

10-2005

Special Project+ National Security

Elizabeth A. Cheney

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [National Security Law Commons](#)

Recommended Citation

Elizabeth A. Cheney, *Special Project+ National Security*, 58 *Vanderbilt Law Review* 1623 (2019)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol58/iss5/4>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Special Project⁺ National Security

INTRODUCTION.....1623

COMBATANT STATUS REVIEW TRIBUNALS AND THE
UNIQUE NATURE OF THE WAR ON TERROR.....1629

THE REVAMPED FISA: STRIKING A BETTER BALANCE
BETWEEN THE GOVERNMENT’S NEED TO PROTECT
ITSELF AND THE 4TH AMENDMENT.....1671

LEAVING NO LOOPHOLES FOR TERRORIST FINANCING:
THE IMPLEMENTATION OF THE USA PATRIOT
ACT IN THE REAL ESTATE FIELD.....1705

INTRODUCTION

“The dilemma is that as security considerations become increasingly enmeshed in technological and political complexity, the layman begins to feel that the complications are bewilderingly beyond his competence to evaluate. That is an understandable but dangerous mistake for a citizen to make in any free and open society. The mere complexity of a relevant problem does not relieve one of the responsibility of solving it. The truth is that few problems today are more relevant to the individual citizen of the United States than those of national security.”¹

—Former U.S. Secretary of Defense Robert S. McNamara

National security has become a hotly debated issue since September 11, 2001. National security has always been of great

⁺ Each year, the VANDERBILT LAW REVIEW publishes one issue with notes devoted solely to one topic of current interest. These notes collectively constitute the Special Project. Past Special Projects have delved into a wide array of topics, from asbestos litigation, 36 VAND. L. REV. 573 (1983), to criminal constitutional law in state courts, 47 VAND. L. REV. 795 (1994), to the Americans with Disabilities Act, 52 VAND. L. REV. 763 (1999).

1. ROBERT S. MCNAMARA, *THE ESSENCE OF SECURITY: REFLECTIONS IN OFFICE* viii-ix (1st ed. 1968).

concern to the government; however former Defense Secretary McNamara's thoughts indicate that national security has now also become an important topic for all individuals to consider.² The "policy and process" of U.S. national security has evolved significantly throughout this country's history, particularly in the years since September 11.

"Most of the American historical experience occurred during the century of unprecedented and prolonged world peace from the Congress of Vienna in 1815 to the outbreak of World War I in 1914."³ Following World War I, Americans quickly disregarded all events outside of the Western Hemisphere and focused their energy on domestic issues, especially as they struggled through the Great Depression. Despite a general aversion to war and standing armies during peacetime,⁴ World War II and the advent of the Cold War, forced the United States to recognize its role and responsibilities as a superpower. As a result, the United States increased its military strength⁵ and, in the latter half of the twentieth century, participated in the Korean War, Vietnam War, and Desert Storm.⁶ The dawn of the twenty-first century brought new military struggles for this nation with the horror of the terrorist attacks in 2001. Thus, in recent years, the country has grappled with redefining its approach to national security.

During the twentieth century, Americans had "an almost ineradicable tendency to think of [the nation's] security problem as being exclusively a military problem, and to think of the military problem as being exclusively a weapons or manpower problem."⁷ September 11, however, jolted Americans into facing the realization that national security involves much more than military strength and manpower. The United States had been attacked on its own soil and it took all of the nation's resources to recover from that tragedy.⁸ The

2. *Id.*

3. AMOS A. JORDAN ET AL., *AMERICAN NATIONAL SECURITY: POLICY AND PROCESS* 51 (4th ed. 1993).

4. *Id.* at 57.

5. *Id.* at 60.

6. Cold War Through Desert Storm, <http://www.teacheroz.com/coldwar.htm> (last visited October 31, 2005).

7. MCNAMARA, *supra* note 1, at 142.

8. See TRICIA ANDRYSZEWSKI, *TERRORISM IN AMERICA* 43-44 (2002) (recounting the horrific events of September 11 and the extended period of recovery in the United States, as emergency workers cleaned up the damage at the sites for months after that day).

September 11 attacks catapulted the fight against terrorism and related issues to the forefront of national security.⁹

This year's Special Project issue contains analyses of different developments in America's approach to national security, primarily since the events of September 11. The first Note, entitled "Combatant Status Review Tribunals and the Unique Nature of the War on Terror," addresses the procedure that should determine whether a suspect is an enemy combatant.¹⁰ The Note argues that despite America's involvement in a literal war against terror, it is difficult "to apply purely law of war norms to suspected terrorists inside the United States." The baseline law of armed conflict allows adversary combatants to be killed or detained indefinitely. Currently, many al Qaeda detainees have been denied POW status. Instead, the Combatant Status Review Tribunal ("CSRT") has administered their due process rights. After outlining the current procedure and evidentiary standards used by CSRTs, the Note points to serious defects in the current approach. Limitations on the available procedures include the expensive nature of the TOP SECRET clearance required to conduct the CSRTs and the lack of Arabic interpreters. The CSRTs, as currently designed, are also confusingly similar in appearance to an AR 190 hearing. All of these issues result in an erosion of American soft power that could otherwise, if used effectively, deny the terrorists new recruits. In order to correct these defects, the Note suggests better articulation of the Administration's legal reasoning, including both public discourse for change under international law and congressional action to determine the specific process required for the detained enemy combatants. Furthermore, the Note recommends that the CSRTs move away from their "quasi-AR 190 appearance." Finally, the Note proposes specific changes to procedures used in the CSRTs.

The second Note, "The Revamped FISA: Striking a Better Balance Between the Government's Need to Protect Itself and the 4th Amendment's Privacy Protections," explores the impact of the "war on

9. See *id.* at 51 (conveying that only nine days after the attacks of September 11, President George W. Bush established the Office of Homeland Security to more effectively address terrorism); see also NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT xv (2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf> (stating that the 9/11 Commission came "together with a unity of purpose because our nation demands it. September 11, 2001, was a day of unprecedented shock and suffering in the history of the United States." The Commission was directed to "investigate facts and circumstances relating to the terrorist attacks of September 11, 2001" to determine how to make the United States more secure.).

10. Robert A. Peal, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629 (2005).

terror” on domestic intelligence gathering under the Foreign Intelligence Surveillance Act (“FISA”).¹¹ This Note begins by exploring the history of FISA, which was first passed in 1978. FISA empowers the federal government to search locations where “foreign intelligence” information is likely to be found without first obtaining a search warrant. Following changes to FISA in the USA PATRIOT Act (“Patriot Act”), which significantly expanded the statute’s scope, a secret federal court held that the amended FISA could be used to initiate searches in certain law enforcement (as opposed to intelligence) investigations. This Note recognizes the Foreign Intelligence Surveillance Court of Appeals’ decision was understandable against the backdrop of the FISA’s tangled history and the text of the Patriot Act but points out that serious questions remain as to the limit of the statute’s broadened power. In particular, the Note focuses on the precise intersection of the government’s FISA power and individuals’ Fourth Amendment right to be free from unreasonable search and seizure, which remains unclear.

The second Note concludes that the court of appeals’ expansive reading of FISA unnecessarily disregards the language of the statute and the relevant case law. Under the court’s view, FISA searches are entrusted almost completely to the executive branch and the secret court that administers FISA. This approach, while undoubtedly a powerful tool in the battle against terrorism, does not adequately protect competing privacy interests. A functional analysis of the powers of the executive and judicial branches indicates that mainline Article III courts are well suited to play a significant role in overseeing the government’s FISA activity. Accordingly, the Note proposes that federal judges perform a screening role when confronted with evidence obtained pursuant to a FISA order to ensure that a defendant’s Fourth Amendment rights are protected.

The third Note, “Leaving No Loopholes for Terrorist Financing: The Implementation of the USA PATRIOT Act on the Real Estate Field,” also addresses aspects of the Patriot Act. This Note focuses on the implementation of anti-money laundering standards in real estate to prevent terrorist financing.¹² Long before September 11, 2001, nations recognized that terrorists were laundering money to finance their operations. The United States addressed this security threat with the Bank Secrecy Act and Financial Crimes Enforcement

11. J. Christopher Champion, *The Revamped FISA: Striking a Better Balance Between the Government’s Need to Protect Itself and the 4th Amendment’s Privacy Protections*, 58 VAND. L. REV. 1671(2005).

12. Elizabeth A. Cheney, *Leaving No Loopholes for Terrorist Financing: The Implementation of the USA PATRIOT Act on the Real Estate Field*, 58 VAND. L. REV. 1705 (2005).

Network; internationally, nations addressed the problem by adopting the Financial Action Task Force and its Forty Recommendations. In response to the events of September 11, the U.S. government quickly approved the Terrorist Financing Executive Order and enacted the Patriot Act; internationally, the European Union amended its money laundering directive and the Financial Action Task Force promulgated Eight Special Recommendations to prevent terrorist financing through money laundering. The Note focuses on the ramifications of the anti-money laundering requirements of the Patriot Act and addresses its possible implementation in the real estate field in the near future. Anti-money laundering procedures in the real estate field pose unique problems because of the large number of people involved in any given real estate transaction and because of the shield presented by the attorney-client privilege. The Note suggests a least-cost avoidance solution that includes the designation of one primary performer, chosen from a pre-arranged list, to conduct the anti-money laundering procedures in each and every real estate transaction. This safeguard would allow other parties to comfortably participate in the transaction with the reassurance that the Patriot Act's requirements had been met.

As these three Notes recognize, national security issues are complex but merit rapt attention, particularly in the wake of September 11. As Former Defense Secretary McNamara commented, "the mere complexity of a relevant problem does not relieve one of the responsibility of solving it."¹³ This year's Special Project thus aspires to meet McNamara's challenge head-on and inform the debate on how to best ensure America's national security. This issue of the VANDERBILT LAW REVIEW presents creative solutions to complicated problems and, in the process, reminds readers that no individual can afford the "dangerous mistake"¹⁴ of ignoring the problem.

*Elizabeth A. Cheney**
Special Projects Editor

13. MCNAMARA, *supra* note 1, at vii.

14. *Id.*

* Special thanks to Rob Peal and Chris Champion for their contributions to the summaries of their notes.
