
Police State, U.S.A.



CHRISTOPHER J. COYNE AND YULIYA YATSYSHINA

“Emergencies” have always been the pretext on which the safeguards of individual liberty have been eroded—and once they are suspended it is not difficult for anyone who has assumed such emergency powers to see to it that the emergency will persist.

—F. A. Hayek, *Law, Legislation, and Liberty*, vol. 3: *The Political Order of a Free People*

Police states are typically defined by certain general characteristics—a highly centralized form of authoritarian government with few, if any, constraints, the prevalence of the state in all areas of socioeconomic life, corrupt elections, a state surveillance apparatus, misinformation operations, arbitrary detention without trial, a militarized domestic police force employed for social control, efforts to silence or censor dissent and the media, and a lack of respect for civil liberties and human rights.¹ Standard examples of police states include Italy under Benito Mussolini (1922–43), Germany under Adolph Hitler (1933–45), the Soviet Union under Joseph Stalin (1927–53), and North Korea under Kim Il-sung (1948–94), Kim Jong-il (1994–2011), and Kim Jong-un (2011–present). Although these governments represent many of the salient features of a police state, the concept is applicable beyond the most egregious totalitarian states.

Real-world governments exist on a multidimensional continuum ranging from a perfectly protective state, where full rights are protected, to an entirely unconstrained predatory state (Marx 2014, 2062). This suggests that the notion of a

Christopher J. Coyne is professor of economics in the Department of Economics at George Mason University and co-editor of *The Independent Review*. **Yuliya Yatsyshina** is program manager in the F. A. Hayek Program for Advanced Study in Philosophy, Politics, and Economics at the Mercatus Center, George Mason University.

1. The term *police state* has evolved over time. For a detailed history, see Chapman 1970.

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police state is better understood as a marginal rather than an “either–or” concept. “There is no strict tipping point or threshold that directly determines whether a nation can be considered as a police state per se; that is, there are degrees of being a police state depending on the governance dimension under examination” (Kurian 2011, 1217). From this perspective, all governments are potential police states, and governments can adopt police-state characteristics on some margins but not on others.

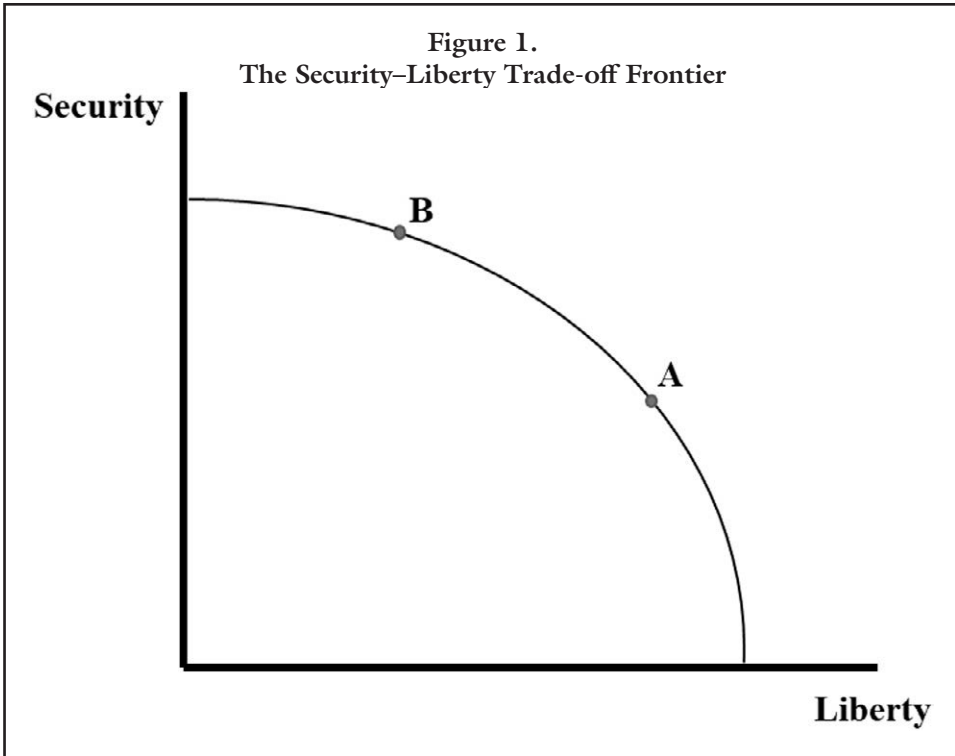
Constitutionally constrained democracies are no exception, as demonstrated by America’s experience with the U.S. government’s “war on terror” after the terrorist attacks on September 11, 2001 (9/11). In the wake of the attacks, the U.S. government expanded its domestic police powers on the grounds of protecting the person, property, and liberties of U.S. citizens. Many of these expanded police-state powers persist today, two decades after the initial attacks. In this paper we explore how a constitutionally constrained democratic government can take on police-state powers that sustain themselves over time. We then catalog some police-state powers implemented in the United States after the 9/11 attacks that remain in effect today.

We contribute to three strands of literature. The first is the literature in constitutional political economy, which asks whether and how government can be simultaneously empowered to be protective and productive yet constrained so as not to abuse those powers (see Brennan and Buchanan 1985; Gordon 2002; Coyne 2018). The second is the scholarship on “low” and “high” policing. Low policing is regular law enforcement aimed at protecting individuals, whereas high policing is intelligence-led policing aimed at protecting the state itself (see Brodeur 1983; Marx 2014). High policing poses a challenge for free societies because state power meant to protect the citizenry can be used to further the higher interests of those constituting “the state,” independent of the interests of the populace. Finally, we contribute to the literature on crisis and government growth (see Higgs 1987), especially in the context of national emergencies and the war on terror (Higgs 2004, 2005, 2007, 2012; Posner and Vermeule 2007; Unger 2012). Our analysis contributes to these categories of literature by exploring how the U.S. government’s response to the 9/11 attacks resulted in lasting expansions in police-state powers.

From Protective State to Police State

The Protective State and the Security–Liberty Trade-off

To understand how a constitutionally constrained government can increasingly adopt the characteristics and behaviors of a police state, we begin with an ideal protective state that protects the core rights of citizens. This involves the provision of contract enforcement and the provision of security against internal and external threats. Within this framework, the protective state is a purely liberty-enhancing apparatus. It assumes that mechanisms exist to select the appropriate mix of state-provided security to ensure that rights are adequately protected and to protect against abuses of power.



This logic underpins the trade-off model (illustrated in figure 1) discussed in the context of the emergency powers of the state and applied to the U.S. government’s war on terror (see Posner and Vermeule 2007). In this framework, there is a straightforward trade-off between citizens’ security and citizens’ liberty, which are presented as aggregate categories. The state increases citizens’ security against threats by adopting police-state characteristics, which result in reductions in citizens’ liberty (the move from point A to point B in figure 1). It is assumed that as threats increase, so too does the benefit of more security and less liberty for citizens. “The problem from the social point of view is to optimize: to choose the joint level of liberty and security that maximizes the aggregate welfare of the population” (Posner and Vermeule 2007, 22).²

In this model, well-functioning political institutions address threats by increasing security and reducing citizen liberty to increase social welfare. “As threats increase, the value of security increases; a rational and well-motivated government will then trade-off some losses in liberty for greater gains in increased security” (Posner and Vermeule 2007, 27). As threats subside, the value of

2. Situations in which governments adopt policies that generate less security and liberty, compared to alternative policy choices, would be represented in figure 1 by a point below the security–liberty frontier. A government that provides little security or liberty to citizens—for example, North Korea—would be located somewhere near the origin of the graph.

liberty, relative to security, increases, and there is movement down the frontier (back toward point A).

Under this ideal protective state, the point selected on the frontier will effectively balance liberty and security of threats to maximize citizen welfare. “Officials do not systematically act as agents either for a majority or for a minority. Rather, the government impartially maximizes the welfare of all whose interests and preferences should count” (Posner and Vermeule 2007, 30). From this perspective, government actors engage in more police-state activities only where it is in the interest of citizens’ aggregate security.

However, in this model these expansions in state power are not sticky or permanent, and police-state powers contract as the benefits of citizen security, relative to liberty, fall. Errors and political opportunism in the security–liberty balance are corrected through political checks and balances—for example, congressional oversight, judicial review, citizen voting—such that there are no persistent and systematic policy errors or abuses of police-state powers. The result is that the police-state powers adopted tend toward efficiency, emerging and persisting only where they effectively secure the core rights of citizens.

The Political Economy of Police-State Powers

The trade-off model assumes that policy makers (1) possess the requisite knowledge to maximize social welfare by selecting the optimal security–liberty bundle and (2) face appropriate incentives to adopt welfare-maximizing policies and to minimize policy errors related to police-state powers. However, numerous frictions in real-world politics call these presuppositions into question.

In principle, a social welfare function ranks alternative states of the world, allowing an analyst to consider the multiplicity of people’s ends and to determine the best allocation of resources to maximize societal welfare. However, as James Buchanan notes, this assumes that individual utilities are given and known to the analyst (1954, 121–22). The issue is that individual valuations are subjective—that is, in the mind of the chooser—and, in contrast to being fixed and given, emerge and evolve only through the process of experiencing life (Buchanan 1959, 1969, 1979). This goes for security, too, which is a highly individualized and subjective concept consisting of many heterogeneous margins.

Thus, even the most benevolent analyst “must remain fundamentally ignorant concerning the actual ranking of alternatives until and unless that ranking is revealed by the overt action of the individual in choosing” (Buchanan 1959, 126). Given the inability to construct a genuine social welfare function, no optimal aggregate security–liberty mix can be known to policy makers as if they are benevolent social planners exogenous to the system they act upon. Instead, they must impose their valuations and judgments on members of society.

The specific policies that constitute the security–liberty mix are not designed and implemented in a vacuum but rather through imperfect political processes. Public choice scholars have identified numerous frictions in democratic politics. Voters’ incentive to be informed is weak due to the small impact of a single vote. Even for voters who wish to be informed, the operations of the national-security state are shrouded in secrecy and have only opaque connections to actual outcomes (see Coyne, Goodman, and Hall 2019). This secrecy weakens the ability of even the most willing voter to be informed in a manner that can check abuses by police-state powers.

Congressional oversight is also limited (Coyne 2018; Coyne and Hall 2018, 58). Members of Congress are reliant on members of the security state—which they are tasked with overseeing—for information involved in the oversight process. This reliance allows those in the national-security state to take advantage of their monopoly control of information flows. Key members of the national-security state are not subject to oversight. For example, the position of national security adviser was created in 1953 as a senior aide to the U.S. president. This position, which has significant influence over national security, does not fall under the purview of congressional confirmation or oversight.

Many members of Congress have limited interest in understanding the nuances and operations of the national-security state given the various demands on their time related to other policy issues that affect their constituents. Even for those who are focused on matters of national security, understanding the contours and nuances of the enormous national-security labyrinth is a near-impossible task. Another issue is that members of congressional oversight committees often have an incentive to see the national-security state persist and expand (see Bamford 2013). Finally, because individual voters have a weak incentive and ability to gather information on the operations of the security state, they are unlikely to pressure their representatives to closely monitor government activities in the area of police-state powers.

Judicial review also suffers from frictions as a check on police-state powers (Coyne, 2018; Coyne and Hall 2018, 59–60). As Edward Corwin argues, “[During] war the Court necessarily loses some part of its normal freedom of decision and becomes assimilated, like the rest of society, to the mechanism of national defense” (1947, 177). The alignment of courts with the other branches of government during war weakens judicial review as a means of checking state power, as suggested in the security–liberty trade-off model. This is especially relevant in the case of open-ended wars, such as the U.S. government’s war on terror, with no clearly defined objectives or indicators of victory, because it suggests that the courts’ ability to check the police state can be weakened for significant periods of time. Even outside times of war, there are reasons that members of the judiciary may be biased toward maintaining and expanding the security state. “Judicial nominees often come from the ranks of prosecutors, law enforcement, and national security officials, and they have often participated in the same sorts of activities the lawfulness of which they will later be asked to adjudicate” (Glennon 2015, 40).

Police-state activities are carried out through a massive convoluted bureaucracy (see Priest and Arkin 2011). As police-state powers expand, so too do the scale and scope of existing or new government agencies. Once bureaus have expanded powers, they have an incentive to maintain and expand those powers even after emergencies end. After a bureau's culture and priorities are established, they tend to be sticky and difficult to change. Together, these dynamics work in favor of maintaining and expanding police-state powers rather than divesting these powers once a threat subsides.

The security–liberty trade-off model suggests that once a threat subsides, society can go back toward where it once was as the state divests its police powers (movement from point B to point A in figure 1). However, state responses to national emergencies have real effects on the fabric of domestic life, effects that cannot simply be undone at will (see Higgs 1987, 2004, 2007, 2012). This means that when the divestiture of police-state powers occurs, the original version of point A will no longer be an option. Institutional residue from prior police-state activities will remain, as will the precedent for future expansions in state power. The police-state powers adopted by the U.S. government in the war on terror cannot simply be reversed at the flip of a switch. Ideologies, interests, and the citizen–civilian relationship have changed in ways that limit the ability to return to “how things were.”

The Post-9/11 U.S. Police State

The Surveillance State

The foundations of the U.S. government's surveillance state were established in the early twentieth century and expanded over time, with the U.S. government increasingly adopting police-state characteristics (see Coyne and Hall 2018, 71–95). In the 1970s, the Church Committee, which investigated systematic abuses by the intelligence community, noted that “virtually every element of our society has been subjected to excessive government-ordered intelligence inquiries” and that “this extreme breadth of intelligence activity is inconsistent with the principles of our Constitution which protect the rights of speech, political activity, and privacy against unjustified governmental intrusion” (U.S. Senate Select Committee 1976, 169).

The war on terror set the stage for further expansions in the surveillance powers of the U.S. police state. Less than two months after the September 11 attacks, Congress passed the USA PATRIOT Act, which expanded the government's legal domestic-surveillance capabilities (see Granick 2007; American Civil Liberties Union [ACLU] n.d.c). This included expansions in the government's ability to review recorded information held by third parties (Section 215) and to search private property without alerting the owner (Section 213). It also weakened Fourth Amendment protections related to “trap and trace” searches, whereby incoming phone calls to a number are captured (Section 214), and to the collection and sharing of foreign

intelligence information (Section 218). As extensive as these powers are, the PATRIOT Act was not the only expansion in state surveillance.

In the wake of the attacks, President George W. Bush also issued an order to ease the constraints imposed by the Foreign Intelligence Surveillance Act of 1978 on the National Security Agency (NSA). This executive order allowed the agency to execute warrantless searches of American citizens' emails and phone calls (Risen and Lichtblau 2005; Donohue 2008, 244–45). In 2008, Congress voted to formally authorize these powers and further expanded the NSA's ability to engage in surveillance activities (Lichtblau and Risen 2009a, 2009b).

The Department of Defense (DoD) partnered with the Defense Advanced Research Projects Agency (DARPA) on the Total Information Awareness program. Based on the idea of “predictive policing,” this program gathered information—phone, bank, medical, and travel records—on Americans in the hopes of identifying terrorists (see Markoff 2002; Pontin 2006; Harris 2012, 2013).

There is a long history of the U.S. government abusing its surveillance power to monitor antiwar and civil rights groups (e.g., COINTELPRO in the 1950s and Projects CHAOS, MERRIMAC, and RESISTANCE in the 1960s). This abuse continued in the wake of the 9/11 attacks with government efforts to collect data on and actively infiltrate antiwar and political groups, even though there was no evidence these groups posed a terrorist threat. These efforts included a secretive agency within the DoD, the Counterintelligence Field Activity Agency, that maintained a database of information on domestic organizations and political activities in order to protect against “potential terrorist threats” (ACLU 2007, 1; Donohue 2008, 245).

Another expansion in surveillance-state powers was the partnership between the DoD and the FBI to issue national-security letters (NSLs) (ACLU 2008; Donohue 2008, 248). NSLs are administrative subpoenas that do not require judicial review and approval and allow government agencies to access private information in the name of national security. Before the 9/11 attacks, the FBI had broader NSL powers than the DoD. The FBI's powers in this area were further expanded under the PATRIOT Act. The partnership between the two agencies allowed the DoD to circumvent the tighter constraints on its surveillance powers. It was also revealed that the CIA was also issuing NSLs, which raised concerns of violations of the agency's charter, wherein the agency is prohibited from engaging in law enforcement and domestic-security functions (Lichtblau and Mazzetti 2007).

This is only a sample of the expansion of police-state surveillance powers following the 9/11 attacks. After several extensions and reauthorizations, the PATRIOT Act expired in March 2020. But the U.S. surveillance state did not return to its pre-9/11 form. The underlying apparatus, which was expansive even before the attacks, is still in place. Many of the surveillance activities and programs outside of the PATRIOT Act still exist in expanded form. Although the PATRIOT Act expired, its spirit is alive and well.

Key provisions that allow for surveillance were included in the USA Freedom Act, which was passed in 2015 and reauthorized in 2020. The expiration clause of the PATRIOT Act permits intelligence agencies to continue ongoing investigations under Section 215, even with the law’s expiration. Just as the war on terror is broad and open-ended, so too is the nature of its ongoing investigations, which creates space for the intelligence agencies to continue to engage in PATRIOT Act–related activities (Savage 2020). Overall, “[a]lthough other leaders may have created more oppressive spying regimes, none has come close to constructing one of equivalent size, breadth, cost, and intrusiveness” of the U.S. surveillance state (Bamford 2016).

Militarized Police

The militarization of police—whereby domestic police adopt the technologies, methods, and attitudes of the military—has been occurring in America for decades (Hall and Coyne 2013; Balko 2014; Coyne and Hall 2018, 96–119). SWAT (special weapons and tactics) teams, which employ military tactics and equipment, were introduced in Los Angeles in the 1960s and spread throughout the country with the onset of the “war on drugs” in the 1970s. In response to the violence resulting from drug prohibition, the federal government established a number of programs—the Military Cooperation with Law Enforcement Act of 1981, the 1208 Program in 1990, the 1122 Program in 1994, and the 1033 Program in 1997—to transfer surplus military equipment from the DoD to state and local police.

The purview of the 1122 and 1033 Programs was expanded to include not just drug interdiction but also efforts to combat terrorism. According to one estimate, since 9/11 the U.S. DoD has transferred \$1.6 billion worth of excess equipment to law enforcement agencies (Katzenstein 2020, 8). Local and state police departments have received aircraft, bayonets, night-vision sniper scopes, tactical and camouflage gear, ambush-protected vehicles, rifles, and grenade launchers, among other military equipment (Rezvani et al. 2014).

Through time, the nature of domestic policing shifted from “protect and serve” (peace officers) to combating an enemy that needed to be defeated and eradicated—that is, to soldiering (Balko 2014). “The most serious consequence of the rapid militarization of American police forces, however, is the subtle evolution in the mentality of the ‘men in blue’ from ‘peace officer’ to soldier [W]hen police officers are dressed like soldiers, armed like soldiers, and trained like soldiers, it’s not surprising that they are beginning to *act* like soldiers. And remember: a soldier’s main objective is to kill the enemy” (Rizer and Hartman 2011, emphasis in the original).

Policing at the state and local levels has become increasingly intertwined with the surveillance state. “Overall, state police are much more involved today than before Sept. 11 in building their state’s intelligence capabilities, conducting terrorism-related investigations and coordinating and planning for homeland security” (Council of State Governments 2006, 7).

As part of the war on terror, the number of Joint Terrorism Task Forces (JTTFs), multiagency partnerships operated by the FBI and Department of Justice, increased from thirty-five before 9/11 to more than one hundred as of 2008 (Federal Bureau of Investigation 2008). Among other things, JTTFs, which include local, state, and national agencies, are intended to increase the efficiency of intelligence sharing and operations across levels of government. The result is centralization of state power as local and state police become integrated with the national police state.

State and local police also received military-grade surveillance equipment, as illustrated by the use of Stingrays, or “cell site simulators.” This technology allows the user to redirect cell phones into transmitting information, such as location and other identifiers. Originally developed for use by the military and intelligence communities abroad, these devices are now in use within the United States by members of local law enforcement, who can use them to surveil the domestic population with little to no oversight (Joseph 2017).

Today, militarized police are engrained in American life. Although the Obama administration put some (marginal) restrictions on the transfer of military equipment, those restrictions were removed by the Trump administration, which embraced a more expansive policy toward police-state powers in the name of “law and order.”

Civil Asset Forfeiture

Civil asset forfeiture is the process through which law enforcement seizes assets from someone suspected of illegal activity without having to charge that person with a crime (ACLU 2019). Civil asset forfeiture was employed during the Prohibition era (1920–1933) and in the 1970s to combat organized crime. Its application was broadened under the war on drugs. The Comprehensive Crime Control Act of 1984 established the Equitable Sharing Program, a profit-sharing arrangement between state and federal authorities regarding seized assets.

The goal was to encourage collaboration between state and federal agencies. The actual result, however, was to incentivize “policing for profit” due to the revenue attached to seizing assets without having to pursue criminal charges and to the significant legal costs for property owners to challenge the seizure. Another perverse consequence was that the program allowed local police to circumvent state rules on asset forfeiture by working with federal authorities because federal law takes precedent (Stillman 2013). In 2000, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA), which raised the bar, albeit marginally, on federal prosecutors regarding what they must prove to keep seized assets.

The war on terror reinvigorated and further expanded the use of civil asset forfeiture. The PATRIOT Act removed CAFRA protections, making it easier to seize the property of anyone suspected of being associated with terror activity. According to one analysis, there were “61,998 cash seizures made on highways and elsewhere since 9/11 without search warrants or indictments through the Equitable Sharing

Program, totaling more than \$2.5 billion” (Sallah, O’Harrow, and Rich 2014). These expanded police-state powers impose high personal and professional costs on many innocent people. “[S]tate laws designed to go after high-flying crime lords are routinely targeting the workaday homes, cars, cash savings, and other belongings of innocent people who are never charged with a crime” (Stillman 2013).

In 2015, U.S. attorney general Eric Holder, seeking to address perverse incentives and to limit abuses, placed restrictions on the Equitable Sharing Program, but then U.S. attorney general Loretta Lynch removed those restrictions in 2016, reinstating the program and the associated police-state powers.

Expanded Border Patrol

In March 2003, the U.S. Customs and Border Patrol (CBP) was established as part of the newly created Department of Homeland Security.³ The mission of CBP, one of the country’s largest law enforcement agencies (60,000 employees, \$20 billion annual budget), is to protect American borders. CBP’s reach into American society is expansive because the legal definition of “the border” includes up to one hundred air miles from any boundary (land or coastal). About two-thirds of Americans thus live within what is defined as the border area. Within twenty-five miles of the border, CBP agents can enter private land, but not dwellings, without a warrant or the landowner’s permission (Miller 2014; del Bosque 2018; ACLU n.d.a).

Although there are laws meant to limit abuses, “[i]n practice, Border Patrol agents routinely ignore or misunderstand the limits of their legal authority, violating the constitutional rights of innocent people. Although the 100-mile border zone is not literally ‘Constitution-free,’ CBP frequently acts like it is” (ACLU n.d.a). John Tomshack, former chief of internal affairs with the CPB, noted that the “Border Patrol has a self-identity of a paramilitary border security force and not that of a law enforcement organization” and acts with a culture of impunity from constitutional constraints (qtd. in Becker 2014). The broad legal definition of what constitutes the border means that a majority of Americans are subject to the CPB’s expansive, “extraconstitutional” powers. “The Fourth Amendment of the Constitution protects citizens from ‘unreasonable searches and seizures,’ but CBP operates with wide discretion, often using alerts from dogs as a reason to pull people aside for secondary inspection” (del Bosque 2018).

The CBP’s vast operations are part of the national surveillance state. The CBP employs advanced technologies to monitor and track individuals inside American borders, including the use of drones in American airspace; “virtual walls,” which rely on surveillance technologies to monitor people in border areas; and the Automated Targeting System, which aggregates data on travelers and assigns an aggregate “risk-assessment” score to the danger posed by those entering and exiting the

3. The creation of the CBP combined employees from the Immigration and Naturalization Service, the Customs Service, and the Animal and Plant Health Inspection Service.

country (see Coyne and Hall 2018, 120–37; Coyne and Goodman 2020). These surveillance tactics involve “the warehousing of staggering amounts of personal information in the digital databases that have ushered in the Post-Constitutional Era,” where lasting expansions in police-state powers come at the expense of the legal protections of private persons (Miller 2014).

No-Fly List

The No-Fly List is a list of people who are either banned from boarding commercial aircraft or subject to additional scrutiny. In the wake of the 9/11 attacks, the U.S. government created two main lists—the No-Fly List, which included banned travelers, and a Selectee List, which included travelers subject to additional screenings. The number of people on the two combined lists grew from around 1,000 in 2002 to more than 70,000 in 2005 (Donohue 2008, 254). The reasons for inclusion on the lists are kept secret, and ordinary Americans may end up on them without knowing why or when they were added or how to challenge and reverse the decision (McIntire 2010). These lists are complemented by the Transportation Security Administration’s Secure Flight system, which collects identifying information on passengers and runs it against the watchlists.⁴

Among the central issues with this system are that “[i]t is not at all clear who runs the lists, how the information gets entered, who verifies it, what the criteria are for inclusion, and how the information is used subsequently” (Donohue 2008, 256). There are also privacy issues. “In July 2005, government auditors alleged that—in violation of existing privacy laws—Secure Flight held information on 43,000 people who were not suspected of terrorism” (Donohue 2008, 256). Finally, there are due-process issues. The No-Fly List and Secure Flight system are a form of precrime profiling, and their structure “shifts the burden of proof onto anyone wishing to travel: a traveler first has to prove that he or she is not the individual sought” (Donohue 2008, 256). The result is that “[i]nnocent victims are unable to face their accusers—the source of the information that has made them a target—unable to see that information, or the criteria by which it was judged, and have no meaningful way to appeal their status” (ACLU n.d.b). These government initiatives deprive ordinary people of their right to travel freely and expand state power in clandestine ways that are insulated from checks against abuses of due process.

Material-Witness Law

A material witness is a person who is believed to possess information that is crucial (material) to a criminal proceeding. Prior to 9/11, Congress authorized the arrest of witnesses unwilling to testify, but this authorization also included restrictions on

4. Secure Flight was the successor to the Computer-Assisted Passenger Prescreening System.

jailing and indicated a preference for depositions instead of court testimony (ACLU 2005, 11). However, after the 9/11 attacks, the Justice Department expanded the use of the law to incarcerate people it wished to investigate but could not charge with a crime (Human Rights Watch 2005; Liptak 2011).

The ACLU concluded that “after extensive investigation, we are not aware of a single instance in which a court has denied a government application for a material witness warrant related to the post-September 11 investigation” (2005, 45). The application of the law since the 9/11 attacks produced numerous instances of people being jailed without due process while the government evaded the requirement of demonstrating probable cause. The result is that “individuals who have not committed any crime themselves may nonetheless be detained for extended periods of time. They stand in legal limbo. As alleged witnesses to other people’s crimes, they can be detained until after the criminal justice system is done with them. They are subject to deprivations of their liberty, even though they have not committed a crime. They are detained because, even though they may not be a risk to society, they know about someone else who may be. They are held because it strategically benefits the government to have them in custody” (Levenson 2002, 1221).

The post-9/11 material-witness law, which remains in place, eroded the safeguard of judicial review while establishing another avenue for expanded police-state powers and permanent erosions of individual freedom. “We generally presume that individuals have a choice to conform their conduct to the law. Thus, we do not criminalize thought or intentions, but only actions... . To lock up a human being on the prediction that he will undertake dangerous and illegal action if left free is, in an important sense, to deny his autonomy” (Cole 2009, 696).

Conclusion

As William Graham Sumner noted, “[I]t is not possible to experiment with a society and just drop the experiment whenever we choose. The experiment enters into the life of society and never can be got out again” (1934, 473). This is certainly the case with post-9/11 expansions in police-state powers. These expansions include global surveillance, the importation of military equipment and techniques into domestic policing, the erosion of due process, and the weakening of private people’s rights over their person and property. Government programs tend to take on a life of their own, and the war on terror is no different.

In the wake of the killing of George Floyd in May 2020, there were protests against police brutality throughout the country. Protestors were monitored through aerial surveillance, and a range of military-grade equipment was deployed (Kanno-Youngs 2020; Lehren et al. 2020; McKinnon and Hackman 2020; Peskoe-Yang 2020). More recently, in the wake of the Capitol Hill riot on January 6, 2021, there are calls for a “new” war on terror that focuses on domestic, homegrown threats.

The idea is a further expansion of the post-9/11 war on terror, as indicated by calls for the importation of counterinsurgency strategies used abroad in the war on terror into American life to combat domestic threats (see Kelly 2021). As this recent development makes clear, perhaps *the* lasting legacies of the war on terror are the entrenchment and expansion of Police State, U.S.A.

References

- American Civil Liberties Union (ACLU). 2005. Human Rights Abuses under the Material Witness Law since Sept. 11, 2001. *Human Rights Watch* 17, no. 2 (June).
- . 2007. No Real Threat: The Pentagon's Secret Database on Peaceful Protest. January. At https://www.aclu.org/files/pdfs/safefree/spyfiles_norealthreat_20070117.pdf.
- . 2008. ACLU Interested Persons Memo on the Office of the Inspector General's Audit of the FBI's Use of National Security Letters. April 7. At <https://www.aclu.org/letter/aclu-interested-persons-memo-office-inspector-generals-audit-fbis-use-national-security?redirect=cpredirect/34805>.
- . 2019. Congress Introduces Bipartisan Bill to Address Policing for Profit. At <https://www.aclu.org/press-releases/congress-introduces-bipartisan-bill-address-policing-profit>.
- . n.d.a. ACLU Factsheet on Customs and Border Protection's 100-Mile Zone. At <https://www.aclu.org/other/aclu-factsheet-customs-and-border-protections-100-mile-zone?redirect=immigrants-rights/aclu-fact-sheet-customs-and-border-protections-100-mile-zone>.
- . n.d.b. Problems with No-Fly List Show Problems with Capps II Airline Profiling System. At <https://www.aclu.org/other/problems-no-fly-list-show-problems-capps-ii-airline-profiling-system>.
- . n.d.c. Surveillance under the USA/Patriot Act. At <https://www.aclu.org/other/surveillance-under-usapatriot-act>.
- Balko, Radley. 2014. *Rise of the Warrior Cop: The Militarization of America's Police Forces*. New York: PublicAffairs.
- Bamford, James. 2013. Five Myths about the National Security Agency. *Washington Post*, June 21.
- . 2016. Every Move You Make. *Foreign Policy*, September 7. At <http://foreignpolicy.com/2016/09/07/every-move-you-make-obama-nsa-security-surveillance-spying-intelligence-snowden/>.
- Becker, Andrew. 2014. Ousted Chief Accuses Border Agency of Shooting Cover-ups, Corruption. *Reveal News*, Center for Investigative Reporting, August 14. At <https://revealnews.org/article-legacy/ousted-chief-accuses-border-agency-of-shooting-cover-ups-corruption/>.
- Brennan, Geoffrey, and James Buchanan. 1985. *The Reason of Rules: Constitutional Political Economy*. New York: Cambridge University Press.
- Brodeur, Jean-Paul. 1983. High Policing and Low Policing: Remarks about the Policing of Political Activities. *Social Problems* 30, no. 5: 507–20.

- Buchanan, James M. 1954. Social Choice, Democracy, and Free Markets. *Journal of Political Economy* 62, no. 2: 114–23.
- . 1959. Positive Economics, Welfare Economics, and Political Economy. *Journal of Law and Economics* 2:124–38.
- . 1969. *Cost and Choice: An Inquiry into Economic Theory*. Chicago: University of Chicago Press.
- . 1979. Natural and Artifactual Man. In *What Should Economists Do?*, 93–114. Indianapolis, Ind.: Liberty Fund Books.
- Chapman, Brian. 1970. *Police State*. New York: Praeger.
- Cole, David. 2009. Out of the Shadows: Preventive Detention, Suspected Terrorists, and War. *California Law Review* 97, no. 3: 693–750.
- Corwin, Edward S. 1947. *Total War and the Constitution*. New York: Knopf.
- Council of State Governments, Eastern Kentucky University. 2006. *The Impact of Terrorism on State Law Enforcement: Adjusting to New Roles and Changing Conditions*. Document no. 216642. December. At <https://www.ncjrs.gov/pdffiles1/nij/grants/216642.pdf>.
- Coyne, Christopher J. 2018. The Protective State. In *Buchanan's Tensions: Reexamining the Political Economy and Philosophy of James M. Buchanan*, edited by Peter J. Boettke and Solomon Stein, 149–69. Arlington, Va.: Mercatus Center, George Mason University.
- Coyne, Christopher J., and Nathan P. Goodman. 2020. The Political Economy of the Virtual Wall. *Peace Review* 32, no. 2: 172–80.
- Coyne, Christopher J., Nathan P. Goodman, and Abigail R. Hall 2019. Sounding the Alarm: The Political Economy of Whistleblowing in the US Security State. *Peace Economics, Peace Science, and Public Policy* 25, no. 1: 1–11.
- Coyne, Christopher J., and Abigail R. Hall. 2018. *Tyranny Comes Home: The Domestic Fate of U.S. Militarism*. Stanford, Calif.: Stanford University Press.
- Del Bosque, Melissa. 2018. Checkpoint Nation. *Harper's Magazine*, October 2018. At <https://harpers.org/archive/2018/10/checkpoint-nation-cbp-search-and-seizures-civil-rights-abuses/>.
- Donohue, Laura K. 2008. *The Cost of Counterterrorism: Power, Politics, and Liberty*. New York: Cambridge University Press.
- Federal Bureau of Investigation (FBI). 2008. Protecting America: National Task Force Wages War on Terror. August 19. At https://archives.fbi.gov/archives/news/stories/2008/august/njttf_081908.
- Glennon, Michael J. 2015. *National Security and Double Government*. New York: Oxford University Press.
- Gordon, Scott. 2002. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Cambridge, Mass.: Harvard University Press.
- Granick, Jennifer Stisa. 2007. *American Spies: Modern Surveillance, Why You Should Care, and What to Do about It*. New York: Cambridge University Press.
- Hall, Abigail R., and Christopher J. Coyne. 2013. The Militarization of U.S. Domestic Policing. *The Independent Review* 17, no. 4 (Spring): 485–504.

- Harris, Shane. 2012. Giving In to the Surveillance State. *New York Times*, August 22.
- . 2013. Total Recall. *Foreign Policy*, June 19. At <https://foreignpolicy.com/2013/06/19/total-recall/>.
- Hayek, F. A. 1979. *Law, Legislation, and Liberty*. Vol. 3: *The Political Order of a Free People*. Chicago: University of Chicago Press.
- Higgs, Robert. 1987. *Crisis and Leviathan: Critical Episodes in the Growth of American Government*. New York: Oxford University Press.
- . 2004. *Against Leviathan: Government Power and a Free Society*. Oakland, Calif.: Independent Institute.
- . 2005. *Resurgence of the Warfare State: The Crisis since 9/11*. Oakland, Calif.: Independent Institute.
- . 2007. *Neither Liberty nor Safety: Fear, Ideology, and the Growth of Government*. Oakland, Calif.: Independent Institute.
- . 2012. *Delusions of Power: New Explorations of State, War, and Economy*. Oakland, Calif.: Independent Institute.
- Human Rights Watch. 2005. Witness to Abuse. June 26. At <https://www.hrw.org/report/2005/06/26/witness-abuse/human-rights-abuses-under-material-witness-law-september-11#>.
- Joseph, George. 2017. Cellphone Spy Tools Have Flooded Local Police Departments. Bloomberg CityLab, February 8. At <https://www.bloomberg.com/news/articles/2017-02-08/cellphone-surveillance-gear-floods-u-s-cities>.
- Kanno-Youngs, Zolan. 2020. U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance. *New York Times*, June 19.
- Katzenstein, Jessica. 2020. *The Wars Are Here: How the United States' Post-9/11 Wars Helped Militarize U.S. Police*. Sewickly, Pa.: Watson Institute, International and Public Affairs, Brown University. September 16.
- Kelly, Mary Louise. 2021. Former CIA Officer: Treat Domestic Extremism as an Insurgency. NPR, February 2. At <https://www.npr.org/2021/02/02/963343896/former-cia-officer-treat-domestic-extremism-as-an-insurgency>.
- Kurian, George Thomas. 2011. Police State. In *The Encyclopedia of Political Science*, edited by George Thomas Kurian, 1217. Washington, D.C.: CQ Press.
- Lehren, Andrew W., Didi Martinez, Emmanuelle Saliba, and Robert Windrem. 2020. Floyd Protests Renew Debate about Police Use of Armored Vehicles, Other Military Gear. *NBC News*, June 20. At <https://www.nbcnews.com/news/us-news/floyd-protests-renew-debate-about-police-use-armored-vehicles-other-n1231288>.
- Levenson, Laurie. 2002. Detention, Material Witnesses, and the War on Terrorism. *Loyola of Los Angeles Law Review* 35, no. 2: 1217–226.
- Lichtblau, Eric, and Mark Mazzetti. 2007. Military Expands Intelligence Role in U.S. *New York Times*, January 14.
- Lichtblau, Eric, and James Risen. 2009a. Officials Say U.S. Wiretaps Exceed Law. *New York Times*, April 15.
- . 2009b. U.S. Wiretapping of Limited Value, Officials Report. *New York Times*, July 10.

- Liptak, Adam. 2011. Civil Liberties Today. *New York Times*, September 7. At <https://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html>.
- Markoff, John. 2002. Pentagon Plans a Computer System That Would Peek at Personal Data of Americans. *New York Times*, November 9.
- Marx, Gary T. 2014. High Policing. In *Encyclopedia of Criminology and Criminal Justice*, edited by Gerban Bruinsma and David Weisburd, 2062–73. New York: Springer.
- McIntire, Mike. 2010. Ensnared by Error on Growing U.S. Watch List. *New York Times*, April 6.
- McKinnon, John D., and Michelle Hackman. 2020. Drone Surveillance of Protests Comes under Fire. *Wall Street Journal*, June 10. At <https://www.wsj.com/articles/drone-surveillance-of-protests-comes-under-fire-11591789477>.
- Miller, Todd. 2014. 66 Percent of Americans Now Live in a Constitution-Free Zone. *The Nation*, July 15.
- Peskoe-Yang, Lynee. 2020. How to Dodge the Sonic Weapon Used by Police. *Popular Mechanics*, June 17.
- Pontin, Mark Williams. 2006. The Total Information Awareness Project Lives On. *MIT Technology Review*, April 16.
- Posner, Eric A., and Adrian Vermeule. 2007. *Terror in the Balance: Security, Liberty, and the Courts*. New York: Oxford University Press.
- Priest, Dana, and William M. Arkin. 2011. *Top Secret America: The Rise of the New American Security State*. New York: Little, Brown.
- Rezvani, Arezou, Jessica Pupovac, David Eads, and Tyler Fisher. 2014. MRAPs and Bayonets: What We Know about the Pentagon's 1033 Program. NPR, September 2.
- Risen, James, and Eric Lichtblau. 2005. Bush Lets U.S. Spy on Callers without Courts: Secret Order to Widen Domestic Monitoring. *New York Times*, December 15.
- Rizer, Arthur, and Joseph Hartman. 2011. How the War on Terror Has Militarized the Police. *Atlantic*, November 7.
- Sallah, Michale, Robert O'Harrow Jr., and Steven Rich. 2014. Stop and Seize. *Washington Post*, September 6.
- Savage, Charlie. 2020. House Departs without Vote to Extend Expired F.B.I. Spy Tools. *New York Times*, March 27.
- Stillman, Sarah. 2013. Taken. *New Yorker*, August 5.
- Sumner, William Graham. 1934. *Essays of William Graham Sumner*. Edited by Albert G. Keller and Maurice R. Davie. New Haven, Conn.: Yale University Press.
- Unger, David C. 2012. *The Emergency State: America's Pursuit of Absolute Security at All Costs*. New York: Penguin.
- U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. 1976. *Intelligence Activities and the Rights of Americans*. Book 2. Washington, D.C.: U.S. Government Printing Office.