

PART IV - DOMESTIC TERROR AND THE FIGHT TO SUSTAIN DEMOCRACY

Counterterrorism 2.0

Deborah Pearlstein*

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INTRODUCTION

Few things focus the mind on lessons learned from past experience more than the urgent need to address the same problem again. The threat that white supremacist terrorists pose to the United States today is of course different in some respects from the threat Al Qaeda terrorists posed in 2001. Most (but not all) Al Qaeda terrorists who threatened the United States were foreign nationals. Most (but not all) white supremacists who threaten us now were born here in the United States. The Al Qaeda of 2001 enjoyed the availability of an effective jurisdictional haven in Afghanistan from which to plan and launch its operations. White supremacist terrorists operating in the United States, even as they enjoyed a degree of official government celebration during the Trump presidency, do not have the same unchecked autonomy here. The U.S. President and much of the foreign policy establishment in 2001 saw Al Qaeda's 9/11 attacks principally as Al Qaeda itself saw them: "an act of war," demanding a U.S. military response.¹ Notwithstanding the rhetoric of some among far-right extremist groups who believe themselves engaged in the opening volleys of a second civil war, the overwhelming focus of the U.S. government response to date has been through domestic law enforcement.

Yet the parallels are also unmistakable. Consider just a few. Soon after the September 11 attacks, U.S. government law enforcement and intelligence agencies began describing Al Qaeda as the most urgent security threat facing the

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, and Co-Director, Floersheimer Center for Constitutional Democracy. © 2021, Deborah Pearlstein.

1. President George W. Bush, Address Before a Joint Session of the Congress on the U.S. Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347-1348 (Sept. 20, 2001).

United States.² In February 2021, after the Capitol Insurrection of January 6, Alejandro Mayorkas, the newly confirmed Secretary of the Department of Homeland Security (the agency created in the aftermath of the 9/11 attacks) similarly described domestic violent extremists as the “most lethal” terrorism-related threat facing the U.S. homeland today.³ The U.S. response to the attacks of 9/11 was profoundly shaped by the emergency moment in which it arose; post-9/11 policies were conceived as part of a temporary state of exception necessary to combat an immediate crisis. (This, notwithstanding the reality that Al Qaeda-style extremism had been a growing danger for years by 9/11, the group having already carried out multiple violent attacks against U.S. targets before 2001.) The government’s post-1/6 response is still taking shape, but there has been a notable shift in the urgency of the rhetoric about far-right extremism in the United States. As the Director of Washington, D.C.’s Homeland Security and Emergency Management Agency told Congress on February 4, “[t]he threats we now face are arguably as dangerous as they were in the immediate post-9/11 environment.”⁴ (This, too, notwithstanding the persistence of white supremacist violence in the United States from the earliest days of our history to the already years-long resurgence since the 2008 election of Barack Obama.⁵) Likewise, in the weeks following 9/11, long before any investigatory commission had been constituted, much less made findings and recommendations about what went wrong, policymakers and scholars of both parties envisioned a response that looked first and foremost to law, to the anticipated need to sacrifice some liberty for more power. “When you’re at war, civil liberties are treated differently,” said Senate Republican Leader Trent Lott.⁶ “[W]e’re not going to have all the openness and freedom we have had,” Senate Democratic Leader Richard Gephardt agreed.⁷ Today, equally uncertain about the findings (or even existence) of an authoritative commission investigation into the events of 1/6, legislators of both parties have backed a new federal law criminalizing the offense of “domestic terrorism,”⁸ and civil rights groups are among those leading calls for more restrictions on hateful speech

2. See, e.g., Current and Projected National Security Threats to the United States: Hearing before the S. Select Comm. on Intel., 107th Cong. 597 (2002) (testimony of CIA Dir. George Tenet).

3. Alejandro N. Mayorkas, *How My DHS Will Combat Domestic Extremism*, WASH. POST (Feb. 25, 2021), <https://perma.cc/5FUV-9JYM>.

4. *Examining the Domestic Terrorism Threat in the Wake of the Attack on the U.S. Capitol: Hearing before the H. Comm. on Homeland Sec.*, 117th Cong. 1 (2021) (statement of Christopher Rodriguez, Dir., D.C. Homeland Sec. and Emergency Mgmt. Agency).

5. See, e.g., Robert O’Harrow Jr., Andrew Ba Tran & Derek Hawkins, *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), <https://perma.cc/U55G-PKG3> (citing CSIS Domestic Terrorism Dataset used by the Washington Post, GITHUB, <https://perma.cc/A6SX-94PE> (last updated April 14, 2021)).

6. Eric Pianin & Thomas B. Edsall, *Civil Liberties Debate Revived Amid Efforts to Fight Terrorism*, WASH. POST (Sept. 14, 2001), <https://perma.cc/C6AW-PVA2>.

7. *Id.*

8. Domestic Terrorism Prevention Act, H.R. 350, 117th Cong. § 3(a) (2021).

online.⁹ These are legal solutions for a multi-dimensional problem, which is at best only partially susceptible to law.

Such conceptually defining characteristics of the early U.S. response to the attacks of 9/11 — seeing the threat as more acute rather than chronic, seeking new legal power before assessing whether a lack of power bore any causal connection to the failure to foresee or repel the attack — helped give rise to some of the most misguided practices of the post-9/11 era. Detainee torture and abuse, the embrace of trial by newly formed military commission — these policies and practices were set in motion in the first few weeks after the 9/11 attacks, driven by the instinct to do *something*, bolstered by the assumption that such policy adaptations would be short-lived, and untethered by any systematic analysis of the longer-term consequences for policy, democracy, or law — or even by any contemplated end state. Yet nearing twenty years on, as Guantanamo detentions continue, and associated military commissions still struggle over what can lawfully be done with defendants or witnesses who were subject to torture in U.S. custody, these lessons now seem apparent. This essay suggests that it is possible to see how these misguided conceptual frameworks helped lead us down badly mistaken policy pathways. And it cautions against similar missteps as we accelerate along the new road ahead.

I. THE GOAL ISN'T JUST SECURITY IN TIMES OF EMERGENCY, IT'S SECURE AND SUSTAINABLE DEMOCRACY

The CIA's post-9/11 detention program, under which CIA imprisoned and tortured dozens of terrorist suspects in secret locations around the world, is perhaps the post-9/11 poster child for the perils of shoot-first-ask-questions-later decision-making. Government officials involved in the program have since described its origins in a time of deep grief and guilt over the failure to prevent the attacks of 9/11, fear over the prospect of future attacks, and intense pressure from political leaders to prevent the next one from happening. Outside government, wildly popular TV shows like “24” about fictional counterterrorism agent Jack Bauer, which aired from 2001-2010, celebrated the effectiveness of torture as an essential interrogation device in responding to the perennial “ticking bomb” in need of disarming. And for years after 2001, scholars in law, political science, and other disciplines focused their attention on the challenges of emergency response,

9. See, e.g., *ADL CEO Tells Congress: Adopt New Law to Fight Hate*, ANTI-DEFAMATION LEAGUE (Jan. 15, 2020), <https://perma.cc/KV7P-8DKA> (urging Congress to put more pressure on social media companies to “shut down the neo-Nazis and anti-Semites on their platforms.”); *SPLC's Lecia Brooks: Congress Must Take Urgent Steps To Prevent Hate Groups From Raising Money Online*, S. POVERTY L. CTR. (Feb. 25, 2021), <https://perma.cc/6YHC-DLKB> (urging “corporations to create – and enforce – policies and terms of service to ensure that social media platforms, payment service providers, and other internet-based services do not provide platforms where hateful activities and extremism can grow and lead to domestic terrorism.”).

embracing the prevailing assumption that counterterrorism policy is primarily about government decision-making when time is of the essence.¹⁰

The effects of this emergency-driven focus, and the haste with which the CIA program was assembled, became publicly apparent years later. As has since been extensively documented in government investigations, the CIA developed the detention program fully aware that it had no relevant knowledge or experience in operating prison facilities. CIA records reveal no evidence that CIA ever consulted other federal agencies that did have such experience and no indication CIA conducted any research into effective interrogation techniques, relying instead on independent contractors who likewise lacked any actual interrogation experience. Above all, from the time the President authorized the CIA to begin detaining and interrogating terrorist suspects six days after the 9/11 attacks until the Defense Department was finally persuaded to take custody of the prisoners remaining in CIA custody in 2006, the U.S. government had no identified “endgame” for what to do with any of the detainees held in CIA custody after CIA had concluded its interrogations. CIA had a plan, such as it was, for gathering short-term, emergency-relevant information. It had no plan for whether, once it had finished torturing detainees, it should let the detainees go, hand them over to someone else, or continue to detain them for the rest of their lives. There was no conception of what the world would look like once the particular terrorist “emergency” had passed.¹¹

Among many lessons to be drawn from this experience: not letting the response to acute danger swamp the development or compromise the success of long-term policy. Like radical Islamist extremism, white supremacist extremism – present in the United States in one form or another since the founding – seems exceedingly unlikely to vanish or be defeated altogether. As they have since the Civil War, a majority of Americans continue to share the goal of achieving in this country a sustainable, multiracial democracy. Whatever their potential short-term benefit, how would new restrictions on “dangerous” or hateful speech, or new criminal offenses that appear designed to (or do) target individuals based on group association or ideological beliefs (however repugnant) contribute to that goal?

As other countries riven by internal division have painfully learned, repressing hateful speech can eliminate a less-violent outlet for airing grievances that can help alleviate pressure toward violent conduct even in otherwise stable societies. And such policies can readily be turned against otherwise non-threatening groups when political administrations shift. More, overly aggressive restrictions can produce further radicalization, accelerating rather than forestalling a cycle of violence. Less than a decade on in America’s post-9/11 response, it had already

10. See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 56 (2007); BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 3-4, 13-14 (2006).

11. See S. REP. NO. 113-288, at xi-xxv (2014).

become clear to national security professionals that this was precisely the path we had taken. As one veteran counterintelligence interrogator put it:

I learned in Iraq that the No. 1 reason foreign fighters flocked there to fight were the abuses carried out at Abu Ghraib and Guantanamo. Our policy of torture was directly and swiftly recruiting fighters for al-Qaeda in Iraq . . . It's no exaggeration to say that at least half of our losses and casualties in that country have come at the hands of foreigners who joined the fray because of our program of detainee abuse.¹²

Today, there seems no sensible path forward in embracing new legal restrictions on white supremacist activities that does not involve detailed, concrete analysis of how the population likely to bear the brunt of these new restrictions can be expected to respond in the even slightly-longer term.

II. DON'T SUBSTITUTE LEGAL POWER FOR LONG-TERM POLICY

Washington policymakers were not alone in the first weeks after 9/11 in leaping to conclude that an insufficient degree of federal power was to blame for the United States' catastrophic failure to prevent the attacks – and that an expansion of legal authority would thus be indispensable in preventing another. Indeed, academics were among those leading the charge. As Harvard human rights scholar Michael Ignatieff wrote on September 13: “As America awakens to the reality of being at war - and permanently so - with an enemy that has as yet no face and no name, it must ask itself what balance it should keep between liberty and security in the battle with terrorism.”¹³ For academics who had long sought to champion expansive views of executive power, the moment presented an extraordinary opportunity to advance the cause: “[T]he institutional structures that work to the advantage of the courts and Congress during normal times greatly hamper their effectiveness in emergencies . . . [D]eference to [the executive] should increase in emergencies.”¹⁴

Yet as the invaluable report of the bipartisan 9/11 Commission soon showed, a surfeit of civil liberties was not the primary (or even secondary) reason the terrorists succeeded on September 11. Among many examples of non-law-related failures, FBI agents in Minneapolis failed to search terrorist suspect Zacarias Moussaoui's computer before the attacks not because constitutional restrictions against unreasonable searches and seizures prevented them from doing so, but because they misunderstood the tools the law provided. The vast majority of the September 11 hijackers were able to enter the United States not because anti-discrimination laws prevented border officials from targeting Arab and Muslim men for special scrutiny, but because, according to the Commission, “[b]efore 9/11,

12. Matthew Alexander, *I'm Still Tortured by What I Saw in Iraq*, WASH. POST (Nov. 30, 2008), <https://perma.cc/J8NR-MWTA>.

13. Michael Ignatieff, *Paying for Security with Liberty*, FIN. TIMES, (Sept. 13, 2001).

14. POSNER & VERMEULE, *supra* note 10, at 6.

no agency of the U.S. government systematically analyzed terrorists' travel strategies" to reveal how terrorists had "detectably exploit[ed] weaknesses in our border security."¹⁵

But accrue power the government did, well before it developed a discernable counterterrorism strategy, with Congress enacting a series of new statutes and the executive issuing a raft of orders creating new legal powers. Among the many new powers rapidly asserted was an executive authority to create a new system of military commissions, designed to compensate for the (presumed) inadequacy of civilian criminal or even ordinary military trials in order to provide "swift and certain" justice for the prosecutable among the "worst of the worst" who would come to be held at Guantanamo Bay.¹⁶ As the record of the past 20 years has long since made clear, justice via military commission has been neither swift nor certain. Seven defendants still await trial by military commission, including Khalid Sheikh Mohammed, the one living man perhaps most responsible for the attacks of 9/11. All seven cases are still only in pre-trial proceedings; all seven defendants were subject to torture in U.S. custody.¹⁷ Neither, it has long since become apparent, was such a special authority necessary. As the Supreme Court noted in striking down the original commissions in 2006, the government had offered no particular reason why it would be "impracticable" simply to try post-9/11 defendants under long-existing statutory rules for courts martial.¹⁸ Indeed, between 2001-2018, military commissions produced eight terrorism convictions (several of which were overturned); during the same period, more than 660 were convicted of terrorism-related charges in federal civilian criminal courts.¹⁹ Yet laws and legal institutions, once created, develop a powerful, self-sustaining force of their own. While the commissions' failures were certainly apparent by 2009, ordinary political unwillingness to appear anything less than tough on terrorism, combined with bureaucratic inertia and government-wide knowledge of the time, money, professional and political reputations already invested, persuaded a new administration to double down on commission trials. And the cost of the initial rush to replace hard policy choices with raw legal power was compounded.

The bipartisan growth of calls post-1/6 for a new federal domestic terrorism law feels, in this sense, troublingly familiar. The U.S. Code already features a robust set of federal hate crimes laws, and the ACLU has identified more than fifty statutes already on the books relating to domestic terrorism and material support

15. NAT'L COMM'N ON THE TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM'N REPORT 384 (2004).

16. Katharine Q. Seelye, *Some Guantánamo Prisoners Will Be Freed, Rumsfeld Says*, N.Y. TIMES, (Oct. 23, 2002), <https://perma.cc/N5XC-BA62> (quoting U.S. Def. Sec'y Donald Rumsfeld).

17. Sarah Almkhatar, Carol Rosenberg et al., *The Guantánamo Docket*, N.Y. TIMES (May 18, 2021), <https://perma.cc/4ZMR-W29A>.

18. *Hamdan v. Rumsfeld*, 548 U.S. 557, 622-624 (2006).

19. HUMAN RIGHTS FIRST, TRYING TERROR SUSPECTS IN CIVILIAN COURTS (Feb. 2018), <https://perma.cc/V6ZQ-AMAV>.

for it.²⁰ Rather than identifying specific gaps in the criminal code that might allow particular individuals who should be prosecuted to escape sanction, supporters of adding the new crime argue more that its absence “limits our societal condemnation of the defendants and their dangerous ideologies.”²¹ It is not enough to prosecute a perpetrator for crimes against federal property, the argument goes; effective measures against white supremacist violence require that “[j]uries, judges and the public . . . pass judgment on the conduct *as terrorism*.”²² Yet while there is little doubt that law can sometimes play an essential expressive function in this sense, there is reason to worry that the application of such laws might have the effect of elevating or encouraging extremist groups as much as deter and prevent them from acting, especially in the post-9/11 universe in which public perception of the attack is still so sharply informed by partisan political allegiance.²³ As it stands, with data still extremely limited about the extent of the problem (the result of years of inattention and the absence of an effective uniform system of hate crimes reporting), it is nearly impossible to make a persuasive case that such a new law is necessary to fill some otherwise unfulfilled criminal gap. It is an ideal moment to let reasoned policy drive any reforms in law – not the other way around.

III. RULES CAN BE CHANGED BY PEN, THEY CAN ONLY BE APPLIED BY PEOPLE

Among the most searing images to come out of U.S. detention operations post-9/11 were those of young American soldiers at the U.S. prison facility in Abu Ghraib, Iraq, posing with prisoners who they had humiliated, beaten, or worse. One young woman in those pictures, 19-year-old Private Lynndie England, was among very few U.S. personnel ever held accountable for what became the widespread abuse of detainees in U.S. custody. Sentenced to three years in prison, England was a junior member of a reservist military police unit deployed to Iraq wildly unprepared for the vast detention responsibility it had been given. She was also influenced by the example of her senior officer (and romantic partner) Charles Graner, who did have detention experience, but largely as a guard with an already extensive record of abusing civilian prisoners back home. England and Graner were ultimately punished.²⁴ But they were also, by any measure, only the tip of a frighteningly large iceberg.

20. MICHAEL GERMAN & SARAH ROBINSON, WRONG PRIORITIES ON FIGHTING TERRORISM 6-7 (Oct. 31, 2018), <https://perma.cc/KVL8-4S84>.

21. Richard B. Zabel, *Domestic Terrorism Is a National Problem. It Should Also Be a Federal Crime.*, WASH. POST, (Feb. 2, 2021), <https://perma.cc/E6YJ-LJB6>.

22. *Id.*

23. See, e.g., 3. *Views on the rioting at the U.S. Capitol*, PEW RESEARCH CENTER (Jan. 15, 2021), <https://perma.cc/2KGL-A43C>; *Most Voters Who Incorrectly Say Trump 'Definitely' Won the Election Say He Bears No Responsibility for Capitol Riot*, PEW RESEARCH CENTER (Jan. 14, 2021), <https://perma.cc/JD84-XDGD>.

24. See David S. Cloud, *Private Found Guilty in Abu Ghraib Abuse*, N.Y. TIMES (Sept. 27, 2005), <https://perma.cc/BNP7-E5AJ>.

By 2006, with U.S. troops still engaged in Afghanistan and near the height of their numbers in Iraq, there had been more than 330 cases in which U.S. military and civilian personnel were credibly alleged to have abused or killed detainees – cases involving more than 600 U.S. personnel and more than 460 U.S.-held detainees.²⁵ The numbers included some 100-plus detainees who died in U.S. custody, including 34 whose deaths the Department of Defense (DOD) reported as homicides, and eight who had been tortured to death.²⁶ Yet notwithstanding the scope of the problem – a problem both U.S. and international investigations by then recognized had its roots in gross failures of policy and leadership – formal accountability for official criminal behavior rarely rose much above the most junior participants involved. It was surely right to hold England, Graner, and other individuals who played a role in post-9/11 detainee abuse, accountable for their conduct after the fact. It would have been far better to have had a robust system of vetting, education, training, and professionalization that would have prevented them from engaging in any such conduct in the first place.

Today, while federal law enforcement has thus far led the effort to find and charge participants who played a role in the attack of 1/6, there seems little doubt that U.S. efforts to counter domestic violent extremism going forward will rely at least as much or more on traditional state and local police. And existing problems with state and local policing, as the country has spent the past year witnessing acutely, are severe. Police reform proposals appropriately abound, many of which are focused on eliminating the doctrine of qualified immunity, a legal rule that has enabled many individual police who engage in misconduct to avoid civil liability for unlawful actions.²⁷ Indeed, ensuring that there exists an effective mechanism to hold wrongdoers legally accountable is vital. But unless such after-the-fact accountability reforms are coupled with policy-level reform, including more robust officer vetting and training, we risk merely empowering a deeply flawed system to take on an even more complex set of tasks – with, as we saw in Abu Ghraib, the risk of making existing conflict that much worse.

CONCLUSION

It is easy to draw too much, or the wrong lessons, from our own recent history. Especially with many of the laws and policies adopted in the wake of 9/11 still on the books, their consequences still playing out, the risk is especially acute. But with America's latest counterterrorism efforts rapidly ratcheting up, the greater harm would be in ignoring the common threads altogether. At a first approximation, it would be better to avoid making the same mistakes again.

25. HUMAN RIGHTS FIRST, *COMMAND'S RESPONSIBILITY* (2006).

26. *Id.*

27. George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. § 102 (2021).