23.

249 See, e.g., Dhanasekaran, *supra* note 210, at 252-53 ("[W]hen police units are trained by the military, they behave like the military, and this often leads to disastrous consequences in the civilian world. Specifically, when police departments engage in the calculus of when a suspect's constitutionally rights trump the use of force, they *err on the side of using force.*") (emphasis added).

250 E.g., Dhanasekaran, *supra* note 210, at 253- (arguing militarized police force might incorporate "military interrogation techniques", including torture into law enforcement practices).

251 Rizer & Hartman, *supra* note 15 (arguing that military equipment and training for police "represent a fundamental change in the nature of law enforcement"); see also Balko, *supra* note 222 ("The problem with this mingling of domestic policing with military operations is that the two institutions have starkly different missions. The military's job is to annihilate a foreign enemy. Cops are charged with keeping the peace, and with protecting the constitutional rights of American citizens and residents. It's dangerous to conflate the two.").

252 See, e.g., Dhanasekaran, *supra* note 210, at 251-52 (The resulting "warrior ethic" [of military-trained and military-armed police officers] which presumes guilt and responds with overwhelming force is routinely applied against Americans. This is diametrically opposed to the mission of a police officer, who should use minimal force and protect the constitutional rights of the accused."); Baker, *supra* note 208 (reporting that officers must realize that protestors are not enemies but people that police might need to engage with in future); Rizer & Hartman, *supra* note 31 ("The most serious consequence of the rapid militarization of American police forces . . . is the subtle evolution in the mentality of the 'men in blue' from 'peace officer' to soldier."); Stamper, *supra* note 230 ("Everyday policing is characterized by a SWAT mentality, every other 911 call a military mission.").

253 Stamper, *supra* note 230.

For the public, the shift in the conceptualization of law enforcement is two-pronged. In the short-term, when the police act like soldiers the adage that a police officer is the one individual among strangers deserving of trust and providing protection quickly disintegrates.²⁵⁴ Hostility meets hostility; distrust garners distrust.²⁵⁵ And where the public does not trust the police, one of the foremost models of policing and one that the Executive is heavily promoting to counter homegrown terrorism²⁵⁶ — community policing — necessarily fails.²⁵⁷

In the long-term, as police behavior changes, the public's bounds of acceptable law enforcement behavior will shift. With each increment that law enforcement gains in its militarization, backed by the threat rhetoric that purports to require the militarization to protect the nation, the degree of scrutiny exercised by the public is likely to decrease.²⁵⁸ Similar to the public's post-Iraq War perception that the U.S. was better off after the invasion despite the flawed intelligence that led to it,²⁵⁹ the public appears to accept their police officers looking and behaving more like soldiers because the threat rhetoric tells us that the enemy is near. For instance, two-thirds of Americans now express little concern about police departments acquiring drones, a military technology, on domestic soil.²⁶⁰

With these shifts in the conceptualization of law enforcement comes the risk of the erosion of many of the fundamental constitutional protections embodied within the criminal law paradigm.²⁶¹ The presumption on which police approach their duties becomes one of defeat, not protection; the

254 Navarrette Jr., *supra* note 231 (“Police officers have the power to either make their job simpler or more difficult. If they treat people well and build relations, people will cooperate. They’ll have leads, witnesses and informants. But if they see the people they’re supposed to ‘protect and serve’ the way an occupying army sees the native population, they’re going to encounter resistance, suspicion, defiance and other things that make their job harder. That’s a recipe for chaos.”).

255 *E.g.*, Whitehead, *supra* note 220 (“[I]n the past, law enforcement strove to provide a sense of security, trust, and comfort[;] the impression conveyed today is one of power, dominance and inflexible authority.”).

256 Empowering Local Partners to Prevent Violent Extremism in the United States, WHITE HOUSE (Aug. 2011), available at http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf (naming local government, law enforcement, and Mayor’s offices as local institutions which the federal government can support to combat violent extremism).

257 *See, e.g.*, Baker, *supra* note 208 (“The more the police fail to defuse confrontations (but instead help to create them — be it with their equipment, tactics or demeanor — the more ties with community members are burned.”); Franceschi-Bicchierai, *supra* note 222 (“According to Stamper, having small local police departments go around with tanks and military gear has ‘a chilling effect on any effort to strengthen the relationship’ between the community and the cops.”); Robert W. Benson, *Changing Police Culture: The Sine Qua Non of Reform*, 34 LOY. L.A.L.REV. 681, 688 (2001) (characterizing militarized law enforcement as the “antidote” to the community policing model).

258 *E.g.*, Kealy, *supra* note 26, at 387 (“[T]he threat of terrorism may spur citizens to actively renounce liberty for safety.”).

259 *Supra* note 151.

260 Scott Shackford, *A Third of Americans Worry About Police Getting Drones*, REASON (Sept. 28, 2012, 12:38 PM), <http://reason.com/blog/2012/09/28/a-third-of-americans-worry-about-police>. *But see* M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29 (2011) (arguing that drones “could be just the visceral jolt society needs to drag privacy law into the twenty-first century”).

261 M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding “Zero-Tolerance” Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 378 (2011) (“A consequence of both the use of war rhetoric and the warlike approach to addressing societal problems is the dehumanization of citizens as ‘enemies’”).

public's presumption that security trumps liberty results in acceptance of increasingly intrusive and abusive practices. Ultimately, when those charged with upholding public safety approach the public as enemies, those very protections and presumptions that our police have traditionally been trained to uphold face little hope of remaining intact.²⁶²

V. CONCLUSION

Through carefully crafted rhetoric of the Executive, the September 11, 2001 attacks marked a fundamental change in the ways in which we collectively regard and respond to terrorism. Whereas acts of international terrorism on U.S. soil were traditionally conceived as criminal acts and alleged terrorists as criminal suspects, the September 11, 2001 attacks were acts of war. This shift altered the legal paradigm under which the nation responded to such acts, moving from the criminal law paradigm to the war paradigm — moving from a framework of constitutional protections and the presumption of innocence to a framework of enemy designations and lethal force. Moreover, the declaration of a *global* war on terror permitted such action on a worldwide battlefield.

This paradigm shift was possible due to the Executive's declaration of war on an abstract phenomenon — terrorism. It is of little surprise that neither the U.S. nor international legal system has settled on a single definition of terrorism because, in practical terms, terrorism is indefinable. Accordingly, declaring war on an indefinable abstraction creates space for the Executive to harness the ambiguity of abstract words and the power of performative terms to define, shape, and color the present war on terror.

Threat rhetoric — the language employed by the Executive to identify and communicate to the citizenry the internal and external threats to the homeland — permeates the gaps that the absence of a single definition of terrorism creates, providing the concretization and contextualization necessary to wage a war. Threat rhetoric is particularly powerful in the war on terror because our notion of “security” has shifted since the early-to-mid twentieth century from a personal “democratic security” to a collective “national security” dominated by secrecy and Executive expertise. The 2003 invasion of Iraq is a pertinent example of the efficacy of threat rhetoric: harnessing the power of words and control over the dissemination of accurate intelligence information, the Bush administration garnered public and congressional support for a war that later proved to be built on false premises.

In a similar pattern, the Obama administration's increasing use of threat rhetoric surrounding homegrown terrorism is aimed toward garnering public support for increasingly intrusive counterterrorism policies and tactics in the U.S. — that is, extending the geographic scope of the battlefield to the homeland and bringing characteristics of the war paradigm within our borders — absent judicial scrutiny. Though the Judiciary was initially reluctant to accept the Executive's expansive view of the battlefield, federal courts are now exercising increasing deference to the Executive on matters of national security. Indeed, when recently presented squarely with the question of the extension of the

262 See, e.g., Kealy, *supra* note 26, at 423 (discussing militarization of police in Northern Ireland and Patten Commission's finding that the militarized training led to “inattention to human rights in practice”).

battlefield beyond Afghanistan, the courts refused to address the issue.

To avoid affording the Executive full discretion to shape the battlefield and, accordingly, import characteristics of the war paradigm into the U.S., the Judiciary must demand increased transparency from the Executive and conduct more fact-finding and exacting scrutiny in matters of national security. Not doing so risks permatizing the militarization of state and local law enforcement and, accordingly, transforming the ways in which police officers and citizens perceive each other. Dis-integrating that vital separation of police forces and military units on which our nation was built threatens to erode many of the fundamental constitutional protections inherent to the U.S. criminal law paradigm.