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National Security and Property: The War on Terrorism as Mid-Wife to Changes in Ownership

Charles Geisler

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170 Uris Hall, Cornell University, Ithaca NY 14853, t. 607-255-6370, f.607-254-5000

National Security and Property:
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By

Charles Geisler

Many have noted that the war on terror has driven a wedge between security needs and civil rights, yet the consequences of this war for property rights have received little attention. This paper explores the conditions under which private property rights are suspended despite their central place in the constellation of values for which the war on terror is fought. These conditions are exceptional--states of emergency in which governments amend their own rules, including normal protections for property. Focusing on the Department of Homeland Security (DHS), the principal institutional offensive against terrorist threats within the United States, I examine four DHS program areas for their property-related impacts. These impacts are direct, through eminent domain, as well as indirect, through the federal preemption of the police power historically reserved to state and local governance. The retreat of strong property rights long viewed as sacrosanct—referred to here as post property--does not apply evenly to all property owners and signals an important way that states of emergency can redistribute property and related wealth.

About the Author

Charles Geisler is a professor in the Department of Development Sociology at Cornell University with a specialty in environmental sociology, particularly controversies in pertaining to land and property. His research focuses on the environmental consequences of war, terrorism, and counter-terrorism. For the past two years he has collaborated on a project on everyday militarization within the United States, partially funded by the Einaudi Center, and its effects on property rights, their changing regulation, and (as with civil rights) their suspension. An edited book entitled *Accumulating Insecurity, Securing Accumulation* will summarize this research in 2010; his most recent edited books are *Property and Value* (2000) and *Biological Diversity: Balancing Interests through Adaptive Collaborative Management* (2001).

Contact Information

Professor Charles Geisler, Department of Development Sociology Cornell University, 237 Warren Hall Ithaca, New York 14853; phone: 607-255-1691; email: ccg2@cornell.edu.

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Introduction

Given the central place of private property in American values, few will be surprised to learn that the FBI, the Department of Defense, and the U.S. Code of Federal Regulations all feature property destruction in their definitions of terrorism.[1] This paper explores the conundrum of how, in a war on terrorism launched in part to protect property rights, the government substantially weakens them. How did this alienation of seemingly inalienable property rights come to be? How might property alienation be theorized and what are some of its practical implications? I set the stage by exploring the ways in which governments, even those solemnly sworn to protect property, disembowel property rights in states of emergency that last for extended periods of time. This leads to a theoretical section on clashing security and property interests as expressed in an ever-stronger police power by the federal government. Though the police power is reserved by the Constitution to the states and their sub-jurisdictions, the expanding Homeland Security State in the United States is centralizing these powers and hollowing out ownership, a condition I will refer to as "post property."

Private ownership is a potent touchstone in American culture that comports with liberal, conservative, neo-liberal, neo-conservative, and libertarian ideals.[2] Its centrality in our social contract distinguishes America from its adversaries in the Cold War and, some assert, its absence dooms other societies to economic and social stagnation (de Soto, 2000). At some level, we fight our wars in defense of private property along with the pursuit of happiness said to accompany it. And politically speaking, it is difficult to find a national leader not paying homage to private property. Jimmy Carter's "smart bomb" destroyed people but saved property. Ronald Reagan, in his first Executive Order, required federal agencies to achieve their mandates without infringing on property rights. Bill Clinton appointed an Under-Secretary of State as a Special Envoy of Property Restitution. George W. Bush made the "Ownership Society" the beachhead of his 2004 re-election campaign. In *The Audacity of Hope*, Barack Obama (2005:149-50) stated: "Our Constitution places the ownership of private property at the very heart of our system of liberty.... The result of this business culture has been a prosperity that's unmatched in human history." In the public mind, private property is a foundational American value.

Yet the U.S. government, though protective of private property, has burdened it with contingencies on many occasions (Siegan, 1997). Of particular relevance to the current volume is the antinomy between private property and national security under emergency conditions (Biggs and Twight, 1987). Security narratives such as those guiding the Department of Homeland Security affect not only civil rights but property rights as well. America is now gripped by an enduring War on Terrorism that shows no signs of abating. So it is an appropriate time to

[1] The FBI defines terrorism as "the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives"; this is nearly identical to that of DoD (White, 2006:6). The U.S. Code definition (28 C.F.R. Section 0.85) is found at http://www.terrorismfiles.org/encyclopaedia/terrorism.html (accessed July 2, 2009).

[2] Private property is "essential" to the pursuit of happiness in the United States (Greene, 1988; Siegan, 1997) and a crowning accomplishment of civilization (North and Thomas, 1977; Story, 2002).

contemplate the conditions under which governments "take back" property rights and centralize the powers to regulate it—powers that in local hands constrain these rights but are amenable to a degree of owner dispensation (Convey, 2009).[3] I confine myself largely to real property ownership in this paper.

The tension between property and national security has not escaped prior notice. Charles Tilly (1985) characterizes state-making as a quintessentially predatory process with many adverse effects for property. European sovereigns used their powers of violence to plunder their neighbors' lands and, after consolidating their territories, to offer internal property protection through extortion—a relationship resembling the protection rackets of modern organized crime. In contrast to familiar social contract theories, which generally assume the relationship between private property and sovereign governments to be positive and reinforcing, Tilly argues that states secure themselves at the expense of property through coercion, thinly veiled (but legal) violence, and military actions. "War makes states," Tilly (1985:170) famously asserted, and little about war is benevolent to property. When wars subside, soldier-civilians prey on domestic property, as do rulers at more exalted levels. State protection is double-edged from its inception and is accompanied with on-going dispossession, taxation and confiscation. Anticipating David Harvey's (2003) recent work on dispossession, Tilly points to the obvious coincidence of war making, state making, and capital accumulation (1985: 177).[4]

In 1951, seeking to understand the life of refugees jettisoned from European nations, Hannah Arendt reflected on the conditions of statelessness and international homelessness. In a chain reaction starting in 1914, European states hastened to secure their borders, deprived minority populations of permanent homes, of their possessions, and finally of the Rights of Man. Such rights, thought to be inalienable, came to an end for masses fleeing the Russian Revolution and the failed Austro-Hungarian Empire. Rights of asylum were deemed anachronistic and in conflict with the rights of states. For purposes here, the relevant premonition in Arendt's work is this: the security concerns of states required the displacement of surplus people to stateless and propertyless status. Presciently, Arendt (1951:295) warned of the involuntary alienization of property in totalitarian as well as non-totalitarian contexts, setting the stage for a broader question: what conditions in non-totalitarian states might evoke the involuntary alienation of property?

Drawing on Arendt, Giorgio Agamben (2005:6-7) reports a world in which protection becomes the norm, even an obsession, and uses the idiom of emergency to foreshadow surges in government power that sweep aside the rights of civilians. "States of exception," the name he assigns to such emergencies, are episodes in which states override or suspend their own laws, appealing to national security as they do so. Like Arendt, Agamben builds his case on the extreme dispossession of life and property that occurred in Nazi Germany, but unlike both Tilly and Arendt, he applies his analysis to America's war on terror. In so doing Agamben crafts the

[3] Zoning boards often exert discretion in regulating private property through variances, conditional uses, special permits, and rights of appeal.

[4] Harvey's (2003) useful work on accumulation by dispossession is somewhat overdetermined by his framing within neoliberalism. This leads him to emphasize relentless privatization of common goods and entitlements such as land, water, and public utilities—the latest waves of enclosures of global commons (see Duffield, 2008:11) and to understate public dispossession of private property.

notion of "indistinction," wherein states of exception become unexceptional and even normal (2005:9). This normalization, through the patriotic framings of Homeland Security, for instance, occurs as states notify citizens that emergency rule is indispensable to the recovery of bygone security, that is, past times when rights were inalienable (Simoes da Silva, 2005) and post property was of little concern.

Agamben (1998:122) moves seamlessly from states of exception to more-tangible *zones* of exception, therein laying groundwork for the remainder of this paper. Zones of exception are physical places (concentration camps, detainment centers, garrisoned places) or more amorphous, "indistinct" zones under full or partial government control in which citizens' rights, including property, are impaired.[5] In the present context they are post-property zones where familiar property rights are restrained if not extinguished in the name of public health, welfare, safety, and (increasingly) security. The police power that regulates them is federalized by senior public servants, sometimes those who declare national emergencies. In these exceptional times, as we shall see, citizens are coaxed to see the concession of property rights as a precursor to their restoration.

The remainder of this paper uses emerging Department of Homeland Security (DHS) policies to illustrate how post property is spreading in response to the war on terrorism. Just as civil rights are claimed by some to unduly protect public enemies, the same logic can be marshaled to indict property rights for cloaking illegal behaviors (storing weapons, plotting attacks, training belligerents, etc.).[6] The Patriot Act, passed in 2001 and renewed in 2006, is widely known for suspending civil liberties but it also permits United States Presidents to "confiscate any property of any foreign person, foreign organization, or foreign country" involved in hostilities toward the United States (Title I, §106); it authorizes the government to confiscate all property, regardless of where it is found and of any person, entity, or organization engaged in domestic or international terrorism against the country, its people, or their property (Title VIII, §806),[7] and, by defining "terrorism" broadly (Title VIII, §808), it enables sweeping government forfeiture powers (Ball, 2004; Abele, 2005). Although the Patriot Act thus poses a grave threat to property rights (Bovard, 2005), the story of post property as a consequence of the Homeland Security State is even more encompassing.

U.S. Zones of Exception

The Office of Homeland Security first came to life in a speech to Congress by President Bush on September 20, 2001. It was followed by the Homeland Security Act of 2002 (Public Law 107-296) and thereafter by a Cabinet-level Department of Homeland Security (DHS) in 2003. Today, DHS is the national command center and coordinating body for the intergovernmental implementation of the *National Strategy for Homeland Security* set forth in 2003. The DHS budget grew from $19.5 billion in 2002 to a requested budget of $50.5 billion in 2009 (a seven percent increase over 2008), a substantial war chest for reshaping security measures in the face

[5] In the U.S., Agamben (2005) uses the Guantanamo Bay internment camp as a leading zone of exception,

[6] See Forst (2009: 202-16) for an overview of threatening behaviors that are the harder to detect when accorded the privacy of private property.

[7] Some provisions on property also appear in Executive Orders; under Section 316 of the Act, property owners may institute a challenge to such confiscations (Ball 2004).

of what some view as extraordinary threats to American values and lifestyle. Whereas the Patriot Act empowers the government to enter and search private homes and to confiscate property, the Homeland Security Act enables a variety of expanded police powers at the federal level. Though constitutionally reserved to the individual states, the police power and its two most potent property-altering mechanisms (eminent domain and land use regulation) are tipping towards Washington in the name of national security.[8]

In the *National Strategy* document, President Bush (2003:5-6) unveiled an "all hazards" plan for his domestic security initiative, stating:

> "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 National Strategy for Homeland Security, therefore, will be based on the principle of partnership with State and local governments, the private sector, and citizens."

The language of the *National Strategy* does not explicitly articulate an emergency police power. Its approach to new regulation is couched in broad partnership terms that enlist non-federal participation and appear not to disturb the police power as reserved for states. Upon closer inspection, however, these regulations supply the federal government with emergency enforcement muscle (eminent domain and financial liability), should the partnerships languish. The regulations divide into four operational missions: regulatory reform; protecting critical infrastructure; securing national borders; and an all-security approach to biohazards. Individually and in combination, the four open post property doors.

a. Regulatory Reform

No policy domain more explicitly influences property rights in land throughout the nation than local land use planning. In the same year the *National Strategy* appeared, the American Law Institute and the American Bar Association offered their annual Land Use Institute and included a paper entitled: "Homeland Security Begins at Home: Local Planning and Regulatory Review to Improve Security." Published in *Land Use Law & Zoning Digest* (Young and Merriam, 2003), it proposed ways in which land use planning could play a role in mitigating terrorist threats to the nation. The authors reassured readers that national security benefits follow from normal applications of property law (ownership, control, and continuing property rights) but warned that local officials, land use planners, and others who fail to take proactive Homeland Security measures (e.g., revise ordinances and codes, comply with inspections by law enforcement

[8] Dubber (2005:121) offers an overview of police power evolution in the United States and speaks to these twin powers. The ultimate court test for legitimate use of the police power is "reasonableness," and few courts will find security to be unreasonable (see Smith, 1920:446). For a useful overview of the police power, see "Police Power" in *Encyclopedia of American History* (accessed on 7-02-08 at http://www.answers.com/topic/police-power). To the extent that uncompensated police power regulation and compensable takings are merging into one operating strategy for land use planning (see Carlson 1976; Meltz, Merriam and Frank, 1999), the reserved power requirement of such planning is perhaps vanishing, especially in times of national emergency (Higgs and Twight 1987).

personnel, and amend plans to incorporate "Homeland Security" elements) do so at "considerable risk" and possible liability (2003:10).[9]

Two years later, the American Bar Association drafted a guide for state and local governments engaged in Homeland Security and emergency management. Its authors, Abbot and Hetzel (2006), concurred that inaction would incur considerable liability risks but added a strong "use it or lose it" proviso; failure among officials charged with planning must be proactive or face prospects of federal override. Local partners were encouraged, for example, to use conditional use permits that impose cleanup responsibility on property owners in the event of attacks resulting in the release of hazardous substances. Failure to respond was serious and could result in federal preemption (Ibid, 2006:93). Local governments were instructed to undertake comprehensive studies of their development review and permitting processes so as to incorporate Homeland Security considerations; they were urged to revise ordinances, codes, and site inspections to comply with Homeland Security "defensive steps"; and they were directed to perform due diligence in planning, purchasing, and remodeling buildings to conform with DHS security guidelines—especially those facilities designated "terrorist sensitive" (Abbot and Hetzel, 2006:95).

But the ABA guide went even further (2006:90). It recommended buffer zones, moats, and bollards to stem terrorist attacks by vehicles. Whereas in the past, adjoining land uses considered incompatible according to health, welfare, and safety standards were separated by lines on zoning maps, physical impediments would now separate land uses based on security concerns. Recent work by Nemeth and Hollander (2009) offers insights into the post property consequences of these recommendations in three urban centers (Los Angeles, San Francisco, and New York). An average of 17 percent of these study sites is now closed or severely limited to public access. The authors consider these zones "militarized" and suggest the emergence of a new land use category, saying:

> "Even before these terror attacks (9/11), owners and managers of high-profile public and private buildings had begun to militarize space by outfitting surrounding streets and sidewalks with rotating surveillance cameras, metal fences and concrete bollards. In emergency situations, such features may be reasonable impositions, but as threat levels fall these larger security zones fail to incorporate a diversity of uses and users."[10]

Security-based land use planning extends beyond major urban sites. DHS offices in all states routinely promote security zones around critical infrastructure and military facilities.[11] California, the state with the most military installations and operations areas in the nation, is an example. In a 2006 *Handbook* prepared by the Governor's Office of Planning and Research, concern is expressed that the state's urban growth was encroaching onto military zones. The *Handbook* notes that by 2001 more than half of the California military installations were adjacent

[9] The 2007 and 2008 presentations provide an overview of selected publications, GAO reports, and a NEPA finding germane to Homeland Security since 2003 (Young, 2007; 2008).

[10] See Project Summary on website (http://www.securecities.com/) accessed on 5/5/09.

[11] Homeland Security's National Infrastructure Protection Plan (NIPP), discussed below, emphasizes a buffer zone approach to keeping enemy surveillance and attacks at bay (NIPP 2006:183). Physical access management requires barriers, state-of-the-art intrusion detection, and evolving "special security zones" around air and maritime ports (Fessler, 2001) and other critical infrastructure.

to or within metropolitan areas and that the state is projecting a population increase of over 50 percent by 2050. Not surprisingly, the threat of civilian-military land use incompatibility is "one of the military's greatest concerns" under any circumstances, but especially in a time of national emergency (OPR, 2006:1-1).

A close reading of the California *Handbook* shows encouragement for regulatory reform backed with overtones of state or federal override if local officials are uncooperative or unresponsive. Its authors say land use compatibility will be achieved when communities and military installations balance their competing interests. This congenial assertion is overshadowed by state laws passed in 2002 requiring cities and counties to consider the impact of further growth on military readiness in their general plans for property adjacent to military facilities or under military aviation routes. The same Act amends the state's Environmental Quality Act to ensure that the military is notified of project proposals within two miles of their installations or special use airspace. These notification requirements expanded in 2004. Since then, the police power belonging to local jurisdictions is abridged, preventing amendment of general land use plans without military review.[12] Though seemingly about partnerships, the *Handbook* (2006:1-3) sends a clear message as to where ultimate planning authority rests: "Local governments must recognize the needs of military installations and operation areas to determine what planning tools local communities should use to promote compatibility."

b. Protection of Critical Infrastructure

Closely related to security partnerships with local governments is the multi-jurisdictional protection of Critical Infrastructure and Key Resources (CIKR). In selling DHS to the nation, President Bush (2003:5) stated that his Administration was going to great lengths to identify and protect critical sea and water ports, airports, nuclear facilities, dams, water and sewer plants, electric power plants, gas pipelines, bridges, biological and chemical facilities, military installations, and government facilities. Special technologies would be deployed (such as Intelligent Transportation Systems) for highways and mass transit systems relied upon by parcel delivery companies, pipeline operators, police, fire, ambulance services and others.[13] Several times since 2003 and for every state, DHS has assessed eighteen infrastructural types and resource sectors in terms of terrorist threats in its National Infrastructure Protection Plan (NIPP). States and local governments assist as partners in this effort; the resulting information is entered into a national geospatial databases for security planning (Allen, 2008:3).

Critical infrastructure suggests a paradigmatic form of post property. Property rights in infrastructure, where "private," are subject to aggressive regulation increasingly framed by security needs. The prevailing state of exception in the United States ("War on Terrorism") imposes a growing list of contingencies on ownership--new liabilities, reduced ability to exclude others (especially public officials on inspection and compliance missions), uncompensated seizure of some or all of the rights of ownership (e.g., enjoyment, use, transfer, disposition), and evermore circumscribed proprietor control. The ubiquitous call for "disaster proofing" in

[12] In compliance with state law, the military has provided electronic maps of critical land and air information on the Internet so assist planners and the state has done the same with its California Military Land Use Compatibility Analyst (CMLUCA).
[13] See http://www.globalsecurity.org/security/systems/irs.htm

response to both natural disasters and extremist threats to critical institutions and infrastructure (Miskel, 2008) triggers alienation of property rights that, with few exceptions, would be legally unacceptable in non-emergencies.[14] Moreover, the transboundary nature of such infrastructure (electrical grids, power supply and transmission systems, telecommunication and cyber networks, transportation corridors for trains, trucks, pipelines, cars, shipping, and air traffic, etc.) weakens the case for community police power and enhances the logic for regional and national regulation. The partnerships proposed by DHS bring together jurisdictions and agencies of vastly unequal powers, reducing the ability of states and sub-jurisdictions to contest preemption, to fight the loss of local control, or to say no to DHS incentive funding for such things as buffer zone development.

Federal preemption of local police power is apparent in the Energy Policy Act of 2005. The Department of Energy's Infrastructure Security and Energy Restoration (ISER) Division has worked with Homeland Security to formulate law which authorizes DOE to designate "National Interest Energy Transmission Corridors" and use eminent domain where states lack jurisdiction over interstate matters or are otherwise non-cooperative. Within the corridors, the law grants the Federal Energy Regulatory Commission (FERC) the authority to issue permits to build or modify transmission infrastructures over state objections (DOE, 2007; Hempling, 2007). These (draft) national corridors extend over two geographic areas: the Mid-Atlantic Area National Corridor (parts of Ohio, West Virginia, Pennsylvania, New York, Maryland, Virginia, New Jersey, Delaware, and the District of Columbia) and the Southwest Area National Corridor (counties in California, Arizona, and Nevada). Legislation currently before Congress (Electric Grid Cybersecurity Bill of 2009) gives FERC (now part of DHS) further authority to issue broad "emergency rules" if cyber threats are imminent.[15]

c. Secure Border Initiative

The Secure Borders Initiative (SBI) is a multi-year plan extending to all land ports of entry *and* the land between them on U.S. borders. Its focus is the perimeter of the United States, home to major infrastructure clusters vital to U.S. security (particularly along coasts) and border crossings. SBI consciously merges terrorist prevention with immigration control, as directed by the Patriot Act (Title V), creating a rapidly evolving zone of exception in which the police power has been aggressively assumed by U.S. Customs and Borders, also a unit of DHS, and enforced by local, state, and federal law enforcement agents as well as the U.S. Coast Guard. Much has been written about DHS's use of eminent domain to create *"zones sanitaires"* along the U.S./Mexican border, a third of which the United States has now secured with walls, roads, cameras, and a 300-foot wide buffer zone (Archibold 2007).

[14] Munzer (2004), among others, portrays property ownership as a spectrum of rights wherein the retention of all or most constitutes ownership and attrition of rights leads to limited ownership. What most acknowledgements of rights attrition bypass is the engrossed powers of central governments in assuming control of property, if not full ownership, in times of natural or human-induced crisis. The exception is the law of necessity which holds the an increase in net social welfare can occur by breaking existing laws to prevent a greater harm (e.g., Christie, 1999). Though usually applied to criminal law, Kusler (2010) assembles cases applying to property destruction to prevent greater harm to environment and society.

[15] See MX Logic report of 4/29/09 at http://www.mxlogic.com/securitynews/network-security/electric-grid-cybersecurity-bill-would-empower-ferc676.cfm.

Present U.S. immigration law authorizes the Secretary of DHS to buy any interest in land adjacent to or in the vicinity of the international border and to commence condemnation if a reasonable purchase price cannot be agree upon.[16] Many such condemnation proceedings are underway on a broad spectrum of public and private lands. DHS's resolve to make the border secure even at a cost to property interests, was stated clearly by Michael Chertoff (2007), DHS Secretary under President Bush:

> "…we are coming to the point that we will need, and if we're going to keep our deadlines, to move forward in terms of giving some entry work and engineering preliminary work and then ultimately some building, whether it's barriers, roads or light fixtures. We're going to need to start doing that in some areas where property owners have not been cooperative… So we're going to be sending letters out today telling them that over the next 30 days we'd like to hear from them and negotiate with them, but failing that, we are going to be commencing eminent domain to give us a right of entry."

A research team of lawyers from the University of Texas has undertaken several studies of DHA condemnation activities on the Texas portion of the southern border. Although DHS has not complied with a Freedom of Information Act request for maps, surveys and appraisals of affected properties, the team has found statistically significant differences in the income and race of owners whose land has been/will be affected and alleges devastating impacts on certain poorer neighborhoods and Native American communities (Sherman, 2009); it is also suing DHS over the FOIA impasse.[17] The same research team completed a study on property rights violations in 2008 stemming from SBI in the Rio Grande Valley. Their assessment (Nedderman, Dulitsky, and Gilman, 2008:7) concluded that, although the U.S. government has the legal right to subordinate the use of private property for national security and the control of immigration, it has not done so in a way that comports with international human rights law based on the doctrine of proportionality. Federal conduct created a greater harm than the harm it sought to prevent; the law of necessity, the authors coentend, does not apply and restrictions on property rights are arbitrary, discriminatory, and disproportional given that other less restrictive measures are available.

The less controversial maritime portion of SBI offers an equally ambitious zone of exception and display of police power for 361 U.S. seaports and much of the coastal zone elsewhere in the country (CBP; 2006). The case for preempting local regulation herein is captured in the following port-and-border protection justification from the Department of Commerce (Ward, 2005:1).

> "America's coasts, rivers, bridges, tunnels, ports, ships, military bases, and waterside industries may be the terrorists' next targets. The overall risk associated with the vulnerability of the U.S. maritime assets, both as a potential target for terrorist activity and more importantly as a transportation platform for the introduction of a 'Trojan Horse,' in which a potential weapon of mass destruction (WMD), terrorist, contraband or illegal aliens, enters the U.S. through its seaports, has been made very

[16] See Illegal Immigration Reform and Immigrant Responsibility Act, §102.

[17] See web-sites of Common Cause and Public Citizen, non-profit organizations opposing the border wall at http://borderwallinthenews.blogspot.com/2009/03/non-profit-sues-feds-over-border-fence.html (accessed 6/3/09).

> clear in the last several years. A catastrophic event at a seaport facility would not only affect the global transport infrastructure, but could also result in global economic devastation for a long period of time."

As with critical infrastructure, the property issues at stake are not easily managed by local jurisdictions or conventional (local) police power. Shipping containers, of which 15 to 20 million currently enter the United States each year (via land and water), are private property. In non-emergency times their physical search could constitute trespass. Though the war on terror alters the legal landscape and makes access by law enforcement agents permissible, a security-property collision is avoided by using screening technologies not requiring physical access. The 2006 Security and Accountability for Every Port (SAFE) Port Act authorizes $400 million a year through 2011 to develop and refine such technologies, and the Customs & Border Protection Agency and the Transportation Security Administration are moving boldly to meet this objective.[18]

Where one sees an unambiguous non-local drift in police power is in the larger "port environments."[19] These include vast bio-physical and human environments and encompass land and water expanses that strain the jurisdiction and planning capacities of local governments. Regulating such areas and defending them from attacks necessitates unusual interventions at the state and federal level.[20] The powerful Port Authorities of New York and New Jersey (known together as PANYN) oversee or are landlord to 20 major cargo terminals and have another 167 privately owned terminals in their joint jurisdiction. Before 9/11, the docks in these facilities were accessible to the public. As requested by the 9/11 Commission, all individual berths are now sectioned off and the public excluded. All area terminals within PANYN now must have security plans that are overseen by the U.S. Coast Guard and DHS restricts access to all areas secured by the Coast Guard (Viana 2009).

The Coast Guard is emerging as an important repository of newly assumed federal police power in the aftermath of its 2005 performance during Hurricane Katrina. Though not widely appreciated, the New York metropolitan area is the third most vulnerable zone in the United States for hurricane hazards after Miami and New Orleans (Viana 2008). Writing in the official Homeland Security magazine, the same author equates environmental security with terrorism, saying: "Should a category 3 hurricane hit New York City, 100 to 150 MPH winds would turn Times Square into a war zone—anything not tied down would turn into a weapon," and adds that

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[18] The former's mission is to secure U.S. ports from people and goods that are prohibited or which threaten U.S. citizens, infrastructure, resources and food supply, while still facilitating legitimate trade and travel. The latter's mission is to protect the Nation's transportation systems and ensure freedom of movement of people and commerce. Both seek sophisticated technologies to detect WMD, contraband, explosives, hidden compartments or stowaways. Accessed 4/9/09 at https://www.fbo.gov/index?s=opportunity&mode=form&id=c77b5f0a1e08845ea116aa1bee8a5e59&tab=core&_cview=0&cck=1&au=&ck=

[19] In 2006 the CBP released a strategic plan, the fourth goal of which was a more "Secure Environment." "Every port of entry," the Report asserted, "is a physical locale shaped by a number of complex environmental factors… [t]he physical design plays a large role in CBP's day-to-day operations within the ports." (2006:36).

[20] Readers will note a parallel between these extra-local regulatory needs and those of the so-called quiet revolution in land use planning occurred in the 1970s and caused nationwide backlash among land owners and property rights groups (Popper, 1976) of the United States--the 200-mile offshore expanse subject to U.S. sovereignty since the 1982 Convention on the Law of the Sea.[20] (OPR, 2006:1-1)

many weather experts think the region is due for "a whopper of a storm" (Viana, 2008:31). The potential for a police power shift from local hands to the Coast Guard is open-ended. Its Atlantic Area Command extends from the East coast to the Rocky Mountains (Dorsey, 2006); it is the lead agency in protecting the vast U.S. offshore Exclusive Economic Zone;[21] and, in the words of a senior Coast Guard authority, "Today, the Coast Guard is a military, multi-mission, maritime force within the Department of Homeland Security… [whose] Missions are executed by shore-based multi-mission forces assigned to 35 sectors in 9 Coast Guard Districts."(Judge Advocate, 2006:2).

d. Bio-Zones of Exception

Security threats to food and health systems generate their own set of property-security and police power tensions. In 2006, a collaborative effort was announced between the USDA, FDA, DHS and the FBI to protect "soft targets"--nation's food supply--from terrorist threats (Kahn, 2006). Where animal infectious diseases can cross into humans or contaminate our food chain, extraordinary efforts are being taken to regulate on behalf of the consuming public. According to the U.S. Department of Justice, however, state and local law enforcement bodies are "strategically unprepared to respond to agro-terrorism" (Schmitt, 2007:1). The now-familiar solution is a partnership between local, state, and federal law enforcers with heavy reliance on farmers as first responders. Yet it is farmers who, if they cooperate, stand to see their animals dispatched on precautionary public health principles or be held liable if they disregard public health recommendations. The likelihood that they will be compensated for acting in the public interest (sacrificing their herds or closing their facility) is low, based again on emergency destruction doctrine of necessity (Meltz, Merriam, and Frank, 1999:193). Farmers inhabit a zone of exception wherein national food security overrides private property loss in land, crops, and livestock.

Threats of bio-terrorism are unsettling the local police power as well. Several years prior to 9/11, legal experts wrote various bills to protect the public against bio-terrorism. After the security breaches of 2001, 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 adopt the model code, detecting and containing bio-terrorism through newly developed police powers for states. These included comprehensive planning for a public health emergency; surveillance to detect and track public health emergencies; and "property control" to ensure adequate availability of vaccines, pharmaceuticals, and hospitals facilities.

These property controls were an early example of the property-security antinomy. The model law gave adopting state officials the authority to appropriate and use health facilities for the care, treatment, and housing of patients or for the destruction of contaminated materials. It empowered governors and state public health officials to preempt existing state laws, rules and regulations, including those relating to privacy and medical licensure, and to take control of public and private property during emergencies, including pharmaceutical manufacturing plants, nursing

[21] The United States' Exclusive Economic Zone (the largest in the world) covers 11,351,000 km² and extends along the eastern and western seaboards, the Gulf of Mexico, the North West Pacific, North East Pacific, Micronesia, Polynesia and Arctic Ocean. Accessed on 5/11/09 at http://earthtrends.wri.org/text/coastal-marine/variable-58.html

homes, other health care centers and communication devices, organizing militia to do so if necessary (Blevins, 2002). After 9/11, as the war on terror dominated the headlines and the anthrax alarm went unresolved, the tension between security and property intensified and amendments were made to the model law. Blevins (2002), President of the Institute for Health Freedom, worried that several objections to the original MSEHPA were being papered over to make the bill appear "less authoritarian." In her words: "…the revised language calls for 'protecting' persons rather than 'controlling' persons during a public health emergency," and the state would now "manage" private property rather than "control" it.

Nonetheless, by 2007, 33 states had introduced a total of 133 legislative bills or resolutions based upon or featuring provisions related to the articles or sections of the model act, now revised and renamed the Turning Point Act (48 of these have passed). A state of exception with unabashed post property directives was therein normalized. Several legal scholars commented approvingly on the property restrictions that accompanied the new "bio-zones" and drew attention to historical parallels that made them normal and well within tradition:

"The exercise of emergency powers to control the movement of individuals and populations, and to seize property, poses risks to personal and economic liberties. It is important, however, to consider carefully the nature of these risks as understood since the founding of the Republic. The rights of liberty, due process, and property are fundamental but not absolute. Justice Harlan in the foundational Supreme Court case of Jacobson v Massachusetts (1905) wrote:'There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.' 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. …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." (Gostin et al., 2002:627)

To summarize, zones of exception spawned by states of exception are evident in the social, political, and legal landscape of the United States. These zones are marked by post property, a diminished version of full proprietorship that stands as grand narrative of the nation. The ascent of post property, a fundamental alteration of the social contract, arises from the emergency conditions occasioned by the War on Terrorism. Unlike the law of necessity, which is used sparingly and applied to isolated cases under standards of proportionality—the harm prevented exceeds the harm invoked—the current state of exception is open-ended and all-encompassing. National security imperatives in the hands of a heavily endowed federal bureaucracy are proving

fully capable of diminishing property rights and commitments. According to most political weathervanes, the War on Terrorism is here to stay, embedded in laws, budget appropriations, and government structure. It is probably no exaggeration to say that, in the tension between security needs and familiar property rights, the former has gained the upper hand and that, under such circumstances, post property will soon be an everyday affair.

Conclusion

The War on Terrorism is freighted with changes in citizen rights we only now are coming to understand. The question guiding this inquiry—is there attrition in property rights due to anti-terrorism policies akin to what has occurred in the arena of civil rights and liberties—has been answered in the affirmative. National security is presently in a state of hyper-sensitivity and pro-activity. A broad spectrum of citizen rights and freedoms, including the right to own possessions with minimal government interference, are under radical renegotiation. With this in mind, we might end on a matter of much consequence: does the post property scenario have distributive consequences for citizens of different means? Part and parcel of this question, is the alienation of property rights described in this paper performed by a neutral government only intent on national security or might special interests be the beneficiaries of the property changes underway?

The issue of whether post property applies evenly and universally cannot be resolved in a few summary sentences. But several thoughts may be relevant to research undertaken in the future. One is Naomi Klien's (2007) explanation (via "shock doctrine") of how privatization was rapidly imposed on Iraq's economy by the Coalition Authority while Iraqi citizens were distracted by war emergencies. Emergencies can be deeply political moments. Another is that a parallel may exist in the securitization of major banks and investment companies occurring in the current economic crisis. To date, the emergency bailout for leading banks and financial institutions has cost taxpayers $2.5 trillion, though share holders, homeowners, pensioners, and former employees are spiraling downwards with respect to property and related welfare (Rich, 2009). Some elites are enjoying windfalls and are untouched by post property—elites with considerable leverage in Washington. There is no *a priori* reason to believe that the government presiding over the bailout is not swayed by private interests nor that the War on Terrorism at home is any less affected by opportunism than the War on Terrorism abroad.

Finally, there is much historical evidence that the police power of government is used to the advantage of some and the disadvantage of others, with or without a state of emergency. The police power and its twin engines of uncompensated regulation and eminent domain has been used repeatedly to foster windfall gains for selected interests. Eminent domain has at times been delegated to private corporations to spur economic growth and job creation (Schieber, 1981; Cockburn and St. Clair, 2004), and the Supreme Court's decision in Parker v Berman (1954) and in Kelo v City of New London (1995) are reminders that governments can legally condemn the property of some for the benefit of others.[22] Title 1 of the 1949 Federal Housing Act authorized

[22] In Berman v. Parker, a unanimous Court observed: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (Findlaw accessed on 5/30/09 at http://caselaw.lp.findlaw.com/data/constitution/amendment05/14.html#f186)

the widespread use of eminent domain for urban renewal which destroyed "blighted" neighborhoods in hundreds of cities and showered windfall gains on developers and growth coalitions packed with elites (Molotch, 1976; Fullilove, 2004). Government takings, partial takings, and "givings" (subsidies and incentives of many kinds) directly and indirectly affect land values and related wealth generation (Runge et al., 2000).

There is a fine line between curbing property rights in the public interest—in the present case, national security--and dispossession of property on selected groups in society. If sovereign governments have the power to take property partially or completely, the temptation to redistribute it in the process for political end is probably irresistible. States of emergency, often defined by these same governments, can be a mainspring of wealth accumulation even as they enlist the public interest to gain support and legal approval for their behaviors. Post property entails many questions that take us beyond our initial concern with property and security under extraordinary condition.

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