

Land Use Planning and Security in Terrains of Terror

Charles Geisler
Cornell University

David Kay
Cornell University

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Abstract: Terrorism and its threats affect modern landscapes in many ways. They redistribute populations and businesses; destroy infrastructure and public goods; convulse property values and housing markets; and interrupt ecosystem services and life support systems. This research examines “what it would be like” if government responses to extremist threats included the militarization of land use planning. In considering this scenario, we look at the history of military influence on domestic land use policies, at the changing civil rights regime in America and its relation to the plausible toleration of massively circumscribed property rights, and at the array of post 9/11 Homeland Security measures that have changed the terms of reference for acceptable emergency preparedness. The opportunity costs of counter-terrorism, we suggest, already include a *de facto* shift in land use planning away from traditional local, civilian control toward stronger militarized policing of public and private property rights.

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Introduction:

*“Opinion polls, budgets for fighting terrorism, and attention to the topic by politicians and other opinion leaders show that the American political system consciously believes, or at least acts as if it believes, that al-Qaeda-type terrorist attacks against targets inside the United States are not just a major problem but a challenge of overwhelming and immediate importance.”
(Lustick, 2006:24)*

Since the 1970s, many have forecast that land use planning in the United States would move towards ever greater social control. Though lawmakers and judges have not always complied (Jacobs, 2004), on-going concerns about population location, environmental security, urban restructuring, and amenity loss have kept the social control narrative very much alive. So has 9/11. In today’s so-called “Age of Terror” (Croft, 2007), much has changed in America with respect to social control. What are the implications for land use planning? How and to what degree do perceived terrains of terror ignite interest in strong police powers over property rights at the state and federal levels? Might this interest eventuate militarized land use planning at least while the United States is officially at war?

Terrorism has diverse spatial implications (Batement and Reily, 1987; Bauman, 2002). Since 9/11, researchers have deciphered spatial connections between terrorist threats and facilities siting (Swanstrom, 2002; Giglio, 2002; Eisinger, 2004) and linked terrorism to evolving urban mobility (Graham, 2002; Little, 2006). Some have investigated the effects of 9/11 attacks on residential location preferences and population redistribution (e.g., Kay, Geisler, and Bills, 2006; Roe, Irwin, and Morrow-Jones, 2005) and others have analyzed how governments, bowing to certain constituencies, manipulate or misuse the “treat of terrorism” to restrict the use of public spaces in urban places (Marcuse, 2006) or to substantially extend pre-terrorist crime and traffic management (Coaffee, 2007). Space is an important resource in terror management. It can provide buffers, refuges, threshold-checkpoints, corridors for evacuation and safe passage, zones of quarantine and exclusion (*cordons sanitaires*), and places of forced detention and containment. Yet the recent “spatial turn” in

the social sciences seems not to have considered the connections between terror and territory in general nor, so far as we can tell, between militarization and domestic land use planning.

The present research investigates two segments, namely those pertaining to civil and to property rights, in the chain of events between terrorist threats and alterations in domestic land use planning. Terrorism stresses already fraying social cohesion (Durodié, 2007) while inducing fear, speculation about “why they hate us,” and debate as to counter-terrorism measures capable of protecting the “homeland” (Thompson, 2003). In the United States after 9/11, this resulted in national legislation known as Homeland Security Act of 2002 (Public Law 107-296) and a Cabinet Department called the Department of Homeland Security (DHS). The DHS budget grew from \$19.5 billion in 2002 to a requested budget of \$47.7 billion in 2008. With near unanimous passage of the Patriot Act of 2002 and generalized fear of subsequent attacks, many civil rights were severely compromised. Americans are growing used to warrantless surveillance of telephones, their internet behaviors, and library requests; to travel regulations and border restrictions; to preventive justice, indefinite detention in off-shore prisons of non-citizens, and habeas corpus restrictions; and privacy concessions ranging from identity checks to unprecedented coordination of data bases across sectors, agencies, and regions.

At some point the dismantling of civil rights arrives at the doorstep of property rights. Trading off property rights for security is not a familiar trope in America. In fact, the narratives of yesterday’s wars call for the staunch defense of individual ownership rights as well as national territorial integrity. Our enemy in the Cold War grossly disregarded private property, and our Lockean culture tells us that nation states exist to protect property rights. Extinguishing these entitlements for national security seems contradictory; private property is “essential” to the pursuit of happiness in the United States and a crowning accomplishment of civilization (North and Thomas, 1977; Storey, 2002). Yet we may have arrived at a point where, as with civil liberties, unfettered property rights afford privacy and protection thought to work against the health, safety, and welfare of society. Under such circumstances, unprecedented change in land use planning may as well be at hand, including the substitution of

centralized and more uniform military control of property rights for decentralized civilian control.

In this analysis we explore the prospect of militarized land use planning in the United States. We ask what such a term might mean, what it would be like to live in a militarized planning environment, and, more speculatively, how likely such a scenario is. We undertake our task in several steps, starting with a typology of state responses to terrorism that helps us respond to the meaning and conceptualization question. We then seek working examples of the typology applied to land use planning. Two things are worth noting in advance. Neither terrorism nor military land use responses are new. Both occurred long before 9/11 and are imbedded in latent and manifest forms in our planning culture. Second, militarized land use planning is familiar abroad, especially in times of war (e.g., “containment,” “strategic occupation,” “security zones”), but lacks a domestic vocabulary and conceptualization. Readers may judge for themselves, but there would appear to be evidence that military land use planning operates within the United States and is not limited to times of war, threats of war, or even national emergency. Finally, we turn attention to post-9/11 and the advent of Homeland Security. In light of past and present military influence in land use planning, public acquiescence over waning civil liberties, DHS coordinating efforts across sectors, and the “agenda for a permanent war” (Kaldor, 2003:13), we predict a growing integration of civilian and military land use planning if not a shift from the former to the latter.

II. A typology of State Responses to Terrorism

For purposes of this paper, we define militarized land use planning as the reappropriation of property rights by military institutions, surrogates, and contractors in the name of greater national security. The understanding that the state’s legitimacy rests on its performance as a guarantor of both territorial integrity and wealth production (Litfin, 2000), together with the recognition of land’s simultaneous role as territory and factor of production, hints at what could be at stake for a state engaged in such reappropriation.

In recent work on the war on terrorism in Northern Ireland, Adrian Guelke (2007) provides a three-fold typology describing different state responses to terrorism. His point of comparison is the (nation-) state response to non-terrorist criminals—those whose illegal behaviors are a-political, not associated with a transcendent ideology, nor directed intentionally at civilian populations. *Accommodation* is the least punitive state response. It often results in amnesty for violent offenders and insurgents who challenge the state. It is done to set the stage for political settlement and power-sharing. More familiar is the response of *criminalization*, a strong “rule-of-law” approach that approximates the punishments that judges impose on society’s worst criminals. *Suppression* is the name Guelke gives to state responses to politically motivated violent offenders. The danger they pose to society as a whole warrants extraordinary steps. Collectively, these steps constitutes a “war” model, “...since militarization of security and the rhetoric of war frequently accompany it” (Guelke, 2007:274).

Of course, governments may combine the above responses in different ways. They may profess one model but use covert policies that are not easy to characterize. Over the course of the Irish war of independence, beginning after World War I and continuing into the administration of Tony Blair, the British Government began with a criminalization strategy and quickly shifted to suppression (e.g., the Special Powers Act of 1922). Though discredited in many quarters, the Orwellian provisions of this Act continued decade after decade and, according to Guelke, became the envy of the South African Minister of Justice during apartheid. With the growing criticism of state terrorism in the 1970s and 1980s, British commitment to the European Convention on Human Rights in the 1990s, and constitutional reform in England in 2000 was there a shift to accommodation. This was accomplished only with a trade-off: passage of the Criminal Justice (Terrorism and Conspiracy) Act of 1998 and a broadening of the definition of what constituted “terrorism.”

This typology has face validity and provides groundwork for understanding land use planning in contexts of extremism. Accommodation and law-and-order have their place in terrains of terror but will be dispensed with if national security is breached or

under assault in the judgment of state leaders. Though it would be simplistic to see this progression as iron-clad, it serves as a rough guide to what might trigger the militarization of land use planning. Facilitating conditions are:

- Instability: radical insurgency challenging existing order;
- Insularity: property rights create spaces where threats to security can proliferate (e.g., restraint on trespass and free access; the right to use one's owned space to create lethal substances and test them);
- Critical uncertainty: Law-and-order and accommodation seem to quell only symptoms of a disturbance, precipitating the use of force (e.g., incidents at Waco or Ruby Ridge);
- Ambivalence and ambiguity: diminished civil liberties tolerated as "cost of survival."

These conditions are partially operative in the United States today. National leaders are coalesced around a homeland security strategy involving laws and structures that circumscribe civil rights and liberties. The reduction of property rights as a counter terrorism measure is, with a few exceptions, not yet official nor politically viable. Individual property rights are a core value in America, and, interestingly, are most strongly defended today by the political factions most forcefully advocating an agenda of militarization. More fundamentally, property rights have been called human rights (McPherson, 1979) and, as private rights, have much in common with civil liberties in terms of their Enlightenment origins. John Locke himself wanted property rights—which he conceived as natural rights, to be protected by sovereign states as civil rights (Stephens, 2002).¹

Yet the historical linkage between property rights and national security in the United States may be at a tipping point and the suppression of the former may serve the nation better, in the eyes of some, than their unfettered use. Lustick (2006:31) sets the stage by saying:

¹ See Shachar and Hirschl () for a compelling treatment of parallels and overlaps between property rights and citizenship rights.

Although federal officials have occasionally acknowledged infringements on norms of privacy and the hardships suffered by innocent people as a result of mass arrests of suspects, government spokespersons have regularly defended these practices. They justify more monitoring of more speech and behavior of more Americans with fewer judicial constraints than ever before by appealing to the extreme nature of the threat of catastrophic terrorism.

Indeed, curtailing property rights could be presented as a course correction in a country that widely regulates property rights in land already and has periodically attempted to centralize and standardize them well before the current “terrain of terror.”

III. The Militarization of Land Use: Early Examples

It requires only a modicum of history to recall that the United States has often used land policy to advance national security. Such policies initially had little to do with local control or devolved powers. They were nation-building strategies on continental landscapes. They frequently had military content and organization and followed a genealogy largely forgotten at present. Examples are familiar: indigenous people were forcibly resettled on reservations and subjected to surveillance and military containment (Brown, 2001); early national parks were surveyed and governed by the United States Army (Runte, 1972); soldiers were “paid” for their military duty following the Revolutionary War, the War of 1812, and the Civil War with land script for homesteading (Sakolski, 1957; Bockstruck, 1998); and early forts evolved into civilian centers before and after Independence just as military roads gradually became the turnpikes and throughways of society.

The engagement between military strategy and land use planning continued generation after generation. The Interstate Highway System is a well-known military contingency system for efficient military movement. It was authorized in 1956 as the National System of Interstate and Defense Highways (41,000 miles of roads). Since then, DOD has continued to update defense-sensitive highway corridors (Weingroff, 1996). Some 29,000 acres of land in the U.S. are dedicated to military bases, depots, practice zones, test sites, and

strategic set-aside zones. We accept their restricted access status as a normal part of national security and pay for it with our taxes. In response to rapid land development near military installations, at least a dozen states have passed legislation to protect their military installations from encroachment, while the National Governor's Association has issued "best practice" guidelines on how state and local governments can adopt land use policies tools that limit incompatible development near military installations (Butler, 2006)

The jurisdictions in which they exist often receive federal funds and benefits for "hosting" them (Downey, 1985). We are accepting of heightened military presence in a dozen national parks and monuments considered vulnerable to terrorist attacks and disruption (Clark, 2006; Benton-Short, 2007).

Much more subtle are the indirect or latent ways in which the military influences civilian land use controls. Environmental impact assessments, typically required by state and federal governments, are not infrequently waived or changed for the military, as in the case of military-induced Superfund Sites (Jacob, 1992). Federal or state authority trumps local land use powers under a broad range of circumstances ranging, for example, from a) control of religious and adult uses (first amendment rights), exclusionary zoning of housing, and restrictions on building on wetlands or in flood plains, to b) limitations on construction heights near airports and siting of cell towers, to mention only two infrastructures of civilian and military significance (Nolon, 2001: 357 ff.; Stabley, 2005). The 1988 Defense Savings Act scrapped EPA control over military actions (Kirby, 1992) and President Nixon quashed the environmental impact assessment of the Trans-Alaskan Pipeline in the early 1970s because moving oil to the lower forty-eight states was the "moral equivalent to war" (Geisler, 1982).

According to the "growth machine thesis" (Logan and Molotch, 1987), the key actors finagling land use decisions are civilian elites. Yet cities such as Omaha, Jacksonville, Tucson, Salt Lake City, Colorado Springs, San Jose, San Francisco, Los Angeles, San Diego, Tampa, Amarillo and Albuquerque, and dozens more have significant military elites at or near the land use planning table (Kirby, 1992). Houston and Las Vegas, both thought to be quintessential "free enterprise" cities not encumbered by conventional land use planning, have both

became major Sunbelt cities thanks to heavy military spending and related “planning” of their infrastructure (Parker and Feagin, 1992). Whole regions of the country tip in one direction or another with respect to demography, land use, appropriations, employment, and tax base thanks to military presence—in particular the “Gun Belt” studied by Hall and Markusen (1992). “Military Keynesianism” (Melman, 1988) has enormous spatial implications and can dilute or prefigure civilian land use planning.

Military land use planning on a regional level often occurs around military bases. For example, the Nellis Air Force Base in southern Nevada has been home to major Air Force flight operations since 1929 (Parker and Feagin, 1992). Mining and ranching were initially permitted land uses on the base but later prohibited. As the Korean conflict and later wars advanced, the surrounding valley was declared a “critical defense area” by Washington and Nellis became a military “company town.” Housing projects, hospitals, schools, sewers, streets, and diverse facilities were built in the 11,000 acre precinct, adjacent to restricted ranges for flight operations. By 1985 Nellis was southern Nevada’s largest employer. Over the Base’s first 50 years or so, over \$3 billion tax dollars went into its physical infrastructure and the high-security no-fly zone (for nonmilitary aircraft) above it expanded to 5 million acres. (As land use planners know, air rights are property rights frequently contested in zoning cases.) Here and elsewhere, they have been appropriated as “military space.”

Finally, there is the land use planning response to nuclear age concerns. Dudley (2001) traces the doctrine of “defensive dispersal” to move populations away from cities assumed to be Cold War targets. This mindset led policy makers to “legislate sprawl as a national imperative under the rubric of national defense” (2001:62). The doctrine was one of several forces behind conscious decisions by cities and towns to use land use planning to accomplish joint civilian-military objectives. Ziegler (2005) updates this planning response to the post-9/11 world. He offers considerable evidence that fear of terrorism has replaced civilian apprehensions about nuclear destruction and generated a second round of defensive dispersal land use and environmental planning. To this new “age of terrorism” and its land use implications we now turn.

IV. Post 9/11 Militarization of Land Use Planning

“The attacks of 9-11...raised the issue of the role the military will play in America’s domestic security. Since 1878, the Posse Comitatus Act has prevented active duty military personnel from making domestic arrests or conducting searches on American citizens.... If another large-scale terrorist attack occurs, the government’s power could grow yet again. Indeed, in the aftermath of the logistic failures at all levels of government in Hurricane Katrina, many supported President Bush’s argument for greater military in natural disasters.” (Mayer, 2006:55)

The militarization of land use planning is particularly plausible if there is a perceived threat that more terrorist attacks in the United States are imminent. Many commentators have issued such warnings since 9/11, and the images of domestic terrorist catastrophes are featured in a long list of movies, television shows, and best-sellers (Lustick, 2006). A public opinion poll in 2005 found that 94 percent of Americans believe that terrorists inside the U.S. are planning new attacks and another poll in the same year reported that fewer than 5 percent believe that the federal government was doing “too much” to prevent acts of terrorism (cited in Lustick, 2000:19). The bi-partisan “9/11 Report” led by former Congressman Lee Hamilton and former New Jersey Governor Thomas Kean (2005) echo these apprehensions, as did the National Intelligence Estimate of July, 2007. Therein, the likelihood of an Al-Qaeda attack on the United States in the next three years was considered near certain (NIE, 2007).

The Office (later Department) of Homeland Security (DHS) was first designated in President Bush’s speech to Congress on September 20, 2001. Today, DHS is the national command center and coordinating body for intergovernmental implementation of the *National Strategy for Homeland Security* set forth in 2003. It collaborates closely in this mission with the Departments of Defense (DOD), Energy (DOE), Health and Human Services (HHS), Justice (DOJ), and State (DOS). DHS is thus the organizational shell within which we might look for counter-terrorist land use planning to

emerge, be this planning familiar or unfamiliar in appearance.

In the months following 9/11, President Bush unveiled his Homeland Security initiative (2003:5-6):

The higher priority we all now attach to homeland security has already begun to ripple through the land. The Government of the United States has no more important mission than fighting terrorism overseas and securing the homeland from future terrorist attacks. This effort will involve major new programs and significant reforms by the Federal government... The strategy will be a truly national plan, not just a Federal government strategy. The nature of American society and the structure of American governance make it impossible to achieve the goal of a secure homeland through Federal activity and expense alone. The National Strategy for Homeland Security, therefore, will be based on the principle of partnership with State and local governments, the private sector, and citizens.”

This *National Strategy* does not explicitly refer to emergency land use planning nor state contingencies under which such planning will be militarized. Yet three of its four basic missions contain spatial provisions that, combined, might be thought of as security-based land use planning occurring with DOD knowledge and input (we will return to the notion of a “security system” entailing radical land use alterations below). These are: securing national borders against hostile immigrants, protecting critical infrastructure, and regulatory reform in cooperation with local government.

Border and Transportation Security:

In his 2003 report, *Strengthening the Homeland, Securing the Nation*, President Bush noted that the United States has a 7,500-mile land and air border shared with Canada and Mexico and an exclusive economic zone encompassing 3.4 million square miles. Securing these entails “land use restrictions,” plans, and enforcement codes spread across many states and six federal agencies within the DHS. Border checks of goods and people are the cornerstone component of a secure national frontier. According to Sheller and Urry (2006: 2), the management and surveillance of transmigrant populations has

become a paramount concerns of urban governance and policing. Immediately after 9/11 President Bush deployed the National Guard at points along the Canadian border. Because the Guard is barred from long-term occupation of major airports by the Posse Comitatus Act, the President asked governors to use their call-up authority to perform the same task (NYT, July 21, 2002). This led to the stationing of 8,000 National Guard at baggage screening checkpoints at 420 major airports (Bush, 2003). Because commercial airports are typically not located on international borders, U.S. border control efforts extend inland to airport perimeters, these being points of entry and exit of large numbers of international travelers (GAO, 2004). Civilian sky marshals appeared on US flights in the 1970s and have become common on commercial flights since 9/11.

The 9/11 attack also occasioned NORTHCOM (the Northern Command), a domestic Command added to the Pentagon's Unified Command Plan with a mission of "defending the United States and supporting the full range of military assistance to civil authorities" (Smith, 2002). By 2004 its staff of 750 was almost evenly divided between military and civilian employees (Drexler, 2004); its staff now exceeds 1,200 and it has an annual budget of just under \$200 million (O'Hanlan, 2006). A more detailed account of NORTHCOM's mission suggests potential conflicts with the Posse Comitatus law:

The command's mission is the preparation for, prevention of, deterrence of, preemption of, defense against, and response to threats and aggression directed towards U.S. territory, sovereignty, domestic population, and infrastructure; as well as crisis management, consequence management, and other domestic civil support.²

The Posse Comitatus Act was enacted after the Civil War in response to the perceived misuse of federal troops who were charged with keeping order in the South. It has been amended to assist federal agencies in drug interdiction work, protecting national parks, executing quarantine and certain health laws, and to support civilian agencies at Olympic events (*NewsMax Wires, 2002*). The New York

² Provided by Global Security Information, accessed on 9/20/07 at <http://www.globalsecurity.org/military/agency/dod/northcom.htm>

Times (2002) reported that some Pentagon officers are receptive to changes in the law that would allow expanded domestic military work. NORTHCOM currently flies patrols over American cities, uses unmanned surveillance blimps and Predator drones along the American coastlines, and monitors the waters up to 500 miles off the coast (NYT, 2002).

Many other technologies, programs, and plans are in place to make America safe at its points of entry on international boundaries and within the country. These include physical barrier walls as well as enhanced patrols by law enforcement agencies, the Coast Guard, and military units. As part of DHS, the INS is experimenting with fences consisting of towers with radar high-definition cameras (Archibold, 2007). Exterior boundary maintenance, fortified with military units, is a form of land use regulation with which most Americans are not familiar, though the rapid growth of gated communities has brought a first-cousin of this form into our daily experience (Blakely and Snyder, 1997). Like more familiar forms, border security regulations separate conflicting uses (and users), it protects domestic property values, and it upholds the health, safety, and welfare of (national) community within.

Protection of Critical Infrastructure:

Security for the nation's vast infrastructure is a challenge of monumental scale and complexity. For example, 95 percent of US imports arrive in containers through the nation's major ports (NPR, Oct. 8, 2001). Steve Flynn (2000), writing about national risk environments, asserts that no single federal agency is in charge of our ports nor are their data bases well coordinated. Like many others, including a recent Presidential Commission, Flynn advocates screening of containers despite the immensity of the task. Access to container zones is now controlled so that only authorized personnel and truck drivers with *bona fide* credentials can transport containerized goods.

President Bush's *Strategy* (2003:5) states that, in addition to airports, his Administration has gone to great lengths to identify and protect critical infrastructures such as sea and water ports, nuclear facilities, dams, water and sewer plants, electric power plants, gas pipelines,

dams and bridges, and biological and chemical facilities, military bases and installations, and government facilities. Special sensors, computers, and digital equipment are now used to collect, process, and disseminate information to improve the security and general operational effectiveness of railroads. Intelligent Transportation Systems (ITS) for highways and mass transit being aggressively developed, as are new air traffic control and maritime vessel tracking systems. Parcel delivery companies, pipeline operators, and police, fire, and ambulance services are also incorporating these technologies.³

Many facilities that might attract terrorist attacks now have electronic or physical perimeter barriers with state-of-the-art Intrusion detection equipment. Since 2001 if not earlier, the United States has had “Special Security Zones” around major ports (Fessler, 2001) and an “all hazards approach” has been established in a National Infrastructure Protection Plan (NIPP). The NIPP includes provision for Buffer Zone Protection Programs (BZPP) and offer grants to State, local, tribal and other law enforcement and security bodies to protect CI/KR facilities. Buffer zones, long a means of protecting cities and national parks from growth pressures, serve as a counter-terrorist strategy by impeding enemies of the United States from conducting surveillance or launching attacks from the immediate vicinity of a potential target (NIPP, 2006:183).

The Department of Energy’s Infrastructure Security and Energy Restoration (ISER) Division works with DHS to prevent terrorists from using energy infrastructure. In the Energy Policy Act of 2005 DOE was authorized to designate two “National Interest Energy Transmission Corridors.” On paper, these Corridors are comprised of geographic areas where consumers are adversely affected by transmission capacity constraints or congestion, areas that are concentrated (in the East) in Ohio, West Virginia, Pennsylvania, New York, Maryland, Virginia, and New Jersey, Delaware, the District of Columbia, and (in the West) California, Arizona, and Nevada (DOE, 2007). The national security function of these corridors—the 2005 law permits the use of eminent domain to construct new transmission lines over state and local objections if need be—has not yet been

³ See <http://www.globalsecurity.org/security/systems/irs.htm>

announced.

The all hazards protection approach, originating in the Bush paper of 2003, makes specific reference to bioterrorism, a growing threat to agricultural, medical, and natural resource “infrastructures.”⁴ In 1998, the US Commission on National Security in the 21st Century concluded that biological agents are the most likely choice of weapons for disaffected states and groups. Biological weapons are nearly as easy to develop, far more lethal, and will likely become easier to deliver than chemical weapons and, unlike nuclear weapons, biological weapons are inexpensive to produce and the risk of detection is low (US Commission on National Security, 2002). In 1993, the US Congressional Office of Technology Assessment estimated that the aerosolized release of 100 kg of anthrax spores upwind of Washington, DC, could result in approximately 130,000 to 3 million deaths, a weapon as deadly as a hydrogen bomb (Inglesby et al., 1999). In the face of such threats, the lines between public health and land use planning blur—both are powers constitutionally reserved primarily to the states as a legitimate exercise of their police powers (Gostin, 2000; Machin, 2006).

For example, within a year of 9/11 the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities drafted the Model State Emergency Health Powers Act (MSEHPA) at the request of the Centers for Disease Control and Prevention. MSEHPA was designed to help states detect and contain bioterrorism through updated public health functions. These included comprehensive planning for a public health emergency; surveillance to detect and track public health emergencies; and “property management” to ensure adequate availability of vaccines, pharmaceuticals, and hospitals, and provide power to abate hazards to the public's health. The section of the model law addressing property management gives state officials the authority to appropriate and use property, including health care facilities, as necessary for the care, treatment, and housing of patients and for the destruction of

⁴ The “all hazards” approach has many expressions, including the “Pandemic and All-Hazards Preparedness Act,” or “PAHPA,” signed into law on December 19, 2006, by President Bush. PAHPA substantially reorganizes federal, state, and local public health efforts across sectors (see below). (Hodge, 2006).

contaminated materials. A team of legal experts writing in the Journal of the American Medical Association about MSEHPA addressed the powers of sovereign states in light of individual and civil rights (Gostin et al, 2002: 625):

Coercive powers are the most controversial aspects of any legal system. Nevertheless, they may be necessary to manage property or protect persons in a public health emergency. There are numerous circumstances that might require management of property in a public health emergency (eg, shortages of vaccines, medicines, hospital beds, or facilities for disposal of corpses). It may even be necessary to close facilities or destroy property that is contaminated or dangerous... There similarly may be a need to exercise powers over individuals to avert a significant threat to the public's health. Vaccination, testing, physical examination, treatment, isolation, and quarantine each may help contain the spread of infectious diseases.... Provided those powers are bounded by legal safeguards, individuals should be required to yield some of their autonomy, liberty, or property to protect the health and security of the community.

By late 2002, Legislative bills based on the MSEHPA had been introduced in 34 states. By August of 2007, 33 states had introduced a total of 133 legislative bills or resolutions based upon or feature provisions related to the Articles or sections of the model act, now revised and renamed the Turning Point Act; 48 of these have passed.

Once again, we would emphasize that the use of military systems and resources to protect and regulate critical infrastructure is not new. On April 9, 1952, acting in his dual capacity as the Nation's Chief Executive and the Commander in Chief of the Armed Forces President Truman used the military to seize control of 88 U.S. steel mills to avert strikes that might cripple US efforts to win the Korean War (Canellos, 2005). The Supreme Court eventually ruled against the seizure. According to the same author, some have drawn parallels between Truman's act and President Bush's use of Executive Authority to eavesdrop on and surveil American citizens. But there is a closer parallel to the property breach by Truman. In 2007, President Bush empowered the Immigration and Naturalization Service to enter private firms suspected of hiring illegal aliens. A

recent report by the DHS says that 3,200 administrative arrests were made in the 2006-2007 fiscal years and “742 criminal arrests in worksite enforcement cases” (Chertoff, 2007). Both presidents overrode the private property interests of employers in the name of national security.

Cooperation with Local Governments:

As terrorism spreads globally, land and air-space are often “zoned” to control population movement and access to vital resources, contain or exclude unwanted groups, buffer polarized people and precincts, and to enforce regulation within occupied areas. Familiar examples abound: South Africa under apartheid, Palestine after the 6-Day War, between North and South Korea after the Korean War, between the Soviet Union and Europe during the Cold War, as well as between the USSR and Iran and Bulgaria-Greece in the same period (McNeil, 2000). Refugee camps are a version of emergency zone that becomes engrained long after the emergency has subsided. More recently Bagdad has been host to a Green Zone and more expressions of the term are likely in the future. But domestically, in contrast, zoning tends to be a devolved, local prerogative known for peace-time applications and civilian consent.

Zoning is the standard bearer among land use planning regulations for much of the nation. It is backed up by a zoning/planning board and, ideally, a master or comprehensive plan to guide and regulate development. Local governments derive their regulatory powers over land use from their respective state constitutions or statutes. States have the power to promote the public health, safety, morals, and general welfare—often referred to as the police power of the state referred to above—a power which is delegated in varying degrees to cities, towns, villages, and counties. Mackin (2006:48) refers to the police powers of zoning to guard the public health and safety as its protective powers.

Under acknowledged threats to the environment, national security, and public health and safety states may take back certain policing powers and curtail various property rights (Nolon, 2001; Blaesser and Weinstein, 2007). This is a legitimate function of state

sovereignty—a prerogative which only grows in legitimacy in times of crisis and national emergency. A post 9/11 example is the Model State Emergency Health Powers Act or MSEHPA, in which adopting states asserted their right to appropriate private property under specified circumstances. Citing precedents, several legal scholars with public health credentials reviewed MSEHPA approvingly with these words: (Gostin et al., 2002:627):

Similarly private property was held subject to the restriction that it not be used in a way that posed a health hazard, as Lemuel Shaw of the Massachusetts Supreme Judicial Court observed in 1851: ‘We think it settled principle, growing out of the nature of well ordered civil society, that every holder of property . . . holds it under the implied liability that it shall not be injurious to the right of the community.’ ‘It is unquestionable,’ wrote the Maine Supreme Court in 1876, ‘that the legislature can confer powers upon public officers, for the protection of the public health. . . . The individual right sinks in the necessity to provide for the public good. These doctrines remain lively today in the United States and under international law. Even in principle, it would be almost disingenuous to argue that individuals whose movements or property pose a significant risk of harm to their communities have a "right" to be free of interference necessary to control the threat, or that property rights trump the protection of the common good from extreme peril. There is simply no basis for this argument in constitutional law and perhaps little more in political philosophy.

Even as local zoning faces pre-emptive challenges from states in the name of emergency public health protocols, it is also drifting in directions some will see as a shift from civilian to military control. Prior to 9/11 the Federal Emergency Management Agency (FEMA) was an independent agency coordinating and responding to natural disasters in the United States. Incorporated into DHS, FEMA’s budget was cut, an action some blamed for the failures of FEMA in response to Hurricane Katrina in 2005 (Mayer, 2006). Among the many responders to Hurricane Katrina were personnel from the private security contractors such as ArmorGroup International and

Blackwater USA, who specialize in supporting U.S. military operations in the Middle East. According to a Washington Post article soon after the hurricane, their mission is to guard against looters rather than defend against coordinated insurgent attacks. "But the presence of the highly trained specialists represents an unusual domestic assignment for a set of companies that has chiefly developed in global hot spots where war, not nature, has undermined the rule of law " (Witte, 2005:A14).

Here the lines between disaster planning and locally enforced security measures using private military personnel are entangled. Conventional land use planning usually operates through zoning, special districts, coastal and shoreland protection, and assorted growth controls, conservation easements and land trusts. But in natural disasters or conditions of "total war," national land use planning and law and order agendas merge. In addition to the "defensive dispersal" policies of the Cold War noted above, Presidential pacification plans at home have contained detailed spatial plans for domestic military control (McCollough, 1992); labor has been reallocated both sectorally and spatially to maximize war time production (Hall and Markeson, 1992); and suspect sub-populations have been put in internment camps (e.g., Burton et al., 1999). These draconian measures were justified in times of national emergency to assure military effectiveness.

Another recent example of military and civilian co-planning of land use is the Navy's Public-Private Ventures (PPV) program enabled by the Military Housing Privatization Initiative (MHPI), approved by Congress in 1996. The MHPI allows the military to obtain private-sector capital and expertise to develop, manage, and improve military housing as well as military morale. In this instance military decision-making over land and property was down-shifted to Texas-based real estate firms to upgrade Marine Corps housing. More than \$550 million has been raised to this end.⁵ Lincoln Property Company, an international real estate services firm headquartered in Dallas, Texas, is a member of the Hunt Lincoln Clark LLC for military housing at Camp Pendleton and MCB Quantico, currently operating over 5000 housing units for the United States Marine Corps. Lincoln is one of

⁵ See <http://www.clarkrealty.com/Portfolio/military.stm>, accessed on 9/20/07

the largest multi-family residential management companies in the US. Clark Realty is actively involved in the development and construction of the new homes for Quantico Family Housing Personnel and their families. The web-page of one of the firms explains the partnership:

When complete, Hunt Lincoln Clark Family Communities will manage homes at Quantico and Pendleton for the Marine Corps during the next 50 years. Hunt Lincoln Clark Family Communities, LLC is a joint venture among Hunt Building Company of El Paso, Texas; Lincoln Property Company of Dallas, Texas; and Clark Realty of Bethesda, Md. Clark Realty manages the design, development, and construction at MCB Quantico. The asset and property management services of both Quantico and Camp Pendleton are being provided by Lincoln Property Company. Hunt Building Company manages the design, development, and construction at Camp Pendleton.⁶

Collaboration between DHS and state and local governments is evolving and assuming many forms. At present, there is no shortage of civilian-military linkages in forging land and housing policy. Some of these accommodate “local control” structures and traditions; others pre-empt (or have the power to preempt) local land use planning under extreme circumstances. Such circumstances arise, as we shall see below, when conditions of “total war” prevail; and Posse Comitatus obstacles to using federal troops, the National Guard, Reservists, and private security forces as enforcers appear to be soluble.

Discussion:

How likely is the militarization of land use planning in the United States? We will address this question by summarizing our logic to this point and by offering a scenario for such planning that requires little legal change to the status quo. In the foregoing account, we presented a typology of state responses to terrorist threats and made the subsequent points. Military control of domestic land in peace time

⁶ (<http://www.clarkrealtybuilders.com/RecentEvents/releases/121.stm>)

and times of war is not new in our society and spans public as well as private lands. Civilian-military lines blur when the National Guard or private sector militias are deployed, and blur even further when military contracting reshapes local and regional land use planning, directly and indirectly. Second, in the wake of 9/11 and the onset of Croft's (2007) "Age of Terror," there are new signs of militarized land use planning at several levels. The newly-mandated Northern Command exemplifies one national response (considered by some to be "moderate" in scale (O'Hanlan, 2006)). And, though DHS has not announced an integrated land use defense plan for the country, it is doing its best to evolve inter-agency and inter-governmental responses with explicit land use planning ingredients. We offered evidence from border security initiatives, critical infrastructure protection, and cooperation with local governments—the home base of traditional land use planning.

In addition to these accounts, we drew attention to legal rearrangements bearing on our subject. Civil rights in America are officially in retreat. Such a climate recasts other rights and liberties, we suggested, including property rights, and potentially dis-empowers political discourses that might reassert these rights. It is probably not an exaggeration to say that we have entered a state of "total war", or at least its rhetorical precursors. As recently as late 2005, President Bush compared our war on terrorism to the struggle faced in World War II and implied equivalence to the Cold War struggle with the Soviet Union (Lustick, 2006:11). Total war entails the unequivocal commitment of societal resources to a war mission and the subordination of politics to the war effort-- politics that might chafe at reduced property rights. "Total war," as stated by Chickering (2000: 36), "...is fought heedless of the restraints of morality, custom, or international law...[and] requires the mobilization not only of armed forces but also of whole populations." By definition, total war brings the "front line" home, and civilians are expected to make far-reaching sacrifices.

In a society subject to total war and abridged civil rights, it is not difficult to imagine a re-consolidation of police powers and measures that convert land use planning from a civilian tool for the health, safety and welfare of the community to a military tool for national defense and security. Nor is it difficult to find, quite literally, an army

of enforcement agents.⁷ Writing in the new publication, “Disaster Preparedness,” a Senior Fellow for National Security and Homeland Security, James Carafano (2006) foresees how the military could be summoned for greater domestic duty in times of national emergencies with virtually no changes to the Constitution or the Posse Comitatus Act. Troops only need be subject to governors and mayors as opposed to federal administrators, something DHS could easily accommodate in its current planning structure. According to Carafano, the National Guard are already considered “citizen soldiers” and are exempt from Posse Comitatus constraints; states now have the power to create state defense forces (SDF) and several have done it; and normal military units can be assigned to domestic tasks as long as they are subject to state or local control. In the event that DHS were to assume control of these forces, few alarms would go off; federal forces have been used 175 times in the last 200 years under assorted justifications, for example, the Insurrection Acts (Carafano, 2006: 7). Should federal troops, reservists, and the National Guard be in short supply, state or federal governments can hire private security forces such as Blackwater or Worldwide Security Services, Ltd. As of 2004 these firms were protecting 11 domestic military installations (Albiston, 2005) in addition to their other national emergency assignments.

It would seem, then, that the legal fences blocking the militarization of land use planning are low, the motivation for doing so in some quarters is high, and the checks and balances that might check such developments are at a historic low. Though we have come across nothing suggesting that the military wants to be the nation’s land use planner, this may be because we are using an overly narrow conceptualization. The Pentagon is, after all, the largest landowner in the world (Turse, 2007) and may be thinking in terms of occupation rather than regulation while keeping an eye on due process. Or perhaps we need to dispense with “land use planning” and turn instead to security planning and system management. In Israel, the “security sector” currently controls over half of the land base and uses a seamless mixture of civilian and military stratagems (Oren, 2007). The Israel Defense Forces, the home of the security sector, receive

the lion's share of US military overseas assistance (Fisk, 2007) along with unabashed moral support and high-level security consultation. This precedent can hardly escape the attention of the US Government, DHS, and its many partnering agencies.

Conclusion:

This research is preliminary. There are many sources we have yet to consult; many more that are relevant to the question of militarized land use planning are surely classified. Additional inquiry is needed. Somewhere between remote contingency planning and an emergent planning paradigm driven by security and "all hazards protection" is a warehouse of new land use policies, some latent, some manifest. The police powers live on in these policies but are no longer strictly civilian nor local in nature. Like traditional land use planning, the new hybrid depends heavily on **ex ante** planning, prediction, and modeling. For all its emphasis on using military units for rapid response and national defense in the wake of calamity, the DHS is spawning land use plans to prevent the catastrophic terrorist attacks in the first place.

The militarization of the police powers over land has implications for property rights. As the "health, safety, and welfare" of the nation eclipse those of the community, land use planning will become more centralized and uncompromising. It is a situation ripe with paradox: Homeland Security and home land security will cross swords. Threats to national security yield total war thinking and planning. As the front line moves home, land use planning leaves the community, or at least is subject to directives from the state and nation rather than local property law and custom. This paradox will not appear in headlines or political speeches. Political leaders in America know that rolling back property rights is a high stakes game that is best done, if at all, indirectly and with little publicity. Appropriating land rights for higher purposes has rarely been a popular re-election strategy, even if part of a winning military strategy.

Or perhaps we are connecting too many dots and are misreading the potential resistance to militarized land use planning altogether. It may be that there is no paradox after all, that the militarization of land use planning is occurring, but that it will not be contested due to changes

in American society. Consider the views of Wendell Berry in the wake of 9/11. The curtailment of civil rights and the use of overwhelming force by our government, according to Berry cannot protect us from a long list of dangers which he lists. He finishes his list as follows:

And they cannot protect us from what may prove to be the greatest danger of all: the estrangement of our people from one another and from our land. Increasingly, Americans—including, notoriously, their politicians—are not *from* anywhere. And so they have in this “homeland” which their government now seeks to make secure on their behalf, no home *place* that they are strongly moved to know or love or use well or protect. (2003:6)

The weakening home place and identity arguably means a weakening in our unalloyed commitment to a culture of private property. A similar sentiment is powerfully argued by sociologist Zygmunt Bauman on a global scale. “It has also become clear,” he posits (2002:88), “that the annihilation of the protective capacity of space is a double-edged sword: no one can hide from blows, and nowhere is so far away that blows can not be plotted and delivered from the distance. Places no longer protect, however strongly they are armed and fortified.” In a word, the hyper-mobility of society and citizens, both trustworthy and otherwise, makes conventional land use planning problematic. Highly mobilized citizens may acquiesce to militarization of space, be indifferent to it, or be so fearful in the absence of civil rights that they don’t question it.

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